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COSTELLO et al. v. SCOTT et. al. (No. 1,723.)
(Supreme Court of Nevada. Jan. 2, 1908.)

1. JURY—RIGHT TO JURY TRIAL—EQUITY CASE.

In an equity case, a party cannot demand a jury as a matter of right; the calling of a jury being within the discretion of the judge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 35-65.]

2. SAME—LEGAL AND EQUITABLE ISSUES.

Where a suit to establish a partnership and for an accounting was treated by all the parties as an equitable proceeding throughout, and a jury was called to determine certain questions of fact, but no jury was ever demanded to try certain legal issues raised by defendant's answer, their right to a jury trial of such issues was waived, and the court was authorized to disregard the jury's conclusions on the facts, and to file his own findings and base a decree thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 35-65, 176-181.]

3. MINES AND MINERALS—MINING PARTNERSHIPS—CREATION.

In a suit for an accounting of an alleged mining partnership and to establish plaintiffs' interest in certain mining claims discovered by defendant S., evidence held to sustain a finding that a partnership for the location and operation of mines existed between plaintiffs and defendant S., covering the locality in controversy, at the time the claims in question were discovered, and that plaintiffs were entitled to an interest therein.

4. SAME—GRUB-STAKE CONTRACT.

A "grub-stake" contract, by which one agrees to furnish supplies for a prospector and share in any mining claims he may discover, does not constitute a partnership, unless the agreement extends beyond the mere furnishing of supplies in consideration of a participation in the discoveries.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 222.]

5. SAME—CONTRACT—MODIFICATION.

Plaintiffs and defendant S. having formed a partnership for the location and operation of mining claims, S. on May 4, 1906, wrote plaintiffs that he had arrived in F. and secured a two-thirds lease on certain property; that he would need \$50 to carry on the lease, giving plaintiffs one-third or one-half thereof. Plaintiffs in reply on the 10th complained of their inability to raise money, but promised to send the same not later than the following Tuesday, and called for a description of the camp and lease. On May 19th plaintiffs wrote another letter, inclosing the \$50, and again called for a full description of the lease and the claims S. had located between G. and F. Held, that

such correspondence did not constitute a termination of the prior partnership between the parties, and a new contract to operate the leased ground, but contemplated a continuance of the prior relations between plaintiffs and S.

6. APPEAL—ADMISSION OF EVIDENCE—PREJUDICE.

Defendant S. was not prejudiced by the admission of a letter in evidence in an equity suit, where its exclusion would not have changed the rights of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4185, 4186.]

7. SAME.

Where the question of partnership in issue was a matter of legal construction to be placed on prior correspondence between the parties, which, as found by the court, established a partnership, the admission of other subsequent letters, which was erroneous, because they contained self-serving declarations, was not prejudicial to defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4177.]

8. FRAUDULENT CONVEYANCES—NOTICE—EVIDENCE.

Plaintiffs and defendant S. having entered into a prospecting partnership, S., while living with defendant F., located a number of claims, some in the names of plaintiff O., and S. and F., of which F. had knowledge, and later conveyed to F. surface town site rights in land covering a number of claims in controversy. F. testified that he first learned that plaintiff O. was interested with S. when he (F.) first went to G. Held, that such facts were insufficient to charge F. with notice of the existence of a partnership between plaintiffs and S.

9. APPEAL—FINDING OF FACT—CONCLUSIVE-NESS.

A finding of fact in an equity suit, supported by the evidence, is conclusive on the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3970-3978.]

10. MINES AND MINERALS—MINING PARTNERSHIP—CONTRACTS—PERFORMANCE.

Where S., while a member of a prospecting partnership, located certain mining claims, and with others transferred town site surface rights to F., in consideration of his performance of the location work necessary to hold the claims, and to survey and plat the same, neither plaintiffs nor S. were entitled to complain that F. subsequently made arrangements that such work should be done by another.

11. SAME—AUTHORITY.

Where a partnership for the location of mining claims, etc., was practically without funds, a member of the firm was authorized in good faith to convey certain town site surface rights embracing such claims, in considera-

tion of the grantee's performance of the location work, etc., necessary to hold the claims.

12. PARTNERSHIP—ACCOUNTING—JUDGMENT.

A receiver in proceedings for an accounting of the assets of a firm in which plaintiffs were entitled to a half interest with defendant S. became possessed of \$1,816 belonging to the firm, and the final decree adjudged to plaintiffs against S. the sum of \$2,180.00, which sum included the \$1,816. *Held*, that such judgment was erroneous, as in effect a double judgment for plaintiffs for one-half of the \$1,816.

13. NEW TRIAL—ERRORS—CORRECTION—REMITTITUR.

Where a judgment for plaintiffs in a suit for an accounting of a partnership was excessive through mere oversight of the trial judge, and on an application for a new trial plaintiffs confessed the error, and offered to remit the excess, the court had power to deny the motion on plaintiffs' filing a remission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 324-329.]

14. APPEAL—REVIEW—DISPOSITION OF CAUSE.

Where a judgment was excessive through misadventure of the trial judge, the Supreme Court, in the event of a denial of a new trial without requiring remission of the excess, on its attention being called to the error, would modify the judgment, and affirm the order denying the motion for a new trial, as authorized by Comp. Laws, § 3434.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4462-4476.]

15. MINES AND MINERALS—MINING PARTNERSHIPS—ACCOUNTING—DECREE.

Defendant S., while a partner of plaintiffs, located, with his two codefendants, certain valuable mining claims, which defendants transferred to a corporation. Plaintiffs then sued for an accounting, to which the corporation was not a party, and a decree was entered giving plaintiffs an undivided half of an undivided third of the claims in question; the decree also reciting that plaintiffs were entitled to an undivided one-half of any and all further moneys or other consideration received or to be received by S., or contracted to be paid to him, accruing or arising out of any interest, property right, claim, or demand of S. to such mining claims, etc. *Held*, that such decree did not attempt to adjudicate plaintiffs' rights to stock in the corporation nor any of its rights, and was therefore not objectionable as being a double judgment, in giving plaintiff one-half of S.'s third in the claims deeded to the corporation, and also one-half of all stock issued by the corporation to S. in consideration of the transfer.

16. JUDGMENT—CONCLUSIVENESS—PARTIES.

Where a corporation to which certain mining claims had been transferred was not a party to a suit for an accounting between plaintiffs and the corporation's grantors, the corporation was not bound by a decree establishing plaintiffs' rights as against such grantors.

17. APPEAL—ADMISSION OF EVIDENCE—PREJUDICE.

Where, in a suit for an accounting between partners and others concerning certain mining claims transferred to a corporation, the question whether a deed by one of the partners of his interests in the claims to the corporation conveyed the title so as to cut out plaintiffs' equities was not involved nor attempted to be determined, the admission of such deed was not prejudicial to defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4154, 4185.]

Appeal from District Court, Churchill County.

Suit by Thomas J. Costello and another against Murry Scott and others. From a

decree in favor of complainants, defendants appeal. Affirmed as to all the defendants except N. R. Fitzpatrick, and reversed and new trial granted on certain of the issues between plaintiff and defendant Fitzpatrick.

Thos. S. Ford, for appellants. McIntosh & Cooke, for respondents.

NORCROSS, J. This is an appeal from the judgment and an order denying defendants' motion for a new trial. The action was brought by respondents, alleging a copartnership for mining purposes between themselves and defendant Murry Scott. They prayed for a decree dissolving the alleged copartnership, for the appointment of a receiver, for an accounting, and for other appropriate relief incidental to the dissolution of the copartnership. The nature and character of the copartnership between respondents and defendant and appellant Scott is alleged in the complaint as follows: "That on or about the 8th day of December, 1905, the plaintiffs and defendant made and entered into a contract and agreement in and by which it was then and there mutually stipulated, contracted, and agreed by and between said plaintiffs and defendant that they would engage together as copartners in the business of prospecting for, discovering, locating, leasing, acquiring, and working mines and mineral claims in the counties of Nye and Churchill in the state of Nevada, and in such other counties and places in said state as might be subsequently agreed on; that said defendant should give his time and attention to said business, and should furnish his work, labor, and services necessary for the purposes of said business, and that the plaintiffs should from time to time advance and pay the expense of said business, exclusive of defendant's said labor, and until said business should become self-sustaining; that any and all property so discovered, located, or in any manner acquired by said defendant should be held and owned by said plaintiffs and defendant in common, each (that is to say, plaintiffs) having, holding, and owning an undivided one-half part, share, and interest therein, and the defendant having, holding, and owning the remaining undivided one-half part, share, and interest therein; that the proceeds of any and all sales, options for sales, working bonds, or leases arising from, or in any manner or wise accruing out of, said business and property so acquired should be divided, as aforesaid, between plaintiffs and defendant, share and share alike; that plaintiffs and defendant should have, hold, and own, as aforesaid, respectively, an undivided one-half interest of, in, and to any and all mines and mining claims located or otherwise or in any manner acquired in pursuance of said agreement or subject thereto, and should have, hold, and own an undivided one-half interest, as aforesaid, of, in, and to all profits, proceeds of

sales, or other consideration arising from said business."

The answer of defendant Scott denies that he ever entered into any contract of copartnership with the plaintiffs Costello and Newhall, and denies that he had ever entered into any agreement or business relations whatever with the plaintiff Newhall. He further alleges that he and the plaintiff Costello did enter into "a (so called) grub-stake agreement," which was confined exclusively to the Goldyke district, in Nye county. The nature of this agreement is set forth in defendant Scott's answer to be as follows: "By the terms of said agreement, the plaintiff Costello was to furnish money to this defendant, and with said moneys defendant was to purchase necessities to support him, and materials for working said mines, and the said contract was fully performed and carried out by this defendant; but the amount of moneys furnished by said Costello was wholly inadequate and insufficient for the purposes designated. The said defendant was to locate and acquire title to mines, and as far as he could, and his time permitted, was to do preliminary work thereon, required by the laws of Nevada to be performed within 90 days after location; and after being so located, and the title acquired, the said Costello and defendant were to be equal owners therein, and each was to own an undivided half thereof. The said understanding or contract had no other terms, and the said conditions, so described, constituted the whole thereof, and there was no agreement as to how long said contract should last, and no time was fixed when it should terminate; but it was mutually understood by and between the parties that said contract might be dissolved at the will of either party, when it appeared to him that the same became unprofitable, or for other reasons he desired to terminate the same, and the said agreement between Costello and Scott was dissolved and terminated prior to the time that the said business association or partnership of Mays, Savage, and Scott was formed." It is alleged in the pleadings and shown by the proofs that on or about the 23d day of May, 1906, the defendant Scott, who was then at the town of Fairview, in Churchill county, joined defendants Mays and Savage in a prospecting expedition. These three parties, two days later, discovered the mines of Wonder, about 20 miles from Fairview, which proved to be of great value.

The main contention, upon the merits in this case, is plaintiffs' claim to an equal interest with Scott in the fruits of his discovery at Wonder, by reason of the alleged partnership. The case came on for trial in Churchill county before the court, with the aid of a jury. Special issues were submitted to the jury, which, in the main, were answered in favor of the contention of defendant Scott. To the question, "Was the partnership or grub-stake agreement confined, or intended to be confined, to the Goldyke district,

in Nye county?" the jury answered "Yes." Upon the question as to whether there was a partnership agreement, as contended for by plaintiffs, the answer of the jury was in the negative. Also, in reference to the contention of plaintiffs that they had, shortly before the Wonder trip, sent him \$50, upon which he was subsisting at the time of the said discovery, the jury answered in the negative. These may be regarded as the principal special issues submitted to the jury, and are sufficient to notice for the purposes of this opinion.

After the jury had returned its verdict upon the special issues submitted, respective counsel entered into a stipulation "that any and all further hearings, arguments, and proceedings to be had before the court in said cause may be had, heard, and taken before the court at Reno, in Washoe county, Nevada; * * * that an order may be made by the court for a change of venue in said cause for any and all purposes of said cause." The stipulation also contained another provision governing "any further accounting in said cause." Upon this stipulation the court entered an order transferring the cause to Washoe county, where the case was finally argued and submitted. Upon the 3d day of January, 1907, the court rendered its decision, in which it rejected the conclusions reached by the jury upon the special issues, and found in favor of plaintiffs' contentions, and entered a decree accordingly. Defendants' counsel filed exceptions to the findings of the court, and in due time moved for a new trial upon the grounds of errors of law occurring during the trial, insufficiency of the evidence to justify the decision of the Court, and that the decision, findings, and judgment of the court are not supported by the evidence, but are contrary thereto. The motion for a new trial was heard by the successor in office of the judge who tried the case, and the motion denied. The case comes to this court in a transcript of nearly 1,400 pages, and the questions presented are ably and elaborately discussed by counsel in 350 pages of brief.

1. The first question, in logical order, is whether the court had power to set aside the verdict of the jury upon the questions of fact submitted to it, and substitute contrary findings of its own. In a purely equity case, it is well settled in this state that a party cannot demand a jury as a matter of right. The calling of a jury in such a case is a matter of discretion with the judge. "In such a case, when there are contested questions of fact, the chancellor may, and oftentimes should, call a jury to assist him in arriving at a just conclusion; but the verdict is merely advisory, and only to satisfy his conscience. If he is not satisfied with it, he can and should disregard it. If it is satisfactory, he can and should adopt it, and file his findings and decree accordingly." *Duffy v. Moran*, 12 Nev. 97; *Lake v. Tolls*, 8 Nev. 200; *Van Vleet v. Olin*, 4 Nev. 95, 97 Am. Dec. 513. It is

contended, however, in this case that the answer of defendant Scott raised a legal issue upon the question of the existence of the partnership, and that the finding of the jury upon this issue was controlling upon the court. Conceding that the answer did raise certain legal issues, it may be admitted that, if a jury had been called to try these issues, the court would not have power to disregard the verdict of the jury upon such issues, and make findings contrary thereto. But this is not the situation presented in this case. The jury was not called to determine the legal issues. The case was treated by all parties as an equitable proceeding throughout, and the right of the court to pass upon the legal, as well as the equitable, issues does not appear to have been questioned until after the jury brought in its verdict, and, so far as the record shows, not until after the trial judge had rendered his decision. The minutes of the court, included in the transcript, show that, after the argument upon and the disposal of the motion to discharge the receiver, the court set the case down for trial upon a day certain, "by the court with the aid of a jury." Counsel for both sides were present when this order was made, and they are deemed to have consented to it. *Haley v. Bank*, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815. The stipulation which respective counsel entered into immediately following the verdict of the jury upon the special issues, shows, we think, that the trial was regarded as being by the court, with the jury simply in an advisory capacity. In the opinion rendered by the trial judge the following statement is made: "A trial was had before the court, a jury being called to assist the court in determining the questions of fact involved." It is manifest from this that the court understood the case to have been conducted as a purely equitable proceeding—a matter that there could hardly have been any opportunity for him to have been mistaken upon.

Counsel cites *Van Vleet v. Olin*, 4 Nev. 97, 97 Am. Dec. 513, and quotes, in support of his contention, the following: "The court below treated the case all through as an ordinary action at law. When an action is so tried and treated by court and counsel, the law must be correctly submitted to the jury." The case cited was an equity case, which the court and counsel treated, so far as the trial was concerned, as an action at law. Applying the reasoning in that case to the present case, and it can with equal force be said that where an action presents both legal and equitable issues, but is treated by court and counsel as a purely equitable case, and a jury is impaneled simply in an advisory capacity, the court has the same right to disregard the findings of the jury upon the legal issues as it has to disregard those bearing upon the equitable issues.

Counsel cites many cases in his brief supporting the contention that, where legal issues are involved in an action, the party raising

the legal issue has the right to have such issue tried by jury. In his reply brief counsel directs our attention to two decisions of the Supreme Court of California, cited in his opening brief, which he argues are entitled to the greatest respect, presumably because of the similarity of our Code and practice with that of California. The cases are *Newman v. Duane*, 89 Cal. 597, 27 Pac. 66, and *Donahue v. Muster*, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283, and in both these cases a jury was demanded to try the legal issues, which demand was denied by the court, and exception taken. In this case a jury was never demanded to try the legal issues, and, therefore, the cases cited are not in point. Whatever right defendants may have had in this case to a trial by jury of any issues raised by answer, such right was waived by failure to demand a jury trial thereof, and by consenting that the case be tried by the court with the aid of a jury, as in a purely equitable case. The court had the right to disregard the conclusions of the jury upon the facts. Upon appeal the main questions presented are whether the findings of the court are supported by the evidence. *Harris v. Lloyd*, 11 Mont. 390; 28 Pac. 736, 28 Am. St. Rep. 475; *Stockman v. Irrigation Co.*, 64 Cal. 57, 28 Pac. 116; *Hayne on New Trial and Appeal*, § 234.

2. The principal questions upon the merits involve a determination of the contractual relations, if any, existing between the plaintiffs and defendant Scott at the time of the discovery of the Wonder mines. This relationship must be determined, in the main, by correspondence had between the parties during the month of December, 1905, and following. On December 8, 1905, defendant Scott wrote to plaintiff Costello as follows: "No doubt you will be somewhat surprised when you open this letter to see it is from me. * * * Well, Tom, if you feel like staking me here, I think I can get some very valuable ground here. * * * If you desire to stake me, you will have half interest in all the claims I locate. If you can spare the money, I think it will be a great investment for both of us. * * * If you desire to stake me, do not say anything to any one about it, and we will come out all O. K. in the spring. This camp will be a hummer before many months. If I could have only seen you when you was here, I know everything would have been all O. K. * * *" To this letter the plaintiffs, on December 14th, replied as follows: "Your letter received, and will say in answer that we have practically exhausted our own means, but we are in correspondence with several parties from whom we expect some help. If they come through, we will at once come to your assistance. We could have done business in the summer and fall easily, but at that time you were tied up with other parties, and I am glad to see you have gotten some very nice properties for them, and

we have no doubt but what you will be able to find other good properties in the future. Now, when you answer this, let us know what you need. Then, if things come right with us, we will be able to advise you at once." On December 24th defendant replied as follows: "Everything is looking fine here. They have made a new strike at the Goldyke that is very good, they say. I have been prospecting the hills since you was here, and have made some very important finds. I have my eyes on some claims that I think will be very good property. Some fellows have the ground located, but I know they will not do any work, and I will get the property. * * * I have panned some of the rock, and it pans very good. I have four claims here. They are side claims of the Idahoes, the claims that we made the strike on. They are very good property, and I am willing to hand you over half if you can handle them; but in the meantime I would like to do some work on them, so I can show them up to the best advantage. I think we can make some money here if we form a partnership. I will get the properties if you can dispose of them, and some very good ones at that. In regard to what I will need to keep me going, about all I will need at present will be grub. I have plenty of tools to do all the work that I will do. You know about what it will cost. I think this will be a chance for both of us to make some money. I think this new find of mine will be another Goldyke. It has the earmarks of being a fine property. Well, Thomas, let me hear from you at once, so I will know what to do. I will close. Yours, as ever." To this letter plaintiffs replied, December 30th, as follows: "Your very welcome letter received several days ago, and we assure you we appreciate your position, but you can rest assured we are doing all in our power to help you, but will tell you right now money is a darn scarce article here in Tonopah. But we have written to several different parties, and we have every reason to believe that at least two of them will come through. * * * Money will be rather close with us for perhaps the next sixty days, or until such time as we get returns from our correspondents. Now, here is what we would like to have you do. Of course, you understand, we are willing to go in partnership with you, and you also understand, old man, we will have to depend on the outside for money to carry on operations until such time as we get a company floated. So we would like for you to send us a diagram of the best thing you have; tell us about the veins—their width and values and formation; also whether it is a sinking or tunneling proposition. Now, it is our candid opinion that although it will take a little while to get things started right, of this you may feel sure, if you go into this partnership with us, we will all make money. So you go ahead, and get ahold of the best propo-

sitions you can, and get them in such a way that Bemls and Turpin will not be able to complicate matters with us. We will float them, as people are beginning to get a little excited over the Goldyke country. You keep us posted from time to time, and we will do our share by keeping you supplied with money to the best of our ability. Please find inclosed \$40. Do the best you can with this amount, as you know we will do better as conditions admit, etc. Your friends." On January 5, 1906, defendant replied as follows: "Your welcome letter was received this morning. * * * I have four claims joining the Idahoes, and I have been doing the assessment work. * * * I will send you the papers in my next letter, and you can put them on record. I only have my name on the location papers, but you can put your name on when you record them. As soon as the snow goes away, so I can see the ground, I will begin to ruseel the hills. * * * I am satisfied we will make some money here this year. As soon as the snow goes, I will locate all the leges on these claims, and write you all the particulars. I received your check and it will come in handy at present. Well Tom, I will do my best out here, and I think we will not be very long doing some business." On January 21st the plaintiffs wrote defendant as follows: "What is the matter, old man; we have not heard from you for quite a while. We have several people on string, and would like to know what you have that we can offer them; so we think it advisable for you to let us know at your earliest convenience, as we are extremely anxious to keep in touch with these clients. Send diagrams, extent of veins, formation, and how far from Goldyke, and direction, and a general opinion as to their value, and whether they are sinking or tunneling propositions, water, etc. Mining conditions are looking up quite favorably, and it is quite certain we will do a considerable business during the coming summer. By the way, we wrote you on the 30th of December, inclosing a check for \$40. Please let us know if you have received same, as we have not heard from you since that time. * * * " On February 2d defendant replied as follows: "I cannot see why you did not get my last letter. * * * I will send some location papers, * * * and you can put them on record. * * * I think we will be able to sell them this summer. * * * I located them because they were so close in to the Idahoes, and I am sure we will get some money for them. I will have plenty of good ground before very long. I have been digging for water here, and I will have plenty of water in a few days." On the same date, February 2d, plaintiff wrote defendant as follows: "We only received your letter of January 5th yesterday. * * * Please address in future Costello & Newhall, Box 866, Tonopah. * * * We are glad to hear the good reports from that section, and agree

with you that there are good chances for us to make some money out there during the coming season." On February 7th plaintiff Newhall wrote defendant as follows: "Your favor of February 2d, with location notices received last night, and I filed the notices for record this morning. Mr. Costello is at Crow Springs, and will not be in until the night of the 13th. We expect to collect some money between this and the 15th, and will send you some just as soon as we can receive it." On February 26th plaintiffs again wrote to defendant as follows: "We have been trying for the past three weeks to get rid of some stock in order to raise some money. * * * By the way, when you answer, please let us know what kind of showing there is on the four claims we have had recorded, and what you think they are worth, as it is possible we might get some one interested. We understand from the papers that there are quite a number of good strikes being made around Goldyke, and hope the reports are true. You will find inclosed money order for \$25. We promised to help you out by the 15th, but it was impossible to do so." Answering the foregoing letter on March 14th, defendant after acknowledging its receipt, and writing at some length describing properties located and the general outlook of the camp, continued as follows: "Burns north of us has some very fine rock and he is going to lease his ground and I am going to take a leice and I think we will shurley make some money out of the leice he has rock that you can see all kinds of gold in if Burns ground proves good this camp will be all O. K. I will take the leice when he lets them because if any of the leices proves good we will be able to sell our leice for some money. We had an offul snow storm last night. I will write you agin in a few days and let you know all about the claims I will have and the leice. * * *" On March 21st defendant again wrote relative to some claims which he had relocated, and which were in dispute, and requesting the opinion of plaintiff Costello as to the legality of the location. Closing, he says: "This camp will surely come to the front, and we will be in the swim." This letter was answered March 27th, giving defendant the advice asked for, and inclosing a money order for \$25. The letter concludes: "Try and keep us well informed how matters are progressing." On April 5th defendant wrote plaintiffs as follows: "Your letter received and will say in reply that I was very glad to heare from you. I am glad also to know that I have the claims. I would like to see you come out here. I think these claims would be a good stock propersition one of the best in this district, something that will stand a show to make a mine. We have that Gold Dyke ledge shure. Know is the time to do something for this camp is coming to the front shure this summer. I think it would a good idle to stok this property if you are in a position to

do so. We are still having snow here but I think that we will have some nice weather soon. Evry thing is looking good out this way. I have your check Well Tom I would like to see you out this way as soon as you can do so. * * *" A few days after writing the letter last above mentioned, the defendant Scott went to Tonopah to see plaintiffs personally. The evidence is conflicting as to the conversation had between them. The court accepted as true the version given by plaintiffs, and as the trial court is the exclusive judge of the credibility of the witnesses, its action in this respect is binding on this court. The plaintiffs testified to the effect that, at this conversation in Tonopah, the Burns lease was discussed, and that it was agreed between them that the lease should be taken, but that it was not contemplated that the parties should work the same to any considerable extent. It was to be taken principally for the purpose of getting it in shape, and transferring it to others at a profit. At this conversation, also, the project of prospecting the south end of the Fairview Range was discussed. At that time Costello drew a diagram of that section of the country, and stated to the defendant that he had seen some very rich float that was reported to have come from that country, and that he would like to have the same prospected, and that it was agreed between them that the first matter to be taken care of was the obtaining and putting in shape of the lease, and that thereafter some prospecting should be done in the south end of the Fairview Range. Upon this trip plaintiffs gave defendant \$25 on account of his expenses. Scott returned to Goldyke, and on April 18th wrote to plaintiff Costello as follows: "I arrived home. I am not golng to take the Leise. Burns would not do as he agreed to and I think we had better not have anything to do with him. I know he has a great mine but he will not do the wright thing by a Leice and I will not take one. He promised me before I went to Tonopah that he would give me 9 months and transfurable but he has changed his mind and onley wants to give me 6 months and not transfurble and I do not want the Leice on those terms because that would not give us a chance. I am going out prospecting and will be away about three weeks out about 15 or 20 miles from here. I saw some rock from this place yestaday and it was great rock. I will do some work on some of our claims here when I come back if I do not find anything on this trip. The camp is looking good. We will make some money this year I am sure. They are making some good striks on the Gold Dyke extension." Defendant next writes, on April 30th, from a place called Snow Point, to Costello as follows: "I am out prospecting between Atwood & Fairview. This is a verry good country to prospect in. I am about 18 miles from Fairview. I have been here two days. Two fellows

here has some very fine rock and I have some claims joining them and I think I will stay here for some time. I will be in Atwood in about two weeks. This is a fine looking camp and I think it will be a good one. * * *

On May 4th the defendant wrote to plaintiff Costello from Fairview. This letter was lost, but its substance was testified to by Costello as follows: "That he [Scott] had arrived in Fairview; that the country looked very good; he had done a little prospecting while going in; that he had secured a lease—a two-thirds lease—on a piece of property close in to the big strike; that he would need fifty dollars to carry on the lease; that he would get the two-thirds of the lease, giving me one-third, or one-half in the lease." On May 10th plaintiffs replied to this letter as follows: "Your very welcome letter reached us yesterday. We will have to beg you to wait until between now and Tuesday, during which time we will be able to raise the money you asked for. We are caught short owing to the trouble in California. * * * You can rest assured we will have money up there, leaving here not later than next Tuesday. Please write us a good description of that camp and the lease you have taken hold of. This letter will be handed you by Mr. J. W. Langley or his business partner, Mr. Trimble. It will do no harm to let them see what we have, and there is a possibility that at a later date they may be of assistance to us."

The foregoing is all the correspondence which is admitted by both parties to have been written and received before the Wonder discovery. Plaintiffs testified that on May 19th they wrote to defendant, inclosing \$50 in currency, asked for, a copy of which letter was admitted in evidence. Defendant Scott denied he had ever received the letter or the \$50. The court found that the letter and money had been received by Scott, and that Scott was subsisting thereon at the time of the Wonder discovery. On May 23d Scott, together with defendants Mays and Savage, left Fairview on a prospecting expedition, and two days later discovered and located the Wonder mines, 20 miles north of Fairview. After the discovery of the Wonder mines there was no further correspondence upon the part of Scott with the plaintiffs. Plaintiffs wrote three letters to Scott after the Wonder discovery was known, which were admitted in evidence over defendant's objection, and will hereafter be considered. It is the contention of the defendant Scott that the correspondence had between himself and plaintiff during the month of December, 1905, shows but a grub-stake agreement, applicable only to the Fairplay district; that plaintiffs failed to keep their part of the contract to supply defendant with necessities, and that the agreement was terminated about the time Scott left Goldyke, in April; that if the agreement was not so terminated, then it was terminated by the new contract entered

into at Fairview in respect to the lease. "Grub-stake" contracts have sometimes been called prospecting partnerships, and are said to partake of the character of 'qualified partnerships.' Yet, unless the agreement goes beyond the mere furnishing of supplies in consideration of a participation in the discoveries, the word 'partnership' is improperly used and is misleading. It is simply a common venture, wherein one, called the 'outfitter,' supplies the 'grub,' and the other, called the 'prospector,' performs the labor, and all discoveries inure to the benefit of the parties in the proportion fixed by the agreement. The prospector has the right to insist on the outfitter performing his part of the agreement as a condition precedent to participation in such discoveries. Should he fail to do so, the prospector may discover and locate for his own advantage, free from any obligation to the outfitter. * * *

Is it essential to a right in property under a grub-stake contract that such property be acquired by means of the grub-stake furnished, and pursuant to such contract? * * *

The 'grub-stake' contract, properly speaking, applies to the search for and location of mines on the public domain. * * *

We frequently encounter cases where the object of the venture is not only to search for and discover mines, but also to work and develop them, and conduct a general mining business. This is something more than a 'grub-stake' contract. Such an agreement constitutes a partnership." Lindley on Mines (2d Ed.) vol. 2, § 858, p. 1565 et seq.

We think a fair interpretation of the letters which passed between plaintiffs and defendant Scott warrants the construction placed upon them by the trial court, that they show that the parties in question engaged in a partnership in present for mining purposes. If the letter of December 8th contained the only proposition upon the part of defendant, and the proposition therein contained had been accepted without modification, it would have constituted simply a grub-stake agreement. The answer to this first letter informs defendant that plaintiffs have practically exhausted their means, but that they are in correspondence with several parties, and if they "come through," they will at once come to his assistance. The letter concludes: "Now, when you answer this, let us know what you need. Then, if things come right with us, we will be able to advise you at once." To this letter defendant makes a proposition of what he proposes to do. He informs plaintiffs that he has already been prospecting the hills, and has "made some very important finds." He also knows of some valuable locations that are shortly to expire, and he will "get them." He has four claims already located, which he is willing to turn over a half interest in if plaintiffs "can handle them," but in the meantime he proposes to do some work upon them, to show them up to a better advantage. The

gist of the proposition made by defendant is embodied in the two sentences contained in this letter: "I think we can make some money here if we form a partnership. I will get the properties if you can dispose of them, and some very good ones at that." He states in this letter that about all he will need will be grub, as he has plenty of tools. He requests a reply to this letter, so he "will know what to do." In the letter of December 30th plaintiffs accept the proposition, which both parties style a "partnership," and which constitutes a partnership in law. Plaintiffs, however, explain in their letter that they have to "depend on the outside for money to carry on operations until such time as we get a company floated." They say to defendant in this letter: "You go ahead, and get hold of the best propositions you can. * * * We will float them." "You keep us posted from time to time, and we will do our share by keeping you supplied with money to the best of our ability." The contract is clear from these two letters. Defendant, who is a practical miner and prospector, is to get hold of good properties, some of which he already has and others he has in view. These properties the plaintiffs, who are stockbrokers, and in the business of selling and promoting mining properties, are to dispose of. The parties are to have an equal interest in all mining property acquired by defendant and the proceeds of any sales effected by plaintiffs, or an equal interest in any stock companies organized to handle such properties. The subsequent correspondence shows that defendant was satisfied with the proposition that plaintiffs, "to the best of their ability," were to keep him supplied with money. No definite time was fixed for this partnership to last, but the court properly held that it was the intention of the parties that it was to continue at least into the summer of 1906, for that was the time, frequently referred to, when they would "surely make money" out of their venture.

It is very earnestly contended by counsel for appellant that the contract entered into between Scott and the plaintiffs had reference only to the Fairplay district, in which Goldyke and Atwood are situated. Although the earlier correspondence between the parties refers only to this district, there is no specific declaration that their operations are to be confined to that district. It is common knowledge that where parties enter into grub-stake agreements, or general partnerships for mining purposes, they care very little about the place where the mines are found. The main thing which the parties to this partnership wanted was mining properties of sufficient promise and value to enable them to be handled so that money could be made out of them. That the parties did not intend to confine their operations exclusively to the Fairplay district is shown by their conversation in Tonopah, when plaintiff Costello pointed out the advisability of prospecting the south end of the Fairview Range; by the letter of

defendant of April 18th, when he notified plaintiffs that he was going on a prospecting trip 15 or 20 miles from Atwood, and would be gone about three weeks; by the fact that defendant testified that the grub purchased for this prospecting trip should have been paid for by plaintiffs; by defendant's letter, written April 30th from Snow Point, in which he says: "I am out prospecting between Atwood and Fairview. * * * I will be in Atwood in about two weeks"; by defendant's letter from Fairview of May 4th, relative to the lease at that place, and plaintiffs' reply thereto of May 10th.

3. It is contended by counsel that defendant's letter of May 4th, informing plaintiffs that he could receive a two-thirds interest in a lease at Fairview, and plaintiffs' letters of May 10th and 19th, respectively, in reply thereto, created an entirely new contract between the parties, and terminated whatever contractual relations previously existed between them. Plaintiffs' letter of May 10th is very brief, and there is nothing in it that would indicate a thought upon the part of plaintiffs that their previous relations were to be terminated by the taking of the lease. The letter is written as though plaintiffs understood that the lease had already been taken. They say: "Please write us a good description of the camp and the lease you have taken hold of." This is the only direct reference to the lease in the entire letter. It is not likely that parties would sever old relations and form new ones without a more extended discussion of the matter. The letter of May 10th contains but 14 lines, and treats the lease proposition as though it was an ordinary business matter between them. In the letter of May 19th plaintiffs say: "We finally made the rifle, and you will find the fifty dollars asked for inclosed herewith. * * * Please give us a full description of the lease you have taken hold of and your opinion of the camp in general. And by the way, you had better give us a description of the claims between Goldyke and Fairview." Defendant Scott denies that this letter of May 19th was ever sent or received. His counsel in his brief on appeal says: "Assuming that the letter of May 19th was written and sent, what is the result? Plaintiffs are bound by the last meeting of the minds of the parties. A specific, defined, and unambiguous agreement was entered into between the three, not intended or contemplated by the original contract, and it is the only one existing after May 19th, and must control this case. Offer and acceptance made by letter create a mutual obligation, and form a valid contract." If this letter was neither written nor received, then the contract in regard to the lease could never have been effected, for the necessary money was not forthcoming. If the letter was written, whether received or not, it shows that plaintiffs had no idea of terminating the relations previously existing between plaintiffs and Scott, for in that let-

ter they ask for a description of the claims located by defendant between Goldyke and Fairview. There is certainly no act shown, upon the part of plaintiffs, prior to the Wonder discovery, indicating any desire upon their part to dissolve the partnership. The evidence shows that they had been doing their best to carry out their part of the agreement, even though they had not met with any marked success in the disposal of mining property. They had contributed money to Scott "to the best of their ability," and apparently to Scott's satisfaction, for he is not shown to have complained to plaintiffs that they were not doing enough, or were not complying with their part of the agreement. The evidence in this case shows that, up to the time of the Wonder discovery, the parties had reposed mutual confidence in each other. Scott knew that money was not easy with the plaintiffs. They frankly explained to him their financial situation in the very beginning of the transactions, and Scott was satisfied. Scott knew, as did every one, that the San Francisco disaster made money tight in this state for some time thereafter, and this situation is referred to in plaintiffs' letter of May 10th. In all the correspondence between the parties from December, 1905, to May, 1906, inclusive, there is not a line or a word indicating a severance of the contractual relations which they had entered into. After Scott made the Wonder discovery, he ceased all communications with plaintiffs. When one party to a partnership for mining purposes makes a discovery which would be of great value to the partnership, courts will not look with favor upon any contention upon the part of such discoverer that the partnership relations had previously been severed, unless such severance is clearly established. In this case the contentions of defendant Scott, based upon the correspondence alone, and independent of the other corroborative testimony in the case, fails to have any convincing force.

4. The contention of appellant that the evidence does not support the finding of the court that plaintiffs' letter of May 19th, together with the \$50 alleged to be inclosed therein, was received, in the view we take of this case, is immaterial. The trial court in its decision analyzes the evidence upon this question of fact, and we could not, under well-established rules, disturb such finding unless it was clearly against the evidence. But, conceding for the purpose of the argument that it was unsupported by the evidence, it would not be prejudicial to defendant, for plaintiffs' right to recover in this case is based upon the contract entered into by the parties in December, 1905, and this letter of May 19th, whether received or not, could not alter the terms of that contract, or affect the rights of the parties arising thereunder.

5. The court admitted in evidence, over defendant's objection, three letters written by

plaintiffs to Scott, of dates June 23, July 15, and July 16, 1906. It is claimed the evidence shows these letters were never received; that they contained self-serving declarations supporting plaintiffs' contention of the existence of the partnership. The court found as a fact that these letters were received. Conceding, without deciding, that the court erred in their admission, the error, if any, was harmless, for the letters only tended to support plaintiffs' contention of partnership. The question of partnership was a matter of legal construction to be placed upon prior correspondence. We have already construed this correspondence to establish a partnership. The letters in question could add nothing to the proof of the existing contract.

6. Plaintiffs allege in their complaint: "That subsequent to the 25th day of April, 1906, as plaintiffs are informed and believe, and so aver the fact to be, the said defendant, together with the said L. A. Savage and William Mays, became the owners of the possessory title of the Wonder townsite in the said mining district, county of Churchill, and state of Nevada, by virtue of a discovery of mineral and the location thereof as quartz claims, the number and a more particular description of which plaintiffs are unable to give; that as plaintiffs are informed and believe, and so aver the fact to be, for the purpose of cheating and defrauding plaintiffs of their share and interest of, in, and to defendant's one-third interest in the said townsite location and claims, the defendant transferred and released, without a valuable or any consideration, his said undivided one-third interest therein to said codefendant, N. R. Fitzpatrick, who then and there took the same, with full knowledge of defendant's said fraud, and of the plaintiffs' rights and equities in and to the same, and subject thereto." Plaintiffs pray for a judgment and decree "vacating, annulling, and setting aside the release or conveyance made by defendant to said codefendant N. R. Fitzpatrick as to the plaintiffs' undivided one-half of the premises affected thereby." Defendant Scott's separate answer contains the following allegation and denial: "Defendant admits that the said firm of Mays, Savage & Scott became the owners of possessory title of the Wonder townsite. He avers that the mining claims on which said townsite exists were located by the firm; that no mineral has been discovered thereon up to present date. The surface of said located claims was segregated from the mineral, and it was agreed by said firm that the surface should be occupied for townsite purposes. An agreement was entered into by which certain parties should promote the sale of town lots on said townsite, but the said agreement reserved all of said claims except the surface to the locators. The defendant Murry Scott transferred to said Fitzpatrick his interest in said surface in consideration that said Fitzpatrick would,

among other things, promote the building of a townsite, and thereby enhance the value of defendant's mining property, and in further consideration of indebtedness existing on the part of defendant to said Fitzpatrick, for as much as the said Fitzpatrick had given defendant shoes, food, and other necessities, by which he was enabled to sustain life, during a portion of the said time that the said Costello had agreed to furnish him with food and necessities, and which he had neglected to do. Defendant denies that the said transfer was fraudulent or without any consideration, and avers that at the time the same was made the property had nothing but a prospective and speculative value, and it was not known that any town would ever exist thereon." The separate answer of Fitzpatrick, Mays, and Savage contains the following allegations and denial: "Defendants deny that said Murry Scott transferred to defendant Fitzpatrick his interest in the said surface claims comprising the townsite group without consideration. Deny that said transfer was made for the purpose of cheating and defrauding the plaintiff. Avers that the said transfer was made for a valuable consideration. That prior to the formation of said partnership of May, Savage, and Scott, the said Scott was without the necessities of life, and the said Fitzpatrick furnished and delivered the same to Scott, and he was under financial obligation to him for so doing, and the properties of defendants was without any real present value, but its value was speculative, and was no more than sufficient to compensate the said Fitzpatrick for money advanced by him. Defendants further aver that a large portion of said townsite group for the proceeds of the sale of which an accounting is asked for was separately located by defendant N. R. Fitzpatrick, and he was and is the owner thereof by virtue of acquiring the same in his own name under the mining laws of the United States." The court found that the transfer by defendant Scott to his codefendant Fitzpatrick of all the rights of Scott to the surface of claims of which he was a locator was fraudulent, and such transfer, in so far as it affected a sixth interest in the townsite, was set aside, and plaintiffs decreed to be the owners thereof, and judgment given against Fitzpatrick for one-half of the proceeds derived by him from a sale of lots in said townsite of Wonder.

Appellants contend the evidence is insufficient to support the finding that the transfer was fraudulent. Discussing the question of the evidence requisite to establish fraud, this court, in the case of *Gruber v. Baker*, 20 Nev. 476, 23 Pac. 865, 9 L. R. A. 302, said: "A party alleging fraud must clearly and distinctly prove the fraud as alleged. If the fraud is not proved as alleged, relief cannot be had, although the party against whom relief is sought may not have been perfectly clear in his dealings, for fraud will not be carried by way of relief one tittle beyond the

manner in which it is proven. The rules of evidence are the same in equity as at law, and when certain facts as proved amount to a fraud is a question for the court. But the court is not justified in finding such facts upon any less or different kind of proof than would be required to satisfy a jury, for the law in no case will presume fraud. The presumption is always in favor of innocence, and not of guilt. In no doubtful matters should the court lean to the conclusion that a fraud has been committed, nor should it be assumed on doubtful evidence. The facts sufficient to establish a fraud should be clear and convincing. Circumstances of mere suspicion will not warrant the court in coming to the conclusion that a fraud has been committed. We do not wish to be understood as holding that, in order to establish fraud, it requires direct or positive proof; for in matters that regard the conduct of men the certainty of mathematical demonstration cannot be expected or required, and much of human knowledge on all subjects may be inferred from facts that are established. Care should be taken, however, not to draw conclusions hastily from premises that will not warrant it; but, if the facts established afford a sufficient and reasonable ground for drawing the inferences of fraud, the conclusion to which the proof tends must, in the absence of contradiction, be adopted. The motives with which an act is done may be, and often is, ascertained and determined by circumstances connected with the transaction. Various facts and circumstances evince sometimes, with unerring certainty, the hidden purposes of the mind; therefore, fraud may be shown by circumstances. But when the evidence, whether it be direct or circumstantial, is so strong as to produce conviction in the mind of the judge of the truth of the charge, it will be sufficient. This we take to be the extent of the rule that fraud must be proved. But this does not authorize the finding of fraud on less than a preponderance of the evidence, taken as a whole, for it is difficult to see how any disputed question of fact can be found except by the greater weight of evidence. The difference in the weight may be slight, but, unless it preponderates on the side of the plaintiff, the matter in dispute cannot be said to be proved; and this rule is adhered to more strictly in actions of this character than in any other class of civil cases, for it is said that, while the law abhors fraud, it is also unwilling to impute it on slight and trivial evidence, and thereby cast an unjust reproach upon the character of parties. What amount or weight of evidence is sufficient proof of a fraud is not a matter of legal definition. The proof, however, must be satisfactory. It should be so strong and cogent as to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest.

It need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts, from which a legitimate inference of fraud may be drawn. As an allegation of fraud is against the presumption of honesty, it requires stronger proof than if no such presumption existed."

The trial court based its finding that Fitzpatrick had notice of the partnership relations existing between plaintiffs and the defendant Scott upon the following, as shown by the opinion of the court: "It further appears from the evidence in this case that Fitzpatrick lived with Scott in Goldyke district, Nye county, Nevada, at the time that Costello & Newhall were furnishing Scott money, and at the time they were engaged with him in the mining business at Goldyke. It further appears from the evidence that Fitzpatrick was living with Scott at Goldyke from the 16th or 17th of March, 1906, up to the time that the defendant Scott left Goldyke for the Fairview country. It also appears from his evidence that he learned of the relations existing between defendant Scott and Costello at the time he first went to Goldyke, about the 16th or 17th of March; that during the time he was at Goldyke, claims were located in the name of Scott, Fitzpatrick, and Costello." The fact that Fitzpatrick was living with Scott at Goldyke, and the fact that a number of mining claims were located in the names of Costello, Scott, and Fitzpatrick, of which he had knowledge, would not of themselves be sufficient to establish notice to him of the existence of partnership relations. It is a common occurrence for prospectors in locating claims to include the names of other parties, with whom they may have no contractual relations. The mere fact that Fitzpatrick was living with Scott certainly would not afford him any notice of his relations with Costello. There is no intimation in the evidence that Fitzpatrick ever saw any of the correspondence between plaintiffs and Scott, or that he was informed of their contents or effect prior to the Wonder deal. Scott, in one of his early letters to Costello, requested the latter to say nothing about their agreement. It could hardly be presumed, in the absence of evidence, that Scott told Fitzpatrick of their relations simply because they were living together. But the court says: "It appears from his (Fitzpatrick's) evidence that he learned of the relations existing between Scott and Costello at the time he first went to Goldyke." The record shows that Fitzpatrick was asked the question, "When did you first learn that Costello was interested with Scott?" The answer was, "When I first went to Goldyke." This question and answer appears to be all there is in the record upon which the court attributed to Fitzpatrick knowledge of the relations existing between plaintiffs and Scott; at least it is all that counsel has directed our attention to in their brief. The witness may have had one idea

in mind and counsel another when the question was asked. Costello was "interested" with Scott in the locations at Goldyke. This Fitzpatrick knew, and this he may have had in mind when he answered the question, as the question and answer are entirely consistent with this view. Fitzpatrick may have known that Costello was "interested" with Scott in the locations, but may never have suspected the existence of partnership relations. No attempt was made by further questions to ascertain to what extent the witness had knowledge of the relations existing between plaintiffs and Scott. He denied in his answer the existence of such partnership. The burden of proof was on plaintiffs to establish notice, or such a state of facts as would put a person upon inquiry. Both Scott and Fitzpatrick testified that the consideration for the transfer of the townsite interests was partially money owed by Scott to Fitzpatrick, supplies, etc., furnished, and partially an agreement upon the part of Fitzpatrick to do the location work for Scott on the Wonder claims. The court reviews the evidence upon the question of the alleged indebtedness existing between Scott and Fitzpatrick, and the matter of supplies alleged to have been furnished, and concludes that no such indebtedness existed, nor were any such supplies furnished. There is evidence to support this finding, and it is conclusive upon this court. Both Scott and Fitzpatrick testified that part of the consideration was that Fitzpatrick was to do the location work upon the claims. Scott says further that he (Fitzpatrick) was to promote the townsite, and that he considered such promotion would enhance the value of the mining properties. The testimony shows that after Scott transferred his interest in the townsite to Fitzpatrick, that Mays, Savage, and Fitzpatrick entered into an agreement with Kleeman & Co. for the latter to promote the townsite upon a percentage; the latter company, in further consideration therefor, to do all the location work, to hold the claims, survey and plat the same. This the company did. Counsel for respondents contend that this shows that Fitzpatrick did none of this work. But if he agreed to do the work as part consideration for the transfer, and subsequently he made such arrangements that the work was done by some one else, neither Scott nor plaintiffs would be in position to complain, if the transaction was otherwise regular. Scott and the plaintiffs were relieved of paying their proportion of the expense of this work, which was estimated to be over \$700. The agreement between Scott and Fitzpatrick was made in the latter part of May, and the contract with Kleeman & Co. entered into on June 1st following. At this time the value of the townsite was more or less problematical. We are unable to see wherein the evidence in the case discloses any bad motive upon the part of either Scott or Fitzpatrick in the transfer of the former's interest in

the surface rights of the claims in question for townsite purposes. If Scott was defrauding plaintiffs, he was working the same injury upon himself. There is nothing in the evidence indicating that Scott was to derive any advantage from the townsite, secret or otherwise, other than being relieved from the expense of doing his part of the location work upon the claims, surveying, etc. It may be that Scott at the time did not appreciate the value of the townsite, and transferred it for less than it subsequently proved to be worth. However, it is not reasonable that he would seek to injure plaintiffs, when to do so he would inflict equal injury upon himself. If there was anything to indicate he retained any secret interest in the townsite, and only plaintiffs were the sufferers, the situation would be quite different; but there is no such showing. As a member of the partnership of Costello, Newhall & Scott, he could make arrangements to do the location work upon the claims he had located, and if he acted in good faith, his copartners could not be heard to complain. Scott had but little means at this time, and he knew money was hard for plaintiffs to get hold of, and if he arranged to secure work to be done, necessary to acquire title to the mining claims, upon a basis that was as fair to plaintiffs as it was to himself, plaintiffs are hardly in position to complain, unless it violated the conditions of the partnership. In the agreement between Scott and Fitzpatrick nothing but the interest in the surface was transferred; all mining rights were reserved. The partnership for general mining purposes entered into between plaintiffs and defendant Scott did not contemplate the promotion and sale of townsites, and this may be taken as some evidence that Scott did not contemplate defrauding his partners when he made the transfer. While the transfer by Scott to Fitzpatrick of his interest in the surface rights of the Wonder claims for townsite purposes is not clear in all particulars, yet, taking into consideration all of the facts and circumstances as disclosed by the record, we think the showing is insufficient to establish actual fraud in the transaction. The fact that the transfer was verbal does not, of itself, give plaintiffs a right to have it set aside; it being in reference to a matter concerning which Scott had power to bind the partnership.

7. It appears from the evidence that on August 2, 1906, the receiver came into possession of the sum of \$1,816, moneys in bank belonging to the partnership of Costello, Newhall & Scott, and involved in the suit. The final decree of the court, among other things, adjudges and decrees to plaintiffs judgment against Scott for the sum of \$2,180.60, which latter sum is in fact inclusive of the said sum of \$1,816 in bank. The effect of this was to give plaintiffs a double judgment for one-half of \$1,816. It is manifest that this double judgment was an oversight upon the

part of the trial judge. Upon the hearing of the motion for a new trial plaintiffs' counsel admitted the error in the judgment, and offered to remit the same. The court denied the motion for a new trial on condition that counsel for plaintiffs file a remission of this excess judgment, and they accordingly filed the same. Appellant contends that the court had no power to make such order; that its only course in the premises was to grant a new trial. We think the trial court adopted the appropriate procedure in the premises. It is not reasonable that parties should be put to the delay and expense of a new trial in order to correct an error in the amount of the judgment which both parties to the controversy admit is an error. Even if the trial court had denied the motion for a new trial without exacting this condition, this court would, upon its attention being called to the error, modify the judgment accordingly, and affirm the order denying the motion for a new trial. Comp. Laws, § 3434.

8. The record shows that just prior to the beginning of the trial of this cause the Hidden Treasure Mining Company, a corporation, petitioned to intervene, setting up in its petition that it was the owner of certain mining claims in the Wonder mining district, named the "Hidden Treasure," "Hidden Treasure No. 1," "Hidden Treasure No. 2," and "Skiddo Fraction"; said claims having been located by defendants, Scott, Mays, and Savage on or about May 26, 1906; that on or about the — day of July, 1906, said defendants by deed conveyed said claims to said corporation, which ever since had been the owner thereof; that the plaintiffs claimed an interest in said claims by reason of the alleged partnership with defendant Scott. Because of the lateness of the application, the necessity of a continuance, and the fact that the decree in this case could not be binding on the corporation unless it was a party, the permission to intervene was denied. Although there has been some argument in the briefs thereon, the order of the court denying the prayer for intervention is not before us. Upon the trial the court, over defendants' objection, admitted in evidence the deed in question to the Hidden Treasure Mining Corporation. This deed is dated the 28th day of July, 1906, acknowledged on the 5th day of October, and recorded on the 22d day of October following, and covers the mining claims mentioned in the petition. The decree gave to plaintiffs an undivided one-half of an undivided one-third of the claims in question. The decree also contains the following general provision: "It is further ordered and said plaintiffs are hereby adjudged and decreed to be entitled to take and receive and have delivered to them an undivided one-half part, share, and interest of, in, and to any and all other or further moneys or other consideration received or to be received by said defendants Scott, or contracted to be paid to him, or accruing to or

in any wise arising out of any interest, property, right, title, estate, claim, or demand of the said defendant Scott in any and all mining claims, premises, and property acquired by him between December 30, 1905, and August 2, 1906, and plaintiffs are entitled to and are hereby given judgment against the said defendant Scott for the same." It is claimed that this, in effect, is a double judgment in favor of plaintiffs, as it decrees to them not only one-half of Scott's third interest in the claims deeded to the Hidden Treasure Mining Corporation, but also gives them one-half of all the stock issued by said corporation to Scott in consideration of the transfer of the claims. Plaintiffs, of course, are not entitled to an interest both in the stock and in the claims, and we think the trial court never intended to award them both such interests. No specific reference is made in the decree to stock in this corporation or any other. We do not understand from the decree that the court attempted to adjudicate the rights of the Hidden Treasure Mining Corporation, as contended by counsel for appellant, and it is manifest it could not do so. Besides, the court in its decision upon the motion to intervene distinctly stated that if the corporation was not allowed to intervene, no decree it would make would be binding upon the petitioner. Respondents in this case, with full knowledge of the transfer to the Hidden Treasure Corporation, have proceeded upon the theory that that transfer is void in so far as it affects their right to a half of the interest which Scott had to the locations. They have, in effect, elected to claim an interest in the ground itself, and not in the proceeds which Scott obtained therefor, and we think the decree should be so construed. The decree being so construed, it cannot operate to give respondents a double judgment. Whether or not the deed by Scott of his interests in the claims transferred to the Hidden Treasure Corporation conveyed the title, so as to cut out the equities of plaintiffs, is not involved in, was not attempted to be determined in, and could not be determined in, this action in the absence of the corporation as a party. In this view of the case, the admission of the deed in evidence, even if erroneous, could not be prejudicial to defendants.

The record contains numerous other assignments of error, but the view we have taken upon the main questions makes it unnecessary, we think, to determine them.

As against all the appellants, excepting N. R. Fitzpatrick, the decree and judgment is affirmed, subject to the modification in accordance with the remission filed by respondents in the lower court, and also subject to the construction of the decree placed thereon by this court, and as to them the order denying the motion for a new trial is affirmed. In so far as the judgment and decree is against the appellant N. R. Fitzpatrick, it is reversed, and a new trial is granted upon the

issues between respondents and said appellant Fitzpatrick, excepting as to the issue involving partnership relations between respondent and defendant Scott. It is further ordered that the cause be remanded for further proceedings, in accordance with the judgment and decree of the trial court and of this court. Appellant N. R. Fitzpatrick is entitled to his costs upon appeal.

TALBOT, C. J., and SWEENEY, J., concur.

(41 Colo. 432)

FOLEY v. COON et al.

(Supreme Court of Colorado. Dec. 2, 1907.)

1. MECHANICS' LIENS—ENFORCEMENT — BURDEN OF PROOF.

In a suit to enforce a mechanic's lien under Sess. Laws 1899, p. 261, c. 118, requiring the filing of a lien statement within the time prescribed, plaintiff has the burden of proving that he filed the lien statement within the statutory time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 556.]

2. APPEAL—FINDINGS—CONCLUSIVENESS.

An appellate court will not disturb the findings of the trial court or the verdict of a jury merely because the evidence is in conflict; and, where there is sufficient legal evidence on which the verdict or finding can rest, it will not be set aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 3935-3937.]

3. MECHANICS' LIENS—ENFORCEMENT—FILING LIEN STATEMENT—EVIDENCE.

In a suit by a subcontractor to enforce a mechanic's lien, evidence held to support a finding that his lien was not filed within the time prescribed by Sess. Laws 1899, p. 269, c. 118, § 9, prescribing the time in which subcontractors must file their lien statements.

4. APPEAL—PLEADING—STRIKING OUT PLEADINGS—OBJECTIONS BELOW.

Where plaintiff did not object to the striking out of allegations of his amended complaint, on the ground that they stated a cause of action different from that contained in the original complaint, he could not, on appeal, raise such objection, or rely on the cause of action so stricken out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1489.]

Appeal from District Court, Pueblo County; N. Walter Dixon, Judge.

Action by T. H. Foley against W. H. Coon and another. From a judgment for defendants, plaintiff appeals. Affirmed.

H. P. Vories, for appellant. L. A. Crane, for appellee Levvie.

CAMPBELL, J. Defendant Coon, a builder, made a contract with defendant Levvie to put a second story on a previously existing one-story building standing on lots owned by the latter, and plaintiff Foley furnished Coon, the principal contractor, with materials that went into the work of construction. Foley brought this action against the builder and the owner to recover against the former the value of the materials, and to make the amount of his recovery a lien upon the prop-

erty of the latter. Judgment went for plaintiff against the builder, from which the latter has not appealed. The court denied the lien against the owner. Plaintiff appeals.

The only point for determination concerns the rightfulness of the judgment disallowing the lien; and the only question that plaintiff is in position to raise on this appeal is the sufficiency of the evidence to sustain the finding as to the time when the building was completed. The lien is sought to be enforced under the mechanics' lien act of 1899. Sess. Laws, 1899, p. 261, c. 118. Section 9 of the act requires liens of subcontractors and materialmen to be filed for record after the last labor is performed or last material furnished for which the lien is claimed, and at any time before the expiration of two months next after the completion of the building, or structure; while liens of principal contractors must be filed within three months next after such completion. Plaintiff filed three complaints. In the original and first amended complaints, and in his lien statement, he describes himself as a subcontractor, and rests his right to a lien upon the contract which he made with Coon, the principal contractor, which, under the statute, makes plaintiff a subcontractor. In the second amended complaint, besides the facts constituting plaintiff's cause of action as a subcontractor, one based on plaintiff's contract with Coon alone, were allegations appropriate to a cause of action by a principal contractor, one based on plaintiff's contract with Coon and Levvie jointly. The object of the latter averments was to make a case within that clause of section 9, which gives to a principal contractor or three months next after the completion of the building or structure in which to file his lien statement. The court, on defendant's motion, struck from the second amended complaint such new averments, and plaintiff made no objection, and took no exception, to this ruling.

The principal question of fact to which the evidence was directed was upon the controverted issue of the time of the completion of the addition to the building. The burden was on plaintiff to prove that he filed his lien statement within the prescribed statutory period. *Stidger v. McPhee*, 15 Colo. App. 252, 62 Pac. 332. A number of witnesses for plaintiff testified, in effect, that the addition was not completed until about the 4th of December, 1902, while a number of witnesses for defendant fixed such time about the 20th of the previous October. The lien statement was filed January 4, 1903. The trial court found upon this disputed testimony that the building was completed October 20th, and, as this was more than two months before the lien statement was filed, the lien was disallowed. The established rule in this jurisdiction, and this case does not come within any of its recognized exceptions, is that an appellate court will not disturb the findings of the trial court, or the verdict of a jury, merely

because the evidence is in conflict. If there is sufficient legal evidence upon which the verdict or finding can rest, it will not be set aside. Were it necessary to review the evidence in detail, it might not be difficult to show that some of the pronounced apparent differences between the witnesses for the respective parties could, at least in part, be reconciled, or explained, without in the least weakening the court's finding. We cannot disturb the judgment based on the finding.

Equally untenable, both on its merits and because it is not properly saved, is another contention that plaintiff is to be regarded as a principal contractor. The closing part of section 1 of the lien act makes it the duty of the owner of property in certain cases to file the contract, or memorandum thereof, between him and the principal contractor, containing certain matters, with the county recorder of the county, and, in case of a failure to do so, labor done and materials furnished by all persons before such contract or memorandum is filed shall be deemed to have been done at the personal instance of the owner. In other words, the owner is thereby made a principal contractor. A principal contractor, as has already been said, is by section 9 allowed three months next after the completion of the building in which to file his statement. If, therefore, plaintiff is a principal contractor, his lien statement was filed within three months after October 26th, the time when the defendant claims the building was completed. There is no such issue in this case. Plaintiff, in his lien statement, declared himself a subcontractor, and did so in the first two complaints. In the second amended complaint, the allegations whereby plaintiff claimed a lien as a principal contractor were, on motion of defendant Levvie, stricken out by the court, on the ground that a cause of action different from that contained in the original complaint was thereby pleaded. Plaintiff did not object to the ruling of the court striking out this cause of action from the second amended complaint, and cannot raise any such objection here.

Perceiving no prejudicial error in the record, the judgment is affirmed.

Affirmed.

STEELE, C. J., and GABBERT, J., concur.

BURCHER et al. v. PEOPLE.

(Supreme Court of Colorado. Dec. 2, 1907.)

1. STATUTES—TITLE — SUFFICIENCY — DETERMINATION.

Whether the subject-matter of a statute is expressed in its title within Const. art. 5, § 21, must be determined by the contents of the statute, without regard to the source of the power of which the statute is an expression.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 136-139.]

2. SAME—REGULATION OF EMPLOYMENT.

The title of Sess. Laws 1903, p. 309, c. 138, entitled "An act to prescribe and regulate the

hours of employment for women and children in mills, factories, manufacturing establishments, shops, stores and any other occupation which may be deemed unhealthful or dangerous," is not broad enough to cover a provision prohibiting the employment of women for more than eight hours a day in a mill, factory, manufacturing establishment, shop, or store; the title relating to occupations injurious to health, and the provision treating of occupations which may not be unhealthful.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 136–139, 145.]

3. CONSTITUTIONAL LAW—LEGISLATIVE POWER—DELEGATION.

Under Const. art. 5, § 25a, requiring the Legislature to provide for an eight-hour day for persons employed in mining, etc., "or other branch of industry or labor" that it may consider injurious to health, and under the police power the Legislature alone must regulate the hours of labor, and cannot delegate it to either of the co-ordinate departments of the government.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 89–102.]

4. MASTER AND SERVANT — REGULATIONS — HOURS OF SERVICE.

Under Const. art. 5, § 25a, requiring the Legislature to provide for an eight-hour day for persons employed in mines and other enumerated employments, "or other branch of industry or labor" that the Legislature may consider injurious to health, the Legislature, in attempting to regulate any of the unnamed branches of industry or labor, must first declare that the same is injurious to health, and a mere general prohibition of employment in a harmless occupation beyond specified hours is not the equivalent of a declaration of the Legislature that such occupation is injurious.

5. CONSTITUTIONAL LAW—RIGHT TO CONTRACT FOR LABOR.

The right reserved by the Constitution to each citizen to contract for his labor is subject to no restraint except where the public safety, health, peace, morals, or general welfare demands it, and then only where the Legislature in the exercise of its police power selects a proper subject for its exercise and prescribes reasonable regulations.

6. MASTER AND SERVANT — REGULATIONS — HOURS OF LABOR.

Sess. Laws 1903, p. 310, c. 138, which prohibits the employment of women for more than eight hours a day in any mill, factory, manufacturing establishment, or store, and which fails to declare that the laundry business is injurious to the health of employes therein, is invalid when applied to that business, under Const. art. 5, § 25a, requiring the Legislature to fix an eight-hour day in branches of industry considered injurious to health.

Steele, C. J., dissenting.

En Banc. Error to District Court, City and County of Denver; John F. Mullins, Judge.

Frank Burcher and others were convicted of violating the "women and children labor act," and they bring error. Reversed.

Fred W. Parks, for plaintiffs in error. Wm. H. Dickson, Atty. Gen., and Samuel Huston Thompson, Asst. Atty. Gen. (W. F. Hynes, of counsel), for the People.

CAMPBELL, J. Defendants were tried and convicted under an information charging them with violating the provisions of section 3 of the so-called "Women and Children La-

bor Act" of 1903. Sess. Laws 1903, p. 310, c. 138; 3 Mills' Ann. St. Rev. Supp. p. 757. It reads: "No woman of sixteen years of age or more shall be required to work or labor for a greater number than eight hours in the twenty-four hour day, in any mill, factory, manufacturing establishment, shop, or store for any person, agent, firm, company, copartnership or corporation, where such labor, work or occupation, by its nature, requires the woman to stand or be upon her feet, in order to satisfactorily perform her labors, work or duty in such occupation or employment." The title of the act is: "An act to prescribe and regulate the hours of employment for women and children in mills, factories, manufacturing establishments, shops, stores, and any other occupation which may be deemed unhealthful or dangerous, and to repeal all acts and parts of acts in conflict herewith." After defendants' motion to quash the information was overruled, they waived a jury, and submitted the case to the court upon an agreed statement of facts, and the court found them guilty of a misdemeanor, and sentenced them to pay a fine. The salient facts are that defendants were engaged in operating a steam laundry in the city of Denver, in which they had a number of machines, and employed a large number of men and women; that the building in which the business was carried on consisted of a ground floor and basement, well lighted by windows from side and rear, well ventilated and heated, connected with which were good sewerage and drainage, and no escaping gases or other unhealthy conditions surrounded the work, and the water and soap used were pure; that Belle Johnson, a woman over the age of 16 years, was employed in this laundry by them, and her work consisted in operating a shirt body ironer, which necessitated her to stand upon her feet; that under the contract of employment she was required to, and did, thus work more than 8 hours a day, to wit, about 55 hours a week, and averaging about 9 hours per day in the 24-hour day. On this review, as below, the facts being agreed upon, the only disputed question reserved and argued is one of law, whether foregoing section 3 is valid. Defendants challenge its validity upon a number of grounds, only two of which we shall consider, as our decision on them makes the section void, and compels us to reverse the judgment with instructions to discharge the defendants from custody.

The two grounds may thus be stated: (1) The subject-matter of the section is not clearly, or at all, expressed in the title of the act, as section 21 of article 5 of our Constitution requires. (2) The General Assembly has not in this act, or elsewhere, declared or considered the laundry business an occupation, or labor therein, injurious or dangerous to health, life, or limb, which is an essential condition precedent to the validity of an enactment of this character, whether it is

based upon the eight-hour amendment to the Constitution adopted in 1902, and now known as section 25a of article 5 of the Constitution, or upon the general unwritten police power that resides in the legislative branch of our state government. As the Attorney General in his brief and oral argument gave, as the authority of the General Assembly to enact this statute, the so-called eight-hour constitutional amendment, we here insert the same: "The General Assembly shall provide by law, and shall prescribe suitable penalties for the violation thereof, for a period of employment not to exceed eight (8) hours within any twenty-four (24) hours (except in cases of emergency where life or property is in imminent danger), for persons employed in underground mines or other underground workings, blast furnaces, smelters; and any ore reduction works or other branch of industry or labor that the General Assembly may consider injurious or dangerous to health, life or limb." Laws 1901, p. 109, c. 48.

As affecting the first assignment, it makes no difference whether authority for this act is the foregoing constitutional amendment or the unwritten police power if, in essential character, they differ. Whether the subject-matter of section 3 is clearly expressed in the title must be determined by their own contents, and without regard to the source of the power of which the act itself is an expression. This title has to do with a regulation of the hours of employment for women and children in certain enumerated, and other indefinite and unnamed, occupations, which occupations in and of themselves may be deemed unhealthful or dangerous. This the Attorney General concedes, but contends that the words of the amendment, "or other branch of industry or labor," make it competent for the General Assembly to regulate the hours of employment, not only where the occupation or branch of industry itself is injurious or dangerous, but also where the "labor" is of that character; that is to say, even though the particular occupation or place of work is perfectly safe and healthful, yet, if the labor therein or thereat is injurious or unhealthful, the General Assembly may nevertheless limit the number of hours persons shall be employed in that labor. And the Attorney General says that it is under the authority conferred by section 25a of article 5 thus to regulate hours of employment where "labor," as contradistinguished from "branch of industry," is dangerous or unhealthful, that section 3 was enacted. If such be the authority for this section, and if such interpretation thereof be correct (and concerning this and the applicability of the amendment to this statute and this case we express no opinion), it is certainly just as true that in this title there is not a word about regulating employment where labor as such is injurious or unhealthful, but only where the occupation or branch of industry

is of that character. It seems, therefore, necessarily to follow that the subject-matter of section 3 which treats of occupations which, for aught that is said therein to the contrary, are entirely safe and healthful, or which refer only to labor that might inferentially be deemed injurious or unhealthful, is not clearly, or at all, expressed in the title, which purports to regulate hours of employment only in dangerous or injurious occupations. In *re Breene*, 14 Colo. 401, 24 Pac. 3. We hold that the body of section 3 is not clearly expressed in the title.

The second assignment we think is well laid, and here again, as to this objection, we also observe that it matters not whether the source of the power of this legislation is to be found in the express command contained in the constitutional amendment, or is inherent in the police power of the state. The question as to whether the General Assembly by this amendment is given any greater power in making regulations concerning the unenumerated branches of "industry or labor" than that body theretofore and always has possessed as a part of its general legislative power, and certain other questions argued by counsel, we find it unnecessary to determine upon this review. And upon all questions not included in the two assignments determined, and as to the enforceability, meaning, scope, and applicability of this constitutional amendment, we withhold expression of opinion until a cause involving them is before us. If the power to enact such legislation as this reposes in the amendment, or is inherently a part of the general legislative power belonging to the General Assembly, it is entirely clear that the power itself must be exercised, in the first instance, by that lawmaking body. With the ultimate authority of the courts, as was held in *Re Morgan*, 26 Colo. 415, 58 Pac. 1071, 17 L. R. A. 52, 77 Am. St. Rep. 269, to determine as to the validity of the exercise of the police power, both as to the subject selected and reasonableness of the regulation, we are not now concerned. But it is unquestionably true, and cannot be, and is not, controverted, that the legislative branch of government alone has the authority, and is charged with the duty, of enacting such regulations, and cannot relinquish or delegate it to either of the other great co-ordinate departments of government. That this is the correct doctrine is declared by all the cases, and by every author and jurist who has spoken on the subject. The amendment recognizes this doctrine when, after specifying particular occupations in which the period of employment is prescribed, it adds, "or other branch of industry or labor that the General Assembly may consider injurious or dangerous to health, life or limb." Here we have, as to unnamed branches of industry and labor, the express limitation that regulations concerning hours of employment in them must be restricted to those which the General Assembly may consider injurious or

dangerous to health, life, or limb. We look in vain to find that the General Assembly in section 3, or in any part of this, or any other, act, has considered or declared the laundry business, or even labor therein of any kind, either injurious or dangerous. The mere general prohibition of employment in harmless occupations beyond, or in excess of, specified hours, is not the equivalent of a solemn finding and declaration of the General Assembly that such occupations are injurious or dangerous. The amendment contemplates that not until after the General Assembly has considered and enacted that they are of that character can regulations of employment therein, and prohibition of labor beyond a certain time, be made effective, or violations thereof punished as a crime or misdemeanor.

In marked contrast with this act is the act of the Fifteenth General Assembly, found in Sess. Laws 1905, p. 284, c. 119. In that act the General Assembly was evidently intending to carry out the mandate of the constitutional amendment that is here invoked. That title is: "An act to declare certain employments injurious and dangerous to health, life and limb; regulating the hours of employment in underground mines and other underground workings, in smelters and ore reduction works, in stamp mills, in chlorination and cyanide mills, and employment about or attending blast furnaces, and providing a penalty for the violation thereof." The occupations named in section 1 of the act of 1905, which include all of those expressly enumerated in the constitutional amendment, and several others assumed by the General Assembly to be of similar character and hence within the language of the amendment "any other branch of industry or labor," are by the General Assembly expressly "declared dangerous and injurious to health, life and limb," and this declaration is immediately followed by a provision that the period of employment for all persons employed in such occupations shall be eight hours per day. Here we find that the General Assembly conceived that its duty under this amendment was, first, to declare certain occupations to be dangerous or injurious, and then to make the desired regulations concerning the hours of employment. This method was entirely ignored in the act which we are considering. Reading the act of 1903 in its entirety, it is plain that our General Assembly did not purport to say, and did not intend to declare, what occupations were, in its judgment, dangerous or injurious, and therefore occupations of such a character as to justify regulations of hours or labor therein, for in section 2 it said: "All paper mills, cotton mills and factories where wearing apparel for men and women is made, ore reduction mills or smelters, factories, shops of all kinds and stores may be held to be unhealthful and dangerous occupations within the meaning of this act at the discretion of the court." It must be borne in mind, as the Attorney General must concede, that under

our Constitution the right of contracting for one's labor is reserved and guaranteed to every citizen. It is subject to no restraint, except where the public safety, health, peace, morals, or general welfare demands it, and then only where the legislative department of the state government, in the exercise of its police power, selects a proper subject for its exercise and prescribes reasonable and appropriate regulations. In the absence, therefore, of a legitimate exercise by the General Assembly of this power by a declaration to the contrary, the defendants might lawfully by contract require a woman to work more than eight hours per day in their laundry. Yet here is an attempted relinquishment by the lawmaking body of that very power of legislation, and a futile effort to confer upon the courts the authority to make such laws, by saying, in their discretion, and in the first instance, and with no previous declaration on the subject by the General Assembly, what occupations are unhealthful and dangerous. This is a palpable evasion of duty, coupled with an abortive attempt to give to the courts legislative power to make crimes and misdemeanors out of acts which are not in violation of any valid legislative enactment. It is manifest, therefore, that, as to section 3, at least one essential condition precedent to the validity of enactments of this kind is lacking, namely, the considering or finding by the General Assembly that the occupation in question is of a character concerning which only can it, in any event, adopt such regulations as are assumed to be contained in this act. If this, however, were not so, this judgment must be reversed; for, if the courts have the power which section 2 ineffectually tries to give them, the laundry business must be considered healthful, for counsel themselves, in their stipulation of facts, on which the record shows the cause was decided, are in accord that such occupation is healthful. Upon the two grounds discussed, we hold section 3 to be unconstitutional and void.

The judgment must be reversed, and the cause remanded, with instructions to quash the information and discharge the defendants from custody.

Reversed. All the Justices concurring, except STEELE, C. J., who dissents.

JENKS v. STUMP.

(Supreme Court of Colorado. Nov. 4, 1907.)

1. ANIMALS—CRUELTY—CONSTITUTIONAL LAW—POLICE POWER.

In the exercise of the police power, the Legislature may enact laws for the prevention of cruelty to animals, and designate officers charged with the execution thereof.

2. SAME—DUE PROCESS OF LAW.

Where it is sought to deprive one of his property or to create a charge against it, he must have notice of the proceedings, and be afforded an opportunity to be heard, or he will be deprived of his property without due process of law, in violation of Const. U. S. Amend. 14, and Const. art. 2, § 25.

3. SAME.

Mills' Ann. St. §§ 111, 112, 114, which authorize any officer of the humane society to take charge of any abandoned or cruelly treated animal, and provide the same with food, etc., and detain it until the expenses are paid, etc., but which fail to provide for any hearing to determine the facts, authorize the taking of property without due process of law, in violation of the fourteenth amendment to the federal Constitution, and Const. art. 2, § 25; the statute not restricting the power to cases of emergency, in which cases property may be taken without notice.

En Banc. Appeal from District Court, Fremont County; M. S. Bailey, Judge.

Action by William A. Stump against Effie A. Jenks. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. F. Dunklee and O. E. Jackson, for appellant. Waldo & Dawson, for appellee.

CASWELL, J. The appellee (as plaintiff below) brought a replevin suit in the district court of Fremont county to recover the possession of three cows from appellant (defendant below); complaint, in the usual form, alleging ownership, that he was entitled to the possession of property wrongfully taken, demand for possession, and unlawful detention by defendant. The defendant for answer alleges, upon information and belief, that the plaintiff was not in possession of the cows described in complaint at the time alleged, but the same were abandoned, neglected, and cruelly treated, and ranging upon a barren range dividing the counties of Fremont and Teller; and the defendant further justifies under sections 111, 112, Mills' Ann. St., alleging that at the time she took said cattle she was empowered as officer and agent of the Colorado Humane Society to maintain such animals until the expense of food, care, and shelter were fully paid, that her seizure of said cattle at the time same were taken was made solely for the purpose of providing them with proper food, shelter, and care, and to prevent suffering and death of same from hunger, thirst, and neglect; and she further alleges that at the time of the seizure she did not know, and had no means of knowing, who were the owners of the cattle. Plaintiff by his replication denies that the cattle were without food, shelter, and care, or that they were suffering greatly or otherwise from any cause, and denies that the defendant found them in an abandoned, neglected, and cruelly treated condition, and alleges that the cattle were on the range in the usual condition of range cattle, and that at that time and at all times during the winter he had provided and was providing food and shelter for all of his cattle on the range needing such food and shelter, and had men continually employed to gather all cattle which were in a suffering condition and provide for their wants, and plaintiff further submits to the court the validity of the law under which defendant justified. At the trial the plaintiff objected to the intro-

duction of any testimony in support of the allegation of justification in defendant's answer, because the statute relied upon is in conflict with section 25, art. 2, Const. Colo., and the fourteenth amendment to the Constitution of the United States, in that it authorizes the taking of property without due process of law, and further claims the statute to be in conflict with section 25 of article 5 of the Constitution of Colorado. The statutes which are discussed in connection with this case are as follows: Section 111, Mills' Ann. St.: "Any officer or agent of the State Humane Society may lawfully take charge of any animal found abandoned, neglected or cruelly treated, and shall thereupon give notice thereof to the owner, if known, and may care and provide for such animal until the owner shall take charge of the same, and the expense of such care and provision shall be a charge against the owner of such animal, and collectible from such owner by said Humane Society in an action therefor." Section 112: "When said Humane Society shall provide neglected and abandoned animals with proper food, shelter and care, it may detain such animals until the expense of such food, shelter and care is paid, and shall have a lien upon such animals therefor." Section 114: "Any person or corporation entitled to a lien under any of the provisions of this act, may enforce the same by selling the animals and other personal property upon which such lien is given, at public auction, upon giving written notice to the owner, if he be known, of the time and place of such sale at least five days previous thereto, and by posting three notices of the time and place of such sale in three public places within the county, at least five days previous thereto; and if the owner be not known, then such notice shall be posted at least ten days previous to such sale." Counsel on both sides have been diligent in presenting authorities. While we allude to some of them, we think the questions presented have been practically settled by former decisions of this court. In the exercise of the police power of the state the Legislature may undoubtedly enact proper laws for the prevention of cruelty to animals. It may further designate agents or officers who may be charged with the execution of such laws. It is unnecessary in this case to determine whether the statute as it now stands is obnoxious to clause 23, § 25, art. 5, Const. Colo.

The important question presented and chiefly relied upon in the argument is whether the law as it stands contravenes section 25, art. 2, Const. Colo., and the fourteenth amendment to the Constitution of the United States, in that it deprives plaintiff of his property and the possession thereof without due process of law. This phrase has been frequently discussed in this court, and many other courts have defined it in various ways. In *Davidson v. New Orleans*, 96 U. S. 97-104 (24 L. Ed. 616), the court says: "There is

wisdom, we think, in the ascertaining of the intent and application of such an important phrase (due process of law) in the federal Constitution by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning upon which such decisions may be founded." And further in the same case, at page 107 of 96 U. S. (24 L. Ed. 616), Mr. Justice Bradley says: "If a state, by its laws, should authorize private property to be taken for public use without compensation (except to prevent its falling into the hands of an enemy, or to prevent the spread of a conflagration, or in virtue of some other imminent necessity where the property itself is the cause of the public detriment), I think it would be depriving a man of his property without due process of law. * * * In judging what is due process of law, respect must be had to the cause and object of the taking; * * * and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but, if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'" In *Re Lowrie*, 8 Colo. 513, 9 Pac. 498 (54 Am. Rep. 558), the court says: "It is pretty generally stated by those learned in the law that 'due process of law' and 'law of the land,' although verbally different, express the same thought and that the meaning is the same in every case." *Cooley's Const. Lim.* 352-353; *Story's Const. § 1943*. In the same case the court further says, quoting from *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629: "By the law of the land is most clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, his liberty, property, and immunities under the protection of the general rules which govern society." To the same effect is *Wadsworth v. U. P. R. Co.*, 18 Colo. 614, 33 Pac. 515, 23 L. R. A. 812, 36 Am. St. Rep. 309; In *re Dolph*, 17 Colo. 35, 28 Pac. 470. "Due process of law includes law in its regular course of administration through courts of justice." In *Brown v. City of Denver*, 7 Colo. 311, 3 Pac. 459, this court, in discussing "due process of law" and its application, says: "The doctrine of the authorities is that whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of, taking it, the owner must have notice of the proceeding, and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be, by virtue of which his property is to be taken, whether administrative, judicial, summary, or otherwise. At some stage of it, and before the property is taken or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and

errors which may have been committed must be given. Otherwise the constitutional guarantees above cited are infringed." The court in the same case further says: "A valid assessment cannot be made under an invalid law or ordinance, and its constitutionality is to be tested, not by what has been done under it, but by what it authorizes to be done by virtue of its provisions." *Stewart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *San Mateo v. S. P. R. R.*, 8 Sawy. 238, 13 Fed. 722. In the latter case this court had under consideration the validity of a statute authorizing the construction of sidewalks; but it was held in that case, as in other cases, that an assessment of that character could be upheld as a police regulation, and the court was then discussing the police power of the state. Subsequently this theory of taxation was overruled (*Denver v. Knowles*, 17 Colo. 204, 30 Pac. 1041, 17 L. R. A. 135), but such later decision in no wise detracts from the force of the argument of the court as to legislative enactments concerning the exercise of police powers. In *Brophy v. Hyatt*, 10 Colo. 223, 15 Pac. 399, the court having under consideration the power of towns, incorporated under the statute, to declare what should be a nuisance and to abate the same, etc., says: "The ordinance does not strictly speaking declare or work a forfeiture of impounded animals, since it provides for the payment of the proceeds of the sale to the owner after deducting the cost of the proceeding." Conversely it is true that a statute which does not provide for the payment of the balance to the owner after deducting the cost of the proceeding does work a forfeiture. It is not a sufficient answer to this proposition to say that the balance of the proceeds of the sale of animals remaining after deducting the cost for keeping and the cost of the proceedings and sale can be recovered by the owner in an action, because the constitutionality of the statute must be determined by what it authorizes to be done by virtue of its provisions. *Brown v. City of Denver*, *supra*, and cases cited; *Ames v. People ex rel.*, 26 Colo. 83, 109, 56 Pac. 656.

Applying the foregoing well-established principles to the case at bar, we find the statute seeks to clothe the humane society and its agents with extraordinary powers. By its terms the agent is the sole judge of whether an animal is neglected, abandoned, or ill treated, and whether it has sufficient food, nourishment, and shelter. The truth respecting the matter cannot avail, because the agent is clothed with power to take possession of the animals, regardless of their condition. No tribunal or any hearing is provided to determine the facts. The agent may in his discretion take possession and create a charge which becomes a lien upon the property without notice or hearing. The owner may have no knowledge that his prop-

erty is being taken. No provision is made for the payment of any residue over and above the charges of the agent and the expense of the sale to the owner, and such payment is not required by this law, and this is one of the tests of its constitutionality. There is no penalty for failure to return the proceeds of any sale to the owner, and the only redress is by an action to recover the same, and the party aggrieved must himself initiate the action to have his day in court. We think such powers are inhibited by the Constitution, and must hold that the statute is in contravention of article 2, § 25, Const. Colo., and of the fourteenth amendment to the federal Constitution, that it authorizes the taking of property without due process of law, and is not a valid exercise of the police power of the state.

Our attention is called to a line of decisions holding that legislation in the exercise of the police power of the state has been upheld where it was provided that property might be destroyed without notice and without compensation to the owner to prevent the spread of contagious disease, or in the case of a devastating fire and other exigencies. The rulings in such cases rest more upon the municipal right of self-protection and self-defense than the legal construction of provisions concerning due process of law. Such cases are not in point. In *Munn v. Corbin*, 8 Colo. App. 113, 44 Pac. 783, the court having under consideration the powers of a health commissioner to abate a nuisance, says: "The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the land of the individual, is a common-law right, and is derived, in every instance of its exercise, from the same source—that of necessity. It is akin to the right of destroying property for the public safety, in case of the prevalence of a devastating fire or other controlling exigency. But the necessity must be present to justify the exercise of the right; and whether present or not must be submitted to a jury under the guidance of a court." The distinction in all such cases seems to be whether public necessity demands summary action, and, when it does not, notice must be given to the owner of the property and an opportunity be given, before some competent tribunal, to determine the truth of the allegations in each case, before the same is taken and before any lien is created upon it, and before it can be sold. Many of these questions arise in connection with the right of killing animals; that is, in the manner provided in section 113 of the act under consideration. We do not construe that section, which is not before us, but the principles which control in such cases are analogous and applicable to those involved herein. 8 Cyc. 1122, and cases cited. It does not appear from the record that any public necessity existed, nor that the public safety was in any manner conserved by taking these ani-

mals from the range, or that any exigency existed which required them to be taken without a notice to the owner and a hearing to determine whether or not they were abandoned or neglected, nor does the statute purport to restrict the powers granted to cases of emergency.

At the trial there was a verdict for the plaintiff directed by the court, and judgment thereon, based upon the ruling that the statute is unconstitutional.

We think the judgment is correct; and it is affirmed. All the Justices concur.

JENKS v. WITCHER et al.

(Supreme Court of Colorado. Nov. 4, 1907.)

En Banc. Appeal from District Court, Fremont County; M. S. Bailey, Judge.

Action between Effie A. Jenks and William J. Witcher and another. From a judgment for the latter, the former appeals. Affirmed.

Geo. F. Dunklee and O. E. Jackson, for appellant. Waldo & Dawson, for appellees.

CASWELL, J. The facts involved in this case are the same as those involved and considered in *Effie A. Jenks v. William A. Stump*, 93 Pac. 17. By stipulation and order of the court below this case was consolidated with that case for the purpose of trial and determination; the stipulation providing for separate verdict and judgment in each case.

The questions presented for determination here are the same as the questions presented in that case, and the same law is applicable, and for the reasons there given the judgment herein is affirmed. All the Justices concur.

O'NEILL v. POTVIN.*

(Supreme Court of Idaho. Dec. 12, 1907.)

1. JUDGMENT—COLLATERAL ATTACK.

The attack upon a judgment is collateral if the action or proceeding has an independent purpose and contemplates some other relief or result than the mere setting aside of the judgment, although the setting aside of the judgment may be necessary to secure such independent purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 961, 962.]

2. SAME—DIRECT ATTACK.

Where the main object or purpose of an appeal, writ of error or motion, if taken or made in the original action, or in an independent action, is for the purpose of setting aside a judgment, such attack is direct.

3. SAME—JUDGMENT ROLL.

In an action where the service of the summons is made by publication, and the defendant fails to appear and answer, under the provisions of subdivision 1, § 4450, Rev. St. 1887, the following papers constitute the judgment roll, to wit: "Summons with the affidavit of proof of service, and the complaint with a memorandum endorsed thereon that the default of

* For opinion on petition to rehear, see 93 Pac. 257.

the defendant in not answering was entered, and a copy of the judgment."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 546-551.]

4. SAME—PRESUMPTIONS.

In a collateral attack on the judgment, the want of jurisdiction to render the judgment must appear upon the face of the judgment roll; otherwise, the presumption is in favor of the validity of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 937.]

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; Hon. Edgar O. Steele, Judge.

Action by Eugene O'Neill against Edmond D. Potvin. Judgment for defendant, and plaintiff appeals. Affirmed.

Eugene O'Neill and Lloyd H. Eriesson, for appellant. Ben F. Tweedy and Chas. L. McDonald, for respondent.

SULLIVAN, J. This is an action to quiet title to about 157 acres of land, as per government survey, situated in Nez Perce county. Appellant in his complaint claims title in fee to said lands, and alleges that respondent makes some claim thereto adverse to him, and that such claim is without any right whatever, and prays to have the title thereto quieted in himself. The respondent answered, denying the ownership of said lands in the plaintiff, and avers that respondent is the owner of such land, and for a further answer avers that he obtained title to said land under sale by execution issued in the case of Edmund D. Potvin v. William Malenfant to enforce a judgment rendered in the district court in and for Nez Perce county, which judgment was against Malenfant and in favor of the respondent. After a trial of the cause, judgment was entered in favor of the respondent. A motion for a new trial was overruled, and this appeal is from the judgment and order denying the motion for a new trial. The appellant bases his title to said land upon a deed to said premises from Malenfant to the appellant. The real controversy arises over the validity of the judgment in the case of Potvin v. Malenfant; for, unless that deed is void, the appellant has no title, and is not entitled to have the title to said land quieted in himself. Counsel for appellant contend that said judgment was absolutely void by reason of the failure of Potvin in his suit against Malenfant to get service of summons on him by publication as required by law.

The first question presented is whether this is a collateral or direct attack on that judgment. This action was instituted to quiet the title to said land in the appellant. That was its ultimate object and purpose; and, in order to do that, said judgment in the Malenfant Case must be held to be void. This action is clearly a collateral attack on that judgment. In 1 Black on Judgments, § 252, the author defines a collateral attack as follows: "But if the action or proceeding has

an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral, and falls within the rule." "Collateral" is used as the antithesis of "direct." To constitute a direct attack upon a judgment, it is said that it is necessary that a proceeding be instituted for that purpose. In said section 252 the author states: "If an appeal is taken from a judgment or writ of error, or if a motion be made to affect or set it aside on account of some alleged irregularity, the attack is obviously direct; the sole object of the proceeding being to deny and disprove the apparent validity of the judgment." The appellant seeks in this action to obtain some other relief than that of setting aside said judgment. The main object is to quiet the title of said land in himself, and, although the overturning of that judgment is necessary to his success, it does not make this action any the less a collateral attack upon said judgment.

The next question to be considered is: What record may be used in a collateral attack upon a judgment of this kind? By the provisions of section 4456 it is provided that the judgment roll in cases where the complaint is not answered shall be composed of "the summons with the affidavit or proof of service and the complaint with a memorandum endorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment." That section was adopted from the Code of Civil Procedure of California (section 670), and in construing that section the Supreme Court of California in a number of decisions have held that the judgment roll in cases like the one at bar under that section of the statute consists of the summons, the affidavit or proof of service, the complaint with the default indorsed thereon, and a copy of the judgment. Hahn v. Kelley, 34 Cal. 391. That decision was rendered in 1868, and is reported in 94 Am. Dec. 742, and to that is attached an exhaustive note by the learned author, Freeman, which is very instructive, and cites many of the leading decisions that have approved or disapproved of the doctrine laid down in the Hahn-Kelley Case. That action, like the one at bar, was an action to quiet title to a tract of land. It appears that the respondent Kelley brought an action in the Fifteenth district court for the city and county of San Francisco against William Carey Jones, in which action he obtained judgment, and thereafter issued execution thereon to the sheriff, who levied upon the lands in controversy and advertised the same to be sold, and was about to sell the undivided one-quarter of the same as the property of said Jones when the action of Hahn v. Kelley was commenced to quiet his title and restrain the sale. In that action, the respondent Kelley answered, and, when the cause came on for

trial, introduced, among other evidence, the decree in the case of *Hawes v. Jones and Brown*, the order of sale, the sale and deed by the sheriff to Jones, and the conveyance to the appellant by the latter, and then rested. The respondents then introduced in evidence, without objection, the remainder of what was claimed to be by them, the judgment roll in that action, which, as claimed by them, showed that an unsuccessful attempt had been made to serve Jones by publication of summons, but in consequence of certain alleged defects said service was a nullity, and that the decree was therefore absolutely void. The papers thus introduced in evidence by respondent consisted of the affidavit of plaintiff in that action to procure an order for the service of summons therein on said Jones by the publication of the same, the order of the judge directing the publication of the summons, the affidavit of the publisher of the paper in which said summons was published, and an affidavit showing that said summons had personally been served on said Jones in Washington, D. C. The affidavit of the plaintiff and the order for the publication of the summons were objected to as irrelevant and incompetent, because they constituted no part of the judgment roll in that action. It will be observed from that statement of facts that the rule of law applicable to that case ought to apply to the question under consideration in this case. In that case the court held that in a collateral attack on a judgment only such facts and circumstances can be shown or relied on in support of such attack as affirmatively appear on the face of the record or what under the law constitutes the judgment roll. So in a collateral attack on a judgment under our law the only evidence that is admissible in support of such attack is the judgment roll, and, if that shows on its face the court had no jurisdiction to try the cause, the judgment is absolutely void.

The case of *Hahn v. Kelley*, supra, has been very extensively cited, not only by the Supreme Court of California, but by the courts of many other states, and the rule laid down in that case has to some extent been modified or overruled by subsequent decisions of national and state courts. Mr. Freeman says in the note referred to that the first case in which the doctrines of the principal case were called in question is *Galpin v. Page*, 3 Sawy. (U. S.) 93, Fed. Cas. No. 5,206. Mr. Justice Field delivered the opinion in that case sitting as presiding judge of the United States Circuit Court for the Ninth Circuit. In the course of that opinion it is said: "The first position [referring to *Hahn v. Kelley*], that, when a judgment of a court of general jurisdiction is produced in evidence, it can only be collaterally attacked for matters apparent upon its record, and that in the absence of such matters the jurisdiction of the court must be conclusively presumed, is, with certain qualifications and exceptions,

undoubtedly correct. These qualifications and exceptions arise where the proceedings, or the parties against whom they are taken, are without the ordinary jurisdiction of the court, and can only be brought within it by pursuing special statutory provisions." The learned justice, referring to the statute of California allowing constructive or substituted service, said: "The validity of the statute can only be sustained by restricting its application to cases where, in connection with the process against the person, property in the state is brought under the control of the court, and subjected to its judgment, or where the judgment is sought simply as a means of reaching such property or affecting some interest therein, or to cases where the action relates to the personal status of the plaintiff in the state." After pointing out the mischief which would arise from permitting citizens of one state to come into another state and recover personal judgments upon service of summons by publication against citizens of different states, he concluded as follows: "We do not think it within the competency of the Legislature to invest its tribunal with authority having any such reach or force. Certainly no presumption in favor of their jurisdiction can arise when a judgment of this character is produced against a non-resident who has never been within the state, and did not appear to the action." And, on further reasoning, he comes to the conclusion that the statute of California prescribing what the judgment roll should contain, properly construed, required full proof of the jurisdictional facts to be incorporated into the judgment roll; but further states that the courts of the United States are bound to accept as correct the construction of the state statute given by the state courts, and that construction in the *Hahn-Kelley* Case was that the judgment roll did not contain the affidavit and order for publication of summons. That opinion is very instructive and exhaustive on the question under consideration. But the Legislature of the state of California has failed to amend section 670 of the Code of Civil Procedure of that state, and require the judgment roll in such cases as that of *Hahn v. Kelley* to contain the affidavit on application for order to publish summons and the order made therein in addition to the papers now required by the provisions of said section. But the affidavit made for such order and the order are not required by the provisions of said statute to be made a part of the judgment roll, and this court has not the authority to amend that statute in that or in any manner. After Mr. Justice Field's said decision in *Galpin v. Page*, supra, the Supreme Court of California in *Belcher v. Chambers*, 53 Cal. 635, referring to the case of *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959, said: "When the question upon which the judgment of this court depends is such as may be re-examined on a writ of error by the Supreme Court of the United States, we

will follow the rule laid down by the Supreme Court of the United States." And it is stated in the syllabus of that case by the reporter that *Hahn v. Kelley*, 34 Cal. 391, 94 Am. Dec. 742, is overruled. We think the reporter misapprehended the effect of that decision, for in the *Estate of Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146, the court held that the affidavits of service of summons by publication against a nonresident defendant in an action for a divorce and recitals thereof in the judgment are conclusive upon a collateral attack, and that affidavits on the application for the order of publication and the order thereof are no part of the judgment roll, and cannot be considered. The court said: "The affidavits of service and the recitals in the judgment are conclusive. The affidavit on the application for an order of publication, and the order of publication, cannot be considered. They are no part of the judgment roll." The court there also declares that the case of *Belcher v. Chambers*, 53 Cal. 635, is not in point and said: "In that case, as in *Pennoyer v. Neff*, supra, the judgment considered was a personal judgment against a nonresident without personal service of process. So far as the rule established in *Hahn v. Kelley*, supra, is applicable to proceedings in rem, it has not been overruled. The judgment referred to in that case was for money—the deficiency after foreclosure and sale." In the *Malenfant Case* the question of a personal judgment was not involved, at least to no greater extent than the value of the real estate attached in that action was concerned, which real estate was within the jurisdiction of the district court that tried that action. If service of summons is made by publication in an action where the defendant is not a resident of the state, and he has no property within the state, on the authority of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, and *Galpin v. Page*, 3 Sawy. (U. S.) 93, Fed. Cas. No. 5,206, and decisions along that line, the judgment would be absolutely void because a personal money judgment cannot be legally obtained on constructive service of summons—service by publication. And, if it appears on the face of a judgment roll that a personal judgment has been rendered against a nonresident who had no property in the state, such judgment is absolutely void under the decisions above cited. In the *Malenfant Case* the land in question was within the jurisdiction of the court that tried the case, and the judgment roll in that case shows that that court acquired jurisdiction sufficient of the person of the defendant to subject the land owned by him and held under an attachment to the processes of that court. The Legislature of this state has seen fit to adopt said section 4456, Rev. St. 1887, from the practice act of California, which was done after the Supreme Court of California had construed the provisions of that section, and the general rule is that one state adopting

the provisions of the statute of another state adopts with it the constructions placed upon it by the Supreme Court of the state from which it is adopted; and, further than that, it seems to me that the language of that section is too plain to require construction. It provides that the following papers shall constitute the judgment roll, to wit: "In case the complaint be not answered by any defendant, the summons with the affidavit or proof of service and the complaint with a memorandum endorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment." The specific papers are therein named that go to make up the judgment roll, and, if the Legislature had intended that the affidavit for the order of publication and the order of publication should be contained in such roll, it certainly would have named them.

Counsel for appellant contend that this court in *Strode v. Strode*, 6 Idaho, 67, 52 Pac. 161, 96 Am. St. Rep. 249, held that the affidavit and order for publication of summons was a part of the judgment roll. In that case the question was not raised as to what constituted the judgment roll, and the record contains the affidavit of the publisher of the newspaper named in the order for publication, stating the time that the alias summons was published. The record failed to show that a copy of the summons and complaint had been sent to the defendant as required by law, and the main point in that case was that the proof of service of summons failed to show that a copy of the summons and complaint were mailed to the defendant as required by law. The controlling question in that case was the failure of the judgment roll to show the proper service of summons on the defendant. It failed to show that a copy of the summons and complaint had been mailed to the defendant at his last known place of residence or at all. The case of *Mills v. Smiley*, 9 Idaho, 325, 76 Pac. 783, is cited by counsel for appellant as sustaining the position that the judgment roll must contain the affidavit on the application for an order for publication of summons, and the order of the judge made thereon. That case was an appeal from an order made by the court denying the motion to set aside a writ of assistance in that action. The original action was brought to foreclose a mortgage, and the decree foreclosing the mortgage and ordering the sale of the mortgaged property was entered, and thereafter the court granted a writ of assistance in said action against Smiley. Smiley thereafter made application to have the order granting said writ of assistance set aside, and the court denied the application, and the appeal was from such order of denial. The trial court in passing upon that question had before it the record containing the affidavit on the application for the order directing publication of summons, and the order directing such publication. When the case was brought

to this court on appeal, that record was brought here, and this court reviewed that record and considered the case as a direct attack upon that judgment, and not collateral, for the reason that the application for the writ of assistance had been made in that action, and was an order made in that action after final judgment. In that view of the case, the court considered the sufficiency of the said affidavit and order. The court, therefore, passed upon that case as being a direct attack upon the judgment, and for that reason it is not an authority in the case at bar.

We therefore conclude that this action is a collateral attack on the judgment of a court of general jurisdiction; that being true, the fact that the judgment is void must appear upon the face of the record; that the record consists of the judgment roll, and in the *Malenfant Case* the defendant was a nonresident of the state, service of summons was had by publication; that the judgment roll in that case consisted of summons with the affidavit or proof of service and the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; and on the face of that roll it does appear that the court had jurisdiction.

The judgment must therefore be affirmed, with costs in favor of the respondent.

AILSHIE, C. J. (concurring). In concurring in the conclusion reached in this case, I think it best that I state the specific grounds on which I place my concurrence. Section 4456, Rev. St. 1887, was taken from the California Code (section 670, Deering's Code of Civil Procedure), and adopted literally into our code of laws. At the time of and prior to its adoption here the Supreme Court of California had held that the affidavit and order for publication of summons were not a part of the judgment roll, and had no place therein. See cases in main opinion. Under the general rule governing the construction of a statute adopted from another state where it had already been construed, I feel constrained to concur in the opinion of Justice SULLIVAN. In *Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246, this court held that "when a statutory or constitutional provision is adopted from another state, where the courts of that state have placed a construction upon the language of such statute or Constitution, it is to be presumed that it was taken in view of such judicial interpretation, and with the purpose of adopting the language as the same had been interpreted and construed by the courts of the state from which it was taken." Personally I do not think the statute ever meant what the California court has said it meant. When the Legislature said that, "in case a complaint be not answered by any defendant," the judgment roll shall contain "the summons with the affidavit or proof of service,"

it never, in my judgment, intended that the affidavits of a printer and of mailing should constitute "proof of service." Service may be made by the sheriff, and his certificate to that effect indorsed on the summons is "proof of service" (section 4143, Rev. St. 1887), or it may be made by "any person over the age of eighteen years not a party to the action," but in the latter case proof of service is made by affidavit (section 4143). This is proof of personal service. On the other hand, constructive service cannot be made until certain conditions precedent are shown to exist. A printer's affidavit alone in the judgment roll is no proof at all that the case is one where constructive service might be made, and therefore falls short of "proof of service." In such case it seems to me that, in any reasonable view of the law, the affidavit and order for publication are necessary and essential to constitute "proof of service" in this unusual and extraordinary manner, where a defendant is at most only given a constructive notice. I yield, however, my personal views to the construction that has been placed on this statute for so many years, but I now voice the hope that the Legislature may so amend section 4456, Rev. St. 1887, as to specifically require the affidavit and order for publication to hereafter be made a part of the judgment roll in cases where the defendant makes no appearance.

VALLEY LUMBER & MFG. CO. v. NICKERSON et al.

(Supreme Court of Idaho. Dec. 9, 1907.)

1. CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—PLEADING—WAIVER.

In order for a foreign corporation to maintain an action in the courts of this state, it is necessary that it plead a compliance with the Constitution and statutes prescribing the conditions on which it may qualify and obtain a legal capacity to contract and maintain actions thereon, and a complaint that fails to state such facts is subject to demurrer. If, however, the defendant fails to raise the question by demurrer or answer, he will be deemed to have waived the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2647; vol. 39, Pleading, § 1355.]

2. PLEADING—DEMURRER.

A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action is not sufficient to raise the question of the legal capacity of a foreign corporation to maintain an action in this state.

3. MECHANIC'S LIEN—FILING LIEN—DELAY.

Where the materialman had furnished no material for 30 days, and during the last 20 days of that time the building was occupied by the owner, and in the meanwhile the contractor had returned material that was not used in the building, and the materialman had notice of all these facts, he cannot extend the time for filing a lien by proof that he thereafter sent to such building, for the contractor, 40 cents worth of material; there being no showing that such material was necessary for, or used in, the building under the original contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 200.]

4. SAME—DELIVERY OF MATERIAL—EVIDENCE.

A memorandum kept by a yardman in the employ of a lumbering company, giving a description of lumber, the name of the owner of the building to which it was sent, and the name of the teamster to whom the lumber was delivered, is not competent evidence to prove a delivery of the material to the contractor or at the building for which it was furnished, where the teamster was in the employ of the lumbering company, and not the agent of, or in the employ of, the contractor.

5. SAME—PROPERTY SUBJECT—LIABILITY OF OWNER.

Under the mechanic's lien law of this state (Act Feb. 7, 1899; *Sess. Laws 1899*, p. 147), the contractor for the construction, alteration, or repair of a building is the special agent of the owner for the purpose of securing the material necessary for the construction, alteration, or repair of such building; but through such agency the owner cannot be personally bound, but the charge becomes one purely in rem, and runs against the building or structure only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, *Mechanics' Liens*, § 128.]

6. SAME—POWERS OF CONTRACTOR.

The contractor being only a special agent of the owner, with limited power, his authority to bind the property benefited for the payment of the value of the material extends only to such material as is reasonably and ordinarily sufficient properly to construct or repair the building in accordance with the plans and specifications thereof, or in pursuance of the agreement and contract entered into between the owner and the builder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, *Mechanics' Liens*, § 128.]

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by the Valley Lumber & Manufacturing Company against John E. Nickerson and others. Judgment for plaintiff, and defendants appeal. Reversed.

Eugene A. Cox, for appellants. C. H. Lin-genfelter, for respondent.

AILSHIE, C. J. The plaintiff, the Valley Lumber Company, a corporation, furnished to the defendant Hugh Morrison, who was the original contractor in the construction of a building for the defendant Nickerson, lumber and material necessary for the construction of the building. It is alleged by the complaint that the material was furnished and delivered at the premises between the 27th day of February, 1906, and the 31st day of May of the same year. The lien was filed on July 28th following. The lien was therefore filed 58 days after the date on which it is alleged the last material was furnished. The complaint is in the usual form for the foreclosure of a materialman's lien, with the exception of paragraph 1 thereof, which alleges plaintiff's corporate existence and is as follows: "That the plaintiff is, and was at all times hereinafter mentioned, a corporation organized and existing under and by virtue of the laws of the state of Washington, with its principal place of business at Clarks-ton, Wash., and doing business at Lewiston, Nez Perce county, Idaho." The defendants

demurred to the complaint on the grounds that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendants thereupon answered. The answer did not put in issue the corporate existence of the plaintiff, nor did it contain any allegation touching the plaintiff's compliance with the foreign corporation laws of this state.

At the trial the plaintiff introduced a certified copy of its articles, together with a certificate showing that the same had been filed with the county recorder of Nez Perce county, and also a certificate showing that it had filed a designation of an agent; but it did not go further and show that it had made its filings with the Secretary of State. Defendant's attorney objected to the evidence as immaterial and outside of the issue. The defendants failed, however, to raise the question either by demurrer or answer, and must be deemed to have waived it. In *Valley Lumber & Manufacturing Co. v. Driessel*, 93 Pac. 765, just decided, we have held that it is necessary for a foreign corporation commencing an action in this state to allege and prove that it has complied with the law entitling it to do business in the state; but we also held that if it fails to do so, the defendant must raise the question by demurrer or answer, in the usual and ordinary manner of pleading and settling issues, or he will be deemed to have waived it. Of course, if during the trial it should clearly appear to the court, by admission or evidence, that the plaintiff had not complied with the Constitution and statutes of this state, the court might of its own motion nonsuit such a plaintiff. *Katz v. Herrick*, 12 Idaho, 1, 86 Pac. 873.

Passing, now, to a more serious question in this case: Appellants contend that the company has no valid lien, for the reason that it did not file its claim of lien within 60 days after the completion of the building or the furnishing of the last item of material. If appellant's contention is correct on that point, our determination of that assignment of error will dispose of this appeal. The evidence on this point is rather brief. Morrison, the contractor, testifies that "the building was finished 60 days before that (May 31st), and they were living in the house." Nickerson moved into the house on May 11th, and Morrison further states that the house had been completed before Nickerson moved in, and the lumber and material had been cleared away from about the house prior to that time, and unused material had been returned and credited on the bill. He further testifies that he notified the plaintiff of the completion of the building, and that the owner had moved in, and that thereupon the company furnished him with an itemized statement of the material that had been used in the building, and that he checked over the list with the company's secretary, and they made some corrections in the account, and

upon the trial he produced this itemized statement, and it was introduced in evidence as Defendants' Exhibit A. Plaintiff had attached to its complaint what purported to be an itemized statement of the material furnished, and had it marked "Exhibit A." When the contractor was on the witness stand, the plaintiff's attorney asked him a number of questions about the account as shown on Exhibit A, and the defendants' attorney likewise asked the witness a number of questions about the statement as shown on Exhibit A. A careful examination of the proceedings at the trial satisfies us that the plaintiff's attorney was referring to Exhibit A attached to the complaint, while defendants' attorney was referring to Exhibit A introduced in evidence, and which exhibit was the itemized statement presented to the contractor at the time he notified the company of the completion of the work; and it is equally clear that the witness so understood the questions propounded by the respective attorneys. The only material difference between these statements is the last entry in Plaintiff's Exhibit A, which is: "May 31, 20 ft. ceiling, \$0.40." This item does not appear on the Defendants' Exhibit A. The last entry in each of the exhibits, prior to this one of May 31st, is the same, having been made of date May 1st. This latter entry is the last item appearing on Defendants' Exhibit A. The contractor was on the witness stand, but at no time did he state that he ever did any work of any kind on the building, or place any material therein, after the owner moved in. On the contrary, he stated that he had never seen any statement containing this charge of May 31st until he was called as a witness. The plaintiff, in its endeavor to establish the fact that the 40 cent item of May 31st was furnished and delivered for this building, introduced its yardmaster's book, which contains the following entry:

"May 31, Nickerson's
20 ft. Bead Ceiling
20 ft. 1x2 stop."

Frank

—and follows that by proof of the following entry in the office books of the plaintiff corporation:

"May 31, 1905, for Hugh Morrison
Delivered at Nickerson Teamster Frank
20 ft. No. 2 cedar ceiling, .40"

The bookkeeper was unable to identify the handwriting on the yardmaster's book, showing these entries. He thought, however, they were made by one Cooper. He could not identify the 40 cent entry, however, and was doubtful as to the word "Frank," saying that it was apparently a different handwriting from the balance of the entry. Hollister, secretary of the corporation, testified that he entered the name of the teamster on the yard slip. A question arose upon the trial over the admission in evidence of the yardmaster's book, and the bookkeeper's entry of the item, for the purpose of proving

the delivery of the material to the contractor or at the building for which it was furnished. There can be no doubt but that charges made by the yardmaster and the company's officers at the lumberyard are not competent to prove a delivery of the material to a third party or at a point removed from the place of the actual delivery. 2 Ency. of Evidence, 641; White v. St. Phillips Church, 2 McM. (S. C.) 306, 39 Am. Dec. 125. These entries were proper and competent for some purposes, and might be admissible to prove that the company delivered such material to the teamster; but it would take the evidence of the teamster, or some other person, who saw the lumber delivered or knew of its delivery, to prove an actual delivery at the place to which the company undertook to make delivery. If the delivery had been made to the defendants' agent, the case would be quite different; but this delivery seems to have been made to the plaintiff's own teamster, and would not prove a delivery to the defendants. There is an utter lack of evidence in this record to establish even a prima facie showing that the plaintiff furnished the item for the building charged, under date of May 31st, and it likewise falls to show that any work was ever done on the building after May 11th, or that any material was used therein. For this reason alone the plaintiff has failed to establish a valid lien. Where the materialman had furnished no material for 30 days, and during the last 20 days of that time the building was occupied by the owner, and in the meanwhile the contractor had returned material that was not used in the building, and the materialman had notice of all these facts, he cannot extend the time for filing a lien by proof that he thereafter sent to such building, for the contractor, 40 cents worth of material; there being no showing that such material was necessary for or used in the building under the original contract.

The question of trivial work, or a slight change or improvement, by the contractor, not being sufficient to extend the time for filing a lien, does not require our consideration in this case. Here the claimant has failed to establish the essential fact that it filed the lien "within 60 days after * * * it ceased to furnish material." The "20 ft. bead ceiling" item, for which the 40 cent charge is made, is not sufficiently established to extend the time for filing the lien. Plaintiff's counsel, with commendable zeal and much ability, has presented this phase of the case in the most favorable light possible for his client; but the lumber company has failed to furnish him with evidence to establish its contention, or show it in time in preferring its lien. In this case the owner paid the contractor for the job, and the latter failed and was unable to pay the company for the lumber used. Considerable time is consumed by appellants' counsel in arguing the proposition that it is incumbent on a

materialman to show that the material furnished was not only "to be used in the building," but that it was actually used. Section 1 of the mechanic's lien law of February 7, 1890 (Laws 1890, p. 147), is the same as section 3669, Hill's Ann. Laws Or. 1892, and the point under consideration here was considered by Chief Justice Moore in *Fitch v. Howitt*, 32 Or. 296, 52 Pac. 192, and the following conclusion was reached: "The contractor, being in the nature of a special agent of the owner, with limited power, has authority to bind the property benefited for the payment of the reasonable value of such material only as is ordinarily sufficient to properly construct the building in accordance with the plans and specifications thereof, or in pursuance of the agreement entered into between the owner and the contractor." By section 1 of our lien law the "contractor * * * shall be held to be the agent of the owner for the purposes of this chapter." The contractor is a special agent for this purpose only, and the materialman must take notice of the limitations of the agency. It extends only to the purchase of material reasonably necessary out of which to build the structure in accordance with the contract entered into between the owner and the builder. The agency cannot bind the owner personally, but rather binds the property constructed or improved under the contract, and the charge is purely in rem.

Appellants complain of what they contend was a failure on the part of the plaintiff to establish at the trial that the material furnished was necessary for, or was used in, or was to be used in, this particular building. Morrison, the contractor, testified that he was engaged on about six buildings at the time he was at work on this contract, and that he used the Nickerson building as a central point of supply, and that he moved lumber from that place to other buildings as he might need it, instead of returning it to the lumberyard. Plaintiff's yards were in Clarkston, state of Washington, while this building and all the others on which Morrison was then engaged were in Lewiston, in this state. Since a new trial must be had in this case, the parties can produce their proofs as to the amount of material that was to be used in this building that was reasonably necessary for it, and it will be unnecessary for us to further consider that point here.

The judgment must be reversed, and a new trial will be granted. The plaintiff will be entitled to a judgment against the contractor for whatever amount may be found due from him to it. We assume, from what we gather from the record, that there is no reason for a new trial as to the lien; but, since a new trial must be had, it may be on the whole case, and, if the plaintiff should conclude that it has evidence to establish its lien within the purview of the law as herein construed, it may again be heard on that issue.

Judgment is reversed, and a new trial granted. Costs awarded in favor of appellants.

SULLIVAN, J., concurs.

WILKINSON v. BETHEL.

(Supreme Court of Idaho. Dec. 18, 1907.)

TRIAL—FINDINGS OF COURT—SUFFICIENCY.

Under the conditions of the pleadings in this case, *held*, that the following findings of fact are sufficient to support a judgment of dismissal in favor of defendant: "That plaintiff did not purchase or pay for the 30,000 shares which plaintiff claims defendant holds in trust for him; that the allegations of plaintiff's complaint herein are not supported by the evidence, and are untrue; that the allegations of defendant's affirmative defense are proven, and true."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 927.]

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by George W. Wilkinson against J. H. Bethel. Judgment of dismissal and plaintiff appeals. Affirmed.

John O. Bender, for appellant. Daniel Needham, for respondent.

AILSHIE, C. J. This is an appeal from the judgment. The assignments of error go to the sufficiency of the findings to support the judgment. The only allegation in the complaint is as follows: "That on or about September 20, 1905, plaintiff purchased from the Ozark Mining & Milling Company, Limited, a corporation, 50,000 shares of its capital stock, and paid the full purchase price therefor, \$250, and said corporation issued 40,000 shares of said stock to the defendant, and said defendant still holds 30,000 shares of said stock for the plaintiff." To this complaint defendant answered as follows: "Defendant denies that on or about September 20, 1905, plaintiff purchased from the Ozark Mining & Milling Company, Limited, a corporation, 50,000 shares of its capital stock, or any other number of shares or at all, or that plaintiff paid the full purchase price therefor, \$250, or any other purchase price or amount whatever or at all. Defendants admit that said corporation issued 40,000 shares of its capital stock to him. Defendant denies that he, said defendant, still holds 30,000 shares of said stock for the plaintiff, or that he ever at any time or at all held any stock whatever or at all for the plaintiff; and for a separate and special defense to plaintiff's cause of action defendant alleges that he is the owner and holder of 30,500 shares of the corporation stock of the said Ozark Mining & Milling Company, Limited." The cause was tried to the court without a jury, and at the close of the trial the court made and caused to be filed a document entitled, "Judgment of dismissal," the principal portion of which is a recital of

facts the court finds from the evidence, ending with the conclusion of law "that the defendant does not hold 30,000 shares of the capital stock of the Ozark Mining & Milling Company in trust for plaintiff, or otherwise, or at all for plaintiff." The greater part of the findings is with reference to some purported agreement or contract that had been entered into between the plaintiff and his father and one G. A. Nehrhood in regard to the purchase of something like 150,000 shares of the capital stock of the Ozark Mining & Milling Company. None of these findings have the slightest reference to the issues as made by the pleadings (if, indeed, any issues were made by the pleadings). They were outside of the issues entirely, and not responsive thereto, and can in no way support the judgment in this case. The only findings which in any way refer to or are responsive to the issues are as follows: "That plaintiff did not purchase or pay for the 30,000 shares which plaintiff claims defendant holds in trust for him; that the allegations of plaintiff's complaint herein are not supported by the evidence and are untrue; that the allegations of defendant's affirmative defense are proven and true."

It will be seen at once that the pleadings and findings in this case were rather scant, and it is uncertain as to just what issue was being tried. The evidence is not in the record. We are inclined to think, however, that whatever issues were joined by the pleadings are covered by the foregoing findings of fact. Under the rule as adopted by this court in *Eastwood v. Standard Mines & Milling Company*, 11 Idaho, 195, 81 Pac. 382, that the appellate court will give to the findings of the trial court the most liberal construction consonant with the language employed in order to uphold the judgment, we are inclined to hold that the findings in this case are sufficient to cover whatever issues were made and to support the judgment in favor of the defendant.

Judgment affirmed, with costs in favor of respondent.

SULLIVAN, J., concurs.

In re MCVAY'S ESTATE.

(Supreme Court of Idaho. May 20, 1907. On Rehearing, Jan. 8, 1908.)

1. APPEAL—REVIEW—HARMLESS ERROR.

Under the facts of this case, *Acia*, that where a widow makes application to have a homestead set apart out of the real estate belonging to the estate of her deceased husband, and the probate court refuses to grant the petition and an appeal is taken to the district court, where a demurrer is interposed to the petition on the ground that it does not state facts sufficient to entitle her to a homestead, and the court sustains such demurrer and permits the petitioner to amend her petition, where it appears that the petition was sufficient without any amendment, the cause will not be reversed

on the ground of the error of the court in permitting an amendment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4108, 4107.]

2. SAME.

As both parties proceeded upon the theory that the district court might try this matter *de novo*, it is not necessary for us to decide whether on such appeals the district court may try the case anew.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1054, 1055.]

3. SAME—BOND—DEPOSIT OF MONEY.

Under the provisions of section 4778, Rev. St. 1887, a deposit of money equal to the amount of the required undertaking may be received in the place of the undertaking on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2071.]

4. HOMESTEAD—RIGHTS OF WIDOW—SEPARATION OF HUSBAND AND WIFE.

Under the facts of this case, *held*, that the separation of the husband and wife was not permanent and was caused by his cruel and inhuman treatment, and that such separation was not voluntary, and not intended by her to be permanent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 264.]

5. APPEAL—REVIEW—IMMATERIAL ERRORS.

Under the provisions of section 4231, Rev. St. 1887, the court in every stage of an action must disregard any error or defect in the proceedings which does not affect the substantial right of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4029, 4033.]

6. HOMESTEAD—PROPERTY SUBJECT.

Held, that the real estate referred to at the time of the decedent's death could have been selected for a homestead under the laws of this state by either himself or his wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 286-289.]

7. JUDGMENT—EFFECT—PROBATE COURTS—JURISDICTION.

Article 5, § 21, of the Constitution, grants to the probate court exclusive, original jurisdiction in all matters of probate, and, as to such matters, the probate court is a court of record, and to the judgments, records, and proceedings of which absolute verity is attached.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1154.]

8. COURTS—DISTRICT COURTS.

Article 5, § 20, of the Constitution, grants to district courts original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law, from which a clear distinction is drawn between "in all cases both at law and in equity," and "matters of probate, settlement of estates of deceased persons and appointment of guardians."

9. SAME.

Under article 5, § 20, the Legislature is the sole and exclusive judge as to the extent and scope of the appellate jurisdiction that it will confer upon district courts. It may limit it to any case, or class of cases, or subject-matter, or it may not grant any at all; but the Legislature cannot grant to the district court original jurisdiction to hear and determine matters of probate and settlement of estates of deceased persons.

10. SAME — "TRIAL DE NOVO" — DISTRICT COURTS.

Trial *de novo*, as used in Laws 1903, p. 372, means "to try anew," or, "a second time"; that is, to retry the case upon the original papers, and upon the same issues as the case was tried in the probate court.

11. SAME—APPEAL FROM PROBATE COURT.

Under this statute and the Constitution, if an appeal is taken upon a probate matter upon questions of law alone, the district court may review such questions of law which appear upon the face of the record, and may affirm or reverse the decision of the probate court. When an appeal is taken upon both questions of law and fact, if the court should affirm the action of the probate court upon questions of law, the cause may then be tried upon the same questions of fact as were raised in the probate court, in the same way as other cases are tried in the district court.

12. HOMESTEAD—SETTING APART—RIGHTS OF SURVIVING WIFE.

A petition to set aside a homestead, under the provisions of Rev. St. 1887, § 5441, which sets forth the making and return of the inventory of the decedent, the description and ownership of the real property returned in the inventory, that such property was the property of the deceased and that its value did not exceed \$5,000, and that no homestead had ever been designated or selected by deceased or his widow during his lifetime, is sufficient to entitle the widow to have the property therein described set off as a probate homestead.

13. SAME—PROBATE HOMESTEAD.

Under the provisions of Rev. St. 1887, §§ 5440, 5441, a probate homestead is one to be created by the probate court out of real property belonging to the decedent which was subject to a homestead at the time of the death of the decedent, and its value is less than \$5,000, and was of such property as might have been occupied as a home at the time of the decedent's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homestead, §§ 286-289.]

14. COURTS—PROBATE COURTS—DECREE—BOND.

Where the probate court in a probate matter enters one judgment, and includes therein more than one order and the appeal is taken from the judgment, only one bond or one deposit of \$100 under section 1 of the act of March 11, 1903 (Laws 1903, p. 372), is required.

15. APPEAL—CORRECTING RECORD—BOND.

Where an appeal is taken to the district court from the probate court, and the probate court fails to transmit to the district court the undertaking on appeal or the deposit in lieu thereof, the district court may, when it is so made to appear, direct the probate court to transmit such undertaking or deposit to the district court.

16. COURTS—APPEAL FROM PROBATE COURT—JUDGMENT OF DISTRICT COURT.

A judgment entered in the district court in a probate matter on appeal from the probate court is to be executed by the district court certifying such judgment to the probate court, with direction to execute the same in accordance with the terms thereof.

17. APPEAL—REVIEW—RULINGS.

Where evidence has been admitted which becomes immaterial under the law, it is not error for the district court to admit the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4029, 4033.]

(Syllabus by the Court.)

Appeal from District Court, Fremont County; J. M. Stevens, Judge.

In the matter of the estate of David H. McVay, deceased. Petition of the widow to have a homestead set aside granted, and, from the order granting the same, certain of the heirs appeal. Affirmed.

Caleb Jones, for appellant. Soule & Soule, for respondents.

SULLIVAN, J. This is an appeal from the judgment of the district court setting aside certain real estate and personal property to Americus J. McVay, widow of David H. McVay, deceased, and holding that said property is community property of the said McVays; it having been acquired by them during the existence of their marriage. It appears from the record that the said McVays were married at Edgemont, S. D., in 1897, and soon after came to Idaho. On the 21st of July, 1898, they settled upon the land in controversy, which at that time was unsurveyed public land. Mrs. McVay at that time paid one George Summers \$205 from her separate estate for his squatter's right to said land. Thereafter David H. McVay entered said land under the desert and homestead laws of the United States, and by reason of such entries acquired title to said land from the United States while he and his said wife were residing upon said land. The record shows that Mrs. McVay resided upon said land with the deceased until she was compelled by his cruel treatment toward her to leave his home, and reside elsewhere. It appears from the record that the McVays entered into some kind of an arrangement on or about November 9, 1904, whereby he was to furnish her \$1,500, and she was to go away; that some time in November she left her home, and went to the state of Missouri, and thereafter returned to Colorado, and came back to Idaho in 1905. It appears that in March, 1905, McVay leased the land and personal property in question to one Oleson. Oleson took possession thereof, and McVay resided there with him until about the middle of May, when he became sick and went to St. Anthony, the county seat of the county in which said land was situated. He remained there some weeks, and was finally taken to St. Mark's Hospital, in Salt Lake City, Utah, where he died on the 13th or 14th day of July, 1905. His remains were brought back to Fremont county, Idaho, and buried there. It appears that on the 13th day of June, 1905, the said David H. McVay executed his last will and testament, bequeathing to said Levi Oleson all of his property, both real and personal, which will and testament was filed in the probate court of Fremont county on the 20th day of July, 1905, and the time fixed for hearing the petition for admitting said will to probate. At the time fixed, at the request of the attorney for the petitioner, the matter was postponed until the 11th day of September, 1905. It seems that a contest had been filed prior thereto, but the will was admitted to probate on the 15th day of September, 1905. Thereafter, on the 17th day of October, 1905, the widow presented her petition, praying that the court select, designate, and set apart a homestead out of the real property of the deceased for her exclusive use and benefit, which matter was presented to the court and taken under advisement, and was thereafter denied by the court. Thereafter an appeal

was taken to the district court from said order refusing to set apart a homestead to the said widow, and also from an order refusing to set apart the exempt personal property to said widow. Thereafter the executor demurred to the petition of the widow, on the ground that her petition did not state facts sufficient to entitle her to a homestead or to the relief demanded or to any relief whatever, and that said petition did not state facts sufficient to give the court jurisdiction to select, designate, or set apart or cause to be recorded a homestead out of the property of the estate of said decedent. On the 7th day of June, 1906, the court sustained said demurrer, and, over the objection of the attorneys for the executor, permitted counsel to amend said petition, and on the following day the matter came on regularly for hearing, and a jury of 12 men were impaneled to render an advisory verdict to the court. Counsel for the executor thereupon moved that the appeal be dismissed on the ground that no undertaking had been filed or deposit made, which motion was denied. Thereafter a number of witnesses were sworn and testified, and certain documentary evidence introduced. The following interrogatories were submitted to the jury for their answers, and the answer to each interrogatory immediately follows it, to wit: "Q. Did David H. McVay give his consent and approval to his wife's going away from their home in Fremont county, Idaho? A. Yes. Q. Was Americus J. McVay, on account of her husband's cruel treatment towards her, compelled to abandon her home with him? A. Yes. Q. Was the absence of Americus J. McVay from her home with her husband enforced by his cruel treatment of her? A. Yes. Q. Where did Americus J. McVay reside at the time of and immediately prior to the death of David H. McVay? A. In Colorado. Q. If there was a division of the property, was it made with a view to a permanent separation? A. No. Q. Did David H. McVay and Americus J. McVay agree to separate as husband and wife and live apart? A. Yes; by fear. Q. If you find that they did so separate, was such separation mutually intended to be permanent? A. No. Q. If you find that they did so separate, was such separation voluntary? A. No. Q. If you find that they did so separate, did they thereafter look to one another for aid and support? A. Yes. Q. If you find that they separated, did they thereafter conduct their business entirely independent of one another? A. Yes; for the time being. Q. At the time of his death did David H. McVay reside upon the premises in question? A. He was away temporarily from home. Q. Did David H. McVay before his death leave said premises with the intention of taking up his residence elsewhere? A. No." The court thereafter made its findings of fact and conclusions of law, and entered judgment setting apart all of the real estate and personal property to the widow. The appeal is from that judgment.

A number of errors are assigned and a reversal of the judgment is asked. The first and second errors relate to the action of the district court in permitting the petitioner to amend her petition to set apart a homestead, and making such amendment by a paper slip attached to the original petition. We are not advised as to just what such amendment was, although we have two papers in the transcript, one entitled "Petition to Set Apart Homestead," and the other entitled, "Amended Petition to Set Apart Homestead," but the provisions of the amendment are not set forth. In our view of the matter, either the petition or the amended petition was sufficient to warrant the court in passing upon the question whether a homestead should be set apart to the widow or not. The record shows that the application of the widow to have a homestead set apart was contested, and considerable evidence was introduced pro and con. Before proceeding further, however, we will say that, as no amendment was required to give the court jurisdiction to act on said petition, the amendment did not affect it one way or the other. As both parties proceeded upon the theory that the district court might try said matter anew, or de novo, we shall proceed upon that theory without deciding whether on such appeals the district court may try the case anew.

A motion to dismiss the appeal on the ground that no undertaking had been filed on the appeal from the probate to the district court was made by counsel for the executor, which was resisted by the petitioner. It appears that the petitioner, instead of filing an appeal bond on the appeal from the probate court to the district court, had deposited the required amount of cash with the probate judge, and in the record sent up to the district court that fact was not shown, but was made to appear on the hearing of the motion. There was no error in the action of the court in denying such motion, as a deposit of money is authorized by the provisions of section 4778, Rev. St. 1887, instead of the undertaking.

A number of errors are assigned going to the admission of certain evidence. While some of the evidence was immaterial, we do not think it in any way prejudiced the rights of the contestant. The theory advanced by counsel for the contestant is that there was an agreement of separation between the petitioner and her husband whereby their property rights were all settled and adjusted, and that the petitioner was paid \$1,500 as her part of the community property, and that they separated with the purpose and intention never to reside together again. The questions involved in said separation and the adjustment of their property rights were submitted to a jury, and the jury found, in substance, that the deceased gave his consent and approval to his wife's going away from their home in Fremont county; that on account of his cruel treatment she was com-

pelled to abandon her home with him, and her absence from her home was enforced by his cruel treatment of her; that the division of property that was made was not made with a view of permanent separation; that she agreed to separate from her husband and live apart through fear, and that such separation was not mutually intended to be permanent, and was not voluntary; that at the time of the death of McVay he was away temporarily from the premises sought to be set aside as a homestead, and that he did not leave said premises with the intention of taking up his residence elsewhere. Those findings were all in favor of the contention of the respondent. After an examination of the evidence, we are satisfied that it supports the special findings of the jury and the findings deduced therefrom by the court. While there may have been some technical error in the admission and rejection of some of the evidence introduced and offered, we do not think it sufficient to demand a reversal of the judgment; for, under the provisions of section 4231 of the Revised Statutes of 1887, it is provided that any error or defect must be disregarded when it does not affect the substantial rights of the parties, and that no judgment should be reversed or affected by reason of such error or defect. We think, under the facts of this case, that the petitioner or widow is entitled to have a homestead and all exempt property set apart to her.

It appears from the evidence that the real estate described in the petition was the home and residence of the deceased; that he had leased it for one year to Mr. Oleson, from March, 1905; that he left it temporarily in May because of sickness; that he grew worse, and was taken to Salt Lake to a hospital to be treated; that he died therein July 1905. From the facts as shown by the evidence, the deceased or his wife might have had said real property set apart as a homestead at the date of his death. They were only temporarily absent therefrom. As this matter was tried upon the theory that the probate court had no authority to set aside a homestead unless out of property which could, under the law, have been selected as a homestead at the date of decedent's death, the facts of this case bring it clearly within that theory or contention, and for that reason we are not required to decide that question.

We have examined all of the assigned errors, and find nothing that would warrant a reversal of the judgment of the trial court. That judgment is therefore affirmed, with costs in favor of the petitioner.

AILSHIE, C. J., concurs.

On Rehearing.

STEWART, J. A rehearing was granted in this case, and the cause was argued orally, and all the questions presented by the appeal have been fully considered by the court.

Counsel contend that the original opinion falls to pass upon a number of questions presented by the record, and on other questions considered by the court a correct conclusion was not reached. We have therefore deemed it advisable to take up all the assignments of error and decide them. The facts are stated in the opinion delivered by Justice SULLIVAN.

When the cause reached the district court on appeal upon questions of both law and fact, a demurrer was filed to the petition, asking that a homestead be set off to Americus J. McVay. This demurrer was sustained by the district court, and permission was given the respondent to amend the petition by "paster slip." The record, however, shows that an amended petition was filed in the district court. No motion was made to strike the amended petition from the files, nor was any objection made to the amended petition, on the ground that the same was not made or filed in accordance with the permission of the court. Just what an amendment by "paster slip" means we are unable to say; but presume the court intended that the amendment might be pasted on to the original petition; but it is immaterial in this case just what an amendment by "paster slip" means, for the reason that an amended petition was filed.

The appellant assigns as error the action of the court in allowing the respondent to amend her petition in the district court. This assignment of error involves the question of raising new issues on appeal in the district court and of the amendment of pleadings. An examination of sections 20 and 21 of article 5 of the Constitution discloses at once the fact that the framers of that instrument saw fit to classify "matters of probate, settlement of estates of deceased persons and appointment of guardians" as separate, distinct, and aside from "cases at law and in equity," over which they gave the district court "original jurisdiction." It will also be seen from section 20 that "in all cases, both at law and in equity," from which they have clearly distinguished "matters of probate, settlement of estates of deceased persons and appointment of guardians," the district court has "original jurisdiction," and that in all other matters that the Legislature might provide for being heard in district courts the jurisdiction should be solely "appellate." The words "original jurisdiction" and "appellate jurisdiction" as employed in section 20 are used in the clearest and most unequivocal contradistinction to each other. By section 21 the probate courts are given the sole and exclusive "original jurisdiction" in all matters of probate. As to those matters, the probate court is a court of record, to the judgment, records, and proceedings of which, in such matters, absolute verity is attached in every respect as fully and completely as can attach to the records, judgments, and proceedings of district courts or other courts of record.

Clark v. Rossier, 10 Idaho, 348, 78 Pac. 358; In re Elmer and Alva Brady, 10 Idaho, 366, 79 Pac. 75. Under section 20, art. 5, of the Constitution, the Legislature is the sole and exclusive judge as to the extent and scope of the "appellate jurisdiction" that they will confer upon district courts. In other words, they may limit it to any case or class of cases, or subject-matter they may see fit, or they may not grant any at all; but it was never intended by this or any other provision of the Constitution that the Legislature could circumvent the clearest provisions and intent of that instrument by giving to the district court, under the guise of the right to try appeals, what amounts to an original jurisdiction to hear and determine matters of probate and settlement of estates of deceased persons.

It must be assumed that the Legislature when it passed the act of March 11, 1903 (Sess. Laws 1903, p. 372), providing for a trial "de novo" in the district court, on appeal from the probate court, in probate matters, was acting within the purview of the Constitution, and did not intend to go any further than to provide for the exercise of the "appellate jurisdiction" of the district court. Proceeding upon that assumption, let us see what trial "de novo" means. It is defined in Cyc. and Rapalje & L. L. Dictionary as "anew; a second time." In Paul v. Armstrong, 1 Nev. 96, the court, in considering the meaning of this term, said: "The statute says that upon an appeal the case shall be tried de novo in the appellate court. That is, as I understand it, in the same manner, with the same effect, and upon the issues tried in the court below." It would seem that the correct doctrine is stated by the Texas Court of Appeals in *Ex parte Morales*, 53 S. W. 107, wherein the court held that a trial "de novo" on appeal requires "that appeals be tried upon the original papers and upon the same issues had below." It is axiomatic that a cause or an issue cannot be tried de novo that has never been tried. *Southern Pac. Co. v. Sup. Court*, 59 Cal. 471. If there is no issue, there can be no case-made. "Appellate jurisdiction," as used in section 20 of the Constitution, is the direct antithesis of the words "original jurisdiction" in the same section. In the latest edition of *Bouvier's Law Dictionary* the words "appellate jurisdiction" are defined as follows: "The jurisdiction which a superior court has to rehear causes which have been tried in inferior courts." Similar definitions are given in numerous cases reported from the courts. See *State ex rel. Williams v. Anthony*, 65 Mo. App. 543; *State v. Baker*, 19 Fla. 19; In re Jessup's Estate, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; *Dodds v. Duncan*, 12 Lea (Tenn.) 731; *People v. City of Chicago*, 193 Ill. 577, 62 N. E. 196. The very expression, "appellate jurisdiction," refutes and contradicts any idea of filing new pleadings, and framing and settling issues in

a court of such jurisdiction. The amendments of pleadings and filing new pleadings and joining issues suggest at once to the practitioner a court of "original jurisdiction" as the forum in which such practice and procedure is taking place. It is a practice and procedure not usually or ordinarily invoked or countenanced in courts exercising only appellate jurisdiction, and we are not prepared to believe that the framers of the Constitution ever intended to use the phrase in any uncommon, unusual, or extraordinary sense. Amendments should not be allowed in the district court on appeal from the probate court in a probate matter. Section 3 (page 373) of the act of March 11, 1903, supra, provides: "The appeal may be taken either upon questions of both law and fact. If taken upon questions of law alone, the district court may review any such questions which sufficiently appears upon the face of the record or proceeding without the aid of a bill of exception, but no bill of exceptions shall be allowed or granted in the probate court in probate matters. If the appeal be upon questions of both law and fact, the trial in the district court shall be de novo." That is, if the appeal is taken upon questions of law alone, the district court will review such questions of law as were raised in the probate court upon the record, but will not permit any new questions of law to be raised. If the district court sustains the appellant's views, then the judgment will be reversed, and the probate court directed to proceed accordingly. If, however, the district court affirms the judgment of the probate court, then the same is certified back to the probate court with the decision thereon. If the appeal be taken upon questions of both law and fact, then the district court proceeds to try, first, the questions of law, and, if the cause is reversed on questions of law, the questions of fact are not tried. If, however, the cause is not reversed on questions of law, then the same questions of fact as were tried in the probate court will be retried in the district court as other trials in said court are conducted. Witnesses may be called and may testify the same as in the trial of any other cause. In other words, this statute, under the Constitution, grants to the district court appellate jurisdiction to retry only the same issues of law and fact as were heard and determined by the probate court. Whatever judgment may be entered in the district court is to be certified back to the probate court for execution in accordance therewith.

Appellant also contends that the petition filed in the probate court was insufficient, and did not state facts sufficient to entitle her to the relief asked for or any relief; while respondent contends that the petition was sufficient and even goes to the extent of contending that no petition to have a homestead set off to the widow is necessary at all. Rev. St. 1887, § 5420, requires every executor or administrator to return to the court a

true inventory and appraisement of all the estate of the decedent, including the homestead, if any. Section 5422 requires the appraisers to appraise the property embraced in the inventory. Section 5440 provides that "when a person dies, leaving a widow or minor children, the widow or children, until letters are granted and the inventory returned, are entitled to remain in possession of the homestead," etc. Section 5441 provides that "upon the return of the inventory, or at any subsequent time during the administration, the court or the probate judge may on his own motion or on petition therefor, set apart for the use of the surviving husband or wife, or the minor children of the decedent, all property exempt from execution, including the homestead selected, designated and recorded. If none has been selected, designated and recorded, the judge or the court must select, designate, set apart and cause to be recorded, a homestead for the use of the persons thereinbefore named, in the manner provided in this chapter, out of the real estate belonging to the decedent." Section 5443 provides that "if the homestead selected and recorded prior to the death of the decedent is returned in the inventory and appraisement, at not exceeding five thousand dollars in value, the probate court must by order set it off to the persons in whom title is vested by the preceding section." Taking these various provisions of the statute, it is apparent that the Legislature contemplated the setting off to the husband or wife or the minor children of the decedent two classes of homesteads: First, the homestead which had been selected, designated, and recorded prior to the death of the decedent; second, a homestead to be carved out of the real property of the decedent, by the probate court, for the use and benefit of the surviving husband, wife, or the minor children of the decedent. In the case at bar no homestead had been selected, designated, or recorded prior to the death of David McVay; therefore, whatever homestead could be set apart to the surviving widow, must be such as the court created out of the property of the deceased. Inasmuch as the statute provides that upon the return of the inventory or at any time subsequent the court or probate judge may on his own motion or petition set apart a homestead, the respondent contends that no petition was necessary in this case. As to the sufficiency of the petition filed in the probate court asking that a homestead be set aside to the petitioner, Americus J. McVay, the majority of the court are of the opinion that the petition was sufficient, as they contend that the nature and organization of the probate court and the character and class of subjects it has to deal with in probate matters makes it impossible to apply the ordinary principles of pleadings to their proceedings; that many of the orders provided for may be made upon motion of the probate judge himself or upon suggestion by the

administrator or executor or a surviving husband or wife or an interested party in whose favor such order is made; and that the fact that an order is made in a probate proceeding upon the motion of the judge himself, or at the suggestion of an interested party, and without any petition or written pleading at all, does not prevent the party aggrieved from appealing and having the order or decision reviewed in the district court; and that in the case at bar the probate judge might have made an order setting aside a homestead without any written petition at all being made therefor, under the provisions of section 5441 of the Revised Statutes of 1887; that in the instances where the statute provides that a petition or complaint in writing is required, and what it shall contain, in such instances the statute must be followed; but in the case at bar the petition filed in the probate court stated every fact necessary to give the court jurisdiction to act and to grant the petitioner the relief asked for in the petition. In this conclusion of the majority of the court the writer of this opinion cannot concur. It is apparent from the reading of the statute that the probate judge must have before him certain facts in order to warrant him in creating a homestead where none had been selected. These facts are, first, that the applicant is a surviving husband, wife, or minor children of the decedent; second, that the real property was property of the decedent; third, that the property to be set off was a homestead—that is, property upon which a declaration of homestead had been filed, or property which could be created into a homestead at the time of the death of the decedent; fourth, that the value thereof did not exceed \$5,000. If these facts appear to the probate court upon the return of the inventory, from the inventory itself, or such papers as have been filed in the case up to that time, and such facts are proven to the court, then the statute clearly authorized the probate judge to set apart a homestead to the surviving husband, wife, or minor children without any petition therefor. If, however, such facts do not appear, then it becomes necessary to present such facts by a proper petition alleging the same and proofs offered in support thereof. The Estate of Delaney, 37 Cal. 176; Cameto v. Dupuy, 47 Cal. 79. The necessary facts, in my opinion, did not appear in this case from the inventory and other papers on file; hence a petition was necessary. The petition filed in the probate court was not, in my opinion, sufficient to entitle the applicant to the relief therein asked, as it did not state the necessary facts sufficient to authorize the probate court to act.

This leads us to the consideration of the question as to what constitutes a homestead under the provisions of Rev. St. 1887, §§ 5440, 5441. As stated above, had a declaration of homestead been filed prior to the death of the decedent, it would have con-

stituted the property therein named a homestead under these two sections. But in the case at bar no declaration was filed. Therefore it becomes necessary to consider the question as to what is a probate homestead, and what property may be set aside as such where none has been selected, designated, or recorded prior to the time of the death of the decedent. The homestead contemplated under these circumstances is one to be created by the probate court—that is, a probate homestead—and it may be created out of any property belonging to the estate which was subject to a homestead at the time of the death of the decedent—that is, was it property of the decedent; was it of a value less than \$5,000, and was it such property as might have been occupied as a home at that time? In other words, was it land upon which a residence or dwelling house had been constructed which at the time of the death of the decedent could have been occupied as such? If so, it was property out of which the probate court could have created a homestead. It was not necessary that the husband and wife actually lived on the property at the time of the death of the decedent; but, if it were such property as could have been occupied by them, it is property which may be impressed with the homestead right, under the statute, as a probate homestead. *Estate of Gallagher*, 134 Cal. 96, 66 Pac. 70; *In re Pohlmann's Estate*, 2 Cal. App. 360, 84 Pac. 354. This being the law, it becomes immaterial in this case whether McVay and his wife lived together at the time of his death or were actually living upon the premises which she asked to be set aside as a homestead; the only question being, was the property such as could have been occupied by them as a homestead at such time? This clearly appears in the amended petition filed in the district court, and also by the proof. The fact that they were living apart, or the fact that McVay was absent from the premises and had leased the same, is of no consequence. *Eproson v. Wheat*, 53 Cal. 715; *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358.

The next question argued by counsel for appellant is that, when an appeal was taken from the probate court to the district court, the appellant deposited \$100 with the probate court in lieu of the undertaking required by section 1 of the act of March 11, 1903. An examination of the record in this case shows that on the 17th day of October, 1905, the probate judge entered this judgment: "After duly considering the evidence and carefully examining the authorities cited, the court is of the opinion that the petition to set apart homestead and exempt personal property should be denied, and it is so ordered." The notice of appeal provides that the appeal is taken from an order made and entered in the probate court on the 17th day of October, 1905, refusing to set apart the homestead of

said deceased David H. McVay to the petitioner, Americus J. McVay, and also from an order made and entered in the said probate court on the 17th day of October, 1905, refusing to set apart the exempt property of said deceased David H. McVay to said petitioner, Americus J. McVay. It will thus be seen that, while the notice of appeal specifies these two orders as separate orders, yet the judgment of the probate judge was single; both orders being covered by the same judgment. Therefore there is but one appeal, and that is from the judgment made by the probate judge on the 17th day of October, 1905, and the appellant was not required to deposit but \$100 under the provisions of section 1 of the act of March 11, 1903. Where an undertaking on appeal or deposit is made, the appeal cannot be dismissed for failure of the probate court to certify that fact to the district court. When it appears to the district court that an undertaking on appeal has been given, or deposit made, the district court should order the probate court to certify the fact to the district court.

This opinion so far covers assignments of error 1, 2, 3, 33, and 34. Assignments of error from 4 to 32, inclusive, relate to matters involving the admissibility of evidence and other matters which become immaterial under the view of the law as announced in this opinion, as to what is a homestead, and out of what property it may be created by the probate court. Specifications of error 35, 36, and 37 relate to the definiteness of the findings of the court, and under the view of the law as herein announced the findings of the court are sufficiently definite and certain, and even go beyond the requirements of the law.

Under the rule announced in this opinion, it was error for the trial court to permit the petition of the respondent, and the objection and answer thereto by the appellant, to be amended in the district court. But this error in no way affects the respondent's right to recover in this action; and, as a different judgment could not have been rendered from the one the trial court did enter, it would not avail the appellant anything should the cause be reversed for such error. Under the provisions of section 4231 of the Revised Statutes of 1887, "the court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial right of the parties, and no judgment shall be reversed or affected by reason of such error or defect." This court does not feel disposed to reverse this case on the error committed by the trial court in permitting the pleadings to be amended in the district court, as the judgment of the trial court on the record was correct.

The judgment of the lower court will be affirmed; costs awarded to the respondent.

AILSHIE, C. J., and SULLIVAN, J., concur.

AMES v. HOWES.

(Supreme Court of Idaho. Dec. 20, 1907.)

1. TRUSTS—ACTION TO ESTABLISH—LIMITATIONS.

Held, that the demurrer to the complaint was properly sustained.

2. SAME—IMPLIED TRUST.

The trust alleged in the complaint is an implied trust, or one arising from an implication of law, and was not an express trust created by the direct and positive acts of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 91.]

3. LIMITATION OF ACTIONS—EXPRESS TRUSTS—IMPLIED TRUSTS—LIMITATIONS.

Express trusts are not within the operation of the statute of limitations, but trusts which arise from an implication of law or constructive trusts are within the operation of the statute of limitations. Section 4036, Rev. St. 1887.

4. TENANCY IN COMMON—MUTUAL RIGHTS—NOTICE OF CLAIM.

Where one co-tenant takes a deed conveying to him a part of the real estate owned by said co-tenants and records said deed in the proper office, such recordation is notice of the co-tenant's claim to such real estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, §§ 42-52.]

(Syllabus by the Court.)

Appeal from District Court, Bonner County; W. W. Woods, Judge.

Action by Hattie E. Ames against Stephen B. Howes. Judgment for plaintiff, and defendant appeals. Affirmed.

R. E. McFarland, for appellant. C. L. Heitman, for respondent.

SULLIVAN, J. This action was commenced by the appellant to recover the title to certain mining claims. The action was brought in Kootenai county prior to the creation of Bonner county out of a portion of Kootenai, and this action was transferred to Bonner county. It appears from the allegations of the amended complaint that the husband of the appellant and the respondent became joint and equal owners of certain mining claims, they having discovered and located the same in 1897; that on the 4th day of September, 1899, while they were joint and equal owners of said mining claims, a corporation known as the "Grand Copper Mining Company," was organized under the laws of the state of Washington, and it is alleged that by fraud and deceit, and through fraudulent promises and representations, and without any consideration therefor, it induced said Ames and Howes to transfer by deed a three-fourths interest in and to said mining claims to said corporation; that thereafter, on the 3d day of April, 1900, the said Ames and Howes commenced an action in the district court of the First judicial district in and for Kootenai county against said corporation to recover the title to said properties, and to require said corporation to reconvey to them the mining interests so conveyed as aforesaid; that thereafter, on the 27th day of April, 1900, a judgment and decree was entered in favor of

respondents, requiring the said corporation to reconvey to them said interests in said mining claims; that thereafter, on the 12th day of June, 1900, the said corporation, pretending to comply with the requirements of said judgment, executed and delivered to said Howes a quitclaim deed conveying to him an undivided three-fourths interest in and to all of said mining claims, which deed was on the 20th day of June, 1900, filed for record in the recorder's office of said county; and that said corporation executed and delivered to said Ames a quitclaim deed conveying to him an undivided one-fourth interest in and to said mining claims, which quitclaim deed was on the 20th day of June, 1900, duly recorded in the office of the county recorder of said county; that at all of said times said Ames owned and was entitled to an undivided one-half interest in and to said mining properties, and the said Howes was entitled to and owned only an undivided one-half interest in and to said mining claims; that, by the deed of conveyance conveying to said corporation the said mining claims, the said Howes pretended to convey to said corporation a three-fourths interest therein, but that he only owned an undivided one-half interest in said mining properties, and has never at any time owned any greater interest than one-half thereof; that at the time said deeds were executed by Ames and Howes to said incorporation there remained to the said Ames an undivided and undisposed of one-fourth interest in and to all of said properties, and that said quitclaim deed from the said corporation to the said Howes, which pretended and purported to convey to said Howes a three-fourths interest in said mining claims, in fact and in truth conveyed to said Howes only an undivided one-half interest, and that, if it should be held by the court that said deed from said corporation conveyed to said Howes a three-fourths interest in said claims, then one-third of said interest so conveyed belonged to, and should have been conveyed to, the said Ames, and that the said Howes has held that interest in trust for Ames. It is further alleged that on August 13, 1904, the said Ames died intestate, leaving no heirs, except his said wife, Hattie E. Ames, the appellant, and that he left no estate except his said interest in said mining claims, and that he at the time of his death left no unpaid debts. It is further alleged that said deed of said corporation conveying a three-fourths interest in said claims to Howes creates a cloud upon the title of the plaintiff as heir at law of said Ames, deceased, in and to the said undivided one-fourth interest in said mining claims. It is further alleged that on the 2d day of May, 1906, at Kootenai county, plaintiff made written demand upon defendant to convey to her as sole surviving heir at law of said Ames, deceased, the said one-fourth interest in and to said mining properties, but that said defendant for the first time then and there laid

claim thereto, and refused and still refuses to convey to her said one-fourth interest. The prayer is that plaintiff be decreed to be entitled to an undivided one-fourth interest in and to said mining claims, and that Howes be compelled to convey to her by good and sufficient deed said interest, and that said Howes held said one-fourth interest as trustee for Ames, and now holds the same in trust for the plaintiff, and that said deed from the mining company be so reformed as to convey to said Howes only one-half interest in said claims, and that the cloud created by said deed to said one-fourth interest be removed, and that the title to the same be quieted. It will be observed that the complaint is drawn upon and proceeds upon the theory that Howes holds the title to said one-fourth interest in trust for plaintiff, and that he be compelled to convey said interest to the plaintiff. To the amended complaint was filed a demurrer based upon two grounds. The first was that said amended complaint does not state facts sufficient to constitute a cause of action; and, second, that the alleged cause of action is barred by the provisions of section 4036 of the Revised Statutes of 1887 of Idaho. We will state here that, after the original complaint was filed, a demurrer was interposed thereto on the grounds above stated, and was sustained by the court, and the plaintiff given time in which to file an amended complaint. An amended complaint was filed, which was a copy of the original complaint, except that to the twelfth allegation of the complaint was added the following words, to wit: "For the first time then and there laid claim to the same, and." The demurrer to the amended complaint was based on the same grounds as the demurrer to the complaint. Before the demurrer to the amended complaint was decided by the court, counsel for respondent filed a motion to strike the amended complaint from the files, on the grounds (1) that it is identical in language with and the exact duplicate of the original complaint; (2) that on the 4th day of January, 1907, the court sustained defendant's demurrer to the original complaint on the ground that the action was barred by the statute of limitations, to which ruling of the court counsel for the plaintiff excepted, and was allowed 30 days from the 4th day of January, 1907, in which to prepare, file, and serve an amended complaint; that plaintiff did on the 14th day of January file said amended complaint, that the order so made on the 4th day of January sustaining the demurrer has never been appealed from, and is in full force and effect. Said motion was sustained by the court and the action was dismissed and judgment of dismissal entered. The appeal is from that judgment.

It is first contended by counsel for appellant that the demurrer to the complaint should have been overruled, for the reason the complaint shows that at the time the defendant and the deceased, Ames, conveyed

the properties to said mining company, Ames held and owned an undivided one-half interest therein; that Ames and Howes joined in an action for the cancellation of the conveyance made by them to the mining company; and that, on obtaining a decree cancelling said conveyance, the mining company conveyed to the respondent Howes a three-fourths interest in said mining claims, and to said Ames a one-fourth interest. The facts there stated are correct, but it further appears from said complaint that Howes had conveyed to said mining company a three-fourths interest in said mining claims, and that Ames had conveyed to it only a one-fourth interest therein. There is no allegation in the complaint showing why that was done in that way, or showing whether it was done through mistake or not. Ames must have known that he only conveyed a one-fourth interest in and to said mining claims, and, under the decree of the court, the mining company reconveyed to him said one-fourth interest.

It is also alleged in said complaint that the mining company, under said decree and judgment, pretended and purported to convey to said Howes a three-fourths interest in said mining claims, when, in fact and in truth, it conveyed to him only an undivided one-half interest. The whole pleading, as we understand it, purports to allege that the mining company, disregarding said decree, conveyed a greater interest in said mining claims to said Howes than he was entitled to, and alleges that said Howes holds the same in trust for Ames. The demurrer to the complaint was sustained upon the ground that it appeared upon the face of the complaint that the cause of action therein mentioned was barred by the statute of limitations. We think that the demurrer was properly sustained, for the reason that, if there was any trust alleged in the complaint, it was a trust arising from an implication of law, an implied trust. It was not an express trust, as it is not alleged that it was created by contract; but arises from the fact that the mining company had conveyed a greater interest in said claims to Howes than he was entitled to, although it reconveyed to him just the same interest that he had conveyed to it. Express trusts are those which are created by the direct and positive acts of the parties by writing, deed or will. 3 Words & Phrases, p. 2611, and authorities there cited; Perry on Trusts, § 2425. It is stated in Wood on Limitations, § 200, as follows: "It is well settled that a subsisting, recognized, and acknowledged trust, as between the trustee and cestui que trust, is not within the operation of the statute of limitations. * * * And trusts which arise from an implication of law, or constructive trusts, are not within the rule, but are subject to the operation of the statute, unless there has been a fraudulent concealment of the cause of action, and the statute is as complete a bar in equity as at law." No fraud is alleged in the com-

plaint against Howes, and no express agreement is alleged. We think the court correctly sustained the demurrer.

The appellant amended her complaint simply by inserting in paragraph 12 thereof the following words: "For the first time then and there laid claim to the same, and." In order that that amendment may be fully understood, we will here insert a copy of paragraph 12 as found in the original complaint, and following that a copy of paragraph 12 as found in the amended complaint: Paragraph 12 of the original complaint: "That on the 2d day of May, 1906, plaintiff made written demand upon the said defendant to convey to her, as sole surviving heir at law of the said George Ames, the said demanded one-fourth interest in and to said mining properties, but that the said defendant refused and still refuses to do so." Paragraph 12 of the amended complaint: "That on the 2d day of May, 1906, at Kootenai county, Idaho, plaintiff made written demand upon the said defendant to convey to her, as sole surviving heir at law of the said George Ames, the said demanded one-fourth interest in and to said mining properties, but that the said defendant for the first time then and there laid claim to the same and refused and still refuses so to do." It will be observed that in paragraph 12 of the original complaint appellant alleged that she demanded of respondent the said one-fourth interest in said mining properties, but that said respondent refused and still refuses to convey the same to her. In the amended complaint, the allegation, in addition to the ones in the original complaint, is that the appellant on that date, May 2, 1906, "for the first time then and there laid claim to said one-fourth interest." The question then arises, under the demurrer and motion to strike the second complaint, whether the amendment is such that the amended complaint on its face shows that this action is barred by the statute of limitations. No fraud is alleged on the part of the mining company or of Howes in the execution of a deed reconveying said mining claims to Howes. It appears from the allegations of the complaint that the mining company conveyed a one-fourth interest in and to said mining claims to Ames, now deceased, on the 12th day of June, 1900, and on the same date conveyed a three-fourths interest in and to said claims to the said Howes, and that they both filed their deeds for record in Kootenai county on the 20th day of June, 1900. It appears that Ames died in 1904, about four years after said reconveyances were executed. There were no allegations contained in the complaint as to the relations of said Ames and Howes during that period of time in regard to the possession of said mining claims. It does not appear whether they were working the mining claims or not; but it does appear that on the 2d day of May, 1906, about six years after the mining company had reconveyed said

mining claims to Ames and Howes, and about two years after Ames' death, a demand was made on Howes for a conveyance of one-fourth of said mining claims to the appellant, and it is alleged that for the first time on the 2d day of May, 1906, Howes claimed to be the owner of said one-fourth interest. Perhaps the inference to be drawn from that allegation is that he had never claimed it before that date; but, as there is no allegation in the complaint sufficient to show that Howes held one-fourth interest under a contract or agreement with Ames to do so, no express trust is alleged; but there is sufficient in the complaint to show that, if Howes held said interest in trust at all, it was under an implied trust, and an implied trust comes within the statute of limitations. Section 4036, Rev. St. 1887, provides that actions for the recovery of real estate cannot be maintained, unless it appears that the plaintiff, his ancestors, etc., was seised or possessed of the land in question within five years before the commencement of the action. We gather from the complaint that Howes never owned the one-fourth interest in controversy; that the mining company conveyed it to him by mistake. That being true, Howes held that interest under an implied trust, and, as implied trusts come within the operation of the statute of limitation, the complaint on its face shows that the action is barred by the provisions of section 4036, Rev. St. 1887, and for that reason the court did not err in striking the complaint and entering a judgment dismissing the action.

While this was on motion, it raised the same questions as raised by the demurrer. It is contended that Ames and Howes were tenants in common of said mining claims, and that the law presumes the possession of all co-tenants, and, before the possession of one can become adverse, there must be an actual ouster, and, before a tenant in common can rely on an ouster of his co-tenants, he must claim the entire title to the land in himself, and must hold an exclusive and adverse possession. We find no fault with the proposition of law there stated, but in the case at bar there was a decree of a court of general jurisdiction, in a case wherein Ames was one of the plaintiffs, in which a decree was entered requiring the mining company to reconvey to Ames and Howes the title to said mining claims, and on the 12th day of June, 1900, the mining company did reconvey said mining claims, a one-fourth interest to Ames and a three-fourths interest to Howes, and said deeds were filed for record in the proper county. The filing or registration of that deed was notice to Ames that Howes had the title thereto so far as the mining company was concerned, and it is well settled that "the possession of one tenant asserting an exclusive right to the land under a deed conveying the land to him by specific description is adverse to co-tenants having notice of the deed. The registration of a

deed under which a tenant in common claims exclusive right to the land is notice thereof to his co-tenants." *Puckett v. McDaniel*, 8 Tex. Civ. App. 630, 23 S. W. 360, and cases cited; *Winterburn v. Chambers*, 91 Cal. 171, 27 Pac. 658. The deed to Howes was recorded on June 20, 1900, and this action was commenced on May 7, 1906, nearly six years after the date of the conveyance to Howes. Under the provisions of section 4036, Rev. St. 1887, such actions as the one at bar must be commenced within five years from the time that the right accrues.

It is alleged in the complaint that on September 4, 1899, Ames and Howes, "by virtue and right of discovery and location, were joint and equal owners" of said mining claims, and on that date Ames conveyed a one-fourth and Howes conveyed a three-fourths interest therein to said mining company; that thereafter, under a judgment and decree, the mining company reconveyed to Ames and Howes by separate deeds just the share or interest in said mining claims that each had theretofore conveyed to it. If Howes only held one-half interest in said claims under the location notices thereof or deed, the fact that he conveyed a greater interest than he owned did not divest Ames of any interest that he owned therein, and a reconveyance by the mining company to Howes of just the interest that Howes had conveyed to it would not divest Ames of any part of the interest he owned in said claims. I must admit that I do not understand in what manner the transaction between Howes and the mining company divested Ames of any interest he owned in said claims. If A. sells and conveys real estate to C. that belongs to B., the legal title to which is in B., and C. thereafter reconveys the same to A., B. is not thereby divested of his title to said land, and, if the legal title to one-half of said mining claims was in Ames, the fact that Howes attempted to convey the same to said mining company, and thereafter said mining company reconveyed it to Howes, that transaction could in no manner affect Ames' title to said one-half interest thereto.

Judgment affirmed, with costs in favor of respondent.

AILSHIE, C. J., concurs.

EISENHAUER v. QUINN, Sheriff (GERARCI, Intervener).

(Supreme Court of Montana. Dec. 23, 1907.)

1. FIXTURES—UNLAWFUL ATTACHMENT—CONVEYANCE OF LAND.

Where S. wrongfully attached intervenor's house, which was then a chattel, to lands belonging to S., and then conveyed the land and house to plaintiff, the house did not thereby become a part of the realty as between plaintiff and intervenor, though plaintiff purchased, without notice of intervenor's rights, under the rule that a chattel in order to become an irremovable fix-

ture must be annexed to the realty by the owner of the fixture, or with his consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, § 6.]

2. SAME—REPLEVIN—IDENTIFICATION.

Where S. wrongfully attached intervenor's house, while a chattel, to certain land belonging to S., and then sold the land with the house thereon to plaintiff, intervenor was entitled to maintain replevin or claim and delivery to recover the house if it could be identified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, § 70.]

3. SAME—BONA FIDE PURCHASER FOR VALUE.

Where S. wrongfully attached intervenor's house, while a chattel, to land belonging to S., and then sold the land with the house to plaintiff, the fact that plaintiff was a bona fide purchaser for value was no defense to intervenor's right to recover the house in replevin under the rule that in the absence of statute the defense of bona fide purchaser for value without notice is not available against the holder of the legal title, though it may be interposed as against the holder of an equitable title only.

4. ESTOPPEL—DEFENSE—PLEADING—NECESSITY.

Where S. wrongfully attached intervenor's house, while a chattel, to certain land, and then sold the house and land to plaintiff, plaintiff could not claim that intervenor was estopped to claim title to the house without pleading such estoppel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 300.]

5. EXECUTION — INJUNCTION — BILL — ADEQUATE REMEDY AT LAW.

Intervenor, having levied execution on a house for which he had recovered judgment, which house S. had wrongfully removed to certain land and then sold with the land to complainant, complainant sued to enjoin a levy, alleging that he had no plain, speedy, or adequate remedy at law, but did not allege that the sheriff was insolvent, that his official bond was not ample, nor any facts indicating that plaintiff's injury by the removal of the house could not be compensated by damages. *Held*, that the bill was defective for failure to show that plaintiff did not have an adequate remedy at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 498.]

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

Suit by John Eisenhauer against John S. Quinn, as sheriff of Silver Bow county, and Tony Gerarci, intervenor. From a decree in favor of complainant, defendant and intervenor appeal. Reversed and remanded.

W. D. Kyle and M. P. Gilchrist, for appellants. E. M. Lamb, for respondent.

HOLLOWAY, J. In September, 1901, Tony Gerarci was the owner of a certain two-room frame dwelling house, which he had purchased from H. L. Frank. The house was sold to Gerarci separate from the ground upon which it stood, and he immediately started to remove it to another location. One H. H. Smith thereupon wrongfully, without Gerarci's knowledge or consent, took possession of the house and moved it about, and finally located it at 132 West Platinum street, in Butte, partly upon ground purchased by him from Hayes Cannon, and partly upon land belonging to Cannon. In July, 1902, Gerarci commenced an action in claim and delivery

against Smith and others to recover possession of the house. This action was not finally determined until 1904, when Gerardi recovered judgment for the possession of the house or its value. In the meantime, in 1903, Smith and Cannon sold to John Eisenhauer the land upon which the house then stood, and Smith assumed to sell the house also. Immediately after recovering his judgment, Gerardi had execution issued and placed in the hands of the sheriff. When the sheriff undertook to levy the writ, Eisenhauer instituted this suit to secure an injunction restraining the sheriff from removing the house. Gerardi filed a complaint in intervention. The sheriff answered. Issues were joined, the case tried to the court without a jury, and a decree rendered and entered in favor of the plaintiff. From that decree and an order denying a new trial, the defendant and intervener appeal.

In deciding the case the court said: "When Smith attached Gerardi's house to his (Smith's) realty it became a part of the freehold and passed to Eisenhauer on sale and conveyance to him by Smith, Eisenhauer being a bona fide purchaser without notice." In passing upon the motion for a new trial, however, the court held that when Smith seized the house, Gerardi should have asserted his right and should have prevented Smith from attaching the house to Smith's realty, and, after Smith had so attached it, Gerardi should have taken possession of it in his claim and delivery action, or should have filed a notice of his pends, and having failed to do any of these things, after Smith had sold the property to Eisenhauer, Gerardi was estopped to assert his claim of ownership as against Eisenhauer. These questions only need to be determined: (1) Where Smith tortiously attaches Gerardi's house, which was then a chattel, to land belonging to Smith and Cannon, by placing it upon a stone foundation, does the house thereby become a part of the real estate, as between Gerardi and Eisenhauer, so that by deed of land with its appurtenances and improvements Smith and Cannon could convey to Eisenhauer a title to the house sufficient to defeat Gerardi's claim to the house itself? (2) Is the defense that he was a bona fide purchaser for value, without notice, available to Eisenhauer as against Gerardi, the holder of the legal title to the house in question? (3) Is the defense of an estoppel available to Eisenhauer? And (4) does the complaint state facts sufficient to entitle the plaintiff to an injunction?

1. Upon the first proposition many decisions are cited by counsel for the respective parties, all bearing somewhat upon the general proposition, but, with a single exception, presenting facts so different from those in the case now under consideration that they do not render any aid in reaching a solution of the question before us. The exception noted is the case of *Shoemaker, Miller & Co. v. Simpson*, 16 Kan. 43, which is somewhat

analogous to the case before us. *Shoemaker, Miller & Co.* owned certain bars of railroad iron, or rails, near Wyandotte, Kan. *Simpson* owned certain city lots in Lawrence. The Kansas Pacific Railway Company wrongfully took *Shoemaker, Miller & Co.*'s rails, hauled them to Lawrence, and with them and cross-ties laid a track over *Simpson*'s lots for the purpose of hauling sand. The rails were taken without the knowledge or consent of *Shoemaker, Miller & Co.*, and placed on *Simpson*'s lots without his consent. *Shoemaker, Miller & Co.* brought an action in replevin against *Simpson* to recover the rails. *Simpson* defended upon the theory that when the rails were fixed to the cross-ties imbedded in his land, they thereby became a part of his real estate. The trial court found for the defendant, but on appeal the judgment was reversed, the Supreme Court saying, among other things: "We know of no way by which an innocent person can be permanently and legally deprived of his property against his will by the wrongs and trespasses of others, so long as it remains within the power of such innocent person to reclaim his property without committing any serious or substantial injury to the person or property of any other person." And again: "But we do not think that any innocent person can be deprived of the title of his personal property against his consent by having it attached without his consent to the real estate of another by a third person, where such personal property can be removed without any great inconvenience, and without any substantial injury to the real estate." The question, when does a chattel become a part of realty so that it passes as a part of such realty, is one most difficult of solution. It depends upon such a variety of considerations that every case must necessarily depend upon its own state of facts. There is no universal test whereby the character of what is claimed to be a fixture can be determined in the abstract. But one of the elementary rules of the law of fixtures is that a chattel, to become an irremovable fixture, must have been annexed to the realty by the owner of the fixture, or with his consent. *Bronson on Fixtures*, 73; 13 Am. & Eng. Ency. Law (2d Ed.) 604; *Adams v. Lee*, 31 Mich. 440; *Cochran v. Flint*, 57 N. H. 514; *Lansing Iron & Engine Works v. Wilbur*, 111 Mich. 413, 69 N. W. 669; *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460, 42 Atl. 101. With the exception of property taken by judicial process, no one can be deprived of property to which he has the legal title, without his consent, unless he has estopped himself to assert his title. And where A. attaches B.'s chattels to A.'s realty wrongfully, and without the knowledge or consent of B., B. may maintain replevin, or claim and delivery, to recover the same, if the chattels can be identified. *Bronson on Fixtures*, 351; 13 Am. & Eng. Ency. Law (2d Ed.) 681; *McDaniel v. Lipp*, 41 Neb. 713, 60 N. W. 81.

There is no question but what the property in this instance was sufficiently identified by Gerarci, even though certain changes had been made in it after it left his possession. Under the facts disclosed by this record then, we hold that Gerarci did not lose title to his property by reason of the tortious acts of Smith; and this is true whether Elsenhauer had knowledge of Gerarci's claim at the time he purchased the property or not.

2. But particular stress is laid by respondent upon the proposition that he was an innocent purchaser for value, without notice of Gerarci's claim. This contention, however, cannot prevail. Gerarci had the legal title to the house. Smith had not any title at all. It is a general rule in this country that, in the absence of statute, the defense of purchase for value and without notice is not available against the holder of the legal title. *Galnes v. New Orleans*, 6 Wall. (U. S.) 642, 18 L. Ed. 950; *Stout v. Hyatt*, 13 Kan. 232; 23 Am. & Eng. Ency. Law (2d Ed.) 482, and cases cited; 24 Am. & Eng. Ency. Law (2d Ed.) 1169; 19 Cyc. 1052. But such a defense may be interposed as against the holder of an equitable title only. 19 Cyc. above.

3. In denying the motion for a new trial the district court held that Gerarci had estopped himself to urge his title to the property, and in making the order said: "But for estoppel, I am of the opinion Gerarci would be entitled to recover even from Elsenhauer, a bona fide purchaser." This position, however, is altogether untenable. Gerarci in his complaint in intervention set forth his claim to the property, and recited at length the history of his litigation with Smith concerning it. Elsenhauer answered this complaint, but, though he had ample opportunity to do so, he did not plead an estoppel. In *Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994, this court announced the rule as follows: "It is the general rule that matter of estoppel, to be effective, must be alleged. Where, however, there has been no opportunity to allege it, it may be given in evidence with the same conclusive effect as if alleged. In *Isaacs v. Clark*, 12 Vt. 692, 38 Am. Dec. 372, it is said: 'It is no doubt true that where the party has an opportunity to plead the estoppel he is bound to do it, and if he omits it, the jury will not be bound by the estoppel, but may find according to the facts. If, however, there has been no opportunity to plead the matter as an estoppel, it may, in general, be given in evidence, and it will have the same conclusive effect as in cases where it is pleaded. This is according to the current of the authorities, though they may not have been entirely uniform.'" However effective an estoppel might have been, if pleaded and proved, it is not available to Elsenhauer in this instance, since he did not plead it.

4. Appellants contend that the complaint does not state facts sufficient to constitute a cause of action for an injunction. While the complaint alleges that plaintiff has no plain,

speedy, or adequate remedy at law, there are not any facts stated from which such a conclusion could be drawn. If in removing the house the sheriff acted wrongfully and to plaintiff's injury, he would be liable. There is not any allegation that the sheriff is insolvent, nor that his official bond is not ample. Neither is there any allegation from which it can be said that the injury to plaintiff, by a removal of the house, could not be amply repaired by damages. It is elementary that before one can go into a court of equity he must show that he has not a plain, speedy, or adequate remedy at law. We think the complaint fails, in this regard, to state a cause of action for an injunction. In *Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46, this court said: "If plaintiffs had a plain, adequate, and complete remedy at law, a court of equity should refuse to take jurisdiction; and, indeed, it would be without jurisdiction, for equity may act in those matters only in which no remedy is afforded in the ordinary course of law, or in which the remedy at law is deficient." See also, *McCormick v. Riddle*, 10 Mont. 407, 26 Pac. 202.

The judgment and order are reversed, and the cause remanded, with directions to grant a new trial.

Reversed and remanded.

BRANTLY, C. J., and SMITH, J., concur.

NORTH REAL ESTATE LOAN & TITLE CO. v. BILLINGS LOAN & TRUST CO. et al.

(Supreme Court of Montana. Dec. 23, 1907.)

1. TAXATION—ASSESSMENT—SEPARATE PARCELS OF LAND—SALE EN MASSE.

Rev. St. 1879, Fifth Div. §§ 1001, 1004, 1011, 1013-1015, 1030, 1035, 1037-1040, provide for the listing and assessment of land for taxes, and for the sale and redemption of land on which the taxes are unpaid, and, in case of town lots, that the name of the town in which the lots are situated, with a proper description thereof by number and blocks, shall be given, and Comp. St. 1887, Fifth Div. § 1696, provides that each tract of land and each town or city lot shall be assessed separately, except when one or more adjoining tracts or lots are returned by the same person in which case they may be assessed jointly. *Held*, that section 1696 did not change the law as it previously existed, and that a tax deed showing that several disconnected town lots were assessed together and sold en masse for a single sum was void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 574.]

2. APPEAL—DISPOSITION OF CAUSE—EQUITY CASE—FINAL JUDGMENT.

Where, in a suit to quiet title, it appeared that defendant's claim was void on its face, a decree for defendant would be reversed on appeal and the cause remanded with directions to enter judgment for plaintiff under Code Civ. Proc. § 21, as amended by Acts 2d Leg. Extr. Sess. 1903, p. 7, c. 1, requiring the Supreme Court in equity cases to finally determine the same, unless there appears cause for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4591.]

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

Action by the North Real Estate Loan & Title Company against the Billings Loan & Trust Company and others. From a judgment in favor of the Billings Loan & Trust Company, plaintiff appeals. Reversed and remanded.

T. S. Hogan and M. J. Lamb, for appellant.
Jas. R. Goss and W. M. Johnston, for respondent.

SMITH, J. The above-named plaintiff, a corporation, alleges in its complaint that it is the owner and in possession of lots 5 and 6, in block 52, of the city of Billings; that it has title in fee to the lots, and that the defendants, naming several, claim an estate therein adverse to it, which claims are without any legality. The prayer is that plaintiff be declared to be the owner of the lots, that the defendants be adjudged to have no right or title thereto, and that they be enjoined from asserting any claim thereto adverse to plaintiff. The Billings Loan & Trust Company, a corporation, was the only answering defendant. After denying the material parts of the complaint, it alleged affirmatively that it is the owner of the lots in question by virtue of a certain tax deed. The successive steps leading up to the issuance of the deed to one of the defendant's predecessors in interest are pleaded. Plaintiff by replication denies the validity of this tax deed, for the reasons, among others, "that it is void upon its face, and is of no force or effect whatever, and did not convey any right, title, or interest in or to said lots, or any of them to the defendant. * * * or any other person whomsoever." Other objections to the deed were raised, but we do not find it necessary to consider them.

The district court made findings of fact and conclusions of law in favor of the defendant, and entered a decree in accordance with the conclusions of law and the prayer of defendant's answer. The plaintiff thereafter made its motion for a new trial, which motion was overruled, whereupon it appealed from the judgment or decree and from the last-mentioned order. It appears from the bill of exceptions that, after the plaintiff had shown its chain of title by mesne conveyances through the Northern Pacific Railroad Company, the Minnesota & Montana Land & Improvement Company, F. T. Robertson and wife, and Austin North Company to itself, it rested its case. Thereupon defendant offered in evidence a county treasurer's tax deed, which reads as follows: "Know all men by these presents that whereas, the following described real property, to wit: Lots 20, 21, and 22 in block 6; lots 5 and 6 in block 52; lots 18 and 19 in block 53, city of Billings, situated in the county of Yellowstone, and territory of Montana, was subject to taxation for the year A. D. 1886, and, whereas, the taxes assessed upon said real property for the year or years aforesaid, remained due and unpaid at the date of the

sale hereinafter named; and whereas, the treasurer of said county did, on the 25th day of February, A. D. 1887, expose at public sale, at the court house, in the county aforesaid, in substantial conformity with all the requirements of the statute in such case made and provided, the real property above described, for the payment of the taxes, interest and cost then due and remaining unpaid on said property; and whereas, at the time and place aforesaid, Jas. R. Goss of the county of Yellowstone, and Territory of Montana, having offered the sum of eight dollars and 57 cents, being the whole amount of taxes unpaid on said property, which was the least quantity bid for, and payment of such sum having been made by him to the said treasurer, the said property was stricken off to him at that price; and whereas, the time of redemption having elapsed since the date of said sale, and the said property has not been redeemed therefrom as provided by law: Now therefore, I, A. S. Douglas, treasurer of the county aforesaid, for and in consideration of the sum, to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain and sell unto the said Jas. R. Goss, his heirs and assigns, the real property last here described. To have and to hold unto him the said Jas. R. Goss, his heirs and assigns, forever. In witness whereof, I, A. S. Douglas as aforesaid by virtue of authority aforesaid as aforesaid, have hereunto subscribed my name on the seventh day of May, A. D. 1888. A. S. Douglas, County Treasurer." To the introduction of this deed in evidence the plaintiff's counsel interposed the following objection: "That it is a deed to a private individual, and not to the county, and shows that three separate noncontiguous pieces of property are included therein, and in the recitals thereof it appears that the three parcels were sold together, and that the whole of said three tracts of land were purchased as the least quantity bid for." The court overruled the objection, and admitted the deed in evidence. Thereupon defendant introduced in evidence, over plaintiff's objection, a deed from Jas. R. Goss and wife to Albert Carswell, a deed from Carswell to Wm. Read, and a deed from Read and wife to the defendant, all purporting to convey lots 5 and 6 in block 52, and, after one Burton had testified that the property was vacant and unoccupied, rested its case. There was no rebuttal testimony, and the plaintiff thereupon asked for a judgment in its favor "for the reason that the defendant has failed to make any defense to the action." This motion was denied and a decree entered for the defendant, as before stated. No evidence as to adverse possession or abandonment was offered at the trial, and the question of laches is not discussed in the briefs, and was not touched upon in the argument.

The property in question was assessed for taxes by virtue of the provisions of Rev. St. Mont. 1879, Fifth Div. A reference to those statutes discloses the following provisions:

"Sec. 1001. Every tax levied under the provisions of this chapter is hereby made a lien against any and all the property assessed, and such lien shall attach at the time of such assessment, and shall not be satisfied or removed until such taxes are paid."

"Sec. 1004. Every inhabitant of this territory, of full age and sound mind, shall list all property subject to taxation in this Territory of which he is the owner," etc.

"Sec. 1011. The district assessors of each county shall assess and value all property required by the provisions of this article to be assessed and valued, and between the first day of February and the tenth day of September in each year, shall demand of each tax payer in his district a list, as hereinafter provided, of his, her, or their property," etc.

"Sec. 1013. The list shall contain: First: His, her, or their lands, to be designated by township, range, section, and any division or part of section; and where such part is not a government division or subdivision, then some other description to identify it; and his town lots, naming the town in which they are situated, and their proper description, by number and blocks, or otherwise, according to the system of numbering in the town.

"Sec. 1014. Before proceeding to assess any property under the provisions of this article, it is hereby made the duty of the assessor to administer to the person about to be assessed the following oath or affirmation: [giving form of oath] And to ask him, among other questions, the following: How many town lots do you own? Where are they? Describe them.

"Sec. 1015. On or before the tenth of September, annually, the assessor shall make out and deliver to the county clerk an assessment roll, containing in tabular form and alphabetical order, the names of the persons and bodies in whose names property has been listed in his district, with the several species of property and the value, as hereinafter indicated, with the columns of numbers and value footed," etc.

"Sec. 1030. The treasurer shall give notice of the sale of real property. * * * Such notice shall contain a notification that all lands on which the taxes of the preceding year or years, naming it, have not been paid, will be sold, and the time and place thereof, with a list of the lands," etc.

"Sec. 1035. The county treasurer shall make out, sign and deliver to the purchaser of any real property sold for the payment of taxes as aforesaid, a certificate of purchase, describing the property on which the taxes and costs were paid by the purchaser, as the same was described in record of sales, and also how much and what part of each tract or lot was sold, and stating the amount of each kind of tax, interest and costs, for each

tract or lot for which the same was sold, as described in record of sales, and that payment has been made therefor. If any purchaser shall become the purchaser of more than one parcel of property, he may have the whole included in one certificate."

"Sec. 1037. Real property sold under the provisions of this article may be redeemed at any time before the expiration of one year from the date of the sale, by the payment to the treasurer of the proper county, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and subsequent taxes," etc.

"Sec. 1038. The county treasurer shall, upon application of any party to redeem any real property sold under the provisions of this article, and being satisfied that such party has the right to redeem the same, and upon the payment of the proper amount, issue to such party a certificate of redemption, setting forth the facts of the sale, substantially as contained in certificate of sale," etc.

"Sec. 1039. Immediately after the expiration of the time allowed for the redemption of any land sold for taxes under the provisions of this article, the treasurer then in office shall make out a deed for each lot or parcel of land sold and remaining unredeemed, and deliver the same to the purchaser upon the return of the certificate of purchase; * * * any number of parcels of land bought by one person, may be included in one deed, as may be desired by the purchaser."

Section 1040 provides a form of tax deed, of which the one received in evidence in this case is a substantial copy.

It will be seen from the foregoing quotations that at the time these lots were assessed and sold for taxes the law required that the owner should furnish to the assessor a list of his property; and, in case of town lots, that he should name the town in which they were situated, and give a proper description thereof by number and blocks, and that from the lists so obtained the assessor should make out an assessment roll containing the names of the persons who had listed property in his district, together with the several species of property and the value thereof. The Legislature of 1887 passed a law providing that "each tract of land, and each town or city lot, shall be valued and assessed separately, except when one or more adjoining tracts or lots are returned by the same person, in which case they may be valued and assessed jointly." Comp. St. 1887, Fifth Div. § 1696. The Supreme Court of California in the case of *Terrill v. Groves*, 18 Cal. 149, said this: "The act of April, 1857, under which these proceedings were taken, in the fourth section provides that the assessor shall set down in his assessment book (1) the names of all taxable inhabitants; (2) all real estate and improvements on public lands taxable to each, giving the metes and bounds, or describing by lots or fractions of lots; (3) the cash value of all

improvements on real estate, etc. We think the true meaning of the provision is to require a separate assessment and valuation of each lot in cases like this of city property. If a man owned a hundred lots, or if, after the assessment, he sold some of them, and it became necessary or desirable to pay the taxes on a part of the property, it would be impossible to do so without paying the full amount assessed. It was evidently the intention of the statute that each lot should be made to bear its own portion of the public burdens, and a great deal of confusion and injustice would grow out of a gross assessment of several lots, and a sale in gross for the payment of the general tax. This construction seems to be given to the provisions of statutes not very dissimilar in Maine and Ohio (*Shimmin v. Inman*, 26 Me. 228, and *Willey v. Scoville's Lessee*, 9 Ohio, 43), and we think it warranted by the language of our own act." We are of opinion that the passage of section 1696, supra, by the Legislature of 1887, added nothing to the duties of the assessor as the same were indicated by the provisions of the Revised Statutes of 1879, above quoted.

In the case of *Casey v. Wright*, 14 Mont. 315, 36 Pac. 191, the court said: "In *Terrill v. Groves*, 18 Cal. 149, a case very similar to the one under consideration, the court says: 'The plaintiff claims under a tax deed. It seems that these lots were assessed as the property of one Alonzo Green. They were separately listed, but valued jointly, and the aggregate tax on all of them, and two other lots in other blocks, set down. The lots sued for were contiguous to each other, and formed a part of block No. 28 on the plan of the city. These lots were put up and sold together for the aggregate amount of this tax. The appellants contend that this was illegal, and that the sale and the consequent deed were void; and we are of the same opinion.' We think the authorities are almost unanimous that such a sale is void." In the case of *Emerson v. Shannon*, 23 Colo. 274, 47 Pac. 302, 58 Am. St. Rep. 232, the court said: "The defendant, to maintain his title at the trial, offered in evidence a tax deed, purporting to convey lands sold for delinquent taxes en masse for a gross sum, viz. [Here follows description of the land.] We have just held in the case of *Crisman v. Johnson*, 23 Colo. 264, 47 Pac. 296, 58 Am. St. Rep. 224, that under our statute it is lawful for the authorities to assess and sell en masse, for delinquent taxes, a number of town lots. Section 3822, *Mills' Ann. St.*, provides for such assessment if the lots are listed by the same person; and section 3894 provides that, 'when * * * adjoining lots are offered as the property of the same person, one or more may be sold for the taxes of all.' It is not necessary to determine whether, when all our statutes on the subject are considered, it is permissible to sell for taxes several tracts of contiguous acre property, as such a case is not

presented, as the description given of the several tracts in the treasurer's deed will only apply to lands that are not contiguous, but widely separated and in different townships. It shows that these noncontiguous tracts were sold together for a gross sum. When this instrument was offered in evidence for the purpose of showing title in the defendant, the court properly rejected the same. The authorities are uniform that such a deed is absolutely void." In the case of *Speed v. McKnight*, 76 Miss. 723, 25 South. 872, the court said: "The assessment under which this property was sold and the sale were utterly void. * * * The assessment here was the act of the sheriff, and the lots were physically widely separated and of different values, as shown by proof, and should not have been sold as one tract." In the case of *National Bank of Augusta v. Baker Hill Iron Co.*, 108 Ala. 635, 19 South. 47, this language is found: "There can be no sort of doubt that the tax sale and deed under which plaintiff claims were absolutely void, for the reason that the assessment and sale were not made in compliance with the statutory requirements. * * * The assessment in question * * * embraced a great many pieces of property, none of which were valued separately, as required by section 33 of the act (Acts 1868, p. 310), but all were assessed at one gross valuation. * * * Finally, the property was not offered for sale by sections or parts of sections, as required by section 79 (page 321), but was sold en masse, though there were many different and disconnected subdivisions of sections." In *Cocks v. Simmons*, 55 Ark. 104, 17 S. W. 594, 29 Am. St. Rep. 28, it was said: "By the recitals of the deed four sections of land severally assessed were sold in a body for the sum of the taxes due upon all. Each section was thereby sold for the taxes due upon each of the others, as much as for the taxes due upon it. Such a sale is absolutely void, for the collector has no more authority to sell one tract of land for a tax due upon another than for a store account or other ordinary debt." In *Cornelius v. Ferguson*, 16 S. D. 113, 91 N. W. 460, it was said: "But the deed, when read in connection with the eighth finding of fact, is clearly shown to be void, as the court in the latter finding finds that the lots for the year 1889 were sold in bulk for the gross sum of \$59.55. Reading, therefore, the two findings together, the court was clearly right in its conclusions of law that the tax deed was void on its face." The Supreme Court of Iowa, in *Ackley v. Sexton*, 24 Iowa, 320, used this language: "This tax deed was void upon its face, because it embraced several distinct tracts of land, which purported to have been sold en masse for a gross sum. It was precisely such a deed as has been adjudged void on its face by prior decisions of this court." Judge Cooley, in his work on Taxation (2d Ed.) p. 493, thus expresses his views on the subject under consideration: "To group lands

in the sale which are assessed as separate interests is incompetent, even though they be owned by the same person. Each parcel is chargeable with its own taxes, and is to be redeemed by paying them; but such a joint sale charges it with the tax upon the other also, and is like issuing one execution upon several judgments, and selling jointly the lands which are charged with separate liens. It may or may not be important to the owner that he have the opportunity of a separate redemption, but the fact that it possibly may be so is sufficient reason why the law should protect the right." See, also, *Cartwright v. McFadden*, 24 Kan. 622; *Wyer v. La Rocque*, 51 Kan. 710, 33 Pac. 547; *Weeks v. Merkle*, 6 Okl. 714, 52 Pac. 929; *Lowenstein v. Sexton*, 18 Okl. 322, 90 Pac. 410; *Barnes v. Boardman*, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785; *Gibson v. Kueffer*, 69 Kan. 729, 77 Pac. 282.

In reply to the contention of the appellant, counsel for the respondent calls attention to section 1039 of the Revised Statutes of 1879, supra, which provides that any number of parcels of land bought by one person may be included in one deed, if the purchaser so desires, and numerous cases are cited from other states to uphold this proposition. Under the statute, there is no doubt that a deed would not be invalid because it conveys a number of lots or parcels of lands; but it is equally clear to us that, where a deed shows on its face that several noncontiguous parcels of property were sold en masse, the deed is void. The deed received in evidence in this case shows, on its face, that certain lots in blocks 6, 52, and 53, in the city of Billings, were assessed together, and that they were sold en masse for \$8.57. We know, of course, that blocks in cities and towns are bounded by streets and alleys, and it therefore follows that the lots in these different blocks could not be adjoining lots. As was indicated by the Supreme Court of California and also by Judge Cooley, supra, the object of the statute undoubtedly was to provide that the officers' books should show the tax which attached as a lien to each separate lot, piece, or parcel of land, so as to enable the owner, or his successor in interest, to redeem any one lot by paying the tax thereon, without any obligation to pay the tax on other lots in order to clear the title to the particular lot. It seems to us that this is a reasonable right or privilege secured to the owner, and that the courts have properly by their decisions recognized and protected the same. We hold that the tax deed received in evidence in this case is void on its face, and ought not to have been considered by the trial court.

This being an equity case, and no cause appearing why a new trial or the taking of further evidence should be ordered, it is our duty to finally determine the same. Code Civ. Proc. § 21, as amended by the Legislature in Acts 2d Leg. Ex. Sess. 1903, p. 7, c. 1. It is therefore directed that the judgment and order appealed from be, and the same

are hereby, reversed, and the cause is remanded to the district court of Yellowstone county, with instructions to enter a judgment in favor of the plaintiff in accordance with the prayer of its complaint.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

ANDERSON v. RED METAL MINING CO. et al

(Supreme Court of Montana. Dec. 16, 1907.)

1. JUSTICES OF THE PEACE—APPEAL—APPELLATE JURISDICTION.

Though under the express provisions of Const. art. 8, § 21, a justice's court has no equity jurisdiction, and where the justice has no jurisdiction the district court can acquire none on appeal, except to dismiss the appeal and render judgment for costs, yet a person who has mistakenly assumed that he is entitled to equitable relief, and has formed his pleadings accordingly, will not on appeal from the justice to the district court be turned out of court if upon any theory of his pleadings he is entitled to other relief, since under the express provisions of Const. art. 8, § 28, there is but one form of action, and law and equity may be administered in the same case.

2. SAME—JURISDICTION—CIVIL ACTIONS.

Under the express provisions of Const. art. 8, § 21, a justice's court has no equity jurisdiction. An action was brought in a justice's court on an account for labor performed for defendant company by one to whom the account had been assigned, who also prayed that another alleged assignee of the account to other parties who were made defendants should be declared void. A demurrer of the defendant assignees to the complaint was sustained. *Held* that, the case being disposed of in so far as it involved equitable relief, the justice could properly decide the remaining legal question of the defendant company's liability to plaintiff on the account, under Code Civ. Proc. § 66, subd. 1, giving a justice's court jurisdiction of actions arising on contract for the recovery of money only, etc.

3. SAME—INTERPLEADER—SCOPE OF REMEDY—LEGAL ACTIONS.

Code Civ. Proc. § 588, provides that a defendant against whom an action is pending upon a contract may, before answer upon affidavit that without collusion with affiant, a person not a party, makes a demand upon such contract, obtain an order of court substituting such person in his place, etc., on his depositing in court the amount claimed, and the action of the interpleader may be maintained and plaintiff be discharged from liability to the conflicting claimants, though their claims have not a common origin, but are adverse and independent of one another. In an action by an assignee on an account, in which others claiming the account by virtue of a levy under their execution against the assignor were made defendants, a justice of the peace ordered a substitution of the assignor and the other defendants for the debtor. *Held*, that the order of substitution did not convert the legal action into an equitable one, so as to deprive the justice of jurisdiction, since the provision for an interpleader was intended to cover both legal and equitable cases.

4. INTERPLEADER—PROCEEDINGS—EFFECT OF FAILURE TO FILE AFFIDAVIT—WAIVER.

Though the formal affidavit required by the section was not filed, but the application for substitution was made on the amended answer,

the irregularity was waived where the substituted parties became defendants without objection.

5. APPEAL—TRANSFER OF CAUSE—NOTICE—"ADVERSE PARTY."

Under Code Civ. Proc. § 1780, providing that, when an appeal is taken, a notice thereof must be served on the adverse party, etc., an adverse party is one who has an interest in opposing the object sought to be accomplished by the appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2138-2139.]

6. SAME.

Where an action is brought on an account by an assignee thereof, and the debtor interpleads the assignor and another claimant of the account, and the assignor disclaims any interest, admitting the assignment to plaintiff, the assignor is not an adverse party on whom notice of an appeal must be served by plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2138-2139.]

7. JUSTICES OF THE PEACE—APPEAL—TRIAL DE NOVO—DEMURRER.

An assignee of an account suing in justice's court asked for judgment against the debtor, and that the claim of P. to the same account be declared void. P.'s demurrer was sustained. The debtor then interpleaded P. and the assignor, who, on being brought in, both answered, P. making no objection that the complaint did not raise any issue as to the right between himself and plaintiff, but setting up his claim under a levy of execution. Judgment was rendered for P., and plaintiff appealed to the district court, where P. again submitted his demurrer offered before the justice. *Held*, that the court properly overruled such demurrer, since, when the justice sustained it, on the ground that he could not grant the relief asked against P., he practically dismissed P. from the case, and the demurrer had done its work.

8. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF IMPROPER EVIDENCE.

In an action on an account by an assignee, where defendants offer no evidence, but rest their case entirely upon their objection to the jurisdiction, the admission of incompetent evidence as to the consideration for the assignment is not prejudicial where there is no question as to the sufficiency of the consideration nor as to whether it was for value.

9. SAME—PRESUMPTIONS.

Where it appeared that the parties and the judge proceeded upon the assumption that the amount in controversy had been paid into the justice's court, and that at the time of trial it was in the clerk's possession, and the answer of another defendant recited that the money had been paid to the justice, a verdict by direction of the court that plaintiff "is entitled to the sum of \$94 heretofore paid into court" will not be reversed for lack of evidence that any sum had been paid into court, since it will be presumed that the fact that the money had been paid to the clerk was ascertained by the court before it adjudged that the sum belonged to plaintiff.

10. INTERPLEADER—JUDGMENT—INTEREST.

In a trial on an interpleader, it is error in giving judgment for the sum in dispute to award interest on it against the interpleader defendant during the time it was in the custody of the court.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

Action by A. E. Anderson against the Red Metal Mining Company, Paris Bros., and others. Judgment for plaintiff, and defendants Paris Bros. appeal. Modified and affirmed.

L. P. Forestell and L. A. Cohen, for appellants. Donovan & Melzer, for respondent.

BRANTLY, C. J. This action originated in a justice of the peace court. It was brought to recover a judgment against the Red Metal Mining Company, hereinafter referred to as the "company," upon an account for \$94 for labor performed for the company during September, 1907, by one Frankovich, which the plaintiff alleges had been assigned to him for value. Frankovich and Paris Bros., a co-partnership, were made parties defendant. The complaint contains allegations sufficient to state a cause of action against the company. No attempt is made to state a cause of action against Frankovich, nor in the prayer is judgment demanded against him. As to the appellants Paris Bros., it is alleged that they claim to be the assignees of the account under an assignment by Frankovich, but that this assignment is a forgery, and therefore void. In the prayer the plaintiff demands that the Paris Bros.' assignment be declared void, and that he have judgment for the amount of the account and for costs. Paris Bros. interposed a general demurrer to the complaint, which was sustained. The company filed an answer. After the demurrer of the Paris Bros. was sustained, it filed an amended answer, which was verified, in which it admitted all the allegations of the complaint, except as to the merits of the respective assignments of the plaintiff and Paris Bros. As to these, it is alleged that it had no knowledge or information sufficient to form a belief, and, further, that both plaintiff and defendants Paris Bros. were claiming the money due on the Frankovich account under their alleged assignments. It concluded with a prayer that an order be made allowing it to pay into court the amount of the account; that Frankovich and Paris Bros. be substituted as parties defendant in its stead; that the action be dismissed as to it; and that the plaintiff and Paris Bros. be required to submit their respective claims for determination. The order prayed for having been made, the company paid the amount of the account to the justice. Frankovich filed his answer, admitting that he had assigned the account to the plaintiff, and alleging that he had never after made any claim to the amount due thereon. Paris Bros., without objection and apparently without formal notice of the order, answered. After putting in issue the material allegations of the complaint, they allege, as the basis of their claim, that during the month of October, 1908, Frankovich being indebted to them to the amount of \$109, they instituted an action against him to recover the same; that they had caused an attachment to issue and to be levied upon the moneys due him from the company, to secure the payment of the judgment which it sought to recover in the cause; that judgment was duly given and made in said cause in their favor, and against Frank-

ovich for the sum of \$109 and costs; that they thereupon caused an execution to be issued thereon, and to be levied upon the moneys in the hands of the company, and that, by reason of these facts, the moneys in the hands of the court belonged to the defendants Paris Bros., and not to the plaintiff. A trial on the issue thus framed resulted in a judgment in favor of the Paris Bros. Thereupon the plaintiff appealed to the district court. His notice of appeal was not served on Frankovich. When the record was filed in the district court, counsel for Paris Bros. moved to dismiss the appeal on the ground that the court was without jurisdiction of the action or of the appeal. This motion was overruled. The demurrer of Paris Bros., interposed before the order of substitution was made, was submitted to the district court, but was overruled. The trial resulted in a judgment for plaintiff; defendants Paris Bros. declining to offer any evidence, but contenting themselves with their general objection to the jurisdiction of the court to entertain the appeal and try the case. These defendants have appealed to this court from the judgment and an order denying them a new trial.

The contention is made that it is manifest from the complaint filed in the justice's court that the relief sought by the plaintiff is equitable in its nature, and that, since under the Constitution (article 8, § 21) a justice's court has no equity jurisdiction, it had no power to proceed with the trial, hence the jurisdiction of the district court did not attach by virtue of the appeal, in that its jurisdiction on appeal is the same as that of the justice's court. It has frequently been held by this court that, if the justice's court has no jurisdiction of the subject-matter in a particular case, the district court on appeal acquires none, except to dismiss the appeal and render judgment for costs. *Gassert v. Bogk*, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240; *Shea v. Regan*, 29 Mont. 308, 74 Pac. 737; *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695. It does not necessarily follow, however, that the character of an action is to be determined by particular allegations incorporated in the complaint. In a given case a party may assume that he is entitled to equitable relief, and proceed to formulate his pleadings accordingly. It may be apparent therefrom that he is not entitled to the relief he seeks, yet he will not for this reason be turned out of court, if upon any theory of his pleading he is entitled to other relief. Under the Constitution (article 8, § 28) there is but one form of action in this state. Law and equity may be administered in the same case. A mistake as to the form in which the action should be brought, or as to the relief which may be demanded upon the statement of facts made, is of no moment. If equitable relief is demanded, but the facts do not warrant this character of relief, a complaint will be sustained for legal relief, if the facts

warrant it. *Donovan v. McDevitt*, 36 Mont. —, 92 Pac. 49. In this case the plaintiff made Frankovich and Paris Bros. parties. His counsel seem to have proceeded upon the assumption that by so doing he could secure the cancellation of the alleged forged assignment held by Paris Bros. In this they were in error. The court could not grant that character of relief. This contention was made by Paris Bros.' demurrer. The justice, in sustaining this, sustained the contention of defendants that he was without equitable jurisdiction. He retained the action as between the plaintiff and the company, as he should have done. This condition left a simple legal question of the liability of the defendant company to the plaintiff, which the justice had jurisdiction to determine. Code Civ. Proc. § 66. As between these parties the action was one arising on a contract for the payment of money. So far, then, there can be no doubt that the action of the justice was correct. A judgment rendered settling the question of the liability of the company to the plaintiff would have been valid.

Did the justice lose jurisdiction of the case by making the order of substitution? In other words, was the case converted into an equity case by this order? A solution of the question involved turns upon a correct answer to the inquiry: What is the scope and application of section 588 of the Code of Civil Procedure, which declares: "A defendant against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order. And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made, and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another." There is a conflict in the decisions as to the result of an order of substitution made under the first sentence of this section. Some of the courts, as in *New York* and *Missouri* (*Clark v. Mosher*, 107 N. Y. 118, 14 N. E. 96, 1 Am. St. Rep. 798; *Dinley*,

Adm'x, etc., v. McCullagh, 92 Hun, 454, 36 N. Y. Supp. 1007; Miller v. Metropolitan Life Ins. Co., 68 Mo. App. 19), hold that such a substitution converts a case which was at law into one of equitable cognizance. It seems to us, however, that these courts overlook the fact that the method of interpleader provided for in this portion of the section had its origin at the common law, and is cognizable by courts proceeding according to the common law. Originally in cases of joint bailment, when separate actions in detinue were brought by the bailors, the bailee might require them to interplead. If only one had brought suit and the other threatened to sue, the bailee might have the other brought in by garnishment. This might be done, also, by the finder of property under the same circumstances. 2 Story, Equity Jurisprudence, 801-803. In one or two other kinds of actions at law this legal interpleader might be resorted to. Our statute—and most of the states have a similar one—was modeled after the English statutes of 1 and 2 William IV (chapter 58, § 1) and 23 and 24 Victoria (chapter 126, § 12). The first included actions in debt, assumpsit, detinue, and trover. The latter was enacted to avoid the effect of the decision in *Crawshay v. Thornton*, 2 Mylne & Craig, 1 (English Rep. 40 Full Reprint, p. 541), in which it was held by Lord Cottenham that there can be no interpleader where the rights asserted by the claimants are independent, and have not a common origin (4 Pomeroy, Equity Jurisprudence, § 1324, notes). In the class of actions named, after substitution was made, the cause proceeded in the same court between the plaintiff and the substituted defendant, and the question of right was determined according to the course of the common law. *Hamlyn v. Betteley*, 6 Q. B. Div. 63. If a suit is not brought by either claimant, the person against whom the conflicting claims are made may bring his action in equity to compel them to interplead; for, having no cause of action against either of them, he cannot bring an action at law. The second sentence of the section provides for this situation. The last sentence embodies the provision of section 12 of the statute of Victoria, supra. Clearly the section, taken as a whole, is intended to cover the subject of interpleader, both at law and in equity; one purpose being, as declared by the statute of William, supra, to enable courts of law to grant relief in a summary way in many cases in which theretofore they could grant none. So, while there is a conflict in the decisions of the courts in the United States as to the question whether such cases as the one at bar become of equitable cognizance after substitution is made, there can be no doubt that on principle such is not the case. If the case be one which presents only legal issues, it is not changed in character merely by the substitution, but proceeds according to law, unless, as may be the case, some equitable

defense is interposed which invokes the equity powers of the court. This may be the case under the Code, because our courts of general jurisdiction administer both law and equity. It could not be so, however, as pointed out above, in case arising in a justice's court. In support of this view, we cite the following authorities: 4 Pomeroy's Equity Jurisprudence, § 1329; *Maginnis v. Schwab*, 24 Ohio St. 336; *Bank v. Beebe*, 62 Ohio St. 41, 58 N. E. 485; *McElroy v. Baer*, 9 Civ. Proc. R. (N. Y.) 133; *Satkofsky v. Jormadowsky*, 49 Misc. Rep. 624, 97 N. Y. Supp. 357; *Bixby v. Blair & Co.*, 56 Iowa, 416, 9 N. W. 318; *Hoyt v. Gouge*, 125 Iowa, 603, 101 N. W. 464; *Moore v. Ernst*, 54 Miss. 642, note to 1 Am. St. Rep. 800; *Phillips*, Code Pl. § 459.

The claims of the parties here present strictly legal issues. The plaintiff claims by assignment. The defendants Paris Bros. claim by virtue of their levy under their execution. The court was not called on to aid these defendants in any way to enforce the lien of their execution, but was required simply to determine whether they had a lien which was paramount to the title of the plaintiff under his assignment. If the plaintiff had not shown title under his assignment, these defendants would have been entitled to judgment for their costs, and they would have been entitled to nothing more if the suit had been brought in the district court, which has equitable jurisdiction, in the first instance. It is doubtful whether an action for equitable interpleader would have been entertained after this action was brought; for, as suggested in *Hoyt v. Gouge*, supra, the company had a remedy at law, which it properly invoked, and thus was not entitled to go into a court of equity, because this remedy was adequate. It is true that the formal affidavit was not filed. The application for substitution was made on the amended answer; but Paris Bros. became defendants without protest or objection. The irregularity in the mode of their substitution was thus waived.

It is said that the district court had no jurisdiction of the appeal because Frankovich was not served with the notice, as required by the statute. Code Civ. Proc. § 1760. An adverse party, within the meaning of this statute, is one "who has an interest in opposing the object sought to be accomplished by the appeal." *Power & Bro. v. Murphy*, 26 Mont. 389, 68 Pac. 411. In *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103, it is said: "Whether a party to the action is 'adverse' to the appellant must be determined by their position on the record and the averments in their pleadings, rather than from the manner in which they manifest their wishes at the trial, or from any presumption to be drawn from their relations to each other, or to the subject-matter of the action in matters outside of the action. * * * If his (the party's) position on the record makes him nominally adverse, he must be so considered for

the purpose of an appeal from the judgment thereon." While this is true, it does not follow that one who is neither a necessary nor a proper party to the action must be considered adverse merely because he appears as such upon the record. Having parted with his title to the fund by his assignment to the plaintiff, as he admits, Frankovich was not a necessary or proper party, because he had no interest in the action. His presence as a party, therefore, was no more appropriate than that of any other stranger. No relief was demanded against him, nor did he demand any. Nor could he have any interest in the result of the appeal. The justice might have dismissed the action as to him of his own motion. This would not have affected him in the least. Under such circumstances, he was not an adverse party, and it was not incumbent upon plaintiff to treat him as such. The motion to dismiss the appeal was properly denied.

It is said that the court should have sustained Paris Bros.' demurrer. In this contention there is no merit. The justice sustained the demurrer, and practically dismissed these defendants out of the case. This was upon the theory, presumably, that he would not entertain the action as brought and grant the relief demanded against them. It had accomplished its purpose. When the order of substitution was made, the objection was not urged that the complaint did not tender an issue upon the question of right between them and the plaintiff. The district court should have disregarded it, as it virtually did by overruling it.

The court overruled an objection to evidence of a conversation had between plaintiff and Frankovich at the time the assignment was made. The conversation related to the consideration for the assignment; such consideration being medical services rendered to Frankovich by the plaintiff, who is a physician. No question was made as to the sufficiency of the consideration to support the assignment, nor as to whether it was for value. The evidence was therefore not competent. But it is apparent that the ruling was not prejudicial. The appellants offered no evidence, but rested their case entirely upon their objection to the jurisdiction. Upon the evidence furnished by the writing alone, the court was justified in directing a verdict for plaintiff, as it did. The admission of the incompetent evidence could not have affected the judgment of the court in this matter.

The verdict returned under the direction of the court is as follows: "We, the jury in the above-entitled action, find as our verdict that the plaintiff A. E. Anderson is entitled to the sum of \$94 heretofore paid into court." It is said that there is no evidence that any sum had been paid into court, and hence no evidence to support this verdict. It is apparent, however, that the parties and the judge proceeded upon the assumption

that the company had paid to the justice the amount in controversy at the time it was dismissed from the case and was in the hands of the clerk at the time of the trial. The fact that it had been paid to the justice is recited in the answer of Paris Bros. In any event, we must assume that the fact that it had been paid to the clerk was known to the court, or, if not actually known, was ascertained before it adjudged that the sum belonged to the plaintiff. There is no merit in this contention.

The judgment entered declares the plaintiff entitled to recover of Paris Bros. the sum of \$94 in the hands of the clerk, with interest and costs. It is not correct in awarding any recovery as against the appellants, except for costs. It would be manifestly wrong that appellants should be compelled to pay interest for the time during which the sum in controversy was in the hands of the clerk. The judgment should simply have awarded the sum in dispute to the plaintiff, and adjudged appellants to pay the costs.

The cause is remanded, with directions to the district court to modify the judgment as herein indicated. When so modified it will stand affirmed; the respondent to recover his costs.

Modified and affirmed.

HOLLOWAY and SMITH, JJ., concur.

OKLAHOMA CITY v. OKLAHOMA RY. CO. (Supreme Court of Oklahoma. Dec. 18, 1907.)

1. MANDAMUS — PERFORMANCE OF PUBLIC SERVICE.

"When there is a grant and acceptance of a public franchise which involves the performance of a certain service, the person or corporation accepting such franchise can by mandamus be compelled to perform such service."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 268.]

2. CARRIERS — CONTROL AND REGULATION—PREFERENCES AND DISCRIMINATIONS—PASSES—HALF-FARE TICKETS.

The provisions of section 13, art. 9, of the Constitution, do not prohibit a municipal corporation operating a street railway from furnishing transportation free to its policemen and firemen and United States mail carriers, and half-rate tickets to school children, and free transportation to children under a certain age whilst traveling with a parent or guardian.

3. SAME.

Municipalities are not prohibited by the provisions of section 13, art. 9, of the Constitution, from granting franchises for street railways with conditions contained therein for the carrying of policemen, firemen, United States mail carriers, and children under a certain age free, and for the furnishing of transportation to school children at a reduced fare, and when accepted by the grantee in the franchise, are valid.

4. OFFICERS—QUALIFICATION—OATH.

Policemen, firemen, and United States mail carriers are not officers contemplated or included by section 1, art. 15, of the Constitution.

5. CARRIERS — CONTROL AND REGULATION — PREFERENCES AND REGULATIONS — HALF-FARE TICKETS.

Street railways undertaking and contracting with municipalities by provisions contained

in franchises granted by such municipalities, to carry policemen, firemen, United States mail carriers, and children under a certain age free, and also to carry school children at half the regular rate, are not absolved therefrom by section 13, art. 9, of the Constitution.

(Syllabus by the Court.)

Application by the city of Oklahoma City for writ of mandamus to the Oklahoma Railway Company. Writ granted.

The relator is a municipal corporation and a city of the first class under the laws of the state of Oklahoma, and has been since the 1st day of January, A. D. 1902. On the 30th day of January, 1902, the mayor and council of said city duly passed an ordinance authorizing the Metropolitan Street Railway Company, among other things, to build and construct a system of electric street railways over and along the streets of said city, defining the conditions of the exercise of the authority therein conferred to construct such street railway system, and regulating the operation and maintenance thereof, and imposing certain contractual obligations on said company. Thereafter, on the 8th day of February, 1902, the Metropolitan Street Railway company, in accordance with the requirements of said ordinance, filed with the city clerk of said city its proper and written acceptance of the terms and conditions thereof. Thereafter during said year, the Metropolitan Street Railway Company constructed a system of railways in said city, and placed the same in operation, and on the 15th day of June, 1904, said railway company sold, conveyed, and assigned its said railway system, together with the franchise rights and privileges existing in its favor by virtue of said ordinance, to the Oklahoma Railway Company, the respondent herein, and said respondent, in order to procure the assent of the mayor and councilmen of said city to said transfer, filed the said transfer with the mayor and councilmen of said city, together with its written acceptance and assumption of all the duties and burdens imposed therein. Thereafter, on the 27th day of June, 1904, an ordinance was duly passed ratifying and confirming said transfer to said respondent, and authorized the extension and maintenance of said system of street railways on the streets and public thoroughfares of said city, said respondent thereby becoming subrogated to all the powers and rights in said original ordinance of the Metropolitan Railway Company, and thereby became bound to the performance of all the duties therein imposed upon said railway company. As a part of the consideration for the granting of said privileges by virtue of said ordinance and for the use of the streets and public thoroughfares in said city by said railway company in the transportation of passengers from one point to another, it was provided in section 7 of said ordinance as follows: "The charges for transporting passengers to be exacted by said railway company

shall not exceed the sum of five cents for one continuous passage over the said company's lines from points within the city limits to any other point in such city; such limit in price shall not prevent the exaction of any additional fare for return journeys, nor shall transfer slips be good for stop-over privileges. Tickets for the use of school children shall be furnished good for one continuous passage, in quantities not less than twenty rides at the rate of two and one half cents each, under any reasonable regulation which the company may impose to prevent the abuse of such privilege or the use of such tickets by others than children under fifteen years of age in actual attendance on the public schools of said city. United States mail carriers, policemen, and members of the fire department, while in the discharge of their duties shall be carried free." Said respondent has refused, and does refuse, to issue and furnish tickets for the use of school children for one continuous passage in quantities of not less than 20 rides at the rate of 2½ cents each, and has further refused to carry United States mail carriers, policemen, and members of the fire department when in the discharge of their duties, and children under five years of age when accompanied by parents or guardians, free; but is collecting of and from all children, mail carriers, policemen, and members of the fire department, and such children under the age of five years the full authorized fare under the terms of said franchise, five cents for each passenger carried, in violation of the terms of said franchise agreement. It is further alleged by the plaintiff that the transportation of its policemen and firemen while in the discharge of their official duties by the said railway company is a valuable undertaking in behalf of said city, and that, if the said provision is not enforced against said railway company, it will work great hardship in requiring it to pay a large amount of money for the passage of its policemen and firemen over said railway while in the discharge of their several duties, to the great damage and injury of said city. Relator further alleges and avers that said city has paid, and is paying, said respondent to transport said persons and for said reduced fares as a part of the rental or consideration of the use of the streets for said street railway system, and it was so understood and agreed that said railway company should render said service as a part of the consideration for the use of said streets and the privileges granted under said franchise, and that during the five years the said street railway company had been operating in said city numerous schoolhouses have been erected with reference to the line and routes of said respondent's railway system to promote the convenience of children of school age attending schools of said city, and that inhabitants thereof have built and located their homes and residences with reference to such routes, and with reference to

the cheap and convenient line for their children to reach the schools of said city to which they might be assigned, and that the discontinuance of the sale of said school tickets will work a great hardship to the said relator and its inhabitants. The respondent voluntarily entered its appearance, without the issuance of an alternative writ, and confessed the facts stated in said petition, but alleged as a matter of law that the relief demanded should be denied under the provisions of section 13, art. 9, of the Constitution of the state of Oklahoma, and submitted this case under such issue of law.

T. G. Chambers and John Embry, U. S. Atty., for relator. John W. Shartel, for respondent.

WILLIAMS, C. J. (after stating the facts as above). "When there is a grant and acceptance of a public franchise which involves the performance of a certain service, the person or corporation accepting such franchise can by mandamus be compelled to perform such service." Merrill on Mandamus, § 27. Section 13 of article 9 of the Constitution of the state of Oklahoma reads as follows: "No railroad or transportation company, or transmission company shall, directly or indirectly, issue or give any free frank or free ticket, free pass or other free transportation, for any use, within this state, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries for railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents, employed in such transportation; to inmates of the National Homes, or State Homes for disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge, and boards of managers of such Homes; to members of volunteer fire departments and their equipage while traveling as such; to necessary care takers of live stock, poultry, and fruit; to employees of sleeping cars, of express cars, and to linemen of telephone and telegraph companies; to railway mail service employees, postoffice inspectors, custom inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the railroad company or transportation company is interested, persons injured in wrecks, and physicians and nurses attending such persons: Provided, that this provision shall not be construed to prohibit the interchange of passes for the officers, agents and employees of common carriers and their families; nor to prohibit any common carrier from car-

rying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; nor to prevent them from transporting, free of charge, to their places of employment persons entering their service, and the interchange of passes to that end; and any railroad, transportation, or transmission company or any person, other than the persons excepted in this provision, who grants or uses any such free frank, free ticket, free pass, or free transportation within this state, shall be deemed guilty of a crime, and the Legislature shall provide proper penalties for the violation of any provision of this section by the railroad or transportation or transmission company, or by any individual: Provided, that nothing herein shall prevent the Legislature from extending these provisions so as to exclude such free transportation or franks from other persons." The only question that is necessary to be determined in this case is whether or not said section absolves the respondent from its obligation and undertaking to the relator to furnish the tickets to the school children under the terms named, and to carry the policemen, firemen, mail carriers, and certain children free, as stipulated in said franchise. If it be determined that said section does not affect said obligations and undertakings in said franchise, then the peremptory writ should issue.

Section 6 of article 18 of said Constitution reads as follows: "Every municipal corporation within this state shall have the right to engage in any business or enterprise which may be engaged in by a person, firm or corporation by virtue of a franchise from said corporation." It could not be successfully contended that, if the relator were directly engaged in the business of operating said street railway line, it could not carry said school children at the rates and under the terms designated in said franchise, or its policemen and firemen, the mail carriers, and children under five years of age when accompanied by a parent or guardian, without charge, on account of the provisions of section 13, art. 9, supra; for the term "railroad" or "transportation company" or "transmission company," as used in said section, would not include the relator. Section 1 of article 9 of the Constitution reads as follows: "As used in this article the term 'corporation' or 'company' shall include all associations and joint stock companies having any power or privileges, not possessed by individuals, and exclude all municipal corporations and public institutions owned or controlled by the state." Now, if the relator, being authorized to operate a street railway system in said city, would be permitted under the provisions of this Constitution to furnish tickets to the school children under the terms and prices hereinbefore named, and to carry its policemen and firemen, the mail carriers, and certain children free, then, why would not a contract entered into to that end by the

relator be valid? The respondent herein is not furnishing "free transportation." Transportation and reduced rates to a certain class is in this case furnished not by the respondent. This is done by the city, the relator herein, which it has a right to do under the law. In *Re Grimes v. Minneapolis, Lyndale & Minnetonka Railway Company*, 37 Minn. 67, 33 N. W. 34, the court said: "Grimes and wife conveyed to defendant certain land for the purposes of its railway, and in consideration of the conveyance defendant agreed to 'carry' said Grimes and wife, and any of their children, 'free of charge,' in the passenger cars run upon its road. Plaintiff is one of the children mentioned. Held, that the effect of defendant's agreement is to entitle the plaintiff to be carried free of charge. The fact that his father purchased and paid for this right of free carriage is not important. The plaintiff's right is as complete as if he had purchased and paid for it himself, and, as a logical consequence, its infringement, whether tortious or otherwise, is a wrong to him for which he has his action." In *re Erie & Pittsburgh Railway Company v. Douthet*, 88 Pa. 245, 32 Am. Rep. 45: "The agreement of the defendants was to give the plaintiff a pass over their railroad for himself and his family for his lifetime as the consideration of his release of the right of way over his land. The pass was given for a while, and then refused, and this action was to recover damages for their breach of contract." The court held in the above case that the plaintiff was entitled to recover. In *Re Curry v. Kansas & Colorado Pacific Company*, 58 Kan. 18, 48 Pac. 583, the court said: "The company cannot excuse itself upon the score of the interstate commerce act. That act forbids the gratuitous issuance of railway passes, not their issuance for a moneyed or other valuable consideration. The transportation in question was paid for by a conveyance of land; and does not, therefore, come within the prohibitive terms of the law behind which the company endeavors to shelter itself." In *Re Dempsey v. New York Central & Hudson River Railway Company*, 146 N. Y. 294, 40 N. E. 868, the court said: "In considering this question, it must be conceded that, unless the contractual relations of the parties distinguished this case from that of the ordinary public officer, the issue of the annual pass would be illegal. This court has very recently held, in the case of a notary public, that, while it was not quite obvious that he was not in that class of public officers who should be prohibited from accepting privileges or favors from corporations, yet, as the language of the Constitution was plain and comprehensive the courts were bound to strictly enforce its provisions. *People v. Bathbone*, 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384. What, then, are the precise provisions of the Constitution which are claimed to be violated by the strict performance of this contract which was in force for

nearly three years before the Constitution went into effect? 'No public officer or person elected or appointed to a public office under the laws of this state shall directly or indirectly ask, demand, accept, receive, or consent to receive, for his own use or benefit * * * any free pass * * * from any corporation, or make use of the same for himself or in conjunction with another.' Const. art. 13, § 5. It will be observed that a public officer is forbidden to receive and use a 'free pass'; it being the obvious intention of the Constitution to prohibit the public officers of the state from receiving from corporations privileges or favors, in other words gifts, that might improperly influence them in the discharge of their official duties. So, if this constitutional provision applies to the plaintiff as a public officer, it is due to the fact that he is accepting a 'free pass,' a gift from the defendant. This court more than 30 years ago held that the holder of a pass who had compensated the corporation therefor could not be regarded in any just sense as a gratuitous passenger. *Smith v. N. Y. C. R. R. Co.*, 24 N. Y. 227." It was the obvious intention of the Constitution, not only to prohibit public officers of the state from receiving from corporations privileges or favors that might improperly influence them in the discharge of their official duties, but also that the general public should have equal facilities and conveniences of transportation without discrimination in the charges therefor. Section 1 of article 15 of the Constitution reads as follows: "Senators and representatives, and all judicial, state and county officers, shall, before entering upon the duties of their respective offices, take and subscribe to the following oath or affirmation: 'I, ———, do solemnly swear (or affirm) that I will support, obey, and defend the Constitution of the United States, and the Constitution of the state of Oklahoma, and will discharge the duties of my office with fidelity; that I have not paid, or contributed, either directly or indirectly, any money or other valuable thing, to procure my nomination or election (or appointment), except for necessary and proper expenses expressly authorized by law; that I have not knowingly violated any election law of the state, or procured it to be done by others in my behalf; that I will not, knowingly, receive, directly or indirectly, any money or other valuable thing, for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law, and I further swear (or affirm) that I will not receive, use, or travel upon any free pass or on free transportation during my term of office.'" Police-men, firemen, and mail carriers are evidently not officers contemplated by said section. Policemen and firemen are not required under the provisions of this Constitution to take this form of an oath; and hence it cannot be said that it was, or is now, against public policy for the relator, the municipality,

to contract for the "free passage" of its policemen and firemen and the mail carriers. Nor is it against public policy for said relator to contract for a special rate for school children whilst traveling to and from school; for it is undoubtedly the policy of this state to support and maintain public schools. And so an undertaking for reduced fare to the end that the entire public may have the benefit of it for children whilst traveling to and from school is not violative of the spirit or the intention of section 13 of article 9 of the Constitution. Further, it is good policy for the United States mail to be delivered free, being approved not only by the federal, but also by the local, government, and the relator acting with a view of promoting free delivery did not contract against public policy, nor does the Constitution either in letter or spirit prohibit such undertaking which would neither reasonably tend to improperly influence such officers nor discriminate against the public; for the preservation of the peace, the attendance of children upon the public schools, and the free delivery of the United States mails are all conducive to the public welfare. The reduced transportation for the children and the free transportation for the policemen and firemen, the children of certain age, and mail carriers does not come from the respondent railway company, but from the city. It is the result of the city's act just as much so as if it had by bonded undertaking raised the money and paid a moneyed consideration to the respondent corporation, as a result of which said corporation had undertaken and bound itself to carry the school children under the terms named in that franchise, and to carry the policemen, firemen, mail carriers, and certain children of a designated age free of charge; for the franchise was an undertaking granting privileges of great value.

We are of the opinion that this contract which existed between Oklahoma City, the relator herein, and the Oklahoma Railway Company, the respondent herein, was not only a valid contract prior to the adoption of this Constitution, but is also now a valid contract, and not in conflict with section 13 of article 9 of said Constitution, and that the former is entitled to the relief prayed for. Let the peremptory writ of mandamus issue.

TURNER, KANE, DUNN, and HAYES, JJ., concur.

STATE v. BROWN.

(Supreme Court of Utah. Dec. 17, 1907.)

1. CORPORATIONS—PROOF OF CORPORATE EXISTENCE.

Under Rev. St. 1898, § 4859, providing that in a criminal case the existence of a corporation need not be shown by the articles or act of incorporation, but may be proved by general reputation or by the statutes of the state by which the corporation was created, testimony that a company was a corporation organized un-

der the laws of a certain state is incompetent; this not being proof by reputation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 110.]

2. FORGERY—UTTERING FORGED INSTRUMENT—INFORMATION—MATERIAL ALLEGATION.

The allegation that the company was a corporation, in an information charging that defendant knowing the instrument to be forged, and with intent to damage a certain company, a corporation organized under certain laws, uttered and passed as true to a bank a writing purporting to be a check, is a material allegation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 86.]

3. WORDS AND PHRASES—"REPUTATION."

"Reputation" is what is generally said of a person by the people of the community where he is known.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6118-6120.]

Appeal from District Court, Salt Lake County; Geo. C. Armstrong, Judge.

Arthur Brown appeals from a conviction. Reversed, and new trial granted.

Powers & Marloneaux, for appellant. M. A. Breeden, Atty. Gen., and F. C. Loofbour-
ow, Dist. Atty., for the State.

MCCARTY, C. J. The defendant was tried and convicted for the crime of forgery. The information, so far as material here, alleges: "That the said Arthur Brown, at the county of Salt Lake, in the state of Utah, on the 21st day of May, A. D. 1906, did then and there willfully, unlawfully, feloniously, and knowing the same to be false, forged and counterfeited, and with intent to prejudice, damage, and defraud the Utah Apex Mining Company, a corporation duly organized and existing under the laws of the state of Maine, utter, publish, and pass as true and genuine to and upon the Commercial National Bank a certain false and counterfeited writing or paper purporting to be a check, commonly called a 'bank check,' the tenor whereof is as follows [then follows the description of the check]." To prove the existence of the corporation mentioned in the information the district attorney, over the objections made by defendant, was permitted to ask W. C. Orem, a witness for the state, and the witness was allowed to answer the following questions: "Q. Mr. Orem, what, if any, mining companies are you interested in? A. The Utah Apex Mining Company * * * and others. Q. I will ask you what sort of a company the Utah Apex Mining Company is? A. It is a corporation organized under the laws of Maine. Q. I will ask you what, if any, business that corporation carries on within this state? A. The business of mining." Other questions were asked by the district attorney, and answered by the witness, in which the corporate existence of the company was assumed, but no testimony such as the statute requires to prove corporate existence in cases of this kind was offered at the trial. In fact, the only testimony in the record that tends in any degree

to show that the company in question was a corporation is that given by the witness Orem, and timely objections were made to his testimony on this point, on the ground that it was incompetent, immaterial, and irrelevant. The action of the court in overruling the objections is assigned as error.

Section 4859, Rev. St. 1898, provides that: "If upon a trial or proceeding in a criminal case, the existence, constitution or powers of any corporation shall become material, or be in any way drawn in question, it is not necessary to produce a certified copy of the articles or acts of incorporation, but the same may be proved by general reputation, or by the printed statutes of the state or government or country by which such corporation was created." Defendant, appellant here, contends that, as the statute has pointed out but two ways in which a corporate existence in criminal cases may be proved, all other ways or methods of proving this fact are excluded; while, on the other hand, counsel for the state contend that, as the existence of the corporation was material only as a matter of description, the evidence under consideration was sufficient. But matters of description, when essential, must be proved by competent evidence, the same as every other material issue in a criminal case. Now, the statute provides that the existence of a corporation in a case like the one at bar may be shown in two ways: First, by the charter or act of incorporation; and, second, by general reputation. In this case the state attempted to bring itself within the foregoing provisions of the statute, and to prove the corporate existence by reputation, but failed to do so. Reputation is what is generally said of a person by the people of the community where he is known. And, when the subject of inquiry is a corporation, the same rule governs that controls in the introduction of evidence respecting the reputation of a natural person. Therefore it was incumbent upon the state to prove that the company in question was generally reputed to be a corporation in the community where it is known. In other words, before the defendant could be legally convicted, it was necessary to prove the corporate existence of the company either by its charter or act of incorporation or by evidence showing that the people in the community where the company was known in speaking of it generally referred to it as a corporation. But, as we have stated, no evidence of this character was produced at the trial. The testimony given by W. C. Orem on this point in no way tended to prove the corporation by general reputation, and was therefore incompetent, and it was error for the court to admit it.

At the conclusion of the introduction of evidence in the case, defendant requested the court to instruct the jury to return a verdict of not guilty. The refusal of the court to instruct the jury as requested is also as-

signed as error. The allegation that the Utah Apex Mining Company was a corporation was one of the material allegations of the information, and, the state having failed to produce any competent evidence whatever in support of this allegation, the defendant was entitled to an instruction from the court directing a verdict of not guilty, and the failure of the court to so instruct the jury was error.

The judgment must therefore be reversed and a new trial granted. It is so ordered.

STRAUP and FRICK, JJ., concur.

NEPHI PLASTER & MFG. CO. v. JUAB COUNTY.

(Supreme Court of Utah. Dec. 4, 1907.)

1. WORDS AND PHRASES—"GYPSUM."

Gypsum is a mineral, and constitutes a mineral deposit under the mineral laws.

2. STATUTES — CONSTRUCTION — MEANING OF WORDS.

In determining the meaning of words used in a statute or Constitution, the construction placed upon them by the courts must prevail over the popular conception of the terms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 266-280.]

3. WORDS AND PHRASES—"MINES"—"MINERALS."

The term "mines" is not limited to mere subterranean excavations or workings, nor is "minerals" limited to the metals or metalliferous deposits, whether contained in veins that have well-defined walls, or in beds or deposits that are irregular and are found at or near the surface, or otherwise.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4511-4512; 4513-4515; vol. 8, p. 7722.]

4. CONSTITUTIONAL LAW — CONSTRUCTION OF PROVISIONS—EJUSDEM GENERIS—TAXATION.

While, under the doctrine of ejusdem generis, when general words in a Constitution or statute follow particular words, the things contained within the general words must be of the same class or kind as those particularly mentioned, and general words will not be held to include anything which is of a class superior to the class mentioned in the particular words, the doctrine is only a rule of construction to aid in arriving at the intent of the lawmaker, and cannot be applied to override the fundamental principles that all words in a law must, if possible, be given their ordinary meaning, and that the intention of the lawmaker must be gathered from the language employed in the light of the context and of the subject-matter to which it is applied, and that when the intention is clear it must prevail, except that courts cannot assume that the lawmaker really intended to enact either absurd or unjust laws.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 9-11.]

5. TAXATION — PROPERTY SUBJECT TO TAX — CONSTITUTIONAL PROVISIONS — CONSTRUCTION—MINES AND PROCEEDS THEREOF.

Const. art. 13, § 4, provides that all mines and mining claims, etc., containing or bearing gold, silver, copper, lead, coal, or other valuable mineral deposits, shall be taxed, etc., and the net annual proceeds of all mines and mining claims shall be taxed, etc. At the time the Constitution was framed the specified metals were the only ones mined in large quantities in the territory, and coal, with the exception of lime

and common rock, was the only nonmetallic product mined in quantity sufficient to justify the method of taxation proposed. *Held*, that the classification was not intended as a limitation, but an enumeration of substances then produced in quantity sufficient to warrant the method of taxation imposed, and, under the exception to the rule of ejusdem generis that where the particular things enumerated are complete so that there remain no others of like kind, then the things that fall within the general words must be assumed to be of a different kind and not ejusdem generis with those enumerated, the phrase "other valuable mineral deposits" embraces all mineral deposits, including a deposit of gypsum, and the net annual profits from the sale of products manufactured therefrom are taxable under the section.

Appeal from District Court, Juab County; Joshua Greenwood, Judge.

Action by the Nephi Plaster & Manufacturing Company against Juab county. Judgment for plaintiff, and defendant appeals. Reversed, and remanded with directions.

M. A. Breeden, W. A. C. Bryan, T. L. Foote, and Henry Adams, for appellant. Van Cott, Allison & Riter, for respondent.

FRICK, J. This action is based on sections 2684, 2685, Rev. St. 1898, which provide for the recovery of taxes paid by a taxpayer under protest in case such taxes are unlawfully imposed. The action was commenced by the respondent to recover back the sum of \$205 paid as taxes to the appellant, Juab county, under protest for the year 1904, and which, the respondent contends, were unlawfully imposed. It appears from the record that the respondent was then the owner of a placer mining claim patented, on and in which are contained large and valuable deposits of gypsum, which deposits are, and for a number of years, by means of the necessary buildings, machinery, and appliances erected on said mining claim, have been, manufactured or converted into hard wall plaster, dental plaster, finishing plaster, fertilizers, and other manufactured products, all of which were sold on the market. The tax involved represents the ordinary rate of taxes imposed on the net proceeds or profits derived by the respondent from the sale of the products aforesaid, and were imposed by virtue of section 4 of article 13 of the Constitution of this state, which reads as follows:

"Sec. 4. (Taxation of Mines.) All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes; in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purposes, as provided by law; and all the machinery used in mining, and all property and surface im-

provements upon or appurtenant to mines and mining claims, which have a value separate and independent of such mines or mining claims, and the net annual proceeds of all mines and mining claims, shall be taxed as provided by law."

The Constitution became effective January 4, 1896, and in April following the first Legislature enacted a verbatim copy of the section above quoted as section 3 of what was termed the "Revenue Act" (Laws 1896, p. 424, c. 129), except that instead of ending the section with the words, "shall be taxed as provided by law," the section ended with the words, "shall be taxed as other personal property." The act also provided the manner in which the net proceeds of mines and mining claims should be ascertained for assessment and taxation. Section 3 of the act of 1896 was carried forward into the Revised Statutes of 1898 and re-enacted as section 2504, with the exception of the four words, "as provided by law," which were omitted from the body of the section. In 1903 (Laws 1903, p. 76, c. 91) the section was amended by adding thereto, after the words "mining claims," the following italicized words: "*And also the net annual proceeds of coke made from coal or bullion or matte made from ore not taxed, which is deemed a product of the mines, shall be taxed as other personal property.*" Why this last amendment was added is not material now. From the foregoing it is manifest that the law in effect has undergone no material change since its first enactment, and is, in its scope and effect, as it was when first adopted. At all events the scope of the section must be limited in its effect to the terms used in the Constitution. With the intention of so limiting it, the district court entered its conclusion of law to the effect that the profits derived from the product manufactured from the gypsum taken from respondent's mining claim was not the subject of taxation as the net proceeds of mines and mining claims, and entered a judgment in favor of the respondent for the sum of \$205, the amount of taxes paid by it as net proceeds, from which judgment Juab county appeals.

While there are numerous errors assigned, the whole case may be determined upon the one assignment, namely, that the court erred in its conclusion of law and in rendering a judgment for the respondent.

The appellant contends that gypsum is a mineral and falls within the term, "other valuable mineral deposits," referred to in the Constitution, and that it, or the product thereof, also falls within the clause, "and the net annual proceeds of all mines and mining claims," contained in the section quoted. The respondent concedes that the mining claim on and in which the deposit of gypsum is found and from which it is taken was located and patented under the mineral laws of the United States and of this state; that the net proceeds or profits amounted to a sum which would produce the sum of \$205 under the le-

gal rate of taxation, if such proceeds constitute the net proceeds of mines within the purview of the constitutional provision; and that gypsum is a mineral and constitutes a valuable mineral deposit. That gypsum is a mineral, and constitutes a mineral deposit under the mineral laws, cannot well be disputed. Lexicographers, geologists, and laymen all agree that it is a mineral, and such is also the holding of the officials of the Interior Department of the government of the United States, as will be seen from the following decisions: *Phifer v. Heaton*, 27 Land Dec. Dep. Int. 57; *McQuiddy v. State*, 29 Land Dec. Dep. Int. 181; *Pacific Coast Marble Co. v. N. Pac. Ry. Co.*, 25 Land Dec. Dep. Int. 233; *1 Lindley on Mines*, § 97. The only question for solution, therefore, is, does the profit realized from the product manufactured from the gypsum taken from respondent's mining claim constitute "net proceeds" under the clause in the Constitution that all net proceeds of "all mines and mining claims" shall be taxed, as the term is used in the Constitution? If it does, the court erred; if it does not fall within that clause, then gypsum, or the manufactured product therefrom, must be taxed generally as other manufactured products, and not under this section.

Respondent's counsel contend that the gypsum deposit, although a mineral deposit, does not come within the mineral deposits mentioned in the Constitution, and that it does not come within the term "mine" or "mines" as the term is there used. We might dispose of this contention by simply saying that it does clearly come within the term "mining claims," and is a mineral deposit, and therefore falls within the terms in that regard. In view of the contention, however, that the products of respondent's mining claim should not be taxed in this form, because they are not the net proceeds of a mine, as that term is popularly understood, we have examined the authorities, and we think that the workings on respondent's mining claim, under the decisions, also fall within the term "mine," and that minerals, *prima facie* at least, are not confined to the metals.

The question, however, is, what is to be deemed as being within the popular conception of a mine? Is it to be confined to the understanding that a farmer, stock raiser, or ordinary merchant has of the term. Or to what those who work in or come in contact with mines and mining rights generally and popularly understand it to be? Or is it to be understood, when found in a statute or Constitution, what the courts generally have held it to mean? In view that the decisions of courts are but the reflection of the common understanding with respect to particular things and the terms used in any industry, business, or calling, and are thus simply reduced to legal terms, we think that if the courts have construed and applied what is meant by the terms "mine" and "mines," then this meaning must control, and especially so

when the term is used in some statute or Constitution. This must be so for the simple reason that the term will then have acquired a legal meaning, which, unless the contrary clearly appears from the context, must be deemed to be the meaning intended to be applied to it in the law in which it is found.

In *1 Lindley on Mines*, §§ 87 to 97 the author reviews the authorities and discusses the meaning of mines and minerals, and there points out that anciently the term "mine" or "mining" meant subterranean excavation. But in section 89 the author points out that the term "mine" has received an enlarged meaning in later times. He says: "These primary significations were soon enlarged, so that in time the word 'mine' was construed to mean, also, the place where minerals were found, and soon came to be used as an equivalent of 'vein,' 'seam,' 'lode,' or to denote an aggregation of veins, and, under certain circumstances, to include *quarries and minerals obtained by open workings*." (Italics ours.) In section 91, in his work on Mines, Mr. Lindley states some general rules of interpretation as applied in England and Scotland, the fourth of which reads as follows: "Where the term 'mines' and 'minerals' are both used in the same deed or statute, the word 'minerals' is not, on that account, to suffer limitation of its meaning." In referring to the authorities upon this subject, we cannot, for lack of space, give a statement of the cases, but must confine ourselves strictly to the point decided in them.

Turning now to the decisions of this country, we find that the term "mines" is not confined to subterranean excavations or workings, nor is the term "minerals" confined to metalliferous ores. In *Hartwell v. Camman*, 10 N. J. Eq. 128, 64 Am. Dec. 448, 3 Morr. Min. Rep. 229, the chancellor of the New Jersey Court of Chancery, in construing a deed in which the granting clause read "all mines, minerals, opened, or to be opened," after some discussion, at page 136 of 10 N. J. Eq. (64 Am. Dec. 448), said: "Nor can I see any more propriety in confining the meaning of the terms used to any one of the subordinate divisions into which the mineral kingdom has been subdivided by chemists either earthy or metallic, saline, or bituminous. * * * I do not think the term should be confined to the metals or metallic ores. I cannot doubt if a stratum of salt, or even a bed of coal, had been found, they would have passed under the grant." In *Griffin v. Fellows*, *81 Pa. 114, 8 Morr. Min. Rep. 657, it was held that the term "minerals" is not to be limited to metalliferous ores. *Gill v. Weston*, 110 Pa. 312, 1 Atl. 921, is a case where the question arose under an act referring to mining lands passed before petroleum was discovered. The court held that petroleum was a mineral and was governed by the mining laws as such, although unknown when the laws were passed. The case of *Murray v. Allred*, 100 Tenn. 100, 43 S. W. 355, 39 L.

R. A. 249, 66 Am. St. Rep. 740, is a well-considered case in which a great number of authorities upon that subject are cited and reviewed, and the court concludes that under the term "minerals" all the known minerals are included and not only such as contain metals. It is accordingly held that petroleum passed under the grant of "minerals." In *Detlor v. Holland*, 57 Ohio St. 502, 49 N. E. 690, 40 L. R. A. 206, the Supreme Court of Ohio concedes and so holds that, as a general rule, under a grant of "all the coal of every variety and all the iron ore or fire clay and other valuable mineral," all minerals are included. In that case, however, in view of special circumstances, the court held that the petroleum did not pass under the grant. In *Armstrong v. Granite Co.*, 147 N. Y., at page 505, 42 N. E., at page 189 (49 Am. St. Rep. 683), the Court of Appeals, in construing the meaning of "all the minerals and ores," after a discussion of the subject, and conceding that under the term "minerals," metals are generally intended, the court uses the following language: "But it would be an unwarranted limitation of such a grant or reservation to exclude from its operation beds of coal or other nonmetallic mineral deposits of commercial value, or to confine it to such minerals as were known or supposed to be on the premises at the time." In *Brady v. Brady*, 31 Misc. Rep. 411, 65 N. Y. Supp. 621, it was held that a reservation in a deed of "all mines and minerals" included lime rock. To the same effect is *Phelps v. Church, etc.*, 115 Fed. 882, 53 C. C. A. 407. In *Northern Pac. Ry. v. Soderberg* (C. C.) 99 Fed. 506, it is held that the term "mineral," in referring to mineral lands under the mining laws of this country, is not synonymous with "metals." This holding was affirmed on appeal in 104 Fed. 425, 43 C. C. A. 620. In a note to the case of *Armstrong v. Granite Co.*, reported in 49 Am. St. Rep., at page 691, the reporter, in giving his deductions from the decided cases, says: "The term 'minerals' in a grant includes *prima facie* every substance that can be got underneath the surface of the earth for profit. If the terms 'mines and minerals' are used in a grant or exception, the word 'mines' will not, *prima facie*, be held to be the governing word, so as to restrict the meaning which would otherwise be attached to the word 'minerals.'"

From an examination of a large number of cases we are convinced that the foregoing is a fair deduction of the law upon the subject as declared by the modern decisions both of England and this country. From the foregoing, it thus seems clear to us that where we find the terms "mines and minerals" used in grants or in reservations, in instruments of conveyance, in statutes or Constitutions, under the modern construction, the former is not limited to mere subterranean excavations or workings, nor is the latter limited to the metals or metalliferous deposits, whether contained in veins that have well-defined

walls or in beds or deposits that are irregular and are found at or near the surface or otherwise. If, therefore, there are no other legal obstacles in the way, we would be forced to the conclusion that respondent's gypsum deposits are included within the term "other valuable mineral deposits," and would thus fall within the requirement of the Constitution that respondent be taxed on the net proceeds derived therefrom. It is, however, strongly urged by counsel for respondent that the clause in the Constitution, namely, "or other valuable mineral deposits," falls within the rule of construction that when general words follow particular words the things mentioned generally must be confined to the matters incorporated in the particular words. That is to say, all things that may be contained within the general words must be *ejusdem generis*; that is, of the same class or kind of those particularly mentioned. In addition to this general rule, there is also a further restriction upon general words which follow particulars by which the general words will not be held to include anything which is of a class superior to the class mentioned in the particular words. This rule or principle of construction is well established and is of frequent application, especially in penal or criminal statutes, but is not confined to that class. The doctrine of *ejusdem generis* is, however, only a rule of construction, and, like all rules, is resorted to only as an aid to the courts in arriving at the true intent of the lawmaker. These rules must not be applied so as to make them masters, since they are designed as servants merely. No rules of construction, however, can be permitted to override the fundamental principle underlying all rules which requires that all words contained within a statute must, if possible, be given their ordinary meaning, and that the intention of the lawmaker must be gathered from the language employed in the light of the context and of the subject-matter to which it is applied, and when such intention is clear it must prevail notwithstanding some rules to the contrary. By this we do not mean that where the ordinary meaning of the language employed would lead to an absurdity, or inflict great injustice, the ordinary meaning of the words should not be restricted or expanded, if necessary, to avoid an absurdity or an injustice; but this is only another way of stating that courts cannot assume that the lawmaker really intended to enact either absurd or unjust laws. Keeping this principle in mind, what was the intention of the framers of the Constitution in adopting section 4 of article 13 above quoted? When we have once ascertained this intention, it is our duty to declare it whether we deem it wise or unwise, or well or ill adapted to any matters therein contained. Is the clause, "or other valuable mineral deposits," to be restricted to deposits "containing or bearing gold, silver, copper, lead, coal," these being the things enu-

merated preceding the general clause, "or other valuable mineral deposits," which follows as an adjunct? The first exception to the rule of *ejusdem generis* is that where the particular things enumerated are complete so that there remain no others of like kind, then the things that fall within the general words must be assumed to be of a different kind and not *ejusdem generis* with those enumerated.

Can this exception be applied to this case? It seems to us that it not only is proper to apply it, but that, in view of the conditions prevailing when the Constitution was framed and adopted, it must be applied. These conditions, which are matters of common knowledge, were that gold, silver, copper, and lead were the only metals that were being mined and produced in large quantities in the then territory of Utah, and that coal, if lime and common rock be excluded, was the only nonmetallic product that was mined and produced in quantity sufficient to justify such a tax. These enumerated products, therefore, were the only ones from which any considerable revenue could be derived by a tax on the net proceeds derived therefrom. While large deposits of iron and other valuable mineral deposits existed, none were commercially considered, except to a very limited extent. In enumerating the four metals, and in adding coal thereto, the framers of the Constitution manifestly did not intend to classify the minerals along the line of the metals; but, in naming the four metals and coal, simply enumerated those as the ones which were then being largely mined and produced, with the intention, however, that the method of taxation provided for in the section should apply to all "other valuable mineral deposits," whether metallic or non-metallic. The fact that iron, which abounds in very large quantities in this state, was not mentioned, adds some force to this view. We can see no reason for not mentioning it, if it was not that it was not then produced as a commercial product. Its presence in large and valuable quantities was then well known. It may be conceded that, under the doctrine of *ejusdem generis*, iron would fall within the class of metals enumerated, although it also fell within the general terms of "all other valuable mineral deposits," because it is not a superior class, and is a metal, like the others specially enumerated. But if we are correct in assuming that the classification was not intended as a limitation, but rather for the purpose of simply naming the substances then produced in quantity sufficient to warrant the imposition of such methods of taxation, because the state would immediately derive considerable revenue therefrom, then the doctrine of *ejusdem generis* has no application, and the other valuable mineral deposits, whether metallic or non-metallic must be taxed the same as the ones enumerated although not specially named. This view is strengthened somewhat from

the fact that coal, a nonmetallic substance, was included with metals in the specific enumeration. Coal, no doubt, was specially mentioned because it, like the metals mentioned, was produced in large quantities in this state, and thus would yield some revenue on net proceeds. It is true that ordinarily the enumeration of coal would add some force to the contention that since coal, a non-metallic product, was classed with metals, coal was the only nonmetallic substance that was intended to be reached with the metals. If, however, we keep in mind the theory that the metals and coal were mentioned because they were the only substances that were produced in such quantities that would yield a considerable amount of revenue to the state, the contention that coal being specially mentioned was the only nonmetallic substance sought to be reached loses all of its force. Pursuing the foregoing theory further, the framers of the Constitution, after enumerating the metals produced in large quantities, added thereto coal also produced, and then included, and intended to include, all other valuable mineral deposits whether metallic or nonmetallic in the general clause, "or other valuable mineral deposits." This view derives additional force from what follows near the end of the section, namely, "and the net annual proceeds of all mines and mining claims shall be taxed as other personal property." Having thus enumerated the mines, mining claims, and mineral deposits that should be taxed at the purchase price only with the improvements thereon, which is as applicable to respondent's mining claims as to all others, the ores or mineral deposits were not to be taxed according to their value in the earth, but the net annual proceeds derived therefrom were to be taxed as such proceeds were obtained by the owners. If this was a fair and just method of taxation on metals and coal produced, why is it not equally fair and just with regard to all other mineral products? Certainly the difference between the two is not so great either in kind or in the methods employed in obtaining them that it would be either absurd or unjust to treat them both alike in a general system of taxation. We think that it is reasonably clear that the phrase "or other valuable mineral deposits," was not intended to contain minerals only *ejusdem generis* with the metals specially named, but that it was intended that all mineral deposits should be taxed in this way, and not only the metalliferous minerals and coal.

In adopting this construction, we think we are sustained by the authorities. In speaking of the application of the doctrine of *ejusdem generis*, Sutherland on Statutory Construction, § 279, says: "It (the doctrine) affords a mere suggestion to the judicial mind that, where it clearly appears that the law-maker was thinking of a particular class of persons or subjects, his words of more general description may not have been intended to

embrace any other than those within the class. The suggestion is one of common sense. Other rules of construction are equally potent, especially the primary rule which suggests that the intent of the Legislature is to be found in the ordinary meaning of the words of the statute. The sense in which general words, or any words, are intended to be used, furnishes the rule of interpretation, and this is to be collected from the context; and a narrower or more extended meaning will be given, according as the intention is thus indicated. To deny any word or phrase its known and natural meaning in any instance, the court ought to be quite sure that they are following the legislative intention. Hence, though a general term follows specific words, it will not be restricted by them when the object of the act and the intention is that the general word shall be understood in its ordinary sense." The foregoing text is well illustrated and supported by a great number of decisions, among which are the following well-considered cases: *Woodworth v. State*, 28 Ohio St. 196; *Foster v. Blount*, 18 Ala. 687; *State v. Solomon*, 33 Ind. 450; *Tisdell v. Comb*, 7 A. & E. (English Common Law) 223, 788. "The doctrine of ejusdem generis is but a rule of construction," says the Supreme Court of Minnesota, and is intended "to aid in the ascertaining the meaning of the Legislature, and does not warrant a court in confining the operation of a statute within narrower limits than intended by the lawmakers. The general object of an act sometimes requires that the final general term shall not be restricted in meaning by its more specific predecessors." *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 628. The following cases are to the same effect: *Webber v. Chicago*, 148 Ill. 313, 38 N. E. 70; *Lent v. Portland*, 42 Or. 488, 71 Pac. 645. The foregoing statement, it seems to us, is most pertinent with regard to the meaning to be given to the phrase "or other valuable mineral deposits." To restrict this phrase so as to include no more than metalliferous deposits would, in view of what we have said about the production of metals in this state, practically rob the phrase of any meaning whatever. It would simply eliminate from consideration all other nonmetallic valuable mineral deposits of this state, of which there are a great number. To do this, as we read the constitutional provision, was manifestly not the intention of the framers thereof, nor do we think that such was the intent that the people had of it when they adopted the Constitution. The fact that in making reports of the net proceeds the Legislature required that the number of fine ounces of gold and silver and the number of pounds of copper and lead should be reported by the owners of the mines, while nothing was said about other deposits, is, to our minds, of but small significance. No provision in this regard is made with regard to coal, but the manner in which the cost of

mining and reducing any mineral or coal deposit of a marketable condition is to be ascertained is provided for. Under this the net proceeds derived from a gypsum deposit is as easily ascertainable as the net proceeds from any metal or coal mine can be. The law, therefore, in this regard, is as applicable to gypsum or other valuable mineral deposits as it is to metalliferous deposits or coal. The contention that if the constitutional provision is held to apply to a deposit of gypsum because it is generically a mineral deposit, that it must likewise be held to apply to any clay or sand bank and to the waters of the Great Salt Lake is not directly involved in this case, and need not be considered at this time. It is enough for the present to determine that a gypsum deposit is within the constitutional provision, and as to whether any other particular one of the many mineral deposits is within the provision can be best determined when the question is actually presented. If we should now hold that any particular one fell within or without the provision, it would simply amount to a dictum and hence of no binding force or effect. This case involves a gypsum deposit, and nothing else.

We have carefully read all the cases cited by counsel for respondent. Among those cited is the case of *Casher v. Holmes*, decided in the English courts of common law, and reported in 2 B. & M. 592. The report, however, contains no more than a very brief synopsis of the decision. It appears, however, that certain import duties were imposed on "copper, brass, pewter, and tin, and on all other metals not enumerated." While the ground on which the decision is based does not appear, it perhaps was, to some extent at least, based on the doctrine that where a class of persons or objects is specified, which is followed by a general term referring to persons and objects generally, no person or object superior to the class specified will be included within the general term. And thus it was held that gold and silver, being of a superior class, were not included within the term "other metals." This doctrine is not applicable to this case. Nor is the broader doctrine of ejusdem generis applicable, as we have already pointed out. Apart from this, however, we have no means of ascertaining what the terms of the English act were upon which the court passed. It may well be that there was something in the history of English legislation upon the subject, or something in the act itself, that made it apparent that it was not the legislative intent to impose an import duty on the precious metals of gold and silver. It requires no very extended knowledge of political economy or of history to know that gold and silver constitute the metals upon which all nations rely for their medium of exchange, and that at no time did any nation discourage their importation, nor were they ever considered or classed as ordinary articles of trade or com-

merce with the other inferior metals. From these facts it may be readily inferred that a court would hesitate to include gold and silver within the general term under an act such as the one in question in that case. The other cases cited simply announce, illustrate, and apply the general rules of interpretation, and none of them lays down any rule contrary to those we have aimed to follow in this opinion, but, upon the contrary, we think they are in strict harmony with what has been quoted from Sutherland and the decisions.

From what has been said it follows that the trial court erred in the conclusion of law, and in entering judgment for the respondent. In view that the facts are all conceded, and thus the question involved is one purely of law, and it appearing that the respondent cannot so amend its complaint as to state a cause of action in law, the judgment is reversed, and the cause remanded to the district court, with directions to vacate its conclusions of law and substitute others therefor in conformity with the views herein expressed, and when so modified to enter judgment dismissing the complaint; the appellant to recover costs.

MCCARTY, C. J., and STRAUP, J., concur.

BYERS v. SOLIER.

(Supreme Court of Wyoming. Dec. 28, 1907.)

1. HABEAS CORPUS — EXISTENCE OF OTHER REMEDY — CONFINEMENT IN INSANE ASYLUM.

Rev. St. 1890, §§ 4894, 4895, providing a proceeding whereby one who has been adjudged of unsound mind and who has been restored to his right mind may have his restoration to capacity adjudged, and his guardianship, if not a minor, terminated, do not divest the courts of jurisdiction to issue a writ of habeas corpus in behalf of one illegally confined in an insane asylum, under their general power expressly given by Const. art. 5, §§ 3, 10, to issue the writ in behalf of a person in actual custody.

2. INSANE PERSONS — CUSTODY — STATE ASYLUM — POWER OF OFFICIALS TO DISCHARGE.

In view of Rev. St. 1899, § 4888, requiring the state to pay the expenses of returning recovered patients, etc., to their homes, and in the absence of a statute to the contrary, the proper officers of the State Hospital for the Insane have authority to discharge a recovered patient, at least with the approval of the State Board of Charities and Reform, in whom, under the express provisions of sections 633, 634, is vested general supervision of charitable institutions supported by the state, and in the exercise of a reasonable discretion whenever the circumstances are deemed to justify such a course, the hospital officials may release a patient not fully recovered, either unconditionally or temporarily upon expressed conditions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, §§ 81, 83.]

3. SAME — RECOMMITMENT TO ASYLUM AFTER DISCHARGE — NECESSITY OF ANOTHER INQUIRY.

Rev. St. 1899, §§ 4870-4883, provide that the determination of the insanity or incompetency of a person shall be by a jury of six men, etc. Section 4886 provides that the clerk of the district court shall furnish the person to whom

he issues the commitment warrant a certified copy of the verdict and physician's lunacy statement expressly required by section 4884, and the person having the warrant must deliver the certified copies, with the commitment warrant, to the superintendent of the hospital for the insane at the time of commitment. Sections 650-652 provide that the clerk shall notify the superintendent of the hospital of the proceedings, who shall cause the insane person to be conducted there. *Held* that, where a patient, not violently or dangerously insane, was unconditionally discharged by competent authority of the hospital, he cannot be reincarcerated without another judicial inquiry.

4. SAME — COMMITMENT WITHOUT WARRANT — VIOLENT LUNATICS.

The asylum authorities may not commit a person thereto without the legal inquiry except in case of one violently or dangerously insane, who may generally be confined temporarily without warrant until the necessary proceedings can be had.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, § 81.]

Habeas corpus on behalf of Ed Byers against C. H. Solier, superintendent of the State Hospital for the Insane. Plaintiff discharged.

Robert S. Spence, for plaintiff. W. E. Mullen, Atty. Gen., for the defendant.

POTTER, C. J. In this case a petition for habeas corpus was presented to the Chief Justice by E. T. Pavton, for and on behalf of the plaintiff, Ed Byers, alleged to be unlawfully restrained of his liberty at the State Hospital for the Insane at Evanston, in this state, by Dr. C. H. Solier, the superintendent of that institution. A similar application having been denied by District Judge Craig, within whose district the said hospital is located, for reasons presently to be stated, the petition here presented was referred by the Chief Justice to the court, and a preliminary hearing was had upon the question of the right to the writ or the propriety of issuing the same, in view of certain provisions of our statute, upon which the decision of Judge Craig, denying the writ, was based. Thereupon our conclusion to issue the writ as prayed for was orally announced, together with the views of the court upon the question argued at the preliminary hearing, and it was then stated that our opinion upon the question would be set out in writing upon finally disposing of the case. The writ was accordingly issued, and made returnable before this court as authorized by the Constitution. Const. art. 5, § 3. The defendant, as required by the writ, produced the body of the plaintiff before the court, and the case was heard upon the issues presented by the pleadings.

The petition alleges that the pretended cause of the restraint of said Byers is insanity or idiosyncrasy, or both; that about 14 years ago the said Byers was legally committed to the State Hospital for the Insane by a competent court of Albany county, in this state, but that the said restraint is illegal for the reason that the said Byers is sane, sensible,

and able to attend to his own business. The answer and return of the defendant admit that the said plaintiff was duly and properly committed to said asylum or hospital for the insane as an insane patient on or about the month of April, 1893, by the district court of Albany county, pursuant to proceedings therein had to determine plaintiff's mental condition, and alleges, in substance, that by reason of disease in early childhood the mental development of plaintiff became arrested; that he could not learn to read or write, notwithstanding that he attended school for several years; and that by reason of his defective condition he was in constant trouble, and was finally committed to the said asylum as aforesaid for imbecility. It is further averred in the answer that plaintiff's mental defect is chronic and incurable, and that he is what is commonly known as a feeble-minded person; that he is incapable of earning his own living, caring for himself, or keeping out of trouble, and that the probabilities are that he will never improve sufficiently to do so. The answer contains the following statement: "At the time of entering the asylum, plaintiff had arrived at the age of eighteen years, and after remaining therein as a patient for eight years, he was, pursuant to an urgent request and representation made by his mother to the effect that she could care for him at her home, delivered into her custody and by her taken to her home in the state of Michigan, on the fifteenth day of June, 1901. In the month of March, 1902, plaintiff was committed to the Michigan Hospital for the Insane at Kalamazoo, having become insane while in his mother's custody, and on May 2, 1902, by order of the Michigan authorities, he was returned to the Wyoming Hospital for the Insane, where he has since remained." The defendant further alleges that as superintendent of the State Hospital for the Insane he has at all times since the commitment of the plaintiff thereto exercised control and restraint over him, except the period during which he was absent from the said asylum as aforesaid, and that, because of plaintiff's mental condition, the said control and restraint continues up to the present time. It is further alleged that it has been the policy of the said institution of which the defendant is superintendent at all times to release and discharge patients therefrom, whenever a release and discharge is warranted by a proper degree of recovery, but that it would be contrary to plaintiff's best interests in consequence of his defective mental condition to release and discharge him at this time. It is also alleged that the statutes of this state provide a plain and specific remedy for the determination of cases of this character by a trial before a jury in the court from which the commitment was issued in the first instance, whereby the disability so imposed may be removed in all proper cases. Upon the filing of the answer and return, counsel for plaintiff filed and presented a mo-

tion for judgment upon the pleadings, and for the discharge of the plaintiff, for the reason that, upon the averments of the answer, it appeared that the plaintiff is held and restrained of his liberty by the defendant without authority or due process of law. Without deciding that motion at the time it was presented, it was taken under advisement, with the understanding that it should be considered in the final disposition of the case. A reply was thereupon filed, which is more in the nature of a demurrer, since it merely denies the sufficiency of the facts set forth in the answer to authorize plaintiff's restraint. Evidence was, however, produced and admitted on behalf of both parties with reference to plaintiff's mental condition, and his temporary absence from the asylum and the cause thereof, and the matter was taken under advisement upon the pleadings and the evidence for final determination.

1. It is contended on behalf of the defendant that when one having been lawfully committed to the State Hospital for the Insane claims to have been restored to his right mind, or to have recovered sufficiently to authorize his release, his remedy is not by habeas corpus, but by application for an inquiry into the facts before the court or judge before whom the proceedings were had resulting in the original commitment, pursuant to the provisions of sections 4894, 4895, Rev. St. 1899. And it appears that Judge Craig denied the writ upon the petition presented to him, on the ground that the proceeding authorized by those sections of the statute afforded a sufficient remedy, and that the restoration to his right mind of a legally committed inmate of the insane asylum was not therefore a matter that should be determined on habeas corpus. The sections referred to read as follows:

"Sec. 4894. If any person shall allege in writing, verified by oath or affirmation, that any person declared to be of unsound mind has been restored to his right mind, the court or judge by which the proceedings were had shall cause the facts to be inquired into by a jury; provided, that before such matter shall be submitted to a jury it shall be the duty of the court to ascertain and determine whether the proceeding mentioned in this section is instituted and prosecuted in the interest of the person so declared to be of unsound mind; and if found not to be so instituted and prosecuted, the court shall dismiss said proceeding at the cost of the person instituting the same; but if found to be in the interest of the person declared to be of unsound mind, the said matter shall be submitted to a jury, as in this chapter provided. In ascertaining and determining the interest as aforesaid, the court shall have power to examine under oath any and all persons, including the person declared to be of unsound mind.

"Sec. 4895. The court shall cause notice of the trial to be given to the guardian of the

person so declared insane or incompetent, if there be a guardian, and to his or her husband or wife, if there be one, or to his or her father or mother, if living in the county. On the trial, the guardian or relative of the person so declared insane or incompetent, and, in the discretion of the court, any other person, may contest the right to the relief demanded. Witnesses may be required to appear and testify as in civil cases, and may be called and examined by the court on its own motion. If it be found that the person be of sound mind, and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardianship of such person, if such person be not a minor, shall cease."

As previously stated the effect of these sections in relation to the right to the writ of habeas corpus was presented and considered at the preliminary hearing, and the question is again raised by the answer and return of the defendant. Notwithstanding the statutory proceeding thus provided for, we concluded, for reasons briefly and orally announced at the time, that the writ might be issued. We will now proceed to formally explain our opinion upon that matter.

It is argued by counsel for plaintiff that the purpose and effect of the sections aforesaid is to provide a remedy only for the restoration to capacity of one previously declared to be of unsound mind, and that they do not relate to the release or discharge from the hospital for the insane of a person committed thereto or confined therein. It must be conceded that there is some basis for that argument in the fact that restoration to capacity, and the discharge of the guardian, if any, is the only result expressly provided for. An order releasing the party whose condition of mind is involved from the asylum, if there confined, or from any other existing restraint, is not in terms authorized; nor is there a provision for notice to the superintendent or other official of the asylum, or other person who might have the party in custody. The sections are found in the chapter of the Code of Probate Procedure entitled "Guardians of Insane and Incompetent Persons, Lunatics and Drunkards," and in the original act enacted by the first state Legislature, the chapter related largely to proceedings and regulations respecting the guardianship of such persons, though it contained certain sections, constituting all that we have on the subject, providing the forum and the method for determining the insanity or incompetency of any person; and the act itself repealed all former statutory provisions covering that matter. In the Revision of 1899 some subsequent enactments with reference to insane or incompetent persons and their commitment to the asylum, or the Wyoming State Hospital for the Insane, as the institution is now named by statute, have been included in the aforesaid chapter of the Probate Code.

It is well known that the provisions of our Probate Code were generally taken from the statutes of California, though there are occasional differences between the statutes of the latter state and our Code upon the subject. The proceeding under the statute of California similar to the sections above referred to has been held in that state to be only applicable to persons adjudged insane or incompetent, and for whom guardians have been appointed under a related section of its Code of Civil Procedure. *Kellogg v. Cochran*, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104; *Aldrich v. Superior Court*, 120 Cal. 140, 52 Pac. 148. But in that state it seems that there are ample and definite regulations in its Political Code for the commitment of insane and incompetent persons to the state asylum and their discharge therefrom; and in the case first above cited it was said, with reference to the proceeding similar to the one provided for by our statute above quoted, that to hold it to be applicable "to persons committed to the asylums would be utterly inconsistent with the government of those institutions according to the requirements and regulations of the Political Code." And it was further said: "After a person has been committed to either of the insane asylums on a charge of insanity, and received into the asylum, no court in this state is authorized to discharge him therefrom, or to restore him to the capacity of a sane person, under any circumstances, except upon writ of habeas corpus. The power to discharge him otherwise than upon habeas corpus is vested exclusively in the officers of the asylum." It appears that the Political Code of California provides expressly that insane persons received into the asylums must, upon recovery, be discharged therefrom, which is held, in the case cited, to imply power to determine whether or not the patient has recovered. And it seems also to be made the duty of the resident physician to discharge persons who may have been improperly committed. There is a further provision of their Political Code authorizing the kindred or friends of an inmate of an asylum to apply to the judge who committed him for an order to be directed to the trustees of the asylum for his removal to their custody, which may be issued upon their proving that they are capable and suited to take care of him. A still further provision requires the trustees to reject all other orders or applications for the release or removal of any insane person, except an order on proceedings in habeas corpus. *Kellogg v. Cochran*, *supra*. The construction of the California statute similar to that of this state by the California court is not therefore based entirely, if at all, upon the language thereof, or its relative position in the general statutes or the original act containing it, but quite largely, if not altogether, upon the effect of the provisions of a separate Code relating particularly to persons committed to an asylum. The sec-

tions of our statute under consideration were unquestionably suggested by the similar California statutes, and, in the main, the language of the latter is followed by our statute, yet there is some slight difference in that respect, and the statute here has been amended since its original adoption in a particular immaterial to the question now being discussed. The provisions of the Political Code of California, referred to in the decisions above cited, have not, however, been adopted in this state, and we have no statutory provisions similar thereto or to the same effect. It is apparent, therefore, that the California decisions construing their statute corresponding to our own cannot be regarded as controlling or even persuasive authority upon the effect or application of our statute and the proceeding thereby provided for.

We do not find any express provision of our statutes authorizing the discharge of a patient committed to the insane asylum, and, except by habeas corpus, there seems to be no remedy to enforce such discharge unless afforded by the statute in question. We entertain no doubt however of the power as well as the duty of the proper officers of the asylum to discharge a recovered patient, at least with the approval, or under the direction of the State Board of Charities and Reform, in whom is vested general supervision and control of that and all other charitable institutions supported by the state. Rev. St. 1890, §§ 633, 634. It is self-evident that the object of establishing the hospital for the insane was not the involuntary confinement of persons of sound and healthy minds, and that such hospital is not a proper place for the restraint of a person subject to no mental infirmity. And indeed the board and superintendent, as appears by the answer herein, and the evidence in this case, have exercised the power of discharge from time to time, by releasing such patients as were deemed to have reached a proper degree of recovery to warrant it. Nevertheless, the fact remains that there is no statute particularly regulating that matter which could affect the construction to be given the sections authorizing the proceeding, which is here suggested as a statutory remedy sufficient to justify, if not to require, the denial of the writ of habeas corpus in cases of this character.

In the California case of *Kellogg v. Cochran*, supra, an official discharge from the asylum pursuant to the statute was held to operate as a restoration to capacity of the person so discharged; and thus, the proceeding provided by their Civil Code would be unnecessary to obtain a restoration to capacity of one committed to an asylum but without guardian. Whether restoration to capacity of one without a guardian would follow a discharge by an official of the asylum in this state, in the absence of express statutory authority for such discharge, is not necessarily involved in this case, for here we have merely the question of the legality of the plaintiff's

restraint to consider and determine. But it would seem that as our statute providing the proceeding referred to contains no exceptions, and is unaffected and unqualified by other statutory provisions, one who had been committed to the asylum, though without a guardian, might invoke it to have his restoration to capacity judicially declared. Indeed section 4805 seems to imply that the party whose restoration to capacity is sought may be without a guardian. Whether the proceeding may be instituted for the further purpose of procuring by judicial order a release from the insane hospital, or from any other restraint, is a more serious question, and we think may be subject to some doubt. We are of the opinion, however, that it is unnecessary to decide that question in this case. Our comments in relation to the matter have been for the purpose of suggesting to those interested the unsatisfactory, if not doubtful, condition of our statutes regarding the remedy for the discharge upon recovery of one committed to the hospital for the insane, since it is a subject that can be and clearly ought to be regulated by legislative enactment, within reasonable and constitutional restrictions. If it should be conceded that the legality of the confinement of a party in the asylum, whose sanity or soundness of mind is alleged, may be determined in the aforesaid statutory proceeding, and his release enforced thereby, we are of the opinion, nevertheless, that the courts and the judges thereof are not divested by the statute of their jurisdiction conferred by the Constitution to issue writs of habeas corpus on petition by or on behalf of any person in actual custody. Const. art. 5, §§ 3, 10. Moreover we observe nothing in the statute in question to indicate a legislative attempt to interfere with that jurisdiction. If the statute had clearly authorized an order for a party's release from custody by the proceeding provided for, it might, perhaps, have afforded a sufficient reason for requiring a resort to it before the issuance of a writ of habeas corpus; though in such event we are satisfied that the power would exist to issue the writ and determine the legality of the restraint without compelling a resort in the first instance to the statutory proceeding. But as there is some doubt as to the effect of the statute, and we have no doubt of the jurisdiction in habeas corpus, we were and are of the opinion that the writ ought to be issued upon the petition filed herein, and the legality of the restraint of plaintiff determined thereon. That a person unlawfully restrained of his liberty as an insane person is entitled to a writ of habeas corpus upon proper application, as well as a person illegally confined upon any other ground or excuse, is not, we think, open to question. 16 Am. & Eng. Ency. L. (2d Ed.) 598. In a Michigan case this principle was forcibly stated as follows: "The writ of habeas corpus penetrates the walls of insane asylums as fully and freely as any other place where persons

are illegally restrained of their liberty." *Palmer v. Circuit Judge*, 88 Mich. 528, 47 N. W. 355.

2. In our statement of the case, the averment of the answer is quoted which relates to the release of the plaintiff from the asylum at his mother's request in June, 1901, and his again becoming an inmate thereof in May, 1902. It appears from the evidence respecting that circumstance that, at the solicitation of the mother, the defendant, as superintendent of the asylum, with the approval of the board of charities and reform, caused the plaintiff to be delivered into her custody, and he was taken to Michigan where the mother then resided, and an entry was made in the records of the institution to the effect that he had been discharged as improved. Within a short time after his commitment to the Michigan institution for the insane, the authorities of that state, having learned of his previous confinement in the asylum here, contended that he was a proper charge of this state, and insisted that he be received and taken care of by this state; whereupon, by the consent or order of the board of charities and reform, he was brought back and again placed in the hospital for the insane at Evanston, where he has since been restrained, without further commitment or further proceedings in this state to determine his mental condition.

The motion for the discharge of plaintiff upon the pleadings was based upon the allegation of the answer showing such release, and plaintiff's subsequent confinement without a new judicial inquiry; and the point suggested by the motion is also raised upon the evidence. So that, irrespective of the question whether the condition of plaintiff's mind is such as to constitute him a proper subject for restraint in a hospital for the insane, the sufficiency of the proceedings to authorize his present restraint is presented upon the above facts. The statute is somewhat indefinite respecting the commitment and discharge of insane persons or those affected with mental unsoundness, who are not accused or convicted of any offense against the criminal laws, and that is particularly noticeable as to the form and terms of the commitment, or the order therefor, and the authority to discharge one from custody who may have been committed to the hospital for the insane, as well as the condition or occasion which will authorize or require such a discharge. It is provided that the determination of the insanity or incompetency of any person shall be by a jury of six men before the district court, or, in vacation, before the judge, or the court commissioner or clerk of court. Rev. St. 1899, §§ 4879-4883. And the clerk is required to furnish the person to whom he issues the warrant a certified copy of the verdict and the physician's lunacy statement (which statement is required by section 4864), and the person to whom the warrant is issued is required to deliver such

certified copies, with the commitment warrant, to the superintendent of the hospital at the time of commitment. Id. § 4886. Whenever a person is adjudged insane and ordered by the proper court to be committed to the hospital for the insane, the clerk of court is required to notify the superintendent of the hospital of such proceedings; and thereupon the superintendent is required, under such rules as shall have been provided by the state board, to conduct, or cause to be conducted, the person so declared to be insane to the hospital for the insane. Id. §§ 650-652. A section of the Revised Statutes of 1887 (section 3765) is not brought into the Revision of 1899, but is probably in force, as to its continuing provisions which have not been abrogated or repealed, by virtue of section 2714, Rev. St. 1899, which provides that "all acts or statutes in relation to public institutions of the state" in force at the time of the act providing for the last-named revision shall continue in force, or expire, according to their respective provisions or limitations, and shall not be construed as repealed by anything in the said revision contained, or the act providing therefor. Said section of the Revised Statutes of 1887 is found in the chapter devoted to the insane asylum—now the hospital for the insane—and provided for notice to the commissioners of the various counties of the completion and readiness for use of the asylum building whenever that should occur; whereupon it was further provided that, after the receipt of such notice, each board of county commissioners should cause all persons adjudged to be insane, and whose care shall have been thrown upon the county, to be sent as patients of the territory (state) to the insane asylum at Evanston, to be kept and cared for by the territory (state). That a discharge from the asylum or hospital upon discovery of the mental soundness of a patient or the recovery of one committed to it was contemplated by the Legislature is evident from the provisions of section 4888, Rev. St. 1899, which was enacted in 1897, imposing the duty upon the state to pay all expenses of returning recovered patients, and patients found not to be insane, to their respective homes or the county from which they were committed. But there seems to be no provision of the statutes expressly authorizing or requiring a discharge by the asylum authorities. Manifestly, an original judicial inquiry under the statute into a person's mental condition has reference to the condition of the person at the time of the hearing, and a verdict of insanity or incompetency will be based upon such condition at that time. In other words, if it be so found, the person is then declared to be of unsound mind, and as such the commitment to custody follows. But the hearing, verdict, order, and commitment will not necessarily adjudicate the condition of the party for all time. It is evident that, in many cases, recovery may occur. It would seem, therefore, that the commit-

ment should require the restraint of the party only during the period that the insanity, unsoundness of mind, or incompetency shall continue, or until he shall be lawfully released.

In the absence of a statute making positive regulations for a voluntary discharge, must a patient, once committed to the asylum, be retained there until released upon habeas corpus, or by some other authorized judicial proceeding by which a release may be enforced; or, without a judicial investigation, may the officers in charge of the institution discharge one committed to it when they are able to determine that a proper degree of recovery has occurred to justify it, or upon the happening of any condition rendering the discharge in their judgment advisable? We are of the opinion that in the absence of a statute making contrary regulations or restrictions, or expressly or impliedly vesting exclusive authority in the premises elsewhere, the controlling authorities of the institution, to carry out the obvious purpose of its establishment, must be held to possess the power to voluntarily release a committed party upon his recovery; or, in the exercise of a reasonable discretion and acting in good faith, whenever the circumstances are deemed proper to justify such a course, to release a patient who may not have fully recovered, either unconditionally, or temporarily and upon expressed conditions. That the state board and the superintendent have found the exercise of such power to be necessary, in the present state of our statutes, is shown by the averments of the answer in this case. If that should be deemed too great a power to vest in the hospital authorities without restriction, it is a matter easily remedied by legislation. It is clearly not impossible or even improbable that in occasional cases the character of the mental disorder of an inmate may be such that his care out of the institution by relatives or friends willing to assume the burden thereof will be proper without endangering the welfare of the patient or the safety of the public.

In *Rutter v. State*, 38 Ohio St. 496, it appeared that a patient had been committed to the State Hospital for the Insane, and the superintendent of the institution, believing the same for the patient's welfare, permitted her temporary removal out of the state in the charge and custody of her sister. Such action was upheld, notwithstanding that there was no statute expressly authorizing it; and the court refused a mandamus at the suit of the patient's husband to compel her restoration to the asylum. The court said that "the power of the superintendent is measured, in no small degree, in matters of that sort, by the apparent welfare of the patient." The statutes of Ohio provided that a patient might be discharged on the application of the superintendent to one of the trustees, and order of such trustee; and that there might

be a discharge at the request of friends of the patient upon giving a bond, if required by the superintendent, conditional upon the safe-keeping of the patient. The removal of the patient in the case cited was not made pursuant to either of those provisions, but in the exercise of a general discretion for the best interest of the patient. See, also, *Stratham v. Blackford*, 89 Va. 771, 17 S. E. 233.

Having concluded that the authorities in control of the hospital for the insane may in good faith discharge a patient committed thereto, we are next to inquire into the effect of an unconditional discharge, such as occurred in 1901 by the discharge of the plaintiff in this case. We refer to that discharge as unconditional, for we think the circumstances show it to have been such. That any condition was attached to the discharge is not disclosed by the answer or the evidence. It may have been and probably was confidently expected that the patient would be kept out of the state, or at least safely in the mother's custody, but it does not appear that the release of plaintiff was conditioned upon that being done. In view of the matter heard and determined upon a lunacy inquisition under the statute providing therefor, and the effect of an order and commitment for the restraint of the party found upon such an inquisition to be of unsound mind or incompetent, the conclusion seems to be inevitable that the hearing and commitment will have served their purpose, and ceased to be effectual, after an unconditional discharge from the place of lawful restraint by competent authority. If circumstances thereafter should arise seeming to require or justify a renewal of the custody and restraint, in the interest of the person or the public, another hearing ought to be had to determine the question. Great injustice would often, if not generally, result from a different rule, even if the legal rights of the party to be personally affected were not to be considered. But a person charged with insanity or other mental infirmity has the same legal right as any other citizen to claim the benefit of constitutional and statutory provisions affecting his personal liberty.

In the case of *In re Thorpe*, 64 Vt. 398, 24 Atl. 991, the following facts were presented: The relator, an inmate of an asylum for the insane, was ordered discharged by two of the three supervisors of the insane, upon condition that, in case it should become necessary to return him to the asylum, it might be done by a revocation of their order by one of them. The relator was thereupon discharged from the asylum, and a few months afterward one of the two supervisors who had signed the discharge order revoked it, and an officer thereupon took the relator into custody for the purpose of returning him to the asylum. The laws of the state conferred upon the supervisors of the insane authority to discharge such incurable persons as may, in their judgment, be safely and

properly cared for in the place from whence they were committed, but provided that persons so discharged should require for their recommitment to the asylum only the revocation of their discharge by the supervisors. Upon the facts and the law thus stated, it was held, in a habeas corpus proceeding brought by the relator, that the supervisors could impose only such conditions in discharging him as were authorized by the statute; that the power to revoke a discharge was not conferred upon one of their number, but upon a majority of them; that the question passed upon in discharging the relator concerned his personal liberty, and that, when a majority of the supervisors had once adjudged that he be discharged, he could not again be deprived of his liberty except in the manner pointed out in the statute. For those reasons the relator was held to be unlawfully deprived of his liberty, and it was ordered that he be discharged from the custody of the officer.

In *Gresh's Case*, 12 Pa. Co. Ct. R. 295, a petition in habeas corpus was presented by a brother of a party confined in the hospital for the insane, and, after a hearing, an order was made releasing him temporarily until a date therein stated, at which time he was required to again appear, and his wife and the hospital authorities were also required to then appear to show cause why there should not be a full discharge. The petition set up as a ground for release of the party in whose interest it was filed that he had been fully restored to his reason, and was not held for any criminal or supposed criminal matter. At the next hearing the evidence was somewhat conflicting as to the mental condition of the party whose liberty was sought, but the court felt satisfied of his soundness of mind and discharged him. The following remark of the court is pertinent to the inquiry here: "If the reason or judgment of the relator should again fail him to such an extent as to make it a dire necessity to interpose and control him, * * * the law governing the same may be resorted to and enforced, as in other cases." Although, in the present state of our statutes and as they existed in 1901, the asylum authorities may discharge an inmate, if that be deemed proper in their judgment, they are not vested with authority to commit a person thereto, nor to confine him there against his consent, without the inquiry provided by law, except, perhaps, temporarily, in the case of one violently or dangerously insane, until the necessary proceedings can be had, to avoid the injury which might be reasonably expected to occur if the party was allowed to be at large. Generally, it is permissible, without warrant or express authority, to confine temporarily a person disposed to do mischief to himself or another person, until the proper proceedings can be instituted to have the question of his sanity determined. In such a case the restraint be-

comes necessary and therefore proper, both for the safety of the party himself and for the preservation of the public peace. 16 Am. & Ency. L. (2d Ed.) 596.

The case before us does not come within the exception above noted. The restraint complained of appears not to have been undertaken in contemplation of the statutory proceeding for a commitment, but upon the order of the board in the exercise of a supposed duty without further proceedings. The act of the board and superintendent was no doubt in good faith in renewing their custody of the plaintiff; and it may be assumed that if he was a public charge, which seems probable, the burden thereof properly rested upon this state. There is nothing in the evidence before us to show that his relatives or any friend, at the time, was interposing in his behalf, or offering to undertake the responsibility of his support, and we understand that he had no means or estate of his own. We are of the opinion, however, that to justify his continued restraint without his consent a judicial inquiry pursuant to statute was and is required. According to the evidence the plaintiff is not vicious; and he is not insane in the sense that he is subject to delusions. His mental development appears to have been arrested during childhood, and his condition is best expressed, as stated by the superintendent, by the term "feeble-minded." That official testified that the plaintiff is unable to take care of himself, owing to such arrested development, resulting in his lack of knowledge, and inability to acquire knowledge about matters essential to his own interests if allowed to remain at large; and, in the superintendent's opinion, his mind is incapable of substantial improvement, though the party presenting the petition here seems to hold a contrary view. The plaintiff was not only present, but was examined as a witness in his own behalf. So far as he possessed information he answered intelligently; but he appeared to be deficient in a knowledge of numbers and money values, and seemed to have but little comprehension thereof. He admitted that in regard to the exchange of money he would require assistance. He expressed a desire and intention, if released, to take up a homestead and cultivate it near the residence of his friend who presented his petition; and he gave evidence of some understanding respecting the elementary requirements in the cultivation of the soil. He had, it appears, before his commitment to the asylum in 1893, worked at times for others in the city of Laramie, where he then lived; and at the asylum he has been intrusted with certain daily duties, but not calling for the exercise of much, if any, independent judgment. He has had a part in cultivating a garden upon the asylum premises and raising produce for the market upon his own account, in company, however, with another, who we understand took charge of the business features of the enterprise.

Plaintiff's restraint is therefore not a temporary necessity so as to be authorized without a warrant or commitment.

Inasmuch as our decision is based upon the insufficiency of the proceedings to authorize the retention of the plaintiff in the hospital for the insane, and that upon such ground he has a right to demand his release, we do not think it necessary or proper to consider the question whether his condition is such as would render his commitment justifiable upon proceedings instituted pursuant to law. The friend of the plaintiff, who has interceded in this case in the latter's behalf, has announced his willingness and desire to take charge of the plaintiff in case of his release, so far as the same may be necessary for his protection, and we assume that he will do so. There is no apparent reason therefore, even if it would be authorized in any case, to make any other order in the premises than for plaintiff's discharge. For the reasons above stated, we find that the plaintiff is unlawfully deprived of his liberty, and an order will be entered discharging him from custody.

BEARD and SCOTT, JJ., concur.

BUTLER v. SUPREME COURT OF THE INDEPENDENT ORDER OF FORESTERS.

(Supreme Court of Washington. Dec. 20, 1907.)

INSURANCE — MUTUAL BENEFIT INSURANCE — FOREIGN COMPANIES — ACTIONS — VENUE.

Laws 1901, p. 360, c. 174, § 8, provides that foreign beneficiary societies shall appoint the commissioner of insurance their lawful attorney, upon whom all process in actions against them must be served. *Held*, that an action against such a society need not be brought in the county where the commissioner of insurance resides; Ballinger's Ann. Codes & St. § 4854, requiring an action against a corporation to be brought in any county where the corporation has an office for business, or any person resides upon whom process may be served, not being applicable.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Tena Butler against the Supreme Court of the Independent Order of Foresters. From a judgment of dismissal, plaintiff appeals. Reversed.

Belden & Losey, for appellant. M. C. King and Samuel R. Stern, for respondent.

DUNBAR, J. This action was brought by appellant to recover on a certain benefit certificate issued to one August Schneider, wherein appellant is named as the beneficiary. Service was made upon the defendant, a foreign corporation, on the 14th day of February, 1906, by leaving with M. C. King, the Deputy Supreme Chief Ranger and Financial Secretary, at Spokane, Wash., true copies of the summons and complaint. Afterwards service was made upon the commis-

sioner of insurance, who, by the provisions of the statute of 1901 relative to beneficiary societies, is made the statutory agent for the purpose of service of process upon a foreign corporation or beneficiary society. The respondent appeared, and, by way of answer, set out as its plea in abatement the fact that the superior court of Spokane county had no jurisdiction of the case, for the reason that the service was had upon the commissioner of insurance in Thurston county, and that all actions against a foreign corporation must be brought in the county where the statutory agent resides. Upon such plea the court entered a judgment dismissing the complaint, for the reason that the superior court of Spokane county had no jurisdiction to try the cause, to which order appellant excepted, and this appeal is taken.

The respondent relies upon the case of *Hammel v. Fidelity Mutual Aid Ass'n*, 42 Wash. 448, 85 Pac. 35. There action was brought upon an accident insurance policy, and the suit was instituted in Snohomish county. The defendant was a foreign corporation. The summons was personally served upon one C. G. Helfner, who had been appointed statutory agent by the defendant, and who was served in King county. The defendant interposed a motion to dismiss the cause on the ground that it was a foreign corporation, that at the time of the service of summons it had no office for the transaction of business in Snohomish county, that no person resided in said county upon whom process against the defendant might be served, and that the court was therefore without jurisdiction. The motion was supported by affidavit showing that at the time of the service upon Mr. Helfner, the statutory agent of defendant, he was, and for a long time prior thereto had been continuously, a resident of Seattle, King county, and that he was then such a resident. This service was held bad by this court by reason of the doctrine announced in *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 760, and such holding was a construction of section 4854, Ballinger's Ann. Codes & St., which provides that an action against a corporation may be brought in any county where the corporation has an office for the transaction of business, or any person resides upon whom process may be served against such corporation. But that statute is not involved in the case at bar. This is a special statute relating to beneficiary societies who are not authorized to appoint agents in counties where they do their principal business, but the law arbitrarily imposes upon them the duty of appointing the commissioner of insurance of this state, not as an agent to transact business, but as a person upon whom process may be served. His full duty is performed in this regard when he reports the service upon him to the corporation which is sued, and he is not recognized in any other respect as the representative of the company. Section 6,

p. 360, c. 174, Laws 1901, is as follows: "Each such association now doing business or hereafter admitted to do business within this state and not having its principal office within this state, and not being organized under the laws of this state, shall appoint, in writing, the commissioner of insurance and his successors in office to be its true and lawful attorney, upon whom all lawful process in any action or proceeding against it must be served, and in such writing shall agree that any lawful process against it which is served on said attorney, shall be of the same legal force and validity as if served upon the association, and that the authority shall continue in force so long as any liability remains outstanding in this state." So that a different proposition is involved from that in a case where a corporation has an office in the county for the purpose of conducting business, and has appointed an agent with reference to that general business. In this character of cases the beneficiaries are not generally people of large means, and courts ought not to make it hard for them to obtain redress from foreign corporations. There is nothing in the statute to indicate that it was the intention of the Legislature to compel litigants of this character to commence their actions in Thurston county simply because the person who is arbitrarily mentioned by the statute as the person upon whom service could be made happens to reside in that county.

We think the superior court of Spokane county had jurisdiction of the action, and the judgment is reversed, with instructions to proceed with the trial of the cause.

HADLEY, C. J., and RUDKIN, CROW, MOUNT, FULLERTON, and ROOT, JJ., concur.

WINDT v. COVERT. (S. F. 3,114.)

(Supreme Court of California. Nov. 29, 1907.)

1. MORTGAGES — CONVEYANCE CONSTITUTING MORTGAGE—RIGHTS OF MORTGAGEE ON SATISFYING PRIOR LIEN.

Where the maker of a note purchased land incumbered by a mortgage, and caused the vendor to convey the same to the payee to secure the note, the payee held a legal title, subject to the resulting trust in favor of the maker, and was in equity, within Civ. Code, § 2924, a mortgagee, holding a special lien within sections 2875, 2876, and 2923, providing that, where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount, etc.

2. SAME — JUNIOR MORTGAGEE — PAYMENT OF SENIOR MORTGAGE — ENFORCEMENT — LIMITATIONS.

Under Civ. Code, § 2876, providing that, where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount as a part of the claim for which his own lien exists, a grantee in a conveyance operating as a mortgage, compelled to satisfy a prior lien for his own protection, may add the amount thereof to the amount for which the conveyance is security and enforce both in one action, within Code

Civ. Proc. § 720, and, so long as the right to foreclose his conveyance exists, the right to recover the amount paid to satisfy the prior lien is not barred by limitations.

3. SAME.

Where a junior mortgagee pays the debt secured by a senior mortgage after the commencement of an action to foreclose it, he is compelled to pay the senior mortgage for his own protection, within Civ. Code, § 2876, and he may enforce payment of the amount so paid as a part of the claim for which his own lien exists.

4. SAME—"SATISFY."

The word "satisfy," in Civ. Code, § 2876, providing that where the holder of a special lien is compelled to "satisfy" a prior lien, he may enforce payment of the amount thereof as a part of the claim for which his own lien exists, when considered in connection with section 2941, providing for a satisfaction of record, and declaring that it must be entered when any mortgage has been "satisfied," means payment or discharge, and a junior mortgagee who pays a senior mortgage satisfies it, though there is no formal release of record.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6328-6334.]

5. SAME—FORECLOSURE—PERSONAL LIABILITY—DEFICIENCY JUDGMENT.

A junior mortgagee to whom mortgaged land, purchased by his debtor, has been conveyed by the vendor as security for the debt, who pays the senior mortgage, is not entitled by virtue of Civ. Code, § 2876, to a deficiency judgment against his debtor for the amount so paid, a personal liability depending on a promise to pay.

6. SAME—PROCEEDS OF SALE—APPLICATION.

The maker of a note purchased mortgaged land, and caused a conveyance thereof to be made to the payee to secure the note. The payee paid the existing mortgage and foreclosed his conveyance, treating it as a mortgage. *Held*, that the proceeds of the sale should be applied first to the discharge of the payee's claim for the payment of the existing mortgage, though Civ. Code, § 2876, entitles the payee to enforce payment of the amount so paid as a part of his claim.

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Morris Windt against Mary I. Covert. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Judgment modified and affirmed, and order denying a new trial affirmed.

Welles Whitmore and R. V. Whiting, for appellant. Mary I. Covert and Wallace A. Wise, for respondent.

SLOSS, J. On April 27, 1893, the defendant executed and delivered to plaintiff her promissory note in the sum of \$2,200, payable six months after date. At the same time, and as security for the payment of said note, said defendant Mary I. Covert purchased from one Brown a parcel of land in the county of Alameda, and caused Brown to execute a conveyance thereof to the plaintiff. This action was commenced on the 25th day of October, 1897, and by his complaint the plaintiff, treating the conveyance of the land to himself as a mortgage, sought a decree of foreclosure. At the time of the execution and delivery of the deed by Brown to the plaintiff, there existed a mortgage on said

premises made by Brown to one Hardy to secure a promissory note in the sum of \$3,000, with interest at the rate of 8 per cent. per annum. The complaint alleges that on or about the 15th day of December, 1893, Hardy brought an action to foreclose his said mortgage, and that on or about the 25th day of May, 1894, the plaintiff herein paid, satisfied, and discharged said note and mortgage by paying and delivering to Lucius L. Solomons, to whom Hardy had assigned his note and mortgage, the sum of \$3,483.46; that being the amount then due and owing thereon. It is alleged, further, that said sum of \$3,483.46 was necessarily and properly expended by the plaintiff to protect and preserve his own lien. The complaint sets forth that the plaintiff had been in possession of the property and had collected rents, which he credited upon the interest due, and that he had allowed to the defendant a further credit of \$915 on the principal of the promissory note executed by her. An answer was filed raising various issues, and after a trial the plaintiff had judgment of foreclosure adjudging that there was due him from the defendant Covert the sum of \$375.25 on account of the note executed by said defendant, and the further sum of \$4,378.25 on account of moneys paid by the plaintiff to Solomons to pay and satisfy the debt secured by the Hardy mortgage, directing a sale and providing for a deficiency judgment against the defendant Mary I. Covert in the event that the proceeds of such sale should prove insufficient to pay said sums and costs. The defendant appeals from the judgment and from an order denying her motion for a new trial.

It appears that at the time this action was commenced, October 25, 1897, an independent action to foreclose the mortgage given by Brown to Hardy, or a suit by plaintiff to be subrogated to Hardy's claim, would, if then begun, have been barred by the statute of limitations. In the answer of the defendant she relied upon the statute of limitations, so far as plaintiff's right to recover the amount paid on the Hardy note and mortgage was concerned, and it is now urged that the court erred in including the amount paid on said note and mortgage in the judgment herein. This contention is answered by the provisions of section 2876 of the Civil Code, which reads: "Where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him, as a part of the claim for which his own lien exists." That the conveyance of the property in question to the plaintiff, under the circumstances above set forth, constituted him the holder of a special lien within the meaning of the Civil Code (see section 2875), is not questioned. The plaintiff became the holder of the legal title, subject to a resulting trust in favor of the defendant, the real purchaser. But the fact that the title was conveyed as

security gave the transaction, in equity, the additional character of a mortgage. Civ. Code, § 2924. "In such a case the grantee holds a double relation to the real purchaser; he is his trustee of the legal title to the land and his mortgagee for the money advanced for its purchase." *Campbell v. Freeman*, 99 Cal. 546, 548, 34 Pac. 113, 114; *Woodard v. Hennegan*, 128 Cal. 293, 60 Pac. 769; *Banta v. Wise*, 135 Cal. 277, 67 Pac. 129. And as such mortgagee he is the holder of a special lien, "unless otherwise expressly agreed." Civ. Code, § 2923. The effect of section 2876 is to give to the holder of a special lien, who is compelled to satisfy any prior lien for his own protection, the right to add the amount so paid to the amount for which his special lien was security and to enforce both together. "There can be but one action for the recovery of any debt * * * secured by mortgage." Code Civ. Proc. § 726. Such action, which is an action of foreclosure, affords the only method by which the plaintiff could enforce payment of the "claim for which his own lien exists." The only way in which he could enforce payment of the amount paid by him in satisfaction of a prior lien as a part of the claim which he already held was by including that amount in the action brought by him for foreclosure of his mortgage. So long as the right to foreclose his junior lien existed, the right to recover as a part of it the amounts paid by him to satisfy prior liens could not, consistently with the provisions of section 2876, be barred by the statute of limitations. Any other construction of this section might require the holder of a lien, who has been compelled to satisfy prior liens, to commence separate actions to recover the amounts paid on account of such prior liens before his own obligation became due. To compel him to commence such separate actions would be contrary to the plain provision of the statute, which allows him to enforce payment of the amounts so paid by him as a part of his own claim.

The payment of the Hardy mortgage by plaintiff was made after an action had been commenced by Hardy against Brown and the plaintiff herein to foreclose said mortgage, but before said action had gone to judgment. It is argued that a payment at this time was not within the rule of section 2876, above quoted, in that plaintiff was not "compelled" to pay said mortgage. The argument appears to be that a lienholder has no right under this section to satisfy a prior lien until a suit on such prior lien has been carried to judgment and sale has been had and the time for redemption is about to expire. This is an unreasonable construction of the section and one which would not benefit the debtor, since the delay insisted upon would result merely in adding costs and expenses to the amount which must ultimately be paid by such debtor. In *Foster v. Furlong*, 8 N. D. 282, 78 N. W. 987, the Supreme Court of North Dakota, in construing a statute identical with section

2876 of our Civil Code, says: "The compulsion with which one acts in paying a prior lien and which entitles him to add the amount so paid to his lien is merely an existing necessity to do so to protect his own interests under his lien after the party primarily liable to make the payments has defaulted in so doing." We think this is the proper construction of the language; and that where the holder of a lien upon property pays a prior mortgage thereon, after suit to foreclose such prior mortgage has been commenced or is threatened, he is, within the meaning of the section under discussion, compelled to pay such mortgage for his own protection. Upon the payment of the amount of the Hardy mortgage by plaintiff to Solomons (the assignee of Hardy), the suit to foreclose that mortgage was not dismissed, and said suit was still pending at the time of the trial of this case. Furthermore, there was no evidence that any formal release of the mortgage had been entered of record, and the court excluded evidence offered by the defendant to prove that such mortgage had not been satisfied of record. The point made in this regard is that the mere payment of a prior lien is not a compliance with the provisions of section 2876 which gives rights to one who has been compelled to satisfy a prior lien. It is argued that a formal satisfaction must be entered of record. We think there is no reason for giving this technical construction to the word "satisfy." Civ. Code, § 2941, which provides for a satisfaction of record, declares that it must be entered "when any mortgage has been satisfied." The word "satisfied," as here used, unquestionably means no more than paid or discharged, and the same meaning, which is the usual and ordinary one, should be given to it in section 2876.

The appellant attacks the findings of the court to the effect that the plaintiff went into possession by and with the consent of the defendant and that the net rents received by the plaintiff were \$1,330.64. Without reviewing the evidence, we shall merely state that it was sufficient to support the findings.

Finally, the appellant claims that the judgment is erroneous in directing that, in case the property does not sell for sufficient to pay the plaintiff, a deficiency judgment be entered as against the defendant. So far as the judgment authorizes a personal judgment which shall include the amount paid by the plaintiff to satisfy the Hardy mortgage, we think this contention is sound, and must be sustained. The appellant executed a promissory note by which she agreed to pay the plaintiff \$2,200. Of this amount the court finds that \$375.25 is still due. This is the only amount which the appellant ever undertook to pay. While, by virtue of section 2876 of the Civil Code and of the general principles of equity, the property given as security by her for this claim is properly chargeable with the payment of any amounts which the lienholder was obliged to expend to protect

his security, no reason is suggested, and none suggests itself to us, why the appellant should, in the event of a deficiency of security, be held to be personally liable to pay the amount due upon a note which she never executed and payment of which she never assumed. Section 2876 makes the amount paid to satisfy a prior lien a part of a secured claim of the party paying, but this is only for the purpose of enforcing payment out of the security. The lien is made to cover both amounts. But a personal liability does not result from the mere existence of a lien. Such liability depends on a promise to pay, and here there has been no such promise, express or implied. The defendant was not personally liable on the Hardy mortgage while it was held by Hardy or his assignee, and a personal liability to plaintiff could not arise from the mere fact that plaintiff for his own protection, and not at the request of the defendant, paid off the mortgage. While the defendant is not personally liable for the amount paid on account of the Hardy mortgage, it is proper that the proceeds of sale should be applied to the discharge of this claim before applying them to the payment of the amount due on the note signed by the defendant. The Hardy mortgage was, before plaintiff satisfied it, a prior lien, and, as such, entitled to priority in payment. The fact that plaintiff, on paying this prior lien, became entitled to enforce payment of the amount so paid as a part of his already existing claim (Civ. Code, § 2876), furnishes no reason why in equity the respective priorities of the liens, as theretofore existing, should be disturbed.

It was suggested at the oral argument that a sale of the property under the judgment had been had and that no deficiency had resulted, and that, therefore, the question of personal liability is of merely academic interest. But these facts do not appear of record, and, furthermore, the appellant, if she has succeeded in showing that the judgment appealed from was erroneous in any particular, is entitled to recover her costs of appeal. The error herein referred to will not, however, require a retrial of the case, nor will it, in case a sale has been had, require a vacation of that sale. Conformity to the views hereinabove expressed can be effected by adding to the decree a provision that the amount of any deficiency judgment shall not exceed the balance found due on the note executed by the defendant.

It is ordered that the judgment be modified by limiting the amount of any deficiency judgment to be entered against the defendant to \$375.25, with interest at the legal rate from the date of judgment, and that, as so modified, the judgment be affirmed.

The order denying a new trial is affirmed.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

152 Cal. 464

**LAUREL HILL CEMETERY v. CITY &
COUNTY OF SAN FRANCISCO et al.**
(S. F. 3,855.)

(Supreme Court of California. Dec. 4, 1907.)

**1. MUNICIPAL CORPORATIONS—POLICE POWER
—HEALTH.**

Under Const. art. 11, § 11, empowering any county or city to enforce within its limits local, police, sanitary, and other regulations, not in conflict with the general laws, and under the charter of the city and county of San Francisco the supervisors thereof have power to pass ordinances placing such restriction on the use of property or the conduct of business as may be necessary for the public health, provided such ordinances bear a reasonable relation to the object sought to be attained, and are not arbitrary or unreasonable, and are not a cloak for an arbitrary interference with or suppression of a lawful business.

**2. CONSTITUTIONAL LAW—DETERMINATION OF
QUESTIONS—JUDICIAL REVIEW.**

The determination by a legislative body of what is a proper exercise of its police power, or the expediency or necessity of a restrictive measure, though primarily for the Legislature, is subject to judicial review.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1308, 1309.]

3. HEALTH—VALIDITY OF REGULATIONS—CEMETERIES.

Where a cemetery is located in a thickly settled community, further interments therein may be prohibited because the burial of dead bodies therein tends to endanger the public health; but where a cemetery is remote from human habitations, or is close to but few dwellings, the absolute prohibition of interments therein is an unreasonable restriction of a lawful business, not required for the preservation of the public health, and will not be sustained by the courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Health, § 25; vol. 9, Cemeteries, §§ 1-3.]

4. SAME.

Where a city includes considerable tracts of uninhabited areas, interments anywhere within the limits of the city may not be prohibited merely because the territory involved is within the boundaries of the city.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Health, §§ 24, 25; vol. 9, Cemeteries, §§ 1-3.]

5. SAME.

An ordinance of the city and county of San Francisco prohibiting the interment of dead bodies within the limits thereof, adopted after the passage of Pen. Code, § 297, prohibiting the burial of human remains within the corporate limits of San Francisco, excepting in existing cemeteries, or those subsequently established by the supervisors thereof, merely prohibits interment in existing cemeteries, in fact, situated within densely populated portions of the municipality, and is valid as a reasonable exercise of the police power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Health, §§ 24-26; vol. 9, Cemeteries, §§ 1-3.]

6. SAME.

Since the police power granted by the Constitution is not restricted to the suppression of nuisances, but includes the regulation of the conduct of business, to the end that the public health may not be endangered, an ordinance of the city and county of San Francisco prohibiting interments within the limits thereof is not unreasonable in its application to a cemetery, the soil of which is of such character that no disease breeding elements can be transmitted

through the same; the question whether the danger from interments is to be averted by a prohibition of further burials being a question of legislative policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Health, §§ 24-26; vol. 9, Cemeteries, §§ 1-3.]

7. SAME.

Even if a city expressly granted to a cemetery association the right to make interments in a cemetery in perpetuity, the city might exercise its police power and prohibit interments therein, since the police power cannot be contracted away, and since all rights and property are subject to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Health, §§ 24-26; vol. 9, Cemeteries, §§ 1-3.]

8. SAME.

A cemetery at the time of its establishment was outside the limits of San Francisco, in unsettled territory. The municipality granted land for the cemetery, and acquiesced in the expenditure of money in improvements thereof. The city thereafter, by reason of its growth, included the cemetery within its limits, and the surrounding territory became thickly settled. *Held*, that the city was not estopped from exercising its police power by prohibiting further interments in the cemetery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Health, §§ 24-26, 35; vol. 9, Cemeteries, §§ 1-3.]

9. SAME.

After a cemetery, originally located one mile from any habitation, had become the center of thickly populated portions of San Francisco, the city adopted an ordinance, prohibiting further interments therein, which was not to be in force until nearly 18 months after its passage. *Held*, that the ordinance was a valid exercise of the police power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Health, §§ 24-26, 35; vol. 9, Cemeteries, §§ 1-3.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the Laurel Hill Cemetery against the city and county of San Francisco and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Lloyd & Wood and Haven & Haven, for appellant. William G. Burke and Percy V. Long, City Attys., John T. Williams, Asst. City Atty., John S. Partridge, William M. Sims, and Garret W. McEnerney, for respondents.

SLOSS, J. This action was brought to restrain the city and county of San Francisco and its officers from enforcing an ordinance prohibiting the interment of dead bodies within said city and county, and to obtain a decree declaring the ordinance void. The defendants answered and moved for judgment on the pleadings. Their motion was granted, and the plaintiff appeals from the judgment entered upon the order so made.

This court has already in *Odd Fellows' Cemetery Association v. City and County of San Francisco*, 140 Cal. 226, 73 Pac. 987, decided that the adoption of the ordinance in question was a valid exercise of the legislative power of the city and county. It is

urged, however, by the appellant that the case here presented differs in some respects from that considered by the court in its former decisions. Furthermore, great reliance is placed upon two decisions—one of the Supreme Court of the United States, and the other of the United States Circuit Court for the Ninth Circuit of the Northern District of California—both rendered since the filing of the opinion in the Odd Fellows' Case, and both, it is claimed, inconsistent with the views there expressed by this court. The complaint in the case at bar is very voluminous, but its essential allegations do not, we think, differ materially from those set forth by the complainants in the earlier case. Briefly stated, it alleges the incorporation of plaintiff in 1867 as a cemetery association pursuant to the provisions of an act approved April 18, 1859, and entitled, "An act authorizing the incorporation of rural cemetery associations." St. 1859, p. 281, c. 267. It is averred that in 1853 one Nathaniel Gray, and others associated with him, were the owners of a tract of land then lying beyond the corporate limits of the city of San Francisco, containing about 160 acres, which said Gray and his associates determined to appropriate and devote to the purposes of a rural cemetery. They prepared the land for such purposes, clearing it of brush and laying out roads, and doing other work. On the 30th of May, 1854, said lands were publicly dedicated to the purposes aforesaid by the name of the Lone Mountain Cemetery; the dedication being made the occasion of a "solemn and impressive ceremony" in which the mayor of the city participated. The Lone Mountain Cemetery continued to be occupied by said association as a cemetery. In May, 1868, Gray and his associates conveyed to the plaintiff so much of the tract as had been appropriated for the purposes of a cemetery. The plaintiff entered into possession of the land, and has since continuously carried on and conducted there the business of a cemetery, under the name of Laurel Hill Cemetery. On June 23, 1871, the mayor of the city and county made a grant to plaintiff of said tract of land, in consideration of the sum of \$24,139.79, paid by plaintiff to the treasurer of said city and county. Since the establishment of the cemetery and its dedication in the year 1854, plaintiff and its predecessors have sold and conveyed 40,000 lots or plots, a large proportion of which have been used for the purposes of burial, but many of them are capable of receiving a number of interments in addition to those already made therein. Over \$2,000,000 have been expended by the owners of said lots and plots in preparing them for the burial of bodies and in the construction of monuments and tombs and the embellishment of their lots by landscape culture. The plaintiff association has also expended large sums of money in constructing roads, avenues, and paths through said cemetery, in constructing a system of waterworks, and erect-

ing a lodge and walls. Of the area included in said cemetery the plaintiff has about seven acres unsold and ready for sale.

At the time of the establishment of the said cemetery, it was wholly outside the corporate limits of the then city of San Francisco, and was distant more than two miles in a direct line from the business part thereof, and at least one mile from the residence part thereof. No residence had then been built to the west of said cemetery, and the whole country between it and the Pacific Ocean was practically unoccupied. Plaintiff avers "that at no time since the establishment of said cemetery has it or any part thereof been, nor has it or any part thereof, or will it or any part thereof, become injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct the free passage or use in the customary manner of any public park, square, street, or highway; that the soil of said cemetery is sand, and the natural condition and character thereof is such that no dangerous or disease-breeding elements can be transmitted through the same from the decaying remains of bodies buried therein; that since the establishment of said cemetery many residences have been built in its neighborhood, and the same have been and are now occupied with families, and yet it has not been proven that the district embracing said cemetery and said residences was unhealthy and subject to epidemics, but, on the contrary, said district has always been, and is now regarded, as particularly healthy and free from the diseases which prevail in other parts of said city and county." There have never been any wells excavated in the neighborhood of said cemetery "for the purpose of supplying water to any residences of families residing therein, or for any consumption of human beings." It is further alleged that there are within the corporate limits of the city and county of San Francisco several large tracts of land, some of which consist of barren sand hills and are entirely unoccupied, and some of which are used solely for farming purposes; that some of said tracts of land contain several hundred acres, and interments of dead bodies could be made on several of said tracts of land, and within the corporate limits of the city and county of San Francisco, which would be more than a mile distant from any human inhabitant or public thoroughfare.

The ordinance complained of was passed on the 26th day of March, 1900, and provides that after the 1st day of August, 1901, it shall be unlawful for any person, association, or corporation to bury, or inter, or cause to be interred or buried, the dead body of any person in any cemetery, graveyard, or other place within the city and county of San Francisco, exclusive of those portions thereof which belong to the United States, or are

within its exclusive jurisdiction. The violation of the ordinance is made a misdemeanor. This ordinance is assailed by plaintiff upon the grounds that it deprives plaintiff of its property without due process of law, and impairs the obligation of a contract; and that it is unreasonable, in that it prohibits acts which are in no way dangerous to life, or detrimental to the public health. It is also claimed that the city and county is estopped by its acts and conduct to assert or exercise the right of making it unlawful to continue to bury the dead bodies of persons in the cemetery of the plaintiff. The ordinance contains a recital that "the burial of the dead within the city and county of San Francisco is dangerous to life and detrimental to public health." It purports to be passed in pursuance of what is generally known as the "police power" of the state, and of that branch of the police power which has to do with the preservation and protection of the public health. Under the charter of the city and county, read in connection with the state Constitution (article 11, § 11), the supervisors have power to pass ordinances placing such restrictions upon the use of any property or the conduct of any business as may be necessary for the public health. *Odd Fellows' Cemetery Association v. City and County*, supra. Such ordinances must, of course, bear a rational relation to the object sought to be attained. They may not be arbitrary or unreasonable. The exercise of the police power cannot be made a mere cloak for the arbitrary interference with or suppression of a lawful business. *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. In *re Smith*, 143 Cal. 368, 77 Pac. 180. "The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385. But, while the action of a legislative body in assuming to exercise the police power is always subject to review by the courts, the question of the expediency or necessity of a proposed restriction is primarily for the Legislature, and the courts will not interfere with the exercise of the legislative discretion unless it clearly appears that such discretion has been arbitrarily or unreasonably exercised. *Ex parte Whitwell*, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152; *County of Plumas v. Wheeler*, 149 Cal. 758, 87 Pac. 909.

There is ample authority defining the limits of the power of legislative bodies in restricting the right of interment of dead bodies. That the interment of such bodies in the midst of thickly populated districts is likely to prove a danger to the health of the surrounding population, and as such may

properly be prohibited, seems to be settled by a number of well-considered cases, cited in the opinion in the *Odd Fellows' Cemetery Case*. *People v. Pratt*, 129 N. Y. 68, 29 N. E. 7; *Presbyterian Church v. Mayor*, 5 Cow. (N. Y.) 538; *Coates v. Mayor*, 7 Cow. (N. Y.) 585; *Kincald's Appeal*, 68 Pa. 411, 5 Am. Rep. 377; *Sohler v. Trinity Church*, 109 Mass. 1; *City Council v. Wentworth St. Baptist Church*, 4 Strob. (S. C.) 300; *Humphrey v. Front St. Methodist Church*, 109 N. C. 132, 13 S. E. 793. On the other hand, it is equally well settled that the interment of the bodies of the dead is proper, indeed necessary, and that the Legislature may not prohibit such interments in places where no possible danger to human life or health could result. Thus, it has been declared by this court that an ordinance prohibiting the establishment of a cemetery within the limits of the county of Los Angeles without the permission of the board of supervisors was unreasonable and void. *Los Angeles v. Hollywood Cemetery Ass'n*, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75. This went on the ground, as was pointed out in the *Odd Fellows' Cemetery Case*, that the county of Los Angeles "has within its limits many square miles of territory which are not only not thickly populated, but in which there are scarcely any inhabitants at all." In the *Odd Fellows' Cemetery Case* some of the justices intimated that the line of demarcation is that separating cities from counties; i. e., that interments may be prohibited in cities, but may not be prohibited in counties. This is perhaps too broad and general a statement of the rule. The right to prohibit interments in a given territory rests upon the conditions existing in that territory. Where a cemetery in which it is proposed to make interments is located in a thickly settled community, further interments there may be prohibited because the burial of dead bodies in close proximity to the habitations of the living has a tendency to endanger the health of large numbers of persons. Where, however, the place in which it is proposed to bury the dead is remote from human habitations, or is close to but few dwellings, the absolute prohibition of interments is an unreasonable restriction of a lawful business, not fairly justified or required for the preservation of the public health, and will not be sustained by the courts. Ordinarily, cities are thickly populated, whereas the portions of counties lying outside of cities are not. In view of this, it may be properly said as a general rule that interments in cities may be prohibited. It must be borne in mind, however, that the limits of many cities include large uninhabited areas; that oftentimes cities include extensive tracts of land which are not actually occupied by dwellings, and are not likely to be for many years to come. Where a city includes considerable tracts of this character, it will not be said that interments anywhere within the corporate limits may be prohibited merely because the terri-

tory involved is all included within the boundaries of a city. Thus, in *Wygant v. McLauchlan*, 39 Or. 429, 64 Pac. 867, 54 L. R. A. 636, 87 Am. St. Rep. 673, an ordinance, prohibiting burials within the city of Portland was held invalid; it appearing that there were within the city limits considerable tracts of land which were sparsely inhabited. This case is criticised to some extent by this court in *Odd Fellows' Cemetery Association v. City and County*; but whether or not it was rightly decided on the facts appearing we do not question the correctness of the principle that such circumstances may be shown as would make it unreasonable, even in a city, to absolutely prohibit burial anywhere within the city limits. In *Lakeview v. Rose Hill Cemetery Company*, 70 Ill. 191, 22 Am. Rep. 71, an ordinance prohibiting further interments in the town of Lakeview was, by a divided court, held unreasonable and invalid. It there appeared that the town of Lakeview contained 8,400 acres of land, and but 1,500 inhabitants, and that, as is stated in the opinion of the court, the lands of the company owning the cemetery "are well selected and are situated at a proper distance from the populous part of the city, in a sparsely settled community, there being but few dwellings in the immediate vicinity." This case, therefore, is no authority for the proposition that a municipality may not properly prohibit further interments in populous parts of its territory, or anywhere within the municipality, if all of it be, or may soon be, thickly settled. In the case at bar it is true that the complaint alleges that there are within the corporate limits of the city and county several large tracts of land, some of which contain several hundred acres, and that interment of dead bodies could be made on several of said tracts of land at points which would be more than a mile distant from any human inhabitant or public thoroughfare. If the ordinance did in effect prohibit the interment of dead bodies upon any such tracts of land, it may be that it would be to that extent unreasonable, or at least that this allegation would tender an issue which would require the trial court to take proof to determine whether or not under all the circumstances the ordinance was unreasonable. But at the time this ordinance was adopted, and for many years theretofore, the Penal Code of this state contained a provision (section 297) making it a misdemeanor to bury or inter, or cause to be buried, any human remains in any place within the corporate limits of any city or town in this state, or within the corporate limits of the city and county of San Francisco, "except in a cemetery or place of burial now existing under the laws of this state and in which interments have been made, or that is now or may hereafter be established or organized by the board of supervisors of the county or city and county in which such city or town or city and county is situate." By reason of the existence of this statute, it was

already, at the time of the passage of the ordinance in question, a misdemeanor to inter any dead body in any place within the city and county of San Francisco outside of the existing cemeteries, or those to be authorized by the supervisors. There is no suggestion that the establishment of new cemeteries was contemplated. The ordinance, therefore, in effect merely prohibited the interment of bodies in existing cemeteries. It is not alleged that any such cemeteries did, in fact, exist upon any of the vacant tracts of land referred to in the complaint. Indeed, the only cemetery described by the plaintiff is its own, and that, as is shown by the allegations of the complaint itself, is situated in the midst of a thickly settled district. As is alleged, "many residences have been built in its neighborhood, and the same have been and are now occupied with families." As no presumptions are to be indulged in support of the pleading, it may be assumed that all the cemeteries existing in San Francisco at the date of the passage of the ordinance were similarly situated. The effect of the prohibition, therefore, was merely to prevent further interments in cemeteries situated within densely populated portions of the municipality. That such prohibition is a reasonable exercise of the police power vested in the board of supervisors clearly appears from the authorities above cited.

It is, however, claimed that the ordinance is unreasonable in its operation upon plaintiff's cemetery, considered by itself, and this contention is based upon the allegations of the complaint to the effect that the soil of the cemetery is of such character that no disease-breeding elements can be transmitted through the same, that the district in which it is has not been proven to be unhealthy or subject to epidemics, and that the cemetery does not possess the characteristics necessary to constitute it a nuisance within the definition of the Code. Civ. Code, § 3479. It is argued that no legislative body can by its mere assertion make that a nuisance which is not in fact a nuisance. This is undoubtedly true, but the ordinance in question does not proceed upon the basis that further interments are to be prohibited because the cemeteries in which such interments are sought to be made are in fact nuisances under the general law. The police power granted by the Constitution is not restricted to the suppression of nuisances. It includes the regulation of the conduct of business, or the use of property, to the end that the public health or morals may not be impaired or endangered. As was said by this court in the *Odd Fellows' Cemetery Case*, at page 231 of 140 Cal., page 988 of 73 Pac.: "Whenever a thing or act is of such a nature that it may become a nuisance, or may be injurious to the public health if not suppressed or regulated, the legislative body may, in the exercise of its police powers, make and enforce ordinances to regulate or prohibit

such act or thing, although it may never have been offensive or injurious in the past." "The exercise of this power is not limited to the regulation of such things as have already become nuisances or have been declared to be such by the judgment of a court." *Id.* The question is whether in the exercise of a reasonable discretion the board may conclude that the thing prohibited is dangerous to the public health. The views already expressed make it clear that this decision may properly be reached with regard to the interment of dead bodies in thickly settled communities. Whether the danger to be apprehended from such interment is to be best averted by a prohibition of further burials is a question of policy to be decided by the legislative body. The court is not to substitute its judgment for that of the board of supervisors. Any evidence that might be introduced tending to show that, as a matter of fact, a particular cemetery had not proven or might not prove detrimental to the public health, would not alter the fact, of which courts take judicial notice, that cemeteries situated as this one is are likely to cause such injury, and are therefore, as to further use, within the control of the legislative authority.

Much stress is laid by the appellant upon the facts that a grant of this land was made to it by the city and county of San Francisco for the purposes of a cemetery, and that the establishment and existence of the cemetery were known for many years to the city and county and acquiesced in by it. From these facts it is argued that the city is estopped to now prevent the further use of the premises for the purposes of interment of the dead. There is no force in this position. Even if the city and county had made an express contract granting to the plaintiff the right to make interments in this ground in perpetuity, such contract would have no force as against a future exercise by the legislative branch of the government of its police power. *Brick Presbyterian Church v. Mayor*, *supra*. This power cannot be bargained or contracted away, and all rights and property are held subject to it. *Boston Beer Co. v. Mass.*, 97 U. S. 25, 24 L. Ed. 989; *Butchers' Union v. Crescent City Co.*, 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; *New Orleans Gas Co. v. Louisiana Light, etc., Co.*, 115 U. S. 850, 6 Sup. Ct. 252, 29 L. Ed. 516. The alleged estoppel relied on can have no greater force than would a contract such as the one supposed. But, in fact, there is nothing upon which to base the claim of estoppel. As appears from the complaint, this cemetery, at the time of its establishment, was outside the limits of the city of San Francisco, in a then unsettled district, more than a mile distant from the nearest residence section. If, as is claimed, the city acquiesced in the establishment of this cemetery and in the expenditure of large sums of money in its improvement, such acquiescence

was based upon the conditions as they then existed. Since that time the city (or its successor, the city and county) has grown until it has surrounded the cemetery in question. This change of conditions altered what was before a harmless and beneficial enterprise into one fraught with danger to the community. There is no ground for the claim that, because the city in 1854 considered the location in question a proper one for a cemetery, it was bound to continue to so regard it half a century later, when the situation of the cemetery with relation to the city had entirely changed.

Apart from this claim of estoppel, the case does not differ materially from that made by the plaintiffs in the *Odd Fellows' Cemetery Case*. The decision in that case, apart from what we have here said, sufficiently answers the contention of appellant that its incorporation under the act of 1859, and its purchase of the land in question, constituted a contract, which is violated by the ordinance in question. Indeed, on all the questions raised in the earlier case, we should have rested our rulings upon a mere reference to the former decision, but for the fact that the plaintiff, as has been said, relies upon two decisions of federal courts as being in conflict with our views. In *Hume v. Laurel Hill Cemetery (C. C.)* 142 Fed. 532, the United States Circuit Court for the Northern District of California did hold upon a complaint not essentially different from that here presented, that the ordinance in question was void. While we have the highest respect for the opinion of the learned judge who rendered this decision, we cannot, for the reasons above stated, concur in it. It is claimed, further, that the decision of the Supreme Court of the United States in *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169, compels the conclusion that the ordinance in question is void, as depriving the plaintiff of property without due process of law. In any case, we should feel strongly inclined to follow the decision of this high tribunal, and, in a case involving a claim of right under the Constitution of the United States, we should, if that decision had been rendered in a parallel case, be bound to follow it. But we think the *Dobbins Case* is very different from the one before us. There the city council of Los Angeles had in August, 1901, adopted an ordinance making it unlawful to erect and maintain gas works outside of a certain district. In September the plaintiff purchased lands and made a contract for the erection of gas works upon territory which was not within the prohibited zone. After the work had been commenced, the city council on November 25, 1901, passed a second ordinance so changing the boundaries of the territory within which the erection of gas works was permitted as to include the plaintiff's land within the prohibited territory. It was alleged that the second ordinance was adopted at the instigation of a corporation which

was engaged in manufacturing gas and for the purpose of preserving a monopoly by said corporation, and that the territory which was added to the prohibited territory by the second ordinance was devoted almost exclusively to manufacturing enterprises. It was held that the ordinance was void upon the ground that the facts as to the situation and conditions were such as to establish the exercise of the police power in such manner as to comprise a discrimination against the plaintiff, the court saying; "We think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power, which amounts to the taking of property without due process of law, and an impairment of property rights protected by the fourteenth amendment of the federal Constitution." It appeared there that within four months after the city council had fixed the limits within which the business of manufacturing gas could be conducted, and after the plaintiff had, in reliance upon this action, purchased land within the permitted limits and gone to expense in preparing to manufacture gas, the council had, without any apparent change of conditions requiring such action, altered the limits so as to make unlawful that which but shortly before they had, in effect, declared to be lawful. This the court characterized as a "sudden and unexplained change of limits," indicating an intent to discriminate against the plaintiff, and, following its settled rule, it held that the police power could not be made a pretext for such discrimination. But these considerations do not apply to the case at bar. Here there was no change that was either sudden or unexplained. By the ordinance itself a period of almost 18 months was given to those affected by it to prepare for the change. The ordinance, passed in March, 1900, was not to be effective until August, 1901. Furthermore, ample cause for the change was shown. The land affected by it was, when originally dedicated as a cemetery, one mile from any habitation. At the time the ordinance was adopted it had become the center of a thickly populated residence district. These circumstances, which appear from the complaint itself, afford at once the justification for the exercise of the police power, and the refutation of the claim that the exercise of that power was a mere pretense for the spoliation of private rights. On the facts alleged it cannot be claimed that there was no reasonable justification for the action of the board, and there is no claim that the ordinance was passed for the purpose of discriminating against the plaintiff by imposing upon it any onerous burdens which were not imposed upon others similarly situated. We

think the appellant has shown no reason why the ordinance in question was not a valid exercise of the legislative power of the city and county.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MCFARLAND, J.; HENSHAW, J.

152 Cal. 443

BECHTEL v. WIER. (L. A. 1,841.)

(Supreme Court of California. Dec. 2, 1907.
Rehearing Denied Dec. 30, 1907.)

1. MORTGAGES — FORECLOSURE — VOIDABLE SALES—COLLATERAL ATTACK.

A voidable sale under a mortgage foreclosure decree cannot be overthrown in a collateral proceeding brought after the expiration of five years from the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1470, 1541.]

2. SAME—MODE OF SALE.

A sale under execution or foreclosure decree is void only if conducted in a manner prohibited by statute, or in a manner which would not have been in the power of the court in the first instance to authorize.

3. JUDICIAL SALES—VALIDITY—IRREGULARITY—VACATING.

Whether a motion to vacate a sale in execution of a judgment on account of irregularity of the officer making the sale should be granted rests in the discretion of the court; and it is immaterial whether the irregularity consists in disregarding the provisions of the statute or in failing to observe the directions in the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Judicial Sales, § 72.]

4. SAME—CONFIRMATION—EFFECT.

To invoke the rule that a departure from the directions in a decree directing a sale renders the sale void, the departure must be of a material character; and, where an officer in making a sale departs from the directions of the decree, the court may, by confirming the sale, ratify it, provided the terms so ratified are within the power of the court to impose in the first instance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Judicial Sales, § 66.]

5. EQUITY—JURISDICTION—DECREES.

The powers of equity dealing with subject-matters within its jurisdiction are not confined by the rules of law, but a wide play is left to the chancellor in formulating decrees so as to be capable of dealing with the conditions presented.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 986-992.]

6. MORTGAGES — FORECLOSURE — SALES — VALIDITY.

A mortgage of one parcel given by a debtor to secure a debt, and a mortgage of another parcel given by a third person as additional security for the payment of the same debt, were foreclosed by a decree directing a sale of the debtor's parcel first and the sale of the third person's parcel in case of a deficiency. The officer, on being unable to sell the parcels separately, sold them en masse. Held, that the sale was at most only voidable on account of the irregularity, and was good until set aside by a direct proceeding, and could not be collaterally attacked.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1537-1539, 1559.]

7. EXECUTION—SALES—VALIDITY.

A sale en masse under an execution of distinct parcels directed to be sold separately establishes only an irregularity, and is not void, but voidable on a proper application of the judgment debtor.

8. MORTGAGES—FORECLOSURE—SALES.

Where separate parcels are offered for sale separately at a foreclosure sale, and no bid is made, the property may be sold in one parcel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1515.]

9. SAME.

Where a mortgage of one parcel given by a debtor to secure a debt, and a mortgage of another tract given by a third person as additional security for the payment of the same debt, were foreclosed by a decree directing the sale of the debtor's parcel first, and the third person's parcel in case of a deficiency, a sale of both parcels as one tract, after a failure to sell the parcels separately, was valid as against the objection that the sale imposed on the third person the whole burden of the debt, and as against the objection that a sale of the debtor's property must be made before recourse could be had to the third person's property.

10. SUBROGATION—PAYMENT BY SURETY—EFFECT.

Under Civ. Code, § 2848, and Code Civ. Proc. § 709, authorizing a surety satisfying the obligation of the principal to enforce the remedies of the creditor against the principal, etc., a mortgagor in a mortgage given to secure a debt due from a third person is, on a sale of the premises under foreclosure, entitled to be subrogated to the rights of the creditor.

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by L. D. Bechtel against L. Wier. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Herbert Cutler Brown, George H. Moore and E. W. Freeman, for appellant. L. D. Bechtel and Dunnigan & Dunnigan, for respondent.

HENSHAW, J. Plaintiff Bechtel and one Lena B. Mattern each gave a mortgage to secure the debt of the latter. The mortgages were on separate pieces of property. Bechtel's mortgage was given as additional security for the Mattern debt. The mortgage declared that it was given "as security for the payment of one promissory note according to its terms," and declared, further, that, if she shall fail to pay or cause to be paid any part of the debt secured when due, the whole debt secured shall, at the option of the mortgagee or assigns, become due and collectible. A foreclosure was had of these mortgages. The decree and order of sale directed that the parcel of land mortgaged by Lena Mattern be first sold at public auction; that, if the moneys arising from the sale of this property was not sufficient to satisfy the judgment, then, for any deficiency remaining, the parcel mortgaged by Bechtel be sold. The sheriff sold the property, and issued to the purchaser his certificate of sale in due form. His return shows that he first offered the parcel mortgaged by Mattern for sale, and received therefor no bid. He then offered the

Bechtel property for sale, and received therefor no bid. Thereupon he offered both parcels for sale in one lot, and effected a sale for an amount sufficient to satisfy the judgment. After the sale, which was on April 25, 1901, Bechtel leased his land so sold to the defendant in this action at the monthly rental of \$20. Subsequently, upon defendant's refusal to pay rent, plaintiff brought his action in a justice's court for unlawful detainer. The answer pleaded by way of defense the sale of the land, and alleged that the defendant had paid the rent sued for to the purchaser, a fact uncontradicted. Defendant recovered judgment in the justice's court, plaintiff appealed to the superior court, and there recovered judgment, from which this appeal is taken. In the superior court the certificate of sale offered by defendant was excluded upon the ground that the sale itself was void because made contrary to the directions of the decree. Upon the other legal questions involved the attorneys for plaintiff and defendant are in accord. The single proposition to be determined in the case is whether or not the sale was in fact void. If voidable merely, then, owing to the great lapse of time—some five years—and to the fact that this is but a collateral attack and not a direct proceeding to vacate the sale, it could not be overthrown in this action for irregularity. Respondent's position may be thus stated: The terms of the decree ordering sale are controlling. By those terms the Mattern property was to be first sold, and the Bechtel property was to be sold only in the event of and to make good any deficiency which might exist after the sale of the Mattern property; that the right to sell the Bechtel property existed and arose only after the sale of the Mattern property, and the sale of the two parcels in gross was a violation of the terms of the decree and therefore void.

1. Coming to the consideration of this proposition, it is to be remembered that a sale under execution or under foreclosure decree is void only if conducted in a manner prohibited by statute, or in a manner which would not have been in the power of the court in the first instance to have authorized. And in this regard it matters not whether the departure was from the statutory mode or from the directions of the decree. Thus it is said by this court in *Humboldt Society v. March*, 136 Cal. 321, 68 Pac. 968: "Whether a motion to vacate a sale of property, made in execution of a judgment on account of some irregularity on the part of the officer making the sale, should be granted rests very largely in the discretion of the court before which the motion is made; and it is immaterial whether such irregularity consists in disregarding the provisions of the statute for making the sale, or in failing to observe and follow some express direction in the judgment. A party to an action cannot claim an

absolute right to have such sale vacated, unless he shall show that he has sustained some injury by reason of the irregularity." And, says Freeman on Void Judicial Sales, § 21: "It is sometimes said that a sale under a decree must pursue the direction therein contained, that a departure from these directions renders the sale void. But to invoke this rule the departure must be of a very material character. * * * In truth, the court is not absolutely bound by the terms of its order or decree respecting the mode of the sale. * * * If the court had the power to direct the terms of the sale in the first instance, it may change them afterwards, and, if an officer or any other agent of the law, or of the court in making a sale, departs from the directions of the decree, the court may nevertheless, by confirming the sale, ratify his action, provided always that the terms so ratified are such as the court had power to impose in the first instance." *Farmers' L. Co. v. Oregon P. R. R. Co.*, 28 Or. 44, 40 Pac. 1089; *Emery v. Vroman*, 19 Wis. 689, 88 Am. Dec. 726.

The question which thus arises is: Could the court in its direction for sale have provided for the sale as here actually conducted *en masse* to meet the contingency which actually arose, namely, that no bid was obtained for either of the parcels when separately offered? We entertain no doubt that it could. The powers of a court of equity, dealing with the subject-matters within its jurisdiction, are not cribbed or confined by the rigid rules of law. From the very nature of equity a wide play is left to the conscience of the chancellor in formulating his decrees, that justice may be effectually carried out. It is of the very essence of equity that its powers should be so broad as to be capable of dealing with novel conditions. *S. P. Co. v. Robinson*, 132 Cal. 408, 64 Pac. 572. The mortgage contract of the surety in this instance was the agreement that his property should be subject to the payment of the whole debt due from Mattern. His principal right was that the Mattern property should first be exhausted toward the payment of that debt before recourse was had against his property. But his obligation was none the less the payment of the whole debt. If, for any reason, the security of the principal debtor had failed utterly, no doubt can be entertained but that all of Bechtel's property could have been subjected to sale for the payment of all of the Mattern debt. No doubt, therefore, can be entertained but that it would have been within the power of the court, if it had anticipated a failure to derive any money from the sale of the Mattern property, if, in other words, it had become valueless as security, or if, as here, after fully preserving the rights of the surety by ordering first a sale of the principal debtor's property, the court had further decreed that, in case of failure to effectuate the sale, both pieces of property

might be offered and sold in gross. And, in the absence of fraud or unfair advantage taken (and it is to be noted that there is no attack upon the sale for any such reason), it would be assumed, from the fact that the sheriff was unable to sell the parcels of land separately and could only sell them as a whole, that the lands were more valuable taken together than separately. *Hibernia S. & L. Society v. Behnke*, 121 Cal. 339, 53 Pac. 812. Thus we find that it has been consistently held in this state since *Nagle v. Macy*, 9 Cal. 428, that a sale irregularly made is not void, but voidable merely, and is good until regularly set aside. The title of a purchaser at such sale cannot be impeached in a collateral action for any such irregularity. Moreover, it is held that a sale *en masse*, instead of by separate parcels, even if not authorized, establishes only an irregularity and not a lack of power, and is not void. Thus in *Vigorous v. Murphy*, 54 Cal. 346, it is said: "There is no doubt that a sale *en masse* under a writ of execution of several known and distinct parcels, at a price greatly below the actual value of the property, cannot be sustained against the objection of the judgment debtor. Such sales are not void, but are voidable, and will be set aside upon a proper application of the judgment debtor when made in a reasonable time after such sale, where there is no ground in reason for belief that it was less beneficial to the judgment creditor or debtor than it would have been had the sale been made of the separate parcels"—citing *San Francisco v. Pixley*, 21 Cal. 57; *Page v. Randall*, 6 Cal. 32. And in *Hudepohl v. Liberty Hill, etc., Co.*, 94 Cal. 583, 29 Pac. 1025, 28 Am. St. Rep. 149, an appeal from a proceeding instituted to set aside an execution of sale of several distinct lots of land because they were sold in gross, this court said: "It is not sufficient to allege merely that several separate tracts were sold in a lump by the sheriff. *Riddell v. Harrell*, 71 Cal. 262, 12 Pac. 67. Such cases are voidable, not void; and one who seeks to have a sale *en masse* set aside should show that none of the conditions which would authorize the sale of all the parcels together existed at the time of the sale." And Freeman on Executions, § 1711, says: "The decided preponderance of the authorities on this subject shows that a third person cannot object to a sale *en masse*; and that, when the person entitled to complain does not do so by some appropriate proceedings, the sale is impregnable to any collateral assault, and must be treated as valid."

2. We have so far considered the question of the sale to the extent of determining that, at the worst, it was not void, but voidable merely, and that respondent's remedy was by direct proceedings within a reasonable time to vacate the sale, proceedings which were never taken. But equally demonstrable is the proposition that, in the absence of

fraud and injury shown, the sale en masse of the two parcels of land, under the circumstances indicated by the sheriff's return, was not even irregular, but was a perfectly valid exercise of power. *Marston v. White*, 91 Cal. 40, 27 Pac. 588, quotes *Freeman on Executions* to the following effect: "The rule applicable to such cases is stated, and we think correctly, in *Freeman on Executions*, § 296, as follows: 'The rule that distinct parcels should be separately sold is not generally enforced to the extent of denying the right to sell when the sale can be made in no other way. Hence the officer, after offering the parcels separately and in various combinations, without receiving any bids, may then offer and sell them en masse.' * * * Here the lots were offered separately, as directed by the appellant, and the only ground urged for setting aside the sale was that they were sold together. This, as we have seen, was not a valid ground. * * *" So, also, in *Connick v. Hill*, 127 Cal. 164, 59 Pac. 832, it is said: "It is now the settled rule in this state that whenever separate known parcels of land are offered for sale separately in foreclosure proceedings, and no offer or bid made for either parcel, then the property may be offered and sold in one parcel. *Marston v. White*, 91 Cal. 40, 27 Pac. 588; *Hibernia, etc., Society v. Behnke*, 121 Cal. 341, 53 Pac. 812. The same rule is laid down by the Supreme Court of the United States. *White v. Crow*, 110 U. S. 190, 4 Sup. Ct. 71, 28 L. Ed. 113. The rule is to consider every sale made by an officer of court under the mandate thereof as final. *Hopkins v. Wiard*, 72 Cal. 262, 13 Pac. 687." See, also, *Anglo-California Bank v. Cerf*, 142 Cal. 304, 75 Pac. 902. Nor can it matter, as argued by respondent, that the effect of such sale is to impose the whole burden of the debt upon his land, and at the same time to force him in redeeming to redeem also the land of the principal debtor.

By his contract he imposed the burden of the whole debt upon his land, if, for any reason, the security of the principal debtor should fail. He is entitled to be subrogated to all the rights and remedies of the judgment creditor, and this is all he may justly ask. Civ. Code, § 2848; Code Civ. Proc. § 709. Respondent's contention that the direction was for a sale of the principal debtor's property before recourse could be had to the property of the surety, and that nothing can fill the measure of this requirement but an actual sale, presents altogether too narrow a view of the matter, and one not at all agreeable to equity. In this view, if an actual sale of the property of the principal debtor is a prerequisite to the subjection of the surety's property to the payment of the debt, it would amount to a confiscation of the creditor's security to the extent of his lien against the surety's property, in case an actual sale of the property of the principal debtor could not be effected. The reasonable and equitable view of the matter we take to be that

adopted and expounded by the Supreme Court of Iowa. According to the statutes of that state concerning the homestead of the judgment debtor, it is provided that such homestead should not be sold except to supply the deficiency remaining after exhausting other property of the debtor also liable to execution. In *Burmester v. Dewey*, 27 Iowa, 468, there had been a foreclosure upon real property, including the homestead of the judgment debtor. At the execution sale the property was offered in two parcels so as to exclude the homestead, and no bid was received therefor. Thereupon it was offered in gross, including the homestead, and sold. It was there argued, as here, that the law required a sale of the other property, and permitted a sale of the homestead only to supply a deficiency. The court said: "But was the other property named in the writ exhausted? I say it was when it was all offered in the smallest legal subdivisions, and not sold for want of bidders. If, after being thus offered, the other 200 acres had been offered in a body and not sold, and the 240 had been offered and sold, it would to my mind be the merest talk to say that the other property was not exhausted, and therefore the homestead could not be sold; that an offer of the other property, without selling it, is not exhausting it within the meaning of the law. The power to sell, the duty to sell, would, in my judgment, beyond doubt arise after the offer of the 200 in gross, whether sold or not. If this is not so, then the sheriff might be required to perform, in some instances, an impossibility before the homestead could be sold."

With this view we are in full accord, and upon both of the grounds above mentioned the judgment must be reversed and the cause remanded.

We concur: ANGELLOTTI, J.; LORIGAN, J.; McFARLAND, J.

I dissent: BEATTY, C. J.

SHAW, J. I concur in the judgment upon the grounds stated in part 1 of the foregoing opinion. As to the second ground, it appears that the appellant was a surety only, and the provision of the decree requiring a separate sale was for his benefit. I am not prepared to say that he should not have the irregular sale set aside in a direct proceeding for that purpose.

GLENN et al. v. BECHTEL. (L. A. 1,853.)
(Supreme Court of California. Dec. 2, 1907.
Rehearing Denied Dec. 30, 1907.)

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by L. W. Glenn and others against L. D. Bechtel. From a judgment for plaintiffs, defendant appeals. Affirmed.

Herbert Cutler Brown, George H. Moore, and E. W. Freeman, for appellant. L. D. Bechtel and Dunnigan & Dunnigan, for respondents.

PER CURIAM. This was an action to quiet title brought by the grantee of the purchaser at foreclosure sale of the property of the defendant Bechtel. The defense was that the sale was void. Judgment passed for plaintiff. The sale being the same sale as that considered in *Bechtel v. Wier* (L. A. 1,841, this day decided) 93 Pac. 75, and the validity of the sale there having been upheld, the judgment in this case is affirmed.

152 Cal. 523

RIANDA v. WATSONVILLE WATER & LIGHT CO. et al. (S. F. 4,318.)

(Supreme Court of California. Dec. 9, 1907.)

1. PLEADING—DEED—FAILURE TO DENY UNDER OATH—ADMISSION.

Under the express terms of Code Civ. Proc. § 448, the execution of deeds relied on as a defense and set forth in full was admitted by plaintiff's failure to file an affidavit denying their genuineness and due execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 869.]

2. WATERS—CONVEYANCE OF LAND—APPURTENANCES—RIPARIAN RIGHTS.

Where decedent "granted, bargained, sold, and conveyed" land to her daughters, all her legal and equitable interest therein, together with all that was appurtenant or incident to it or beneficial for its enjoyment passed; and her estate has no interest authorizing her administratrix to sue to set aside deeds to water rights and riparian rights appurtenant to the land made by decedent to defendants before the conveyances to her daughters and to quiet title to such rights, on the ground of fraud in procuring the deeds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 167-172.]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Ellen Rlanda, administratrix, against the Watsonville Water & Light Company and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed and dismissal of action directed.

Wyckoff & Gardner and Charles A. Shurtleff, for appellants. Geo. P. Burke and Dickerman & Torchiana, for respondent.

LORIGAN, J. This appeal is prosecuted by the defendants from a judgment in favor of plaintiff and from an order denying their motion for a new trial. The action was brought to quiet title to certain riparian and other water rights in Santa Cruz county, and to set aside two certain deeds made by plaintiff in this action to the defendants Smith and Montague on the ground of fraud in their procurement.

Referring generally to the pleadings, it is alleged in the complaint that Carmen A. de McKinlay died on October 6, 1901, and that plaintiff was duly appointed and qualified as

administratrix of her estate; that on September 27, 1884, said Carmen A. de McKinlay was the owner in fee simple of a tract of land in Santa Cruz county, being lot 1 of the Rancho Los Corralitos, containing 855 acres, which land embraced part of a certain lake known as "Pinto Lake," and part of a certain creek known as "Corralitos creek," in the waters of both of which she had riparian rights appurtenant to her said land; that on said September 27, 1884, and on June 27, 1885, said Carmen A. de McKinlay made and executed in favor of said Smith and Montague deeds in which she granted to them "all and singular the water and riparian rights and privileges of every kind and description which belong or in any manner pertain to" the land described in the complaint, together with a right to have, take, and use the flow of the waters of "Corralitos" creek, and to enter and lay down pipes or flumes on the lands of the grantor "for the convenient use and management and appropriation of said water, water rights, and riparian rights as aforesaid," with a covenant on the part of the grantees as to a given quantity of water from said Corralitos creek which the grantor was entitled to take for usual household, culinary, and domestic purposes, including the watering of stock on her premises, from any pipe or flume laid by said grantees, and which, on her demand, they would supply her from any point on the pipe or flume line she might designate.

It was further alleged that, when Mrs. McKinlay executed said deeds, she did not understand English, and had no independent advice relative to the transactions evidenced by them; that, when the grantees presented said deeds for execution, the portion thereof purporting to convey water, water rights, and riparian rights was not read or explained to her; that, on the contrary, said grantees informed her that the deeds effected simply the transfer by her of a right to enter her lands for the purpose of laying pipes and flumes to take water from the Corralitos creek; that she did not know that said deeds contained anything purporting to convey water, water rights, or riparian rights other than pertained to the waters of said Corralitos creek; that she did not know that she had conveyed her water rights and riparian rights in either of said deeds, and did not discover the contents of them, or the legal effect of said deeds until December, 1900, when she immediately took steps to institute suit to set said deeds aside, but before she was able to do so died.

In another count it is alleged that there was no consideration for the deeds; that the covenant therein by the grantees to furnish her water from the pipes or flumes had never been fulfilled; and that, when the covenant in that regard was made by them in said deed, it was made without any intention on the part of either of them of performing it.

The last count set up a claim of adverse possession to all said water and water rights by Mrs. McKinlay from the date of said deeds to the time of her death. It appears from the deeds, which are attached to the complaint, that the one executed by Mrs. McKinlay September 27, 1884, was recorded January 4, 1901, and the one executed June 27, 1885, was recorded on July 10, 1885. An inspection of the deeds shows that the only difference in their contents is that the last deed specifies the size of the service pipe through which Mrs. McKinlay might take water from the pipe or flume of the grantees, with the provision that she should furnish the pipe for that purpose.

It is further alleged that Smith and Montague in 1897 conveyed to the defendant, the Watsonville Water & Light Company, all the riparian rights and privileges acquired by them under said deeds, but with notice that, when Mrs. McKinlay executed them, she did not know there was anything in them purporting to carry any water or water rights whatever. The prayer was for a decree adjudging that the estate of said Carmen A. de McKinlay, deceased, is the owner of all the water, water rights, and riparian rights and privileges of every kind belonging or pertaining to the land described in the complaint.

A demurrer, general and special, to the complaint having been overruled, the defendants jointly answered, denying all the allegations of the complaint, except the execution of the deeds sought to be set aside and set up as a further and separate defense, that on August 6, 1901, the said Carmen A. de McKinlay, by deed of gift, granted and conveyed a portion of the property described in the complaint to her daughter Flora McKinlay Duckworth, and on the same date, by similar deed, conveyed to her daughter Ellen McKinlay Rlandl another portion of said property, reserving, however, to herself in the whole of said land so separately conveyed a life estate. The said two conveyances to said daughters comprised and embraced all the property described in the complaint. It was then averred that said Carmen A. de McKinlay subsequent to said conveyances to her daughters, and on October 6, 1901, died, and that after that date neither she nor her estate, nor the administratrix thereof, had or possessed any right, title, or interest in and to the land described in the complaint, or in any of the hereditaments or appurtenances thereunto appertaining or belonging; that said estate has no interest in the subject-matter of the action, and is not the real party in interest. Both deeds from Mrs. McKinlay to her daughters were set forth at length as exhibits to the answer and made a part thereof.

We have stated the contents of the pleadings in this general way as sufficiently presenting the point upon which this appeal is to be determined.

While many grounds are urged by appellants for a reversal of the judgment and the order denying a new trial—that the court erred in overruling the demurrer to the complaint, insufficiency of the evidence to sustain the findings and errors alleged to have been committed in the admission of evidence and in other respects—the view we take upon another point presented by appellants makes it unnecessary to enter into a consideration of these matters at all. This point is addressed to the right of the plaintiff as administratrix of the estate of Carmen A. de McKinlay, deceased, to maintain this action. In that regard it is urged by appellants that, as it is admitted by the pleadings that Mrs. McKinlay had before her death conveyed by deeds of grant all the property described in the complaint to her two daughters, such conveyances carried with them as the legal effect thereof all interest, legal or equitable, she had in the property, including all water or riparian rights pertaining or appurtenant to said lands; and hence the estate of Mrs. McKinlay had no interest whatever in the lands described or in the water or riparian rights appurtenant or incident thereto. In considering this point, it will be observed that in the answer of defendants, to which we have called attention, the conveyances to her daughters by Mrs. McKinlay of the land described are set forth in full and made part of that pleading. There was no affidavit filed by plaintiff denying their genuineness and due execution, and hence under section 448 of the Code of Civil Procedure these matters were deemed admitted. This being so, the question then is squarely presented as to the effect of such conveyances upon the right of the representative of the estate of Mrs. McKinlay, or her estate, to maintain the action. We think that in view of such conveyances no such right exists. The terms of conveyance used in the deeds to the daughters are "grant, bargain, sell, and convey," which are of sufficient recognized legal effect to carry all legal or equitable interests she may have had in the land, together with all that was appurtenant or incident to it or beneficial for its enjoyment, and the effect of their use in the conveyances of the land in question was to divest the grantor, Mrs. McKinlay, of any interest whatever she possessed or might have in and to the water rights or riparian rights appurtenant thereto.

Counsel for respondent seem to take the position that, because Mrs. McKinlay had prior to her conveyances to her daughters conveyed these riparian rights to Smith and Montague, therefore they were severed from the lands to which they were appurtenant, and did not pass under the conveyances to her daughters of such lands. There is certainly no reservation as to such rights in the deeds to her daughters, nor anything pretending to accomplish it, and the deeds themselves stand unassailed. As to a severance of the riparian rights in the lands to which

they were appurtenant, the very theory of this case is that nothing of the kind was ever accomplished. If the allegations of the complaint were true that the purported conveyances of the water and water rights by Mrs. McKinlay to Smith and Montague were obtained by fraud—the Watsonville Light & Water Company taking with notice thereof—then at least as between these parties Mrs. McKinlay had never parted with her title to them. There then never was a severance effected in either law or equity as against Mrs. McKinlay, and under the deeds to her daughters by virtue of the comprehensive language of conveyance used in them all her interest, of whatever character, passed with the conveyances of the lands to which they were appurtenant. Either these riparian rights were appurtenant to the land conveyed to the daughters at the time the conveyances to them were made or they were not. If they were not, it was because they had previously been severed by a valid conveyance of them to Smith and Montague, and hence, therefore, neither Mrs. McKinlay during her lifetime, or her estate at her death, had any interest in them. If, on the other hand, the conveyances to Smith and Montague were void, then in legal contemplation these rights as between Mrs. McKinlay and her daughters as grantees had never been severed from the lands, and passed under the conveyances of it from her to them, the granting clause of which we have seen was ample to convey them. In neither view could Mrs. McKinlay or her estate have any claim to such riparian rights subsequent to the last deeds—those to her daughters. Let us concede, for the purpose of illustration, that the deeds to Smith and Montague were void, and that prior to making the conveyances to her daughters Mrs. McKinlay had successfully maintained an action against the defendants here, and had succeeded in having the deeds to the defendants set aside for fraud. The effect of such successful effort would not be to revest in Mrs. McKinlay the riparian rights purporting to have been conveyed to Smith and Montague as severed and distinct from the lands to which they had been riparian when such conveyances were made. The legal effect would be to declare that such rights had not been severed as appurtenant to the lands if an invalid attempt had been made to sever them, and it could not for a moment be contended that the subsequent deeds to her daughters, such as she made of the lands described in the complaint, did not carry such water rights and riparian rights as appurtenant to them. The same result would follow if the conveyances to the defendants were nullified in the present action of the administratrix. If the attempted severance by the conveyance to Smith and Montague of such riparian rights from the lands to which they were appurtenant should now be declared void, the legal effect would be to

restore or attach them as appurtenant to the lands conveyed to the daughters. And, even if as claimed, in one of the counts of the complaint, Mrs. McKinlay had acquired title by adverse possession to these riparian rights subsequent to the deeds to Smith and Montague, unquestionably whatever right she so acquired passed under her deed to her daughters. In fact, as far as any interest which she had in said water or riparian rights is concerned, the comprehensive terms of the conveyances to her daughters of the lands to which they were appurtenant carried them, and she and her estate would be estopped from asserting that they did not. The estate could not in any view have any interest in them.

Little authority is cited on either side as to the effect of the conveyances to the daughters of the riparian rights involved here. The appellants insist, and we think correctly, that the rule is so clear that they did pass under them; and hence that the estate of the grantor thereof had no interest in them, as to make such citations unnecessary. Counsel for respondent rely on the cases of *Kimball v. Gearhart*, 12 Cal. 28, and *Collins v. O'Laverty*, 136 Cal. 31, 68 Pac. 327, as sustaining their position. But the cases cited lend no support to their claim. The *Kimball Case* simply declares that, while a deed carried the property and future use of water, it did not retroact to carry a right of damages for the past illegal use of it. This case does not support in any particular the position of respondent. The *Collins Case* was an action by the administrator of the estate of Collins to set aside two conveyances of land made by his intestate a few days before his death. The result of such an action, if successful, would have been to vest the property in the estate of Collins. There is no analogy between the *Collins Case* and the one at bar. If, after making the alleged void deed, Collins had conveyed the property to third parties, the case would be analogous to the one under consideration. The fact that Mrs. McKinlay did, and Collins did not, make such a subsequent conveyance differentiates the two cases. In the *Collins Case* the property involved in the fraudulent deed, if such deed were set aside, would inure to the estate of Collins. In the present case, if the claim of plaintiff's intestate was sustained, and the deeds to Smith and Montague set aside, the estate of Mrs. McKinlay would not get the property involved—the riparian rights—because the title and right asserted thereto had passed from decedent in her lifetime by the conveyances to her daughters of the lands to which they were appurtenant. In the *Collins Case* this court said: "The sole test of the administrator's right of action is the right of the estate to the property." When we apply this test to the matter under review, it is evident that the plaintiff cannot recover because the administratrix has no right to the

property involved in the action and the estate no interest in it. No further elaboration of the proposition is necessary.

Therefore, in the view we take, the judgment and order must be and is, reversed, and, as the plaintiff has no interest in the subject-matter of the action and is without right to maintain it, the lower court is directed to dismiss it.

We concur: SHAW, J.; ANGELLOTTI, J.; MCFARLAND, J.; HENSHAW, J.

152 Cal. 500

HOUGHTON et al. v. LOMA PRIETA LUMBER CO. (S. F. 3,837, 3,920.)

(Supreme Court of California. Dec. 6, 1907.)

1. APPEAL—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence contrary to strong evidence, but not wholly unwarranted by the evidence, will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

2. MASTER AND SERVANT—WORK OF INDEPENDENT CONTRACTOR—NATURAL CONSEQUENCES OF WORK—EVIDENCE—INSTRUCTIONS.

Where, in an action for injuries from blasting while constructing a road, the evidence showed that the road was being constructed through an uninhabited and practically untraveled region, instructions authorizing the jury to apply the doctrine that, though the work was being done for defendant by an independent contractor, yet defendant was liable if the work done would necessarily produce wrongful consequences, without reference to negligent acts by the contractor, or was intrinsically dangerous and constituted *ipso facto* a nuisance, were improper.

3. NUISANCE—ELEMENTS—BLASTING.

Without reference to the particular locality in which it is carried on, blasting is not so intrinsically dangerous as to be *ipso facto* a nuisance, so that the blaster will be liable for injury caused by it irrespective of his negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 15, 23.]

4. MASTER AND SERVANT—INDEPENDENT CONTRACTOR—LIABILITY OF MASTER.

Where liability depends on negligence, an independent contractor is liable for the negligence, and not the employer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1241.]

5. SAME.

An employer contracting with an independent contractor to construct a wagon road through an uninhabited and substantially untraveled region is not liable for injury happening to some one injured by the blowing out of a stump in the road, though the blasting was done without notice; the chance of injury being remote, and the failure to give notice being the negligence of the independent contractor, and not of the employer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1259, 1260-1264.]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Harriet E. Houghton and others against the Loma Prieta Lumber Company. From a judgment for plaintiff and from an order denying a motion for a new trial, defendant appeals. Reversed.

Bishop, Wheeler & Hoefler and William Rix (Alfred J. Harwood, of counsel), for appellant. Sullivan & Sullivan, Theo. J. Roche, and Chas. M. Cassin, for respondents.

MCFARLAND, J. These appeals both arise out of an action in the superior court entitled "Harriet E. Houghton et al. v. Loma Prieta Lumber Co." (a corporation). That action was brought by the widow and minor children of Herbert E. Houghton, deceased, to recover damages for his death, alleged to have been caused by the negligence of the defendant. The verdict and judgment were for plaintiff, and from the judgment and from an order denying a motion for a new trial the defendant appeals. The appeal from the order denying a new trial is presented in transcript S. F. No. 3,920, and the appeal from the judgment is presented in transcript, S. F. No. 3,837. The two appeals were heard together and will be determined in one opinion.

The injury which caused the death of the deceased occurred in this way: On February 2, 1901, a road was being constructed along a wooded and mountainous region, and about noon of that day a stump which stood in the course of the projected road was exploded. At the time of such explosion the deceased was walking along the course of the said road that was thus being constructed, and was in the close vicinity of said stump, and received such injuries from the consequences of the explosion as caused his death a few days after. It is contended by appellant that the persons who were actually engaged in the construction of the road had given ample notice of the coming explosion, and were not guilty of any negligence in the premises, and that the injuries of deceased were caused by his own contributory negligence; but, while there was strong evidence sustaining this contention, still there was some conflicting evidence on these points, and we cannot say that the finding of the jury against the contention of appellant as against these matters was wholly unwarranted.

The point in the case which requires the most attention, and about the only one that need be discussed in detail, arises out of the contention of the appellant that the road in question was being constructed by one A. W. Wyman as an independent contractor under a contract with appellant, by which Wyman was to have full control and direction of the construction of the road, and was to construct the same for a certain named sum of money; that the explosion was caused by Wyman; that, if there was any negligence in handling the explosion, it was the negligence of Wyman and his employees; and that, therefore, the appellant is not liable for the death of the deceased under the rule of respondeat superior. The evidence was quite clear and strong that the road was being constructed by Wyman as an independent contractor, but respondents contend that there was some evi-

dence which should be considered as conflicting with appellant's evidence on this subject to such an extent as to have warranted the jury in finding that Wyman was not an independent contractor. It is not necessary, however, for us to pass upon this question; for, even if the jury had found that the road was being constructed by Wyman as an independent contractor, still they would have been authorized to find appellant liable, under certain instructions of the court which were erroneous. These instructions occur in several forms, but the point is sufficiently presented in instructions numbers 25 and 27. Instruction 25 as asked by appellant is as follows: "I instruct you as a matter of law that where work is contracted to be done by an independent contractor, the owner or employer retaining or exercising no management or control over the doing of the work, then the employer is not liable for injuries or death resulting from the negligence of the contractor." The court refused to give this instruction as asked; but of its own motion gave it with the following addition: "But this rule, however, is subject to some very important exceptions, among which are the following: If the performance of the work will necessarily bring wrongful consequences to pass unless guarded against, the law will hold the employer answerable for negligence in the performance of the work. If the work contracted for is of such a character that it is intrinsically dangerous or will probably result in injury to a third person, the one directing to have it done is liable for such injury, although the injury may be avoided if the contractor take proper precaution." Instruction No. 27 as asked by appellant is as follows: "I further instruct you that if you find from the evidence that said Herbert E. Houghton was killed by a blast exploded in the course of construction of the road referred to in the complaint, and that such blasting was done by a person or persons hired or employed by A. W. Wyman, and that the said A. W. Wyman was engaged in the construction of said road for the Loma Prieta Lumber Company, under an agreement or contract to construct said road for a specific sum of money, and that in and by such contract the right of selection or control of the persons employed by said A. W. Wyman was not reserved by the Loma Prieta Lumber Company, then said Loma Prieta Lumber Company would not be liable for the death of said Herbert E. Houghton, even though you should find that the persons who did the blasting which resulted in the death of the said Houghton did said blasting in a negligent manner." The court refused to give the instruction as asked, but gave it with the following amendment made by the court of its own motion: "Unless you believe from the evidence that the work contracted to be done would necessarily bring wrongful consequences to pass unless guarded against, or unless you believe that the work contracted to be done was of

such a character that it was intrinsically dangerous and would probably result in injury to a third person."

By these instructions the jury were told that in this case they might apply the doctrine that, although the work was being done by an independent contractor, still the appellant was liable for any injury caused thereby if the work being done would necessarily produce the wrongful consequences, without reference to the negligent acts by the independent contractor, or was intrinsically dangerous and constituted *ipso facto* a nuisance; but the evidence and the facts in the case did not warrant such instruction. The road was being constructed on land owned by one George Olive through a wild, mountainous, uninhabited, and practically untraveled region. It was called the "Spignet Gulch Road." The nearest house was about one-half mile away from the point of explosion. Near a part of the course of the road there was an old trail about one-half or three-quarters of a mile long made many years ago by said Olive, for the hauling of wood upon a one-horse sled. It had not been used for that purpose for many years, and in places was so obstructed by brush and undergrowth that it could scarcely be traveled by pedestrians. There was a place somewhere in that general region of the country called "Olive Springs," which was in the summer months visited to some extent by campers; but it does not appear that even in those months any considerable number of those campers traveled this trail. At the time of the explosion in the month of February it was practically unused. James Olive, a witness for the plaintiff, testified as follows: "When this Spignet Gulch Road was being built, there were no campers there. There were no guests at the Springs at that time. There were no campers in January or February, 1901." George Olive, one of the witnesses for the plaintiff, testified substantially to the same thing. Speaking of this trail, he said: "It was almost impassable in February, 1901. * * * In building the wagon road up to the Spignet Gulch, they even had to brush out the sled road. In February, 1901, it was impassable for a man. Part of the time it was pretty well grown up with brush. The purpose for which that sled road was built was for getting out wood, etc., on a sled. It was what is called a 'gulching road.' It got all covered with brush because it was not used. A lot of brush grew over it. It was never a thoroughfare." Oscar Chase, another witness for plaintiff, said of this trail: "We had to crawl through the brush over part of it. There was considerable of it was brush. The trail was very little frequented so that it was all grown over." Apart from this old trail, in the condition above described, there was in the vicinity of the road that was being built no thoroughfare or traveled road near enough to be affected by an explosion, and

no residences or people engaged in work or business of any kind. It is difficult to imagine a more isolated place, or one at which an ordinary blast would be less likely to cause any injury to person or property. Under these circumstances, it would be a rare thing for a blast there to do injury to any one even if carelessly exploded and without any warning; and yet the jury were told they might hold the defendant liable for injury caused by the blowing out of a stump at such a place, even though the work was being done by an independent contractor. We are satisfied that this view of the case was erroneous, that there was no warrant for the jury finding that the work was done by Wyman as an independent contractor, and still finding that the appellant was liable; and for this reason the judgment and order must be reversed.

Counsel on both sides have cited many authorities touching the question above determined, but we do not deem it necessary to minutely examine and discuss these authorities. The weight of authority seems to be that blasting, without reference to the particular locality in which it is carried on, is not so intrinsically dangerous as to be *ipso facto* a nuisance, so that the blaster would be liable for the injury caused by it whether or not he was guilty of any negligence in the manner in which the blasting was done; but that the question of his liability would depend upon whether or not he was guilty of any negligence. See *French v. Vix*, 21 N. Y. Supp. 1016, 2 Misc. Rep. 312, and the many cases there cited. In the said case of *French v. Vix* it is said: "The later decisions all tend to hold that blasting is not dangerous in itself, and we think that view is now firmly established by the courts of this state." Quotation is made from *Herrington v. Village of Lansingburgh*, 110 N. Y. 145, 17 N. E. 728, 6 Am. St. Rep. 348, in which case the court say: "If there was any culpable negligence which caused the injury to plaintiff, it was that of the contractors. They had entire control of the work and the manner of its performance. They could choose their own time for firing the blast, and select their own agents and instrumentalities. They could make the charges of powder large or small, and they could in some degree smother the blasts, so as to prevent falling rocks and much of the noise of explosion, or they could carelessly omit all precautions, and for the consequences of their negligence they alone would be responsible. If it were a prudent thing to notify persons in the vicinity of the blast before it was fired, then the contractors should have given notice, but the duty to give it did not devolve upon the village." It is not necessary, however, in the case at bar, to discuss the question whether blasting in the heart of a city or in a thickly populated place in close proximity to buildings and traveled streets and highways is so necessarily dangerous that one could not be relieved

from injurious consequences by giving the work to an independent contractor. In considering questions similar to the one here under discussion, this court has recognized the distinction between acts done in secluded places and acts done in thickly populated places. In *Kleebauer v. Western Fuse Co.*, 138 Cal. 497, 71 Pac. 617, 60 L. R. A. 377, 94 Am. St. Rep. 62, where the action was for damages caused by the explosion of powder stored by the defendant, the court said (we quote from the syllabus which correctly states the decision) as follows: "The storage of gunpowder in a powder magazine for use in the manufacture of fuses, in a place properly selected, is not a nuisance *per se*; and in an action for damages for explosion of the gunpowder so stored by defendant, where no negligence was shown, it was error to give an instruction to the jury making no distinction between the use and manufacture of powder, nor any exception to the rule where a secluded situation was selected, and others were afterwards attracted to the locality, and making the defendant liable, notwithstanding the exercise of the greatest care and notwithstanding the explosion and damage were caused by the unlawful act of a third person entirely beyond the control of defendant. In such a case the defendant is not responsible." And, of course, where liability depends upon negligence, the independent contractor is liable for the negligence, and not the party who lets the contract. To hold that a party cannot contract with an independent contractor to construct a wagon road through a uninhabited and substantially untraveled, wild, mountainous region, without being liable for injury that possibly might happen to some one by blowing out a stump on the course of the road, would be substantially to hold that in no case where there is an independent contractor can the letter of the contract escape the rule of respondeat superior. In the case at bar the chance of injury from the blasting of a stump, even when done without notice, was most remote, and the failure to give notice, if there was such failure, was the negligence of the independent contractor and not of the appellant. There is nothing in the contention of respondents that appellant was a trespasser on the land on which the road was to be built. It abundantly appears in the evidence that the road was constructed with the knowledge and consent of the owner of the land, and that he was paid by appellant for the privilege of constructing it.

Quite a number of other points are made by appellant, but we do not deem it necessary to notice them in detail. Most of them are unimportant, and others may not arise upon a new trial. In *Harriet E. Houghton et al., Plaintiffs and Respondents, v. Loma Prieta Lumber Company, a Corporation, Defendant and Appellant*, S. F. No. 3,837, the judgment appealed from is reversed; and in *Harriet E. Houghton et al., Plaintiffs and*

Respondents, v. Loma Prieta Lumber Co., a Corporation, Defendant and Appellant, S. F. No. 3920, the order denying a new trial is reversed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

152 Cal. 531

RISSER v. SUPERIOR COURT OF COUNTY OF SACRAMENTO et al. (S. F. 4925.)

(Supreme Court of California. Dec. 9, 1907.)

HOLIDAYS—SPECIAL HOLIDAYS—JUDICIAL PROCEEDINGS.

One charged with felony cannot complain because his case is set down for trial on a day declared by the Governor a special holiday, under Act Nov. 23, 1907, on the theory that the Legislature can only provide for a general holiday, and that the provision that the superior courts may act on special holidays is void; for, if the law providing for special holidays is void, the proclamation declaring a day a special holiday is without force.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Holidays, § 4.]

In Bank. Appeal from Superior Court, Sacramento, County; J. W. Hughes, Judge.

Application for writ of prohibition by Albert Risser against the superior court of county of Sacramento and another. Denied.

Grove L. Johnson, A. L. Shinn, C. E. McLaughlin, C. O. Busick, and C. B. Harris, for petitioner. L. T. Hatfield, for respondents.

PER CURIAM. The petitioner being under a charge of felony in the superior court of Sacramento county, his case was set down for trial on a day which has been declared a "special holiday" by the Governor, under the laws enacted at the special session of the Legislature lately convened, and approved November 23, 1907, amending sections 10 and 135 of the Code of Civil Procedure. He applies for a writ of prohibition to prevent the superior court from proceeding with the trial of his case on a special holiday. His theory is that the Legislature cannot provide for the creation of a holiday other than a general and full holiday; that the provisions of the aforesaid statutes designating special holidays and declaring that the superior courts may act on special holidays in certain classes of cases are void; and that the effect is that the days which are declared special holidays under that law are really general holidays, on which, as he contends, the court cannot be open.

If the law providing for special holidays is void, the effect would not be to make days so designated full general holidays. In that case the proclamation declaring them special holidays would be without authority of law and of no force. They would, in that event, be no holidays at all, and the superior court could proceed. In any case, therefore, the trial would be lawful.

The application is denied.

152 Cal. 537

PACIFIC VINEGAR & PICKLE WORKS v. SMITH. (S. F. 4319.)

(Supreme Court of California. Dec. 6, 1907.)

1. CORPORATIONS—AUTHORITY OF OFFICERS—UNAUTHORIZED ACTS—RATIFICATION.

A corporation did not ratify its president's unauthorized act in receiving notes, so as to exculpate him from liability to it by presenting the notes in bankruptcy proceedings against the maker and receiving part payment of the amount due thereon, where it first learned of the unauthorized acts on the maker's failure; it being the corporation's duty to realize as much as it could upon the notes improperly taken so that his liability could be accurately estimated, and the general rule that a ratification of an agent's unauthorized act is an acceptance by the principal of the responsibilities of the act and the substitution of himself for the agent being applied to innocent third persons, and to relieve the agent where the principal could have disaffirmed or rescinded as against the innocent third party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1713-1719.]

2. NONSUIT—MOTION—SEVERAL CAUSES OF ACTION.

A motion for a nonsuit directed to all the causes of action sued on is not sustainable as to one cause of action only.

3. APPEAL—HARMLESS ERROR—REFUSAL OF NONSUIT.

Any error in refusing a nonsuit as to a cause of action is harmless where the court instructed the jury to find for defendant thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4209-4211.]

4. CORPORATIONS—BOOKS—IMPUTED KNOWLEDGE OF CONTENTS—UNAUTHORIZED ACTS OF PRESIDENT.

The rule that directors are presumed to know facts disclosed by the corporation's books is designed for the protection of third persons and stockholders, and cannot be applied against a corporation to defeat the liability of its president to it for unauthorized acts.

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by the Pacific Vinegar & Pickle Works against Elizabeth E. Smith, executrix. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

See 78 Pac. 550.

Carter P. Pomeroy, for appellant. Campbell, Metson & Campbell (Thomas H. Breeze, of counsel), for respondent.

HENSHAW, J. Sidney M. Smith in his lifetime was the president of the plaintiff corporation. This action was brought against his estate to recover as damages the balance remaining due on certain promissory notes executed by the California Packing Company to plaintiff corporation, which were accepted and received by Sidney M. Smith as president of the corporation without authority so to do and against the express instruction of plaintiff's board of directors. Trial was had before a jury, whose verdict passed for plaintiff. From the judgment which followed and from the order denying the motion for a new trial, defendant appeals.

Upon the appeal she first contends that the acts of Smith were ratified by plaintiff corporation. This ratification, it is contended, was established by the acts of plaintiff. The notes made by the California Packing Company were indorsed by A. B. Patrick and presented nominally to plaintiff corporation, but, in fact, to its president Smith, by whom there was placed upon the notes the indorsement of the plaintiff corporation, after which some of these notes were discounted in the banks, some by the president himself, while others remained the property of the plaintiff corporation. Subsequently the California Packing Company and its accommodation indorser, A. B. Patrick, both became insolvent. In the bankruptcy proceedings which followed the plaintiff corporation participated by presenting these notes and received from the bankrupts' estates part payment of the amount due thereon. It is urged that these acts amounted to a ratification, and relieved Mr. Smith and his estate from all liability to the Pacific Vinegar & Pickle Works. For the correct determination of this proposition, other facts than those thus stated are necessary for consideration. Some of those facts will be found set forth in *Pacific Vinegar & Pickle Works v. Sidney M. Smith*, 145 Cal. 352, 78 Pac. 550, 104 Am. St. Rep. 42. Others are as follows: The California Packing Company, under an agreement to purchase certain of its supplies from plaintiff corporation, promised to make its settlements on the first collection day of each month for all goods purchased for the calendar month preceding. Afterward Mr. Smith, as president of the corporation, requested of his board of directors that he be allowed to extend credit to the packing company, stating that the latter company could secure the indorsement of A. B. Patrick to its notes; it being understood that A. B. Patrick was financially responsible. The directors authorized Mr. Smith to extend credit to the company not exceeding \$15,000. Under this agreement the sales continued to the packing company, and, in turn, its promissory notes bearing 7 per cent. interest per annum were taken. These notes were discounted by the plaintiff corporation from time to time as money was required. The notes were three-month notes. At first they were paid promptly at maturity, but within a short time the packing company became financially embarrassed. Mr. Cote, its manager, explained the situation to plaintiff's president, and an arrangement was entered into between them whereby, when a note of the packing company became due, Mr. Smith gave to Mr. Cote the check of the plaintiff corporation to pay the note, and in return took the defendant packing company's note—in effect a renewal note for the same amount. Not only did Mr. Smith thus use the money of the plaintiff corporation, but he charged the packing company a brokerage commission of 1 per cent. for so doing, and

in some instances took a bonus in addition thereto. These transactions were concealed from the directors of the plaintiff corporation, to whom at their meetings Mr. Smith represented that the obligations of the packing company were being promptly met, and that the outstanding notes to the plaintiff, which notes it either held or had discounted, amounted to about the sum for which he was authorized to extend credit. When, however, the failure of the packing company came, plaintiff was first apprised that there were of the packing company notes held by it or indorsed in its name by its president Smith, and discounted, either to Smith himself or to the Bank of British Columbia, an aggregate of \$60,000, about \$23,000 of which was held by the bank and about \$21,000 by Smith himself. The cases of *Pacific Vinegar & Pickle Works v. Smith* and *Smith v. Pacific Vinegar & Pickle Works*, 145 Cal. 352, 78 Pac. 550, 104 Am. St. Rep. 42, were cross-actions wherein Smith sought to recover upon the packing company's notes which had been indorsed by him in the name of the plaintiff corporation, and without its knowledge and which were by him held. The determination of that litigation was against Smith's contention, and the facts there brought forth were held not to constitute a ratification.

Nor in this case can it be successfully contended that the acts of the plaintiff amounted to a ratification which would exculpate its agent. The general rule undoubtedly is that the ratification of an unauthorized act of an agent is an acceptance by the principal of the responsibilities of the act and the substitution of himself for the agent. In general, the rule is applied for the protection of innocent third persons, those who have dealt with the agent upon the strength of his apparent or ostensible authority. As to such persons, such a rule is essential for the preservation of their rights; and it is therefore enforced to the fullest extent. It is declared to be the duty of the principal to act immediately after knowledge; and his passivity or silence will be construed into an acquiescence or ratification so as to protect the innocent third party. In general, also, the same rule is applied to relieve the agent where the principal could have disaffirmed or rescinded as against the innocent third party and has failed to do so, and this upon the very logical theory that having accepted the contract as to the third party with knowledge of its terms, and with ability to rescind he has thus affirmed the act as to his agent. But, upon a moment's reflection, it will become apparent that the reason for applying the rule in all its liberality to innocent third persons does not exist in the same broad and benignant sense to the unwarranted and perhaps unlawful act of the agent. Thus, in many instances, the transaction is one which the principal could not rescind, because of the ostensible power of his agent. The in-

nocent third party is thus fully protected. But can it with reason or justice be said that, because the principal is thus compelled to accept the consideration from the innocent third party, the agent himself must of necessity be held harmless for his violation of duty and breach of trust? If an agent with ostensible authority to sell his principal's wheat, but under instructions to sell it for not less than \$1 a bushel, shall sell and deliver it for 50 cents a bushel, there is no power in the principal to rescind the sale. Shall the principal by accepting the 50 cents be held to have exonerated his agent from liability for the other 50 cents per bushel? Such a doctrine certainly does not commend itself, and is not sustained. It is limited, so far as the agent is concerned, to those cases where there remains with the principal, after his first complete knowledge of the transaction, the power to rescind, and, failing so to do, he is properly charged with full acceptance of all the responsibilities of the contract, even to the exoneration of his agent, because, with the ability to rescind, if he had rescinded, the transaction would be at an end and nobody would be injured. But, in a case such as the one here presented, it cannot successfully be contended that the acts of the plaintiff in endeavoring to realize upon the notes of the insolvent corporation, taken and indorsed by Smith in violation of his instructions, could amount, as to him, to an exonerating ratification. As to the packing company, undoubtedly it was a ratification, but, as to the packing company, the plaintiff corporation could do nothing else. Mr. Smith had apparent and ostensible authority to make sales in the manner in which he did. The sales as to the packing company were valid sales. The plaintiff, as to the packing company, could not have rescinded, and in failing to attempt to rescind it cannot be held to have ratified its agent's acts. The sale being complete as between the vinegar works and the packing company, it was not only the right, but it was the duty, of the plaintiff to realize as much as it could upon the notes thus improperly taken by its president, not to the end that he should be relieved from responsibility for the differences, but to the very end that by using every endeavor to realize upon the notes the agent's liability by way of damage could be accurately estimated in terms of that difference. *Triggs v. Jones*, 46 Minn. 277, 48 N. W. 1113; *St. Mary's Bank v. Calder*, 3 Strobb. (S. C.) 403; *White v. Sanders*, 32 Me. 188; *Goodale v. Middaugh*, 8 Colo. App. 233, 46 Pac. 11; *Williams v. Moore*, 24 Tex. Civ. App. 402, 58 S. W. 953; *Continental Ins. Co. v. Clark*, 126 Iowa, 274, 100 N. W. 524.

It is urged that the court erred in refusing to grant a nonsuit as to the twelfth cause of action; plaintiff's liability upon each of these notes being charged in a separate cause of action, and the twelfth dealing with the sum of \$185.20 alleged to have been paid

out of the funds of the plaintiff to the defendant's testator without consideration. On the trial the plaintiff offered in evidence a check drawn by the plaintiff corporation to the order of its president, Sidney M. Smith, and indorsed by him. There was no evidence offered by the plaintiff showing the purpose for which the check was given to Mr. Smith and a failure of proof to show that it was given without consideration or without authority. But the motion was directed "to all the causes of action mentioned in the complaint," and was not tenable unless, as to all, there was a failure of evidence. Moreover, no injury could have resulted to appellant, since, by its instructions, the court charged the jury to find for the defendant as to this particular cause of action. The court was justified in refusing to give defendant's requested instructions Nos. 1 and 2. The instructions were based on the proposition that no limit was fixed by the directors as to the amount of credit which its president Smith could extend to the packing company. There was evidence showing that the board of directors placed a credit limit of "\$15,000 or thereabouts," and that the real authority of the president, Mr. Smith, was limited to the extension of that amount of credit.

Instruction No. 3, requested by the defendant and refused by the court, was to the effect that, though the plaintiff might have originally limited the amount of credit to a particular amount, nevertheless, if after imposing such limit it intentionally, or by want of ordinary care, allowed Mr. Smith to believe that he was authorized to extend such credit to an amount beyond the limit so imposed, and to the extent that he did impose it, this fact, if established, was a defense to the action. In support of this proposed instruction, it is contended that the books of account of the plaintiff corporation had been introduced in evidence, and that, as these books of account would have shown to the directors the true state of facts, negligence or an intentional acquiescence is imputable to them in having allowed the credit to exceed the designated amount. In this appellant contends for the rule that the officers, and particularly the directors of a corporation, are chargeable with knowledge of the facts which its books of account and record disclose. This is unquestionably a rule, as is said by Mr. Justice Brewer in *First National Bank of Ft. Scott v. Drake*, 29 Kan. 311, 44 Am. Rep. 646, which is "founded in public policy, essential to the safety of third parties in their dealings with the bank, and to the protection of the stockholders interested in its welfare and safe management. So far as is necessary to accomplish these results, it should be carefully and strictly upheld; but it should not be carried beyond this, or to such an extent as to work injury to the bank." The rule itself and the limitation of its application cannot be more aptly stated than in the language just quoted. It

is designed to protect, and limited to the protection of, third parties and of stockholders, whose trustees and agents the directors are. But, when it is sought to apply the rule against the corporation on behalf of a president found faithless to his trust, the effort is without support in reason or authority. It would permit an officer of a corporation to enforce his own wrong against the corporation itself. Thus, while this rule of imputable knowledge of the contents of the books of a corporation is presumed for the protection of third persons and stockholders, it is not only never recognized, but distinctly disaffirmed, where the matter complained of is one between the corporation itself and any of its officers or agents. To apply it would be to put a premium on dishonest bookkeeping, and, as pointed out by Mr. Justice Brewer, in the case of a bank, to permit the bookkeeper and cashier to combine and plunder the bank of all its assets, unknown to any one, though every transaction should be entered in the books, and, after doing this, to receive immunity because of the knowledge imputed to the other officers. See, also, *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513; *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551; *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; *Hallmark's Case*, 8 Ch. Div. 329.

For these reasons the judgment and order appealed from are affirmed.

We concur: **McFARLAND, J;** **LORIGAN, J.**

132 Cal. 437

KEYES v. GEARY ST. P. & O. R. CO. (S. F. 3,986.)

(Supreme Court of California. Dec. 2, 1907.)

1. APPEAL—REVIEW—CONFLICTING EVIDENCE.

The verdict, sustainable on the theory that the gripman of a car discovered a child in a perilous condition in time to avoid injuring him by the use of ordinary care, and likewise the refusal of a new trial on the evidence, will not be disturbed on appeal; there having been substantial conflict in the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

2. WITNESSES — IMPEACHMENT — CONTRADICTORY STATEMENTS.

A witness who on his direct examination testifies to a material matter may, in the manner, and on the foundation laid, provided by Code Civ. Proc. § 2052, be shown, by the adverse party, to have made statements inconsistent with his testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1209.]

3. SAME.

Declarations of a witness that would not otherwise be competent against the party for whom he testified are admissible to impeach him, when containing statements inconsistent with his testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1247.]

4. APPEAL—REVIEW—ADMISSION OF EVIDENCE—OBJECTIONS.

Where the gripman of the car which injured plaintiff, a child, testified for defendant that,

when he saw the child, he instantly let go the cable, and stopped the car as quickly as he could, and on cross-examination he denied telling plaintiff's father, at a certain time and place, that, when he first saw the boy, he rang the gong, and thought he could frighten him, and the father was then asked if at such time and place the gripman did not make a certain statement to him, not precisely, but in substance, the same as that contained in the question to the gripman, and the answer finally given, as to what the gripman told him, showed a statement substantially the same as that as to which the foundation was laid, and no specific objection to the method of impeachment was made, but the only objection to the question calling forth the answer was that it was incompetent, and not part of the res gestæ; and there was no motion to strike out the answer, or any suggestion that the foundation laid did not fully cover the matter testified to—defendant cannot urge that a proper foundation was not laid for the impeaching testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1084.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Robert H. Keyes, Jr., against the Geary Street, Park & Ocean Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Platt & Bayne, for appellant. II. H. Hut-ton, for respondent.

ANGELLOTTI, J. This is an action on behalf of an infant plaintiff for damages for personal injuries caused him by being struck by a moving car of defendant. Verdict and judgment were in his favor; and the defendant appeals from such judgment, and from an order denying its motion for a new trial.

1. The evidence given on the trial is sufficient to sustain the verdict upon the theory that defendant's gripman, after actual discovery of plaintiff's perilous situation, could have avoided the injury by the exercise of ordinary care. The well-settled rule that one is bound to use ordinary care to avoid injuring a person whom he actually discovers to be in a dangerous situation, although such dangerous situation is due solely to the negligence of such person, and is liable for the damage resulting from his failure to use such care, is not disputed. The claim is that the gripman did not actually discover the perilous situation of the child in time to avoid injuring him by the exercise of such care, and that, immediately upon discovering it, he did all that he could to stop the car and prevent the injury. An examination of the record has satisfied us that upon this question there is a substantial conflict of evidence, and under these circumstances the verdict of the jury and the ruling of the trial court on motion for a new trial are conclusive upon us. The case here presented is very different from that of *Bennichsen v. Market St. Ry. Co.*, 149 Cal. 18, 84 Pac. 420, relied on by defendant, where there was no evidence at all to show that the motorman saw the child until after the accident had occurred, and the-

contention was that he would have seen her had he exercised reasonable care.

2. It is claimed that the trial court erred to defendant's prejudice in admitting evidence as to a statement made the day after the accident by the gripman of the car to plaintiff's father. The gripman was called as a witness by the defendant, and, on his direct examination, testified: "The moment I saw the child, I released the rope. I had been watching for the crossing. When I saw the young boy coming, I released my cable, and set my brakes as quickly as possible. I stopped my dummy in about eight or nine feet. * * * Before I saw the child, I was looking straight for the crossing, and rang my gong in case any team should get in my way. * * * I did let go of the cable with my grip. When I saw the child, I instantly let go and stopped the car as quick as I could." On cross-examination, he testified: "I had hold of the gong when I first saw the child, and rang the gong for the crossing, and saw the boy at the same time. It is not a fact that I thought the gong would scare the boy away. I have had too much experience for that. Mr. Keyes [the plaintiff's father] came out to my house the day after the accident happened. I do not believe there was anybody there at the time when he first came in." The witness was then asked: "Did not you tell him that, when you first saw the boy, you rang the gong and thought you could frighten him?" This was objected to by defendant as incompetent, on the ground that the statement was not a part of the *res gestæ*, having been made after the accident occurred. The objection was overruled, and the witness answered that he did not make any such statement. Mr. Keyes was called in rebuttal, and testified that he had a conversation with the gripman at the gripman's residence the day or the second day after the accident. He was then asked: "I have asked you whether or not he told you at that time he saw this boy and rang the gong, thinking that the gong would stop the child's running?" This was objected to as incompetent "on the ground that it was not a part of the *res gestæ*." Plaintiff's counsel replied that he was attempting to show that the gripman had made contradictory statements. The objection was then overruled, and the witness answered: "Yes, sir; he did. He made an assertion." The witness was then asked: "What did he say?" This was objected to upon the same ground; and, the objection having been overruled, the witness answered: "The exact words. I do not know that I could recall them, but they were to the effect—" The defendant here further objected that the witness was stating simply his conclusion. The witness was then asked: "Can you give me the substance of what he told you?" The same objections were repeated and overruled, and the witness answered: "The substance was that he rang the gong, and that he

was under the impression that the child would stop or did stop."

We see no error in any of the rulings of the court in this matter. Our law provides: "A witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony; but before this can be done the statements must be related to him with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and, if so, allowed to explain them. * * *" Code Civ. Proc. § 2052. It is unnecessary to cite authorities to the proposition that, in accord with this rule, a witness for an adverse party who testifies on his direct examination as to a matter material to the controversy may be shown, in the manner prescribed by the section quoted, to have made statements inconsistent with his testimony so given on direct examination. The only possible prejudicial effect as to defendant of the evidence in question was that it tended to show an admission on the part of the gripman that he did not upon discovering the child's perilous situation immediately endeavor to stop the car, but relied on the ringing of the gong to warn the child away. This is the effect claimed for the evidence by learned counsel for defendant, and it may be conceded that such was its effect. As we have seen, however, the gripman had testified on his direct examination: "When I saw the young boy coming, I released my cable and set my brakes as quickly as possible. * * * When I saw the child, I instantly let go, and stopped the car as quick as I could." This was most material evidence in support of the defendant's claim that, upon actual discovery of plaintiff's perilous situation, the gripman exercised the required care to avoid injuring him. Giving to the evidence in question the effect claimed for it by defendant, such evidence clearly showed a statement made at another time by the witness regarding the same matter, which was inconsistent with the evidence given by him for the defendant upon his direct examination. It was therefore, upon laying the proper foundation, admissible for the purpose of impeaching the witness, and discrediting the testimony given by him in that regard upon his direct examination. Counsel in discussing the question of the admissibility of this evidence have not referred to these particular portions of the direct examination of the witness, but they appear to us to so completely answer the objections made by defendant that we have not considered other reasons urged by plaintiff in support of the rulings.

It can constitute no valid objection to evidence showing inconsistent statements by a witness that it also shows a declaration by the witness that would not otherwise have been competent evidence against the party. Learned counsel for defendant is undoubtedly right in his contention that plaintiff was not

entitled to show any negligence on the part of defendant by any admission or statement of the gripman made after the accident. But he did have a right to discredit the gripman's affirmative evidence given against him as to the exercise of all proper care by showing other statements made by him inconsistent with such evidence. The evidence was admissible solely for that purpose, and doubtless the trial court, if requested by defendant, would have instructed the jury that it could be considered only for that purpose. The instructions are not contained in the record, and, for aught we know, the jury was so instructed.

We have discussed the objection most strongly relied on by defendant; in fact, the only objection made in the original briefs. In the answer to the petition for a hearing in this court after decision in the district court of appeal, it is urged that proper foundation for the impeaching testimony was not laid. The foundation was certainly laid as to the statement contained in the question asked on the cross-examination of the gripman, viz.: "Did not you tell him that when you first saw the boy you rang the gong, and thought you could frighten him?" The circumstances of time, place, and persons present had already been recited, and the witness answered in the negative. The alleged statement contained in the question asked the impeaching witness was not precisely the same in words as that contained in the question asked the gripman, but it was substantially the same in effect, and, although it was stated by counsel for plaintiff that the evidence was offered for the purpose of impeachment, no specific objection that the proper foundation had not been laid for the precise question asked was made. Practically no answer was given to this question. The answer finally given by the impeaching witness as to what the gripman told him on the occasion in question showed a statement differing somewhat in verblage from the statement as to which the foundation was laid, but it was substantially the same in effect. No specific objection to the method of impeachment was made; the only objection to the particular question calling forth this answer being that it "was incompetent and not part of the *res gestæ*." No motion to strike the answer out was made, or any suggestion that the foundation laid did not fully cover the matter testified to. We are satisfied that for all practical purposes the statement testified to by the impeaching witness was substantially the same as the statement contained in the question asked the gripman, and that the gripman could not have been misled in the matter by the form of the question asked him. While we see nothing warranting a reversal on account of these matters, we do not desire to be understood as approving the practice here followed. The proper practice in impeaching a witness by showing other statements inconsistent with his testimony is

shown by the opinion of this court in *People v. Nonella*, 99 Cal. 333, 33 Pac. 1007.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.

153 Cal. 306

FORSYTH v. BUTLER. (S. F. 3496.)

(Supreme Court of California. Nov. 30, 1907.
Rehearing Denied Dec. 30, 1907.)

1. APPEAL—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

A finding based upon conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

2. PARTNERSHIP—DISSOLUTION—ACCOUNTING.

Statement of proper method of determining items of expense chargeable to one of two partners in the business of packing, handling, and selling raisins, each partner being himself a grower, and turning over crop to the firm to be marketed, under an arrangement that their crops should be packed at a named price, but, when the crop of one should be greater than that of the other, the excess should be packed by the firm at cost at one of the seven packing plants of the firm.

3. SAME—OVERDRAWING ACCOUNT BY PARTNER—LIABILITY FOR INTEREST.

Where a partner through inadvertence overdraws his account which has not been stated, upon a settlement of the firm business, he should be charged with interest on the overdraft from the time he drew it down to the time of settlement, but not after that time, since he is not liable for interest after his money is due him.

4. APPEAL — RECORD — CONTENTS — PRESUMPTIONS.

Even where the record does not show whether any, or, if any, which, of the grounds of the motion for a new trial mentioned in the notice of intention were argued before the court for a new trial as the statement on appeal is expressly required to do under Code Civ. Proc. § 661, and the statement on appeal settled two years after the motion made upon the minutes of the court was denied, does not state or imply that it contains all the evidence pertaining to all the grounds argued before the court, and there are circumstances indicating that evidence pertaining to all the grounds is not included, it will be presumed on appeal that all the grounds mentioned in the minute order were argued in the absence of an objection by respondent as to the sufficiency of the record.

5. COSTS—DISCRETION OF COURT—EQUITY.

In equity costs are discretionary, both in the trial court and on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 21.]

In Bank. Appeal from Superior Court, Fresno County; J. R. Webb, Judge.

Action by William Forsyth against A. B. Butler. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed in part, reversed in part, and remanded, with directions.

Stanton L. Carter, for appellant. Frank H. Short, for respondent.

SHAW, J. The plaintiff and defendant were partners in the business of packing and selling raisins grown in the season of 1894. Each was also a grower of raisins on his own

account, and each delivered to the firm the raisins grown by him, to be packed and sold by the firm for his individual account. After the dissolution of the partnership, Forsyth began this action for an accounting of the firm affairs. Butler thereupon began an independent suit against Forsyth, also for an accounting. The two actions were consolidated for trial and judgment, and but one decision was made for the two cases, covering all the issues in both of them. Butler appeals from the judgment and from an order denying his motion for a new trial.

The principal questions presented arise from differences concerning the settlement of the respective accounts of the members individually with the firm for the packing of the individual crop of each by the firm. According to the partnership agreement, Butler was to have charge of the keeping of the books of the firm, and of the storing, shipping, and selling of the packed product, while Forsyth was to attend to the receiving, grading, and packing thereof. The crop of each partner was delivered to the firm to be packed and sold for his account on the same terms as were fixed for other growers, with an exception to be hereafter referred to. The packing contract with the growers provided that, when the raisins were delivered at the packing house by the grower, the firm should "make a just and true grading according to quality, which grade shall be the basis of the proportionate amount of net receipts from the sale of raisins packed and sold by (the firm) during the season * * * to which said grower shall be entitled"; that all raisins received by the firm during the season from all growers were to be "graded alike as far as possible," but that, in packing and selling them, all the raisins of each grade were to be intermingled and packed and sold together, without distinction as to the persons delivering them. The different grades of raisins were of different values, ranging from 3 to 17 cents a pound, and, as a result, the value of each crop depended upon the proportion of high-grade raisins to be found therein. As they were intermingled in the packing, it was necessary, in order to have a basis of settlement with each grower, that an account should be kept of the total number of pounds delivered by each grower, and also a record either of the total number of pounds of each grade delivered by him, or of the proportion or percentage of each grade which his particular raisins would run. In practice the uniform custom of the firm was to keep an account only of the total number of pounds of all grades delivered by each grower, and to determine the number of pounds of each grower belonging to the different grades by making tests of his raisins, from time to time, as they were delivered, to ascertain what percentage of each grade they contained, and to find the quantity of the respective grades in the particular crop by

means of the percentages thus ascertained. These tests and percentages were made by a "grader" in the employ of the firm, and under the supervision of Forsyth, and were by the grader entered in a book known as the "grade book," which was delivered to the bookkeeper at the close of the season. The grades of the raisins of the two partners, however, were entered only on sheets of paper delivered with the book.

The principal contention of Butler is that his raisins were either not correctly graded or not graded at all; that he had, and should have been credited with, a large quantity of the best quality of raisins, designated as "5 crown" and "6 crown" clusters, whereas he was not credited with any, and that he was credited with a much larger quantity of the poorer and least valuable grades of raisins than he actually had, and that, in consequence, the "proportionate amount of the net receipts" of the total sale of raisins for the season allotted to him, according to the books of the firm, and the test grading made, was much less than the true amount. The findings were against him on these points, and he claims that they are not sustained by the evidence. A vast amount of evidence, covering nearly 700 pages of the printed transcript, was introduced on this subject. We have examined it carefully, and we are satisfied that there is sufficient evidence to support the findings, not only in this, but also in all other essential particulars in which it is claimed to be insufficient, including the finding that the grading was not fraudulent.

That there were test gradings made of the raisins of Butler is established beyond doubt. There is considerable evidence tending to show that these gradings did not fairly show the actual quantity of each grade. There is also a good deal of evidence to the effect that it was a fair and just grading. The evidence being in substantial conflict, the finding is conclusive on this court. The method of grading adopted is necessarily, to some extent, inaccurate, and less satisfactory than a separation of the entire crop into grades and ascertaining the respective amounts by actual weighing of them all. It was, however, much less expensive, and there is reason to believe from the evidence as to the manner of carrying on the business that it was the only practicable method. In any event, it was the uniform method used by the firm. Butler knew the method, was fully advised of the fact that it was uniformly followed, and must have expected that his own raisins would be graded in the same way. He was informed of the grading actually made of his raisins. With this knowledge, he sold the entire output himself, and thus made it impossible thereafter to make any other or better grading. The court was justified in concluding that he had consented to the method adopted and that no fairer grading or adjustment of the matter was feasible

after the goods were all disposed of. The partnership agreement contains the following provision: "In the event either of the said partners should have handled and packed by said firm more of his individual raisins than the other, the surplus is to be packed, handled and sold at the actual cost of the same to the said firm." The crop of Butler exceeded that of Forsyth by 915,899 pounds. This surplus was all of the kind known as "loose muscatels." Butler and Forsyth each signed a "grower's agreement," the same as other customers of the firm. This agreement provided that the firm should charge \$10 a ton for packing this grade of raisins in 50-pound boxes. In casting the account, this rate was charged to each, so far as the crops were equal. But as the surplus was to be packed by the firm at its actual cost only, which was found to be only \$4.50 a ton, Butler was not charged \$4,579.49 for the packing of his surplus at \$10 a ton, but only \$2,060.77, the actual cost. As not alone packing, but also handling and selling, was to be done at actual cost, and it was the manifest intent of this clause of the contract that Butler was to derive no advantage or profit from the work done by the firm with respect to this surplus, the referee made a charge to Butler in favor of the firm of \$1,753.80, which sum he found to be the actual cost to the firm of the handling and selling of the surplus. It was found that the cost to the firm of the handling, packing, and selling of the raisins at the Fresno house for that year, exclusive of the \$4.50 a ton for packing, was a sum equal to 6.026 per cent. of their gross value. The cost of any particular lot of raisins would obviously be the same percentage of the gross value thereof. The gross value of the Butler surplus was \$29,103.87, 6.026 per cent. of which is \$1,753.80, the amount charged. In computing the total expenses of all the raisins which went to make up this percentage, there were included all the general and incidental expenses of the business, except certain specific charges for expense, such as packing, commissions, and the like, which were separately accounted for. This was the correct method, and was in conformity with the provisions of the contract above quoted. To find the actual cost to the firm of any lot of raisins, it would be necessary to ascertain the percentage of the general expense properly chargeable to each pound, or to each dollar's worth of the total value, as was done here. To compute the cost at the rate per pound would not be as favorable to Butler, or, at any rate no more so, since he had a greater number of pounds in proportion to value than did Forsyth. If the firm had packed no raisins except those of the two partners, and it had been agreed that the surplus of one over the other should be packed at cost, it would scarcely be contended that it would not be a fair adjustment of the expense to make the one having the sur-

plus pay such proportion of the general firm expenses as the value of his surplus bore to the value of the total quantity, leaving the balance of such general expenses to be borne equally. This, in substance, was accomplished by the plan adopted by the referee. If Butler were not made to pay this proportion of the general expense, he would obtain the services of the firm in disposing of his surplus and escape payment of his just part of the services which he agreed to pay.

There is no double charge in this plan of settling the account. In the matter of this charge Butler stands to the firm not as a partner, but as a customer or patron. The amount he is thus made to pay goes into the firm account as part of the receipts and to that extent increases the profits, of which Butler receives one-half. The same items of expense which are taken in computing his proper percentages, of course, appear again in the statement of the firm account, but this is in no sense a double charge to him. The firm carried on seven packing houses, and the raisins of the two partners were all packed at the Fresno house. All the raisins of all the houses were taken into account in ascertaining this percentage of the general expense to the gross value of the entire pack; the expenses considered being for the general benefit of them all. It is earnestly insisted that this calculation should have been confined to the expense of the Fresno house alone. This was done, so far as the expenses in that house could be separated. With respect to the expenses common to all, the point is wholly immaterial. It could have been ascertained in the way contended for by first ascertaining what portion of the general and common expense was properly chargeable to the Fresno house, and, with that included, computing Butler's percentage on account of the surplus with reference to the output and expense of the Fresno house as thus increased. The result would have been the same. Soon after the firm began business, Forsyth and Butler each began to draw from the firm large sums of money for individual use. The partnership articles provided that each should contribute equally to the capital and share equally in the profits, that it was to continue for one year, ending April 16, 1895, and that, until the termination of the year, neither partner should draw from the funds of the firm any money for individual use, except the proceeds of his individual raisins delivered by him to the firm to be packed and sold. It further provided that an accounting should be had at the end of the year, and each should then be allowed to draw his share of the profits. No such accounting was ever made; but it does not appear to have been more due to the negligence or fault of Butler than of Forsyth that it was not done. The referee took March 10, 1897, as a proper date for balancing the account. He charged each partner with interest on the respective sums

drawn by him from the firm, from the date on which it was drawn up to March 10, 1897, and from that date to June 2, 1898, which was the time of the trial. Butler's interest charge was \$2,875.19 and Forsyth's \$2,069.88; the excess against Butler being \$805.81. The firm made a profit, computed by the referee at \$23,024.55, which was equally divided in the statement of the account. The interest all went into the profits, and hence Butler obtained a return of one-half of the excess of interest charged against him over that charged to Forsyth. If the interest charge is improper, Butler is injured to the extent of one-half of this excess, that is, in the sum of \$402.95. The referee found that Butler still owed the firm the sum of \$1,818.74, and accordingly gave judgment against him in favor of Forsyth for one-half that sum, or \$909.37, to settle the account, which, of course, included this \$402.95, charged for interest.

Appellant claims that a charge of interest was improper under the evidence. The statement bears many indications of omissions of parts of the evidence which would probably throw light upon the question of interest. As it stands, we are unable to find sufficient evidence to justify a charge of interest to either partner. The rule concerning interest for moneys drawn from the firm for individual use by the partners is thus stated in *Lindley on Partnership* at page 391: "Inasmuch as what is fair for one partner is so for another and the firm, when debtor, is charged with interest, it seems to follow that if one partner is indebted to the firm, either in respect of money borrowed or in respect of balances in his hands, he ought to be charged with interest on the amount so owing, even though on the balance of the whole account a sum might be due him. Except, however, where there has been a fraudulent retention, or an improper application, of money of the firm, it is not the practice of the court to charge a partner with interest on money of the firm in his hands; for example, under ordinary circumstances, a partner is not charged with interest on sums drawn out by him, or advanced to him." There is no evidence that Butler fraudulently retained money of the firm. So far as the evidence indicates anything on the subject, it seems to be the fact that each partner drew approximately enough money from the firm funds to pay what was or would be owing to him on account of his crop of raisins and the balance due him on account of his half of the profits, and that, presumably by inadvertence, the account not having been stated, Butler drew about \$1,000 more than his proper share. If this is the true condition of the account, Butler should be charged with interest on the overdraft from the time he drew it down to the time of settlement. But this would not require any charge to Forsyth, nor would it account for the large amount charged to Butler for

interest, an amount more than double his overdraft. Butler had charge of the books of the firm, and it was his duty to attend to the bookkeeping. He could not excuse the overdraft by the fact that the account had not been stated. It was his duty to state the account, or show good reason for his inability to do so. Hence he should pay interest on the overdraft.

Nor is there any substantial evidence of an improper application of the money drawn. The articles forbid the drawing of money by either partner during the year, and if it had been drawn without other reason than the fact of his being a partner, there would have been an improper application of firm money by each partner. But, in addition to being a partner, each member of the firm stood in the relation of a patron of the firm. Each sold to the firm a large quantity of raisins which the firm packed and sold for his account, the proceeds of which would be owing to him as soon as sales were made and would be due as soon as, under the growers' agreement, settlement was to be made. It seems that, for the most part, the money was drawn against this packing account, and that it was in the nature of an advancement by the firm to the grower on account of the crop received. It was the custom of the firm to make such advancements to the other growers whose raisins it packed, and it is to be inferred, in the absence of anything to the contrary, that these sums drawn by the partners, respectively, were for the same purpose. It may be that it was the custom to charge the grower interest upon these advances until the end of the year, when a settlement was to be made with them. If so, it would be proper to charge like interest to each of the partners for the same period. But as settlement was due in April, 1895, so far as appears (the record does not satisfactorily show when the raisins packed by the firm were sold), and as it was the duty of the firm to make settlement promptly, no interest could justly be charged after a settlement was due for the raisins sold. The evidence, however, does not show whether it was, or was not, the custom to charge interest upon advances to customers. So, also, if it had been proven that the firm borrowed money with which to carry on its business and was paying interest thereon at the time of these advances, then, of course, each partner should be required to pay interest on sums drawn out by him as a partner from the time of drawing until the money became properly payable to him on final settlement, or on striking a balance of profits. The fact that the partnership agreement shows that the firm had made provision for borrowing money, and the fact that money seems to have been drawn out before it would seem possible that any sales could have been made whereby money could have been received from that source, all indicate that money

may have been borrowed, but still there is no evidence that money actually was borrowed, and the money drawn may have been previously paid in by the partners. Each partner became entitled to the money drawn as advances on the crop, as soon as a settlement was due after the raisins were all sold, and no interest should have been charged on the advances after that time. The interest was computed for more than three years, instead of only for a part of one year, as would have been the case in the event stated. Both were evidently drawing against both the profits and the amounts due them from the firm for raisins sold. Butler had by far the largest crop and accordingly drew the most money. The charge of interest against him is consequently greater than that against Forsyth. He could not complain of this difference so long as interest was justly chargeable to him under an agreement to pay interest on advances. But the continuance of the interest after his money was due him would be an injustice to him to that extent.

We are unable to make any proper adjustment of this matter as the record stands. It will be necessary to retry this issue. Evidently this was not considered an important question upon this appeal. Indeed, we had some doubts whether it could be considered at all upon the record presented. The motion for a new trial was made upon the minutes of the court, and was denied on December 17, 1900. The notice of motion contained voluminous specifications as to the insufficiency of the evidence. There is nothing in the record to show whether any, or, if any, which, of the grounds of the motion mentioned in the notice of intention were "argued before the court for a new trial." See Code Civ. Proc. § 661. Ordinarily it would perhaps be presumed that the grounds mentioned in the minute order were all argued. There would be no doubt of this in the present case were it not for the fact that the statement on appeal, settled in December, 1902, two years after the motion was denied, does not anywhere state, or imply, that it contains all the evidence pertaining to all the grounds argued before the court, or relating to the specifications set forth in the notice of intention; but on the subject of what evidence is included therein contains this statement only: "The foregoing is the substance of the testimony in relation to the grading, classification, and quality of the raisins received and packed at the Fresno packing house of Butler & Forsyth during the season of 1894, including the raisins delivered by the firm of Butler & Forsyth." There are many things to indicate that nothing else was intended to be included. The respondent does not raise the objection, and because of his acquiescence we have resolved the doubt in favor of the appellant. But, under all these circumstances and others which we have not stated, we think the appellant should not recover the costs of ap-

peal. The case is in equity, and costs are discretionary both in the trial court and in the appellate court.

We do not consider it necessary to notice the errors of law urged so very briefly by the appellant. None of them affect the merits of the case. The rulings were either correct or harmless.

It is ordered that the judgment, to the amount of \$506.42, be affirmed; that it be reversed as to the excess over that amount; that the order denying the motion for new trial be affirmed, except as to the question of the charges of interest to the respective partners in the statement of the account between them; that as to that issue the order be reversed and the cause remanded to the court below for trial of that issue alone; and that the superior court proceed to take such further evidence as may be necessary, and as may be offered upon the issue aforesaid and determine, in accordance with this opinion, the proper charges on account of such interest and render an additional judgment accordingly, and that neither party recover of the other his costs upon this appeal.

We concur: SLOSS, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

152 Cal. 557

BIEBER v. LAMBERT et al. (Sac. 1,486.)
(Supreme Court of California. Dec. 10, 1907.
Rehearing Denied Jan. 9, 1908.)

1. PUBLIC LANDS—SCHOOL LANDS—SALE BY STATE—CONFLICTING PURCHASERS.

Plaintiff's application to purchase state nonagricultural timbered land was in due form, except that there was a defect in the description, whereby it appeared that one tract of 40 acres, the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, was twice described, making the application seem to cover about 360 acres, though calling for 400. The Surveyor General returned the application, stating as the reason that it called "for the N. W. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$." Thereafter defendant's transferee applied to purchase 560 acres in the same section, including all the land covered by plaintiff's application. Plaintiff then offered another application to purchase 400 acres, wherein the description was the same as in his first application, except that the words "N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ " were substituted for the words "N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$," thus making a good description for 400 acres, in which application the original date of verification was inserted, instead of the true date. A certificate of purchase was issued to defendant's transferee, and it did not appear that at the time she made her application or the purchase money was paid and certificate issued she had notice of plaintiff's attempted application prior to her own, and plaintiff did not occupy the land. *Held*, that defendant's transferee had the better right, the state by its laws offering such lands to the person who first makes proper application, and one who by his neglect or mistake makes an imperfect application, and whose application for that reason is not received, being, by that law, afforded no protection as against another who makes a proper application, which is received before the first person has again presented his application in amended form, except in cases where such first person was occupying the land before the second person

made application therefor. Pol. Code, §§ 3495, 3497.

2. SAME.

Plaintiff's first application was not good for 360 acres of the 400 acres he applied for.

3. SAME—PRIORITY OF RIGHT.

The rule applicable to conflicting purchasers of state nonagricultural timbered land is that, other things being equal, he whose application is first in time is first in right.

4. SAME—PLEADING.

Where a contest under Pol. Code, §§ 3414, 3415, concerning the rights of the respective parties to buy state nonagricultural timbered land, is brought by the one who first filed a proper application, the statement of facts, showing that the land was subject to sale, that he is a qualified purchaser, that he has made and filed due application to purchase, that defendant claims under a subsequent application, and that the order of reference has been made, sufficiently shows his own right, and he need not allege other facts to show that defendant was not entitled to purchase or that his application is void; but, where the contest is brought by the person whose application is second in point of time, in order to show that there is any contest to try, he must aver that there is a claim under an adverse application, and if he alleges that it was filed prior to his own, and it is not defective on its face, he must overcome the presumption in its favor, arising from such priority, by averment and proof of some fact establishing its invalidity.

5. SAME.

Under Pol. Code, § 3514, making a certificate of purchase of state land *prima facie* evidence of title, a certificate is sufficient, if not controverted, to establish the right of the holder so far as necessary to prevent a judgment establishing a subsequent claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 395.]

In Bank. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by Nathan Bieber against Ada Lambert and the Central Trust Company under Pol. Code, §§ 3414, 3415, to determine the rights of the respective parties to buy school lands of the state. Judgment for plaintiff, and the trust company appeals. Reversed.

Rehearing denied; Beatty, C. J., dissenting.

J. E. Pardee (A. E. Bolton, of counsel), for appellant. R. M. Rankin, for respondent. W. A. Gett, *amicus curiæ*.

SHAW, J. This is an appeal from a judgment in favor of plaintiff in a contest concerning the rights of the respective parties to buy school lands from the state, instituted under the provisions of sections 3414 and 3415 of the Political Code. Ada Lambert made application to purchase the lands, obtained a certificate therefor, and transferred the same to the Central Trust Company before the action, in pursuance of the Surveyor General's order of reference, was begun. The trust company claims only as her successor in interest. She was duly served with summons in the action, but failed to appear, and her default was duly entered. The trust company answered, and appeared at the trial, but introduced no evidence in support of the right of Ada Lambert, or in opposition to the plaintiff. The only question presented is the sufficiency of the evidence, in connection with

the facts admitted by the pleadings, to support certain of the findings and the judgment. There is no conflict in the evidence. The facts are as follows: The land is situated in section 36, township 35 N., range 9 E., Mt. Diablo meridian, and is nonagricultural timbered land. On May 13, 1903, Nathan Bieber sent by mail to the Surveyor General at Sacramento his verified application to purchase 400 acres of said section. The application was in due form, except that there was a defect or ambiguity in the description of the land applied for, whereby it appeared that one tract of 40 acres, the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, was twice described, and the application seemed to cover but 360 acres, though calling for 400 acres. The description was as follows: "The N. W. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 36, Tp. 35, N. R. 9, E., M. D. M., containing four hundred acres." The Surveyor General received the application on May 15, 1903, and on May 20, 1903, returned it by mail, accompanied by a letter to Bieber, stating that it was returned "for the reason that your application calls for the N. W. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ " of the section. The complaint alleges, and the court finds, that it was thereby returned by the Surveyor General to Bieber "for correction"; but there is no evidence that the Surveyor General at the time made any suggestion to that effect. In a letter written by him to Bieber on November 5, 1903, the Surveyor General says that the original application was returned to Bieber for correction, and this is all the evidence on the subject. On May 27, 1903, Ada Lambert presented to the Surveyor General her application and affidavit to purchase from the state 560 acres of the same section, including all the land covered by Bieber's application of May 13th, and also the entire S. W. $\frac{1}{4}$ thereof, as well as the remaining 40 acres of the N. E. $\frac{1}{4}$. This application was on the same day received by the Surveyor General and by him filed in his office and numbered 4,237. On May 28, 1903, Bieber offered to the Surveyor General another application, duly verified, to purchase 400 acres of the section, and the same was thereupon received and filed, and numbered 4,240. The description of land in this application was the same as that in his first application except that the words, "N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$," were substituted for the words, "N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$," thus making a good description of 400 acres of land. The application was apparently verified on May 13, 1903, but Bieber testified, and the court finds, that it was in fact verified on May 23, 1903. Bieber testified that this application was made as a correction and amendatory to his application of May 13, 1903. There is nothing in the application of May 28th to show such intent, unless it may be inferred from the fact that the original date of verification was inserted instead of

the true date. There is no other evidence that the Surveyor General was informed that the second application was intended as an amendment of the first. The order of reference, introduced in evidence by plaintiff, makes no mention of Bieber's first application, but recites only the two applications, the one of May 27, 1903, by Ada Lambert, and the other by Nathan Bleber on May 28, 1903. It further states that the application of Ada Lambert was approved on November 27, 1903, and that on January 20, 1904, certificate of purchase No. 4,876 was issued to her for the land she applied for. The complaint alleges that payment of the full purchase price was made upon the Ada Lambert application and a certificate of purchase issued to her by the Surveyor General. The answer admits these allegations, and they therefore stand as established facts in the case.

The complaint is in two counts. The first count is based on the theory that the second application of Bleber is to be treated as an amendment of that of May 13th, and that his rights are the same as if the second had been filed on May 15th, the day the first application was received by the Surveyor General. The second count does not mention the first application, but rests upon that of May 28th alone, and avers that some of the facts stated in the prior application of Ada Lambert are false and her entry consequently void, and upon that ground claims the better right as against her and her successor. The judgment is that Bleber, under his application of May 28, 1903, is entitled to purchase the 400 acres of land therein described, that the Surveyor General must approve the same; that the defendants are not, and never have been, entitled to purchase said 400 acres, or any part thereof; and that, as to said land, the application of Ada Lambert and the certificate of purchase issued to her are void.

1. It is not claimed, and it does not appear, that Ada Lambert, at the time she made her application and paid the fees therefor, nor at the time the purchase money for the land was paid and the certificate of purchase issued to her, had any notice or knowledge of the attempt of the plaintiff to file his application of May 13th, prior to the filing of her application, on May 27th. We are unable to perceive any sufficient ground or reason for declaring his right, by reason of that attempt, to be superior to hers. The land is timbered school land, unfit for cultivation, and Bleber did not settle upon or take possession of it. His application was for more than 320 acres, the largest quantity of tillable land that can be purchased from the state by one person. He did not apply as a settler, nor claim to have occupied the land, but applied to buy it as vacant, nonagricultural school land. The state, by its laws, offers such lands for sale to the qualified person who first makes a proper application for it, and one who, by his own neglect or mistake, makes an imperfect and uncertain application to purchase a body

of such land, and whose application the agents of the state, for that reason, refuse to receive or file, is by that law afforded no protection and given no priority of right, as against another qualified person who makes a proper application for the same land, which is received and filed before the first person has again presented his application in an amended and perfect form, except in cases where such first person was occupying the land before the second party made application therefor. Pol. Code, §§ 3495, 3497. If the plaintiff had made a proper application and the Surveyor General had, without sufficient cause, rejected it or refused to receive and file it, possibly the plaintiff could claim a prior and superior right to purchase against a second applicant, although he did not occupy the land and such second applicant was ignorant of his offer to make a filing. We need not decide as to this, for the plaintiff's application was uncertain and ambiguous with respect to the land he sought to purchase, and there was good reason for rejecting it on that ground. He has no equitable grounds upon which to claim that Ada Lambert's prior application should not, if otherwise lawful, give her priority of right. There is some contention that the plaintiff's application was good for 360 acres of the 400 acres he applied for, although one tract of 40 acres was twice described therein, and that the Surveyor General should have received and filed it as an application for the land actually and properly described. There is no merit in this claim. The description was uncertain. There was no means of ascertaining therefrom what other 40-acre subdivision the plaintiff intended to describe instead of or in addition to that described twice, nor wherein the mistake lay, nor of determining that he was willing to take less than 400 acres. The reasonable and proper course was to return his application with a statement of the defect. It follows that the judgment was not authorized under the first count of the complaint.

2. In the second count the false statements made by Ada Lambert in her application were particularly alleged to be those to the effect that she was a citizen of the United States, a resident of this state; that there was no occupation of the land adverse to any that she had; that she desired to purchase it as school land, and solely for her own benefit; and that she had made no contract or agreement to sell the same, and it was alleged that her certificate was therefore void. The answer of the trust company joined issue upon these allegations, and alleged the qualifications and prior right of Ada Lambert to purchase, claiming as her assignee. The court found that her statements in the application that she desired to buy the land as school land and solely for her own use and benefit, and had made no contract or agreement to sell the same were false. This finding is challenged by a specification that it is unsupported by the evidence. We find no evidence

in the record to sustain it, and consequently it must be excluded from our consideration as a foundation for the judgment.

The principal contention of the respondent is that in land contests of this character each claimant must become an actor, and must, by an appropriate pleading, state to the court the facts necessary to give him a prior right to purchase the land and must support his allegations in that behalf by proof, and that, if he fails to introduce any evidence, he must, in all cases, fail of any relief, and judgment must go against him in any event, and that, if the adverse party produces proof that he made an application in due form, and that he was a qualified purchaser, the right of such adverse party to purchase must be adjudged accordingly, although his application may be subsequent in time to that of the other party, and no proof be made showing the invalidity of the previous application or the lack of qualification of the previous applicant. There are cases to which this rule would apply, but this case is not of that character. As before stated, this land is not suitable for cultivation and no applicant therefore need be an occupant or actual settler, and in this case neither party claimed to be, or was, an occupant. The state holds such lands for sale and the rule clearly applicable to conflicting purchasers is that, other things being equal, he who is first in time is first in right. After the order of reference is made, either party may bring an action to determine the better right. It is always necessary for the party bringing the action to state facts which will show that there is an adverse claim which creates a contest. *Polk v. Sleeper*, 143 Cal. 71, 76 Pac. 819. If the action is brought by the one who first filed a proper application for this class of land, the statement of facts showing that the land was subject to sale, that he is a qualified purchaser, that he has made and filed due application to purchase, that the defendant claims under a subsequent application, and that the order of reference has been made will sufficiently show his own right and the inferiority of the right of the defendant, and he need not, unless he chooses to do so, allege other facts to show that defendant was not entitled to purchase, or that his application is void by reason of false statements or other causes. Where in such a case he rests upon proof of his own right and the subsequent application of the defendant, and the defendant offers no proof in support of his own case, the plaintiff is clearly entitled to judgment; for his application, being first in time, is *prima facie* first in right and the defendant's subsequent application is presumptively void.

But, where the action is begun by the person whose application is second in point of time, the conditions are, or may be, reversed. In order to show that there is any contest to try, he must aver that there is a claim under an adverse application. If he alleges that this was filed prior to his own, and it is not

defective on its face, he must overcome the presumption in its favor arising from such priority by averment and proof of some fact or facts establishing its invalidity. If his own proof shows a prior application by the other party and the issuance of a certificate thereon by the Surveyor General and no defect or invalidity appears on the face of these papers, and no outside evidence is given to impeach them, such plaintiff must fail. The first applicant is required to make a sworn statement showing his qualifications as a purchaser, and it is only after this has been done that the Surveyor General has authority to issue his certificate. The presumptions that the law has been obeyed, that the first applicant is innocent of the crime of perjury, and that official duty has been properly performed come to the aid of the defendant. In the absence of controverting proof, these presumptions will prevail. The certificate is made *prima facie* evidence of title in the holder. *Pol. Code*, § 3514. It is not conclusive, of course, in a contest of this character (*McFaul v. PfanKuch*, 98 Cal. 402, 33 Pac. 397), and perhaps in this class of cases its *prima facie* force is no greater than that which arises from the presumption above mentioned; but it is at least sufficient, if not controverted, to establish the right of the holder, so far as may be necessary to prevent the plaintiff from obtaining judgment establishing the subsequent claim, and to require judgment that plaintiff take nothing by the action.

The cases of *Lane v. Pferdner*, 56 Cal. 122, *Gilson v. Robinson*, 68 Cal. 543, 10 Pac. 193, *Garfield v. Wilson*, 74 Cal. 178, 15 Pac. 620, and *Prentice v. Miller*, 82 Cal. 573, 23 Pac. 189, are cited in support of the proposition that either party to such contest must fail if he does not prove his qualifications as a purchaser, and the truth of any fact stated in his application and alleged by the other party to be false. In *Lane v. Pferdner* the question of the effect of the lack of any evidence on behalf of a defendant is discussed and decided. It was held that he has the burden of proof to establish the averments of his answer to the effect that he is qualified to purchase. In that case, however, it does not appear that there was any proof of facts by the plaintiff, or any facts admitted by the pleadings, which would have the effect of establishing the defendant's claim and a *prima facie* prior right in defendant, as is the case here. If in this case the plaintiff had merely alleged that the defendants claimed a right to purchase which was inferior to that of plaintiff, and that Ada Lambert was not a qualified purchaser and had made the false statements as found, and had rested his case after proving his own right, as the plaintiff did in *Lane v. Pferdner*, without proving or averring facts showing a prior right in defendants, the decision in that case would control, and judgment would properly go for the plaintiff, if defendants introduced no evidence. But the case is different here, and is

governed by the rule stated in *Polk v. Sleeper*, 143 Cal. 73, 76 Pac. 819, to the effect that, where a plaintiff in such a contest by his pleading or proof shows a prima facie prior right in the defendant, he must go farther and show some "fact, matter, or thing that would invalidate the defendant's certificate of purchase." The ordinary rules of pleading, practice, and evidence are to be followed in these contests (*Hinckley v. Fowler*, 43 Cal. 64), and for the purpose of defeating the plaintiff's claim the defendant may rely on proof made by the plaintiff and facts admitted by the pleading, as in other actions.

The other cases cited by respondent are not applicable to the precise point here under consideration. They merely announce the general doctrine that each party is an actor, and must allege and prove his own case. Nothing is said in regard to the effect of facts admitted by the pleadings, or proof in his favor which may be made by his adversary.

The judgment is reversed.

We concur: ANGELLOTTI, J.; MCFARLAND, J.; HENSHAW, J.; LORIGAN, J.

(152 Cal. 415)

GREENWOOD et al. v. BEELER.
(S. F. 3,756.)

(Supreme Court of California. Dec. 2, 1907.)
VENDOR AND PURCHASER—CONTRACT—MODIFICATION BY AGREEMENT.

A written agreement was made by a landowner by which he sold it, the purchaser to pay a certain sum down and the balance in monthly installments, with interest, title to be conveyed on full payment. *Held*, that a subsequent parol contract, by which the vendor agreed to advance to the purchaser money to build a house on the land, the purchaser to increase his monthly payments under the written contract, and that later a written contract should be drawn up to secure the increased loan, could not be considered a rescission of the original written agreement.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by F. M. Greenwood and others, as executors of the will of Monroe Greenwood, deceased, against Edward A. Beeler. From an order denying plaintiff's motion for a new trial, they appeal. Affirmed.

F. M. Parcells, for appellants. R. F. Morgan and F. A. Hornblower (Chas. E. Nougues, of counsel), for respondent.

ANGELLOTTI, J. In this action judgment went for defendant, and plaintiffs have appealed from an order denying their motion for a new trial. The justices of the District Court of Appeal for the First District being unable to agree upon a judgment, the matter was transferred to this court for hearing and determination.

The action is one by the executors of the will of Monroe Greenwood, deceased, to obtain a judgment fixing the amount due on a contract for the sale by deceased to Beeler

of a lot of land, requiring Beeler to pay the same within a time to be fixed by the court, and providing that, in default of such payment by defendant, his right, title, and interest shall be forever barred and foreclosed, and plaintiffs' title quieted as against him. It appears by the complaint, and is admitted by the answer and cross-complaint of Beeler, that the only written contract between the parties was one entered into on February 23, 1895, whereby deceased agreed to sell the land to Beeler for \$1,050, Beeler agreeing to pay said amount in installments, \$50 at the date of the agreement, and the balance in monthly installments of \$20 or more at his option, with interest on deferred payments at the rate of 7 per cent. per annum, and all state, city, and county taxes on the property. The contract provided that the deceased would convey the property to Beeler, by good and sufficient deed, upon full payment being made in the time and manner stated, and that any failure of Beeler to comply with the terms of the contract would release deceased from all obligations to convey, and cause a forfeiture of such money as had been paid by him. It is admitted that, as alleged in answer and cross-complaint and found by the trial court, payments were made from time to time by Beeler, aggregating such an amount that, if the same were applied solely on such written contract, there remained due thereon on March 28, 1899, the sum of \$270.10 only, which amount was on said day duly tendered to plaintiffs by defendant, with a demand for a deed, and refused by them.

It appears that in May, 1896, deceased orally agreed to advance to Beeler the money necessary to construct a dwelling house on the land, and that he did, in pursuance of this understanding, between May 20, 1896, and September 23, 1896, advance sums aggregating \$876.50, the cost of said house. If all money paid by Beeler was paid on the written contract, none of this \$876.50 or any interest thereon has ever been paid. Plaintiffs claimed that this should be taken into consideration in determining the amount due and payable before a deed can be required, and that they were entitled to foreclose Beeler's rights in the land under the agreement, in the event of his failure to pay the same. They further claimed that the amounts paid by Beeler were paid, not only on account of the purchase price of the land under the written contract, but also on account of the amount advanced for the construction of the house, and that consequently more than \$270.10 remains due on the written contract. In support of their claims, they alleged in the complaint, after alleging the written contract, first, that on or about May 1, 1896, the deceased and Beeler mutually agreed to terminate and rescind said written contract, and that the same was rescinded at that time; and, second, that on said day deceased and Beeler entered into an oral agreement whereby deceased agreed to sell the

land to Beeler for \$1,050, giving him credit for all amounts paid on the written agreement, to advance the money necessary to construct a dwelling house thereon, and to convey the premises by deed upon the payment by Beeler of the whole amount, purchase price and advances, with interest on deferred payments at the rate of 7 per cent. per annum, in monthly installments of at least \$30. They further alleged that all subsequent payments made by Beeler were made on account of both the purchase price and the amount advanced for the house. These allegations were all explicitly denied by the answer, and explicitly found against by the trial court, which adopted the theory that the loaning of the money for the house was in no way connected with the matter of the written agreement, and that the money was loaned upon the express understanding that thereafter deceased would suggest to defendant some form of security therefor which would be agreeable to him, and defendant agreed to give such security as deceased should thereafter require. Deceased died October 10, 1896, and nothing was ever done in the matter of furnishing security. The court gave judgment, as asked in the cross-complaint, declaring Beeler to be the owner of the land, subject only to a lien in favor of plaintiffs for the amount remaining due on the written contract, \$270.10.

As before stated, this is an appeal only from the order denying plaintiffs' motion for a new trial; no appeal from the judgment having been taken. The record is such that we are limited to a consideration of the question of the sufficiency of the evidence to support the findings of fact of the trial court upon the matters already specially referred to, viz., the alleged rescission of the written contract, the alleged making of the new oral contract, and the question as to whether the moneys paid by Beeler were paid on account both of purchase price of land and loan for house, or on such purchase price only. Unless it can be held that the evidence is legally insufficient to support one or more of the findings as to these matters, the order of the trial court must be affirmed. A careful consideration of the evidence shown by the record has satisfied us that it cannot be so held. The well-established rule that, where there is a substantial conflict of evidence upon any proposition, this court will not interfere with the finding of the trial court thereon, is, of course, not disputed by counsel for plaintiffs. His claim is that there is no such conflict, but there plainly is such a conflict as to all the matters embraced within the particular findings under consideration. The evidence introduced by plaintiffs as to conversations between deceased and Beeler was so far as it tended to show any attempted rescission or change in the written contract, or any attempted oral agreement relative to the subject-matter or terms thereof, opposed to the positive and unqualified testimony giv-

en by Beeler, as was also the evidence on behalf of plaintiffs tending to show admissions made by Beeler. There was nothing in the admitted facts of the case, or in the evidence given by Beeler when considered in connection with the admitted facts, that is necessarily inconsistent with the theory of defendant that the money for the construction of the house was loaned to Beeler by deceased with no understanding between the parties other than that it was a loan which was to be repaid, with interest, that by reason of having a house on the land Beeler would increase the amount of monthly payments on his contract, and that some written instrument, the terms of which were not discussed, should be at some future time prepared by deceased and executed by the parties, which would constitute an agreement furnishing adequate security to the deceased. Such a transaction could not, of course, be held to constitute a rescission or termination of the existing written contract for the sale of the land, or the making of the oral agreement alleged in the complaint. Upon the question as to the application of the payments made by Beeler, the evidence given by Beeler himself is legally sufficient to support a conclusion that he directed each payment, at the time of making it, to be applied on the amount due on the written contract. Civ. Code, § 1479, subd. 1. The specific findings attacked on the motion for a new trial must be held to be sufficiently supported by evidence.

The order denying the motion for a new trial is affirmed.

We concur: McFARLAND, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

152 Cal. 532

PEOPLE v. HELM. (Cr. 1398.)

(Supreme Court of California. Dec. 10, 1907.)

1. CRIMINAL LAW—APPEAL—REVIEW — PREJUDICIAL ERROR — OVERRULING CHALLENGE TO JUROR.

The erroneous overruling of a good challenge for cause, thereby compelling accused to use a peremptory challenge, is prejudicial, where accused was afterwards obliged to accept an objectionable juror because his peremptory challenges had been exhausted, and this, though no challenges for cause were imposed to any jurors called after the exhaustion of such peremptory challenges.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3117.]

2. JURY—PEREMPTORY CHALLENGES.

The right to challenge peremptorily is absolute, and may be exercised on the mere whim or caprice of accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 599-606.]

3. SAME—BIAS—OPINION.

Pen. Code, § 1076, declaring that no juror shall be disqualified for having formed an opinion founded on public rumor, statements in public journals, or common notoriety, provided it appears that he can act impartially, though changing the common-law rule does not obviate the necessity that jurors must still be indifferent and unbiased; and hence if it does not

appear affirmatively that the juror's opinion is based entirely on one of the three sources of information specified, or if it is shown that his belief originated from any other source, he is incompetent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 438-448.]

4. SAME—EXAMINATION.

Pen. Code, § 1076, declares that a juror shall not be disqualified because he has formed or expressed an opinion on a matter to be submitted to him for consideration if his opinion was formed on public rumor, statements in public journals, or on common notoriety alone, provided he can and will act impartially according to the law in determining the question submitted. *Held*, that the fact that jurors answered that their opinions were founded on common notoriety or statements in the public journals, etc., did not qualify them, where it appeared that they were biased, and that their opinions were not entirely so formed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 448-457.]

5. SAME—SCOPE.

Where a juror stated on his voir dire that he had an opinion touching the guilt or innocence of accused of another murder, the defense was entitled to ask him whether, believing defendant guilty of such other homicide, he had not formed an adverse opinion toward him in the case at bar, and whether he believed the defendant in this case guilty of the prior homicide.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 438-448.]

6. CRIMINAL LAW — APPEAL — ADMISSION OF EVIDENCE—PREJUDICE.

In a prosecution for homicide, accused was not prejudiced by the introduction of a conversation between witness and deceased on the day of the murder, in which deceased told witness that he was unwell, and was going to see a doctor, defendant claiming that such evidence showed that defendant had no knowledge of deceased's plans, and could not, therefore, have prearranged a plot to kill him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3137-3143.]

7. SAME—EVIDENCE—OPINION.

It being contended in a prosecution for murder that defendant and his brother rode bicycles to the scene of the homicide, a witness who had measured the bicycle tracks, but had lost the memorandum of the measurements, was properly permitted to give his opinion as to the width of the tracks, under the rule permitting nonexpert evidence of opinion on questions of identity, size, weight, color, quantity, distance, and time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1048, 1049, 1051.]

8. SAME — MISCONDUCT OF PROSECUTING ATTORNEY—ARGUMENT.

Where, in a prosecution for homicide, there was no proof touching a prior murder of which defendant had been accused, the fact that many of the jurors on their voir dire were interrogated as to their knowledge of such previous murder and defendant's connection therewith, etc., did not justify the district attorney in referring to such murder, and to the connection of defendant and his brother therewith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1668, 1669.]

9. HOLIDAYS—INFORMATION—FILING.

Code Civ. Proc. § 73, declares that the superior court shall be always open, legal holidays and nonjudicial days excepted. Section 134 provides that no court shall be open nor shall any judicial business be transacted on a holiday, save for the purposes enumerated, and section 13 declares that whenever an act of a secular nature is appointed by law or contract to be

performed on a particular day, which falls on a holiday, such act may be performed on the succeeding day. *Held* that the presentation of an information by the district attorney for filing, its reception and the placing of a file mark thereon by the clerk of the court, being ministerial acts, they might be performed on a holiday.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Holidays, §§ 2-5.]

10. CRIMINAL LAW—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where the state claimed, and there was evidence to indicate, that larceny was defendant's motive in killing deceased an instruction that it was not claimed that the homicide charged was committed in the perpetration or attempt to perpetrate another felony, was erroneous as inapplicable to the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980, 1981.]

In Bank. Appeal from Superior Court, Fresno County; George E. Church, Judge.

William Helm was convicted of murder, and he appeals. Reversed and remanded.

Everets & Ewing, for appellant. U. S. Webb, Atty. Gen. (George W. Jones, of counsel), for the People.

HENSHAW, J. Defendant was informed against by the district attorney of the county of Fresno for the crime of murder, was tried, and found guilty of murder in the first degree. He moved for a new trial and in arrest of judgment. His motions were denied, and the judgment was pronounced imposing the death penalty. From the judgment and order denying his motion for a new trial, he prosecutes this appeal.

The defendant was accused of murdering a farmer and his wife who were camped by a roadside in the county of Fresno, shooting them both with a shotgun. The apparent motive of the crime was larceny. The evidence was circumstantial in its nature. Public feeling was much aroused by other crimes of violence which had been committed, and by another murder, that of a man named Jackson. Of the commission of these crimes this defendant was also suspected. The community, as was natural, was much exercised, and there was great prejudice against the defendant. It became a matter of difficulty, therefore, to secure upon the trial the fair and impartial jury to which every defendant is entitled. Some 59 jurors called to the box were excused upon challenge for actual bias. Defendant's challenge to others upon the same ground was denied, and his counsel was obliged to interpose peremptory challenges to them. Defendant's peremptory challenges were thus exhausted when only eight members of the jury had been obtained. Three of the last four were accepted by defendant without challenge for cause. The fourth was challenged for cause, and the challenge overruled. While it is true that the erroneous overruling of a good challenge for cause, thereby compelling the use of a peremptory challenge, is not prejudicial error where it is not made to appear that the challenger was obliged afterward to accept an

objectionable juror, without power to use a peremptory challenge upon him, it is equally true that where such a condition is shown to result, as here, the error at once becomes prejudicial if the defendant has been obliged to exhaust his peremptory challenges in relieving himself from jurors who should have been excused by the court under challenge for cause, and the rulings of the court upon such jurors becomes a most important matter of review. It makes no difference in this respect that no challenges for cause were interposed by defendant to any jurors called to the box after the exhaustion of his peremptory challenges had been forced by the improper rulings of the court upon his challenges for cause. It may often happen that a juror most obnoxious to a defendant may successfully pass examination upon his *voir dire*. That examination may disclose no ground for the interposition of a challenge for cause. Yet there may be some reason known to the defendant which would make it most prejudicial to him that the juror should be retained. Even more, the right to exercise peremptory challenges is absolute. Such a challenge may be exercised upon the mere whim or caprice of defendant. So that again we say that any rulings of a court which compel a defendant to exhaust his peremptory challenges and force him to accept jurors after his challenges have been so exhausted becomes the proper subject of review.

The modification of the common-law rule which has been worked by section 1076 of the Penal Code has often been the subject of consideration. The common-law rule which demanded the strictest impartiality upon the part of each individual juror, which declared that one and all should, as between the crown and the defendant, "stand indifferent as they stand unsworn," has, by the section before adverted to, been subjected to an exceedingly narrow change. Jurors must still be indifferent and unbiased. Where, however, a juror has formed or expressed an opinion upon the matter to be submitted to him for consideration, and that opinion it is established was formed upon public rumor, statements in public journals or common notoriety alone, such a man is not necessarily disqualified, provided that it is made to appear to the court, upon his declaration under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly in deciding the question to be submitted to him. It will be noted, therefore, that the right to unbiased and unprejudiced jurors is still an inseparable right to the trial by jury guaranteed by our Constitution. *Lombardi v. Cal. St. R. R.*, 124 Cal. 317, 57 Pac. 66. It is for the trial court in the first instance to determine, and it must be affirmatively made to appear, when a juror is shown to have an opinion, that that opinion is founded upon public rumor, common notoriety, or statements in the public journals; and it must further be made to appear

to the satisfaction in the first instance of the trial court that such opinion can and will be absolutely laid aside by the juror and that so laying it aside he can and will act with strict fairness and impartiality. If it is not made to appear that the juror's opinion is based entirely upon one or all of the three sources of information above named, if it is shown that his belief has its origin in any other source than one of the three enumerated, he is at once as thoroughly disqualified under our Code as he would have been at common law. This proposition is here emphasized because of its exceeding importance and consequence to a defendant. Thus in *People v. Miller*, 125 Cal. 44, 57 Pac. 770, a challenge was interposed upon the ground of actual bias. The jurymen stated that he had read newspaper accounts of the killing. He had heard the matter discussed by persons, but did not know whether such persons assumed to know the facts or not. From what he had heard and read he had formed an opinion rather unfavorable to the defendant; that is, if what he had heard and read was true. He did not know who the witnesses were. It would take a little evidence to remove the opinion he had. The only impression he had about the case was a sort of impressionable opinion formed from others. If sworn as a jurymen, he would try to lay aside his opinion entirely and act solely upon the evidence. He would regard the statements he had heard as of little weight. He had some idea that they might be mistaken. He would take the instructions of the court as to the law. This court held that the challenge for actual bias which was disallowed should have been allowed, and said: "Under the Penal Code of this state a single exception is found to the common-law rule, and that exception is declared in section 1076. This juror was clearly disqualified, unless he came within the provisions of the aforesaid section. The exception found in the law covers the single case where the opinion of the juror is founded upon public rumor, statements in public journals or common notoriety, and it further appears to the court from the declarations of the party under oath that he could and will, notwithstanding his opinion, act impartially and fairly upon the matters submitted to him. The court is not allowed to hold that a juror is qualified when he is impressed with an opinion as to the guilt or innocence of the defendant, unless that opinion is based alone upon one or more of the cases enumerated in the aforesaid section of the Code. * * * As far as this record discloses, any one of the parties with whom the juror conversed as to the circumstances of the killing may have been an eyewitness to the tragedy and an important witness at the trial. The record must show affirmatively a contrary state of facts to this, or the exception of section 1076 to the common-law rule cannot be invoked. There is nothing in the evidence which would justify the con-

clusion that the opinion of the juror was founded alone upon public rumors, statements in the public journals, or common notoriety." So, also, in *People v. Wells*, 100 Cal. 227, 84 Pac. 718, this court said: "Omitting from the statement of the juror that these things came to him from parties directly interested in the case, and allowing the examination to rest upon the sole fact that the juror entered the box with an opinion as to the guilt or innocence of the accused, that fact is of itself a disqualification, even though the juror should declare to the court under oath that, notwithstanding his opinion, he would and could act fairly and impartially upon the matters submitted to him. The juror would not only be disqualified at common law, but disqualified under the Penal Code, for he has not brought himself within the provisions of section 1076; as those provisions require an affirmative showing to the court that his opinion is based upon public rumor, common notoriety, or statements in public journals. Such a showing is not made in this case."

It is thus the established law that it must be affirmatively shown that the opinion which the juror holds was based upon one or all of the matters enumerated in section 1076, or he is disqualified. Again, in *People v. Wiel*, 40 Cal. 268, a jurymen on voir dire stated that he had a fixed and settled opinion regarding the guilt or innocence of the defendant. He believed what he heard, and it would require evidence to remove the opinion now existing in his mind. He further stated on cross-examination that his opinion was not an unqualified one; that he could try the case and render a verdict according to the evidence, notwithstanding any opinion previously formed in regard to the case. The challenge was denied. This court said: "The ruling in disallowing the defendant's challenge to the proposed juror * * * was clearly erroneous. The statement of the juror on his examination in chief clearly shows that he had formed an unqualified opinion and belief as to the guilt or innocence of the defendant, notwithstanding his subsequent statement on cross-examination." "And," proceeds the court, "it appears from the above recital of facts from the record that defendant was driven to a peremptory challenge to relieve himself from this, to him, obnoxious juror, and this contributed to swell the number of peremptory challenges exercised by him to the full extent allowed by law before the panel was full, and before the last man required to complete the jury was called to the box for examination as to qualifications, so that the defendant could not exercise a peremptory challenge upon this last juror, however obnoxious to him he may have been. Thus it plainly appears that the direct result of the disallowance by the court of defendant's challenge for cause was to contract the number of peremptory challenges to which he was entitled, and that such an error may

have been seriously prejudicial to the defendant." In *People v. Suesser*, 132 Cal. 632, 64 Pac. 1095, this court said: "No more now than formerly is the defendant compelled to submit his case to a juror who has such an opinion of his guilt as will require evidence to remove, and thus unjustly add to the burden of his defense. * * * Most of the 20 peremptory challenges allowed the defendant were exercised upon proposed jurors who stated upon voir dire that, if sworn as jurors, they would take their seats in the box with a strong opinion against the defendant which it would require evidence to remove. Some said strong evidence. Where such a state of things exists the defendant cannot have a fair and impartial trial."

These lengthy quotations have been made, not alone because they announce the well-settled law in this state, but because they are peculiarly apposite to the evidence touching the examination of jurors presented on this appeal. The juror Seklemin testified on voir dire that he had read about the case and talked with people a little about it, but with no one who claimed to know anything about the facts. He had heard other people discuss it in his presence. He had formed an opinion in reference to the case, and he had that opinion at the time he was being examined, and it would take evidence to remove it. The opinion went directly to the guilt or innocence of the defendant, and, if selected as a jurymen, it would require evidence to remove it before he could be perfectly free with reference to the trial of the case. This opinion was of such a nature that it would require less evidence or evidence of less positive nature to produce a conviction in his mind than it would if he had never heard of the case. This juror was challenged for cause, and upon redirect examination and recross-examination he was asked whether he could "listen to the testimony from the mouths of the witnesses here and obey the rules that you will hear the judge tell you in the end. Can you do that?" and the witness answered "I think I can, and I will; yes." Further he testifies that he thinks he could give the defendant a fair and impartial trial. He thinks he could set aside the opinion that he has, though that opinion is one that would require evidence to remove. "It certainly would at this time, in my present frame of mind, require evidence to remove that opinion from me. I could set that opinion aside very easy, but not until I had heard some evidence on the part of the defendant. That is a positive fact. These statements that I have heard spoken by people I do not know whether they are true or false. I never heard them denied. Have no reason now to think they were untrue, and I would continue with that idea in view until the defendant placed some evidence before me to the contrary." Again interrogated by the district attorney as to whether he could not and would not set aside this opinion and

obey the instructions of the judge, he answers: "I think I can; yes." To the next appeal of the district attorney, "Won't you do that if the judge tells you that it is the law?" he answers, "I think I can set aside my present opinion. I will obey the instructions of the court, but I have a certain opinion. I think I can set that opinion aside." The final question is then asked: "Your conscientious opinion now is that you can and will do it, is that right? A. Yes." The court then interrogates the juror: "Q. And you can do that and will do it? A. I think I can and I will. Q. You say you think you can. Do you know that you can? A. I know that I can." The challenge was denied. E. R. Winters testified that he discussed the case with his neighbors; read it in the papers. The people with whom he talked made statements in a general way about the case. They were people in whom he had confidence and had no reason to disbelieve them, and accepted their statements as true. From these statements and from what he had heard and read generally he had formed an opinion touching the guilt or innocence of the defendant, and he had that opinion still. "It is a fixed and settled opinion, at least to the extent that it would require some evidence to remove it. If selected as a juror, I would possibly require the prosecution to convince me beyond a reasonable doubt of the guilt of the defendant. In my present state of mind it would not require as much evidence to convince me of the guilt of this defendant in this case as it would where I had never heard anything about the facts and circumstances. It might require more evidence on the part of the defense to prove the young man innocent than it would in a case I had never heard anything about. Feeling as I do, and taking everything into consideration, what I have heard and read, and the opinion I have I do not see why I could not fairly and impartially try the case at this time. From these things I have formed an opinion in a certain way, and that opinion would require evidence to remove it. The mere direction or request on my part on my mind to lay aside that opinion would not be sufficient. I certainly would have to have evidence to lay aside that opinion that I now have." Further, he testifies that the opinion is formed solely upon statements in the newspapers and public rumors. It is not an unqualified opinion. That he is in a state of mind which would not prevent him from acting with entire impartiality. The challenge for cause interposed by the defense being denied by the prosecution, the juror further testifies: "By an unqualified opinion, I mean that I have not such an opinion, if there was sufficient evidence, that it could not be changed. I could change that opinion if there was evidence, but it would require, in my present frame of mind, evidence to change that opinion. Q. You read of the fact that the defendant had been accused of sev-

eral different murders. A. Yes, sir. I don't know as that would tend to prejudice me against the defendant. It would take evidence to remove my opinion now. The opinion is based upon whether or not those things that I heard and read are true or not." Upon this juror the defendant was required to exercise a peremptory challenge. E. Neeley testified that he had read some of the accounts of the preliminary examination of the defendant, and never discussed the case, only just passing remarks with his neighbors. He had formed an opinion. "The opinion is one that, until evidence is introduced to remove it, I will take with me into the jury box. I would have to have evidence on the part of the defense to change my mind. If the evidence brought out here in this case is different from what I have read that came out at the preliminary examination, then I have no opinion. I don't believe I could act just as fairly and impartially in this case if selected as a juror as I could in a case that I have never heard anything about. The little impression that I have would bob up until all the evidence was in. I think that opinion or impression that I have would crop up in my consideration of the case. I don't know that I could handle this case as a juror with the same degree of fairness and impartiality that I could in a case that I knew nothing about. I think that is the way I feel." This juror was challenged, and upon examination by the district attorney he testified that his impression would go into the jury box with him; that he did not think it would prevent him from obeying the instructions of the court, and he did not think it would prevent him from acting with entire impartiality. If taken as a juror, he would give his verdict according to the evidence and the instructions of the court. He would have to do it. He would do it to the best of his ability. Defendant's challenge for cause was disallowed. George Wells read of the case in the newspapers and talked it over with people. He did not know whether the people he talked with knew the facts or not. The people with whom he talked were people in whom he had confidence. He never heard any statements to the contrary from what he heard from them. He did not know whether they were witnesses in the case or not. From what he had heard he had formed an opinion with reference to the guilt or innocence of the defendant. The opinion was based on what he heard and read. "Do not know whether or not the things I have heard were from people who were witnesses or not. It would require evidence upon the part of the defendant to change my opinion. I could disregard the opinion if I heard different evidence. It is not such an opinion that it would influence me in the rendition of my verdict." He thinks that he feels that he could meet the qualifications of a juror. If he heard the same evidence he would have the same opinion. It is an opinion such that it would

require less evidence to convict the defendant than if he had never heard of the case. To that extent it would influence his mind as to the rendition of a verdict until the opinion was changed. The opinion is adverse to the defendant, and based not only upon what he had read, but upon the statements of people with whom he talked. The people were not witnesses that he knew of. Does not know whether they are or not. He could absolutely discard from his mind any opinion and listen to the evidence and nothing else, and upon that alone, under the instructions of the court, render his verdict, and would not be influenced by the opinion that he then had; but still that opinion is so strong that it would require evidence to remove it from his mind. It is a fixed and settled opinion until it is changed. It is not absolutely changeless. Upon examination by the district attorney, in answer to the question: "Well, now, this is based upon newspaper reports and public rumor, is it not?" he said, "Yes. Q. Solely based on that? A. Yes." The challenge was denied, and the juror peremptorily excused by the defense. N. N. Norton upon voir dire testified that he had read pretty much all about the case, and conversed in regard to it with his neighbors. He did not know whether the people he talked with knew anything about the facts in the case or not. "I do not think they knew any more than I read in the papers, but I don't know." Had an opinion in reference to the guilt or innocence of the defendant. He thought that opinion would go with him into the jury box. It was unfavorable to the defendant, and it would take evidence on the part of the defendant to remove it. Was pretty sure that, unless some affirmative evidence was introduced to change his mind with reference to the matter, the opinion would influence him in the rendition of the verdict. On cross-examination he testifies that the opinion formed in his mind is from newspaper reports alone. Asked if he would obey the instructions of the court and regard only the evidence introduced, he answers that he would try to do that. Asked whether he would find anybody guilty of a crime on newspaper report, says he does not think he would. He does not think he would allow an unsworn newspaper report to influence his mind against testimony sworn to in court. Finally, asked by the court if he could fairly and impartially try the case and make up his verdict solely from the evidence and from the instructions, he answers, "I think so." The challenge to this juror was disallowed, and the defendant exercised a peremptory challenge upon him. John Cobbe had read and heard of the crime with which the defendant was charged, and attended the preliminary examination of this defendant charged with the murder of Mr. Jackson. He had discussed the case, and heard it discussed. He did not know whether the people with whom he talked were wit-

nesses in this case or not. He does not think he talked with any one who was a witness. He does not know that they were. "Do not think I have talked with any of the officers in the case." He had formed an opinion as to the guilt of the defendant. He recalled portions of what he heard and statements made in reference to the case. He heard people make statements in reference to this defendant being seen on the White's Bridge road on the afternoon the crime was committed. (Witnesses in the case did testify to seeing the defendant on the White's Bridge road on the afternoon of the day when the crime was committed.) Further, he testifies that the opinion could be removed by the same kind of evidence that it was formed with; that it was from public rumors. He rather thought he could try the case fairly and impartially; rather thought he could act with the same degree of fairness if selected as a juror as he could in a case where he had never read or heard anything about it. He would require just as much evidence on the part of the prosecution in this case as if he had never formed an opinion or impression. Further, he testifies that feeling as he does now it would require evidence of some kind or character to remove from his mind the opinion that he has touching the guilt of the defendant. Challenged, he testified that the opinion is made up of public opinion and newspaper reports. He thinks he could give the defendant the presumption of innocence. He thinks he could wholly discard the impression which he has, not act upon it and not take it into consideration; but until he does receive some evidence, something of some kind, he would have this opinion, and it would require evidence—sworn or unsworn evidence—something to remove it from his mind. The challenge for cause to this juror was disallowed and a peremptory challenge exercised upon him. J. J. Wash, examined after the defendant had exercised all of his peremptory challenges, had read of the case, heard it discussed and discussed it with others. He had an opinion and believed that it would require evidence on the part of the defense to remove the opinion. It was adverse to the defendant. If the evidence was strong enough, he could lay aside the opinion. The opinion was created from rumors and newspaper reports. "I could lay aside the opinion, provided there was sufficient evidence produced to convince me that it was a mistake I am laboring under. Until that evidence was introduced I would have the opinion, but not necessarily a fixed or settled opinion. It would require evidence on the part of the defendant to remove the opinion, but until it was removed by evidence it would influence me to the extent of requiring evidence to remove it." Challenge for cause interposed by the defense being denied, the juror further testified that, if sworn as a juror, he could and would depend upon the testimony as he heard it from the lips of the

witnesses and the instructions of the court.

With these extracts from the examination of the jurors before us, we think little need of comment is required. The jurors were doubtless conscientious in their answers, but as to some it certainly cannot be said that they gave evidence of the impartiality of mind which alone would qualify them. In other instances, while in answer to leading questions from the district attorney they stated that their opinions were founded upon common notoriety or the public journals, it is made equally apparent that their opinions were not so founded. One had attended the preliminary examination of the defendant, which preliminary examination he thinks was for the murder of Jackson. He talked with a man who saw the defendant at White's Bridge on the afternoon of the homicide. Witnesses did testify to seeing this defendant at White's Bridge at that time. Other jurors testified that they did not know whether or not the persons with whom they talked were witnesses or purported to know the facts. In each and all of these cases there is a failure to establish affirmatively that the opinion of the juror was based wholly upon public rumor or statements in the public journals or common notoriety. It is not sufficient to qualify a juror that he should be led to say that his opinion is based upon common rumor, when from his own lips the evidence discloses that it is not so founded. As to some of the jurors, it is apparent that they were biased within the meaning of the Code. As to others it is not made apparent that their opinions were founded exclusively upon matters enumerated in section 1076 of the Penal Code. "In criminal cases," says Judge Cooley (*Holt v. People*, 13 Mich. 224), "wherein, after full examination, the testimony given upon the challenge leaves a reasonable doubt of the impartiality of the juror the defendant should be given the benefit of the doubt."

In contemplation of the new trial which must necessarily result from the foregoing views, certain questions which must arise upon such new trial demand consideration. A juror upon voir dire had stated that he held an opinion touching the guilt or innocence of the defendant in reference to the Jackson murder case. He was then asked if, believing the defendant guilty in the Jackson Case, he had not formed an adverse opinion toward the defendant in the case at bar. The prosecution objected to this question, and was sustained. The defense then propounded the following question: "Now, Mr. Colburn, you believe the defendant in this case is guilty in the Jackson matter?" To this, likewise, the prosecution's objection was sustained. These questions should have been allowed—not only as tending to throw light upon the juror's condition of mind as to the matter under investigation, but also as legitimate inquiry for the purpose of determining whether a peremptory challenge should be interposed to him.

In the very nature of the workings of the human mind, if the juror did believe the defendant to have been guilty of the Jackson murder, he was more likely to have believed him guilty of the murder here charged, and if, in fact, the juror did believe the defendant guilty of the Jackson murder, the defendant was clearly entitled to know this, to the end that he might peremptorily excuse him from sitting upon the jury. A witness testified that on the day of the murder he met Mr. Hayes (the murdered man) and his wife at White's Bridge. They were going west. He was asked if he had had any conversation with Mr. Hayes, and, answering "Yes," was told to give the conversation. The defense objected. The witness answered: "He said he was going to Fresno. He said he was unwell, and was going to Fresno to see a doctor." It cannot be perceived how this evidence, even if in strictness inadmissible, could have been in the slightest degree injurious to the defendant, while elsewhere in defendant's brief it is contended that this very evidence is of importance and value to defendant, as showing that he could not have had any knowledge of the Hayes' plans, and thus could not have prearranged any plot for the murder. The witness McSwain had taken measurements of the size of certain tracks made by bicycle wheels; it being contended by the prosecution that the defendant and his brother rode bicycles to the scene of the murder. The witness had lost the memorandum of the measurements, and was permitted, over objection, to testify that one of the tracks was about an inch wide, and that the other was somewhat smaller. The rulings of the court were proper. In the absence of the memorandum, the testimony was the best which could be afforded, and the evidence was admissible under the well-settled rule that a person may give his opinion on the question of identity, or his judgment of size, weight, color, quantity, distance, and time, matters of opinion open to all men of ordinary information. *Raymond v. Glover*, 122 Cal. 475, 55 Pac. 398; *Commonwealth v. O'Brien*, 134 Mass. 198; 1 Wigmore on Evidence, § 413, 559, 1977; 5 Encyclopædia of Evidence, p. 476 et seq.

Repeatedly, in the argument before the jury, the district attorney referred to the murder of Jackson, and of this defendant's and his brother's connection with it: "Then all at once they were arrested and both in jail—two charges—Jackson killed, lonely old man out here—unoffending woman and man murdered. * * * He could not have sworn to it if he had not been charged with the Jackson murder. * * * We sought to prove that he had recognized him [defendant] before he was arrested and before the Jackson murder." It is sought to justify these remarks of the district attorney upon the ground that many of the jurors upon voir dire were interrogated as to their knowledge of the Jackson murder and of defendant's

connection with it, as to whether or not the fact that the defendant was charged with this murder tended to influence the jurors' opinions in the case at bar, and other like questions. But, while it is apparent that the Jackson murder was a matter of common knowledge and notoriety in the community, and was doubtless in a general way known to every man upon the jury, yet, so far as this record discloses, there was no evidence upon the trial touching the murder, and the references of the district attorney to it, and to defendant's connection with it, were therefore improper.

The information in this case was filed upon the 26th day of May, 1906. This date was one of the holidays declared by the chief executive following the earthquake and fire in the city and county of San Francisco. It is contended by defendant that the information was illegally filed, and is therefore void. Section 78 of the Code of Civil Procedure declares that the superior court shall be always open, legal holidays and nonjudicial days excepted. Section 134 of the same Code declares that no court shall be open nor shall any judicial business be transacted on a holiday, saving for the purposes enumerated. The presentation of an information by the district attorney for filing and the reception of this information and the placing of its file mark thereon by the clerk of the court are all purely ministerial acts. *Ex parte Sternes*, 82 Cal. 245, 23 Pac. 38; *People v. Nogiri*, 142 Cal. 596, 76 Pac. 490. The only provision of the law other than those cited bearing upon this question is that contained in section 13 of the Code of Civil Procedure, which declares that, whenever an act of a secular nature is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day. But this amounts to no more than a legal permission for the postponement of the act, and in no sense prohibits the doing of the act upon the designated day. It follows that it was not error, therefore, to file the information upon a legal holiday.

Coming, finally, to the instructions, as to the one to the effect that there need be no appreciable space of time between the formation of the intent to kill and the act of killing. It is perhaps not necessary to suggest that such instruction should be given in the language indicated by *People v. Maughs*, 140 Cal. 253, 86 Pac. 187. As has been said, throughout the case of the prosecution it was indicated and argued that larceny was the motive for these murders. The court instructed the jury as follows: "In this case it is not claimed by the prosecution that the homicide charged was committed in the perpetration or attempt to perpetrate another felony." It is manifest that the contention of the prosecution was at variance with this instruction, and, while it may not be perceived that the giving of it was injurious to the defendant,

yet certainly under the evidence it had no proper place in the case.

The evidence, while circumstantial, was sufficient to sustain the verdict.

We perceive no other matters calling for consideration; but for the reasons given the judgment and order are reversed and the cause remanded.

We concur: BEATTY, C. J.; McFARLAND J.; LORIGAN, J.

152 Cal. 406

BONNEAU v. NORTH SHORE R. CO.

(S. F. 4,196.)

(Supreme Court of California. Dec. 2, 1907.
Rehearing Denied Dec. 30, 1907.)

1. CARRIERS—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—CARE REQUIRED OF CARRIER.

A carrier of passengers must exercise the highest degree of care for their safety and transportation, and is liable for any injury sustained by them in the course of transportation through failure to exercise such care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1085-1106.]

2. SAME—ACTIONS—PRESUMPTIONS.

Proof that an injury to a passenger occurred through some accident happening to the train on which plaintiff was riding in the course of its operation by the carrier raises a presumption of negligence on the part of the carrier in the operation of the train, makes a *prima facie* case against it, and throws on it the burden of proving that the injury sustained was without negligence on its part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1238.]

3. SAME—INSTRUCTIONS—CONSTRUCTION.

In a personal injury action by a passenger, where it appeared that the coach in which plaintiff was riding left the rails, turned over, and was thrown into a creek, it was not error to instruct that the fact that the train overturned is all that plaintiff need establish to recover for injuries sustained, unless his want of care contributed to the overturning or to his injury, and that to rebut this presumption of negligence defendant must show that the overturning was the result of inevitable casualty, or some cause which could not have been prevented by human care and foresight, and in doing this the defendant must necessarily explain how the overturning occurred, and, if it fails to do this, the presumption of negligence remains; for, notwithstanding the latter part of the instruction it merely required the defendant to show that the car overturned without any negligence on its part.

4. SAME—BURDEN OF PROOF.

In a personal injury action by a passenger, an instruction that, in order to recover for such injuries as plaintiff received, it was only necessary to show that he was a passenger of the defendant, and that the car that he was riding in was overturned without his fault, and that, when this was done, the legal presumption arose that the overturning occurred through the negligence of defendant, and the burden of proving that there had been no negligence was cast upon the defendant, did not require the defendant to prove by a preponderance of evidence that it was not negligent, but simply declared that under the circumstances the presumption of negligence would prevail, and entitled plaintiff to recover, unless it was met or overcome by evidence of equal or greater weight, and the instruction was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1334.]

5. SAME — MISLEADING INSTRUCTIONS — BURDEN OF PROOF.

The instruction could not have misled the jury as to the burden of proof, where the jury was told in eight separate instructions that plaintiff, to recover, must prove negligence of the defendant by a preponderance of the evidence, and in three other places that, if they found the evidence on the question of negligence equally balanced, they should return a verdict for defendant, and, at the request of defendant, the court instructed that the presumption of negligence from the happening of the accident was not conclusive, but might be rebutted by the defendant, and that in rebutting the presumption it was not necessary to overcome it by a preponderance of the evidence, but it was sufficient if enough evidence was introduced to balance the presumption, for in that event it was overcome in the eyes of the law.

6. TRIAL—REFUSAL OF INSTRUCTIONS—EQUIVOCAL INSTRUCTIONS.

In an action by a passenger for injuries received through the overturning of a car, refusal of an instruction that, if the railroad company has shown the exercise of the required degree of care, it is not obliged to go further and explain the cause of the accident, is not error, where the court instructed that the law permits the defendant in answer to any presumption of negligence to show the facts connected with the accident, and if it appears that the company had used proper care the presumption of negligence was overcome, and if at the time of the derailment the train was being operated with proper care, and the roadbed, ties, and rails at such time and place were constructed, etc., with proper care, and from some unforeseen cause, not to be anticipated by defendant in the exercise of the required degree of care, the wheels left the rails, defendant would not be responsible; for the instruction given was a correct statement, and embodied all that was material in the instruction refused.

7. DAMAGES — PERSONAL INJURIES — LOSS OF TIME AND EARNING CAPACITY.

In an action for damages for personal injuries, the value of time lost during the disability resulting from the injuries, and the impairment of capacity for future earnings, are proper elements of damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, *Damages*, §§ 237-241.]

8. SAME—EVIDENCE — ADMISSIBILITY — PAST EARNINGS.

In an action for damages for personal injuries, evidence of earnings for the past several years prior to the accident is admissible on the question of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, *Damages*, § 490.]

9. SAME—EXCESSIVE DAMAGES—GROUNDS OF OBJECTION.

A verdict in an action for damages for personal injuries can only be disturbed as excessive when it appears that the award can be sustained on no other theory than that it was the result of passion or prejudice on the part of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, *Damages*, § 857.]

In Bank. Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Action by Thomas S. Bonneau against the North Shore Railroad Company for personal injuries. Judgment for plaintiff. From an order refusing a new trial, defendant appeals. Affirmed.

Jesse W. Lillenthal and J. W. Cochrane, for appellant. John Flournoy and Thomas P. Boyd, for respondent.

LORIGAN, J. This action was brought by plaintiff to recover damages for personal injuries sustained by him on June 21, 1903, through the derailment, overturning, and wrecking of one of defendant's passenger cars in which he was a passenger, occasioned, it is alleged, through the negligence of defendant in operating its train between Tomales and San Anselmo, in Marin county. Plaintiff obtained a verdict and judgment for \$7,500, and defendant appeals from an order denying its motion for a new trial.

The points made on appeal relate to certain instructions given and to other certain instructions refused, rulings as to evidence offered, and the sufficiency of the evidence to justify the amount of the verdict. The evidence showed that the train of defendant on which plaintiff was a passenger consisted of an engine, tender, and one passenger coach; that, as the train was passing over a bridge across a small creek near Pt. Reyes, the passenger coach in which plaintiff was riding left the rails, turned over, and was precipitated into the creek, the plaintiff sustaining thereby the injuries for which he sought compensation.

As to the instructions attacked by appellant: The court instructed the jury that "the fact that the train did so overturn is all that he [plaintiff] need establish in order to recover for such injuries as he may have sustained, unless his want of ordinary care contributed to such overturning or to his injury. In order to rebut this presumption of negligence, the defendant must show that the overturning was the result of inevitable casualty or of some cause which human care and foresight could not prevent, for the law holds it responsible for the slightest negligence, and will not hold it blameless, except upon the most satisfactory proofs. In doing this the defendant must necessarily explain how the overturning occurred, and, if it fails to do this, the presumption of negligence remains." There can be no question of the accuracy of the general principle of law contained in this instruction. A carrier of passengers is held to the exercise of the highest degree of care for their safety and transportation, and liable for any injury sustained by them in the course of transportation through failure to exercise such care. And, where an action is brought by a passenger against a carrier to recover for injuries, he makes a *prima facie* case against the carrier when he shows that his injuries were sustained by some accident happening to the train on which he was riding in the course of its operation by the carrier. Such proof raises a presumption of negligence on the part of the carrier, in the operation of the train, and the burden is then thrown on it to show that the injury sustained by plaintiff was without negligence on its part. This has been the rule in this state for upwards of 40 years, being first announced in *Boyce v. California Stage Co.*, 25 Cal. 468, and since reaffirmed,

among other cases, in the recent case of *McCurrie v. Southern Pacific Co.*, 122 Cal. 561, 55 Pac. 324. Counsel for appellant, however, criticised the last portion of the instruction given, in which it is declared to be the duty of the defendant to explain the cause of the overturning of the car, insisting that the defendant was not called on to prove how it overturned—what was in fact the cause of its overturning—but only that it occurred without any negligence on the part of the defendant. But, taking into consideration the entire instruction, it is apparent that the portion criticised only casts on the defendant the duty of showing that fact. The explanation that the defendant is required to make, as the instruction states it, is one which will show that the accident was the result of inevitable casualty, or that it resulted from some cause which care and prudence on the part of the carrier could not have prevented. In other words, that the accident was the result of some cause other than the negligence of the carrier itself. This is the only explanation the instruction calls for, was the only one which was stated and reiterated in the other instructions to the jury given by the court of its own motion and at the instance of the defendant, and was the one to which the evidence on the part of defendant was addressed. The instruction as given was taken from the language of the court in the *Boyce Case*, and is in the exact language of an instruction given in the case of *Mitchell v. Southern Pacific Co.*, 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130, and approved by this court as a correct statement of the law.

It is also insisted that the court erred in giving another instruction. It told the jury: "That the plaintiff was a passenger of the defendant, and that the car in which he was riding was derailed or overturned without his fault, is all that the plaintiff need establish in the first instance in order to recover for such injuries as may have been proximately caused him thereby. When the plaintiff has done this, the legal presumption arises that the derailment or overturning of the car occurred through the negligence of the defendant, and the burden of proving that there has been no negligence is cast upon the defendant." Complaint is made that this instruction incorrectly declares the rule as to the burden of proof; the position of the appellant being that, in an action where the only question is as to the negligence of the defendant, the burden of proof is always upon the plaintiff to show by a preponderance of the evidence such negligence; that the burden of proof never shifts, and that it was error to instruct the jury that "the burden of proving that there has been no negligence is cast upon the defendant"; that in effect this was to instruct the jury that the burden was cast upon it to prove by a preponderance of evidence that it was not negligent. But it is quite clear that this instruction had nothing to do with declaring any rule as to

the burden of proof in the case; that is, the burden of proving by a preponderance of evidence the negligence of defendant. This is always on the plaintiff, and never shifts. All that is declared by the instruction criticised is that as a presumption of negligence on the part of the carrier arises from proof of the overturning of the car in which plaintiff was riding, which, in the absence of any evidence on the part of defendant meeting it, would entitle the plaintiff to recover, it is incumbent on the defendant, if it would avoid the effect of the presumption, to produce evidence of equal or greater weight to meet or overcome it, or it will prevail. That there was no error in the giving of the instruction complained of, and that the construction placed upon it by appellant is unwarranted, is so clearly established by the authorities in this state that further general discussion of the proposition would be unprofitable. In the recent case of *Cody v. Market St. Ry. Co.*, 148 Cal. 90, 82 Pac. 668, the following instruction given by the trial court was presented for review: "Hence, when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part." It will be observed that there is no essential difference between the instruction immediately quoted and the one involved at bar. There is a difference in phraseology only. In the *Cody Case*, discussing the objection urged against the instruction there presented, this court said: "It is claimed that the court erred in giving this instruction. It is suggested that the effect of this instruction was to make it incumbent on defendant to overcome the showing of plaintiff by a preponderance of evidence, whereas, under the universally recognized rule, no verdict could be rendered for plaintiff in the absence of a preponderance of evidence showing negligence on the part of defendant. That this contention is not well founded is shown by the opinion of this court in several cases where the question has been discussed. Such an instruction simply informs the jury that, when the facts stated therein are shown, a presumption of negligence on the part of the carrier arises, which is sufficient to make out a prima facie case for the plaintiff, and requires the defendant to meet the case thus made, or, in other words, to answer the prima facie case, or it will prevail. But it does not require a defendant to show want of negligence by a preponderance of evidence. It does no more than to require him to make such showing as to want of negligence as will leave the jury, with all the evidence before it, unsatisfied as to whether there was negligence on defendant's part, and if, on the whole case, the scale does not preponderate in favor of the presumption of negligence, and against

the defendant's proof, plaintiff is not entitled to a verdict, for he has not established his case by a preponderance of evidence, as he was compelled to do under the well-settled rule. The term 'burden' or 'burden of proof' is frequently used to signify simply the burden of meeting a *prima facie* case, rather than the burden of producing a preponderance of evidence, and as used in the instruction in question imported nothing more." The distinction pointed out is equally shown in previous decisions (*Scott v. Wood*, 81 Cal. 389, 400, 22 Pac. 871; *Kahn v. Triest, etc., Co.*, 139 Cal. 340, 344, 73 Pac. 164; *Patterson v. S. F. & S. M. Ry. Co.*, 147 Cal. 178, 183, 21 Pac. 531; *Valente v. Sierra Ry. Co.* [Cal.] 91 Pac. 481), which are conclusive against the objection to the validity of the instruction urged by appellant.

Neither, when we examine the entire charge of the court, is there any room for reasonable contention that the jury could have understood the instruction in question to mean anything more than that the defendant was required to meet by evidence the presumption of negligence arising from the derailment and overturning of the car, or that it should prevail and warrant a verdict for the plaintiff. In eight separate instructions the jury was told by the trial court that the plaintiff, in order to recover, must prove negligence on the part of the defendant by a preponderance of the evidence. They were also told three several times in the instructions that, if they found that the evidence in the case on the question of negligence was equally balanced, they should return a verdict for defendant, and, at the request of the defendant, the court instructed the jury that the presumption of negligence arising from the happening of the accident was not a conclusive presumption, but might be rebutted by the defendant; that in rebutting the presumption it was not necessary for the defendant to overcome it by a preponderance of evidence; that it was sufficient if it introduced enough evidence simply to balance the presumption, for in that event the presumption was overcome in the eye of the law. With these instructions before them there could be no misconstruction by the jury of the instruction we have been considering.

It is next claimed that the court erred in refusing to give the following instruction tendered by defendant: "If the railroad company has shown the exercise of the required degree of care, it is not obliged to go further and explain the cause of the accident." All that was pertinent in this instruction was, however, embodied in the instructions given. The jury was told that the law permits the defendant in answer to any presumption of negligence to show the facts connected with the accident, and, if it appear from them and on the whole evidence that the company had used proper care, the presumption of negligence was overcome, and that if at the time

of such derailment the train was being operated with proper care, and, further, that the roadbed, ties, and rails at such time and place were constructed, laid, and maintained with proper care, and that, from some unforeseen cause, not to be anticipated by the defendant in the exercise of the required degree of care, the wheels left the rail, the railroad company would not be responsible. This was a correct statement of what showing would relieve the defendant from liability, and embraced all that was really material in the instruction refused.

These are the only points made on the instructions.

As to the rulings on the admission of evidence: Plaintiff at the time of the accident was, and for many years prior thereto had been, an insurance solicitor for the New York Life Insurance Company, receiving commissions upon all business secured by him and written by said company. Over the objection of defendant, he was allowed to testify to the commissions earned by him for several years prior to the accident, which during that period varied in amounts from \$2,000 to \$3,700 per annum. It is insisted that it was error to allow this proof. We think not. As elements entering into the damage which plaintiff was entitled to receive as pecuniary loss were the value of his time for the period during which he was disabled by the injuries and if the injuries impaired his capacity for future earnings, such an amount as would compensate him for loss of such capacity. We know of no better method, and none has been suggested, whereby proof of such pecuniary loss can be presented to the jury than by the testimony of the plaintiff himself as to what his earnings as insurance solicitor were for a number of years and immediately prior to the accident. Naturally the earnings of one following a vocation such as the plaintiff was engaged in as they varied in the past must be uncertain as to the future, but evidence as to what they were in the past must furnish the best basis from which the jury may determine the extent of the pecuniary loss plaintiff has sustained as to either or both of the elements of damage suggested. The authorities sustain the admissibility of such evidence. *Ehr Gott v. City of New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Symons v. Metropolitan St. Ry. Co.* (Sup.) 58 N. Y. Supp. 227; *Missouri, etc., R. R. v. Vance* (Tex.) 41 S. W. 167.

As to the other points made by appellant on the rulings as to evidence, we deem them so untenable as to require neither mention nor discussion.

Lastly, it is claimed that the damages are excessive. We can only disturb a verdict in this class of cases for that reason when it appears that the damages are so excessive that the award can be sustained on no other theory than that it was the result of passion or prejudice on the part of the jury. Nothing of the kind appears here. The evidence in

the case justified the jury in finding that the plaintiff had been damaged upwards of \$2,000 for expenses—medical services, nursing, etc.—incurred by him by reason of the injuries and for loss of time while entirely disabled from pursuing his vocation as insurance solicitor. It appeared, further, that, aside from the pain and suffering he endured incident to his injuries, such injuries were of a permanent character and materially impaired his capacity for future pursuit of his vocation as such solicitor. Under this evidence, it was for the jury to exercise an intelligent discretion in the award of damages, and there is nothing in the amount awarded to indicate that it was the result of other than the exercise of such discretion.

The order appealed from is affirmed.

We concur: McFARLAND, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.

Mr. Justice ANGELLOTTI did not participate herein, deeming himself disqualified.

153 Cal. 426

BUNTING v. HASKELL et al. (S. F. 4,304.)
(Supreme Court of California. Dec. 2, 1907.
Rehearing Denied Dec. 30, 1907.)

1. JUDICIAL SALES—REDEMPTION.

As a general rule, the redemption allowed by statute cannot be effected after the expiration of the statutory period allowed therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Judicial Sales, § 116.]

2. EXECUTION—REDEMPTION—FAILURE TO REDEEM—RELIEF.

Courts of equity may, upon a proper showing of fraud, mistake, or other circumstances appealing to the discretion of the chancellor, relieve judgment debtors whose property has been sold on execution from a failure to redeem within the statutory period.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 849.]

3. APPEAL—RIGHT OF REVIEW—WAIVER—ACCEPTANCE OF PAYMENT ON JUDGMENT.

Where plaintiff secures defendants' property on a judgment sale, and thereafter defendants obtain a decree of redemption upon payment of a specified sum within 30 days, plaintiff's acceptance of the sum within the time given would involve a waiver of his right of appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 984, 985.]

4. QUIETING TITLE—ADVERSE CLAIM OF TITLE.

Plaintiff secured defendants' property on a judgment sale. More than a year thereafter defendants obtained a decree of redemption upon payment within 30 days of a specified sum and 7 per cent. interest thereon, whereupon plaintiff must convey the property to defendants. The sum was tendered, but plaintiff refused it, and appealed from the decree. The judgment was affirmed, and 30 days afterwards plaintiff demanded the sum, tendering a conveyance of the property. Defendants refused to pay, claiming that, under Code Civ. Proc. §§ 703, 704, providing that redemption by the debtor terminates the effect of the sale, and restores the debtor to his estate, and that a tender is equivalent to payment, their tender accomplished the redemption, and that, when it was refused, it was not

necessary thereafter to keep it good or pay the amount to plaintiff. *Held*, in an action to quiet title, that defendants had lost their right of redemption, and that the title vested in plaintiff by the commissioner's deed following the judgment sale, was unaffected by any adverse claim arising from the decree of redemption; the right to redeem given by the decree being not the same right given by statute, and being governed by the conditions in the decree and not those mentioned in the act.

5. JUDICIAL SALES—REDEMPTION.

Civ. Code, § 1504, providing that "an offer of payment * * * stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof," has no application to a tender under a decree allowing judgment debtors to redeem their property within a specified time upon specified conditions, since the decree, being a mere option to redeem, imposed no "obligation" upon them, and neither the title to the land nor its possession was an "incident" to any obligation within the meaning of the section.

In Bank. Appeal from Superior Court. City and County of San Francisco; J. M. Seawell, Judge.

Action by William L. Bunting against Burette G. Haskell and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Wm. B. Sharp, for appellants. Edward C. Harrison, for respondent.

SLOSS, J. This is an action to quiet title to real property. The plaintiff recovered judgment, and the defendants appeal on the judgment roll.

On June 1, 1897, Margaret Reese was the owner of the land described in the complaint, subject to a mortgage made by her on February 20, 1892, to one Iburg. Iburg brought action for the foreclosure of this mortgage, recovering judgment under which the property was sold to Bunting, plaintiff herein, on June 1, 1897. After the expiration of 12 months from said sale a deed of the property was executed and delivered to Bunting by the commissioner who had made the sale. Thereafter, on June 28, 1898, Margaret Reese and some of the defendants herein commenced an action against Bunting, the plaintiff herein, in which action the superior court on January 28, 1901, rendered a judgment that the plaintiffs therein and each of them were entitled to redeem the property from said sale within 30 days from the entry of said judgment, upon payment to the defendant therein (the plaintiff herein) of the sum of \$819.89. This judgment was entered January 30, 1901, and within 30 days thereafter the plaintiffs in that action tendered to Bunting the amount of money necessary under the terms of the judgment to effect the redemption thereby allowed and provided for, but the said defendant refused to accept the said money. Thereafter the said defendant (plaintiff herein) appealed from the judgment, and deposited with the clerk of the superior court a conveyance of the property to the plaintiffs in said action to abide the judgment of the Supreme Court on said appeal. He also surrendered and de-

livered the possession of the property to said plaintiffs. The judgment appealed from was affirmed by this court on December 29, 1903 (Benson v. Bunting, 141 Cal. 462, 75 Pac. 59), and the remittitur filed in the superior court on February 26, 1904. After the filing of the remittitur, Bunting made a demand in writing upon the defendants herein (plaintiffs in said action of Benson v. Bunting) for the payment of the money provided by said judgment for said redemption, and at the same time tendered to them a conveyance by him to them of said property. But the defendants refused to pay the money so demanded, or any part thereof, specifying no objection to the tender or demand, excepting to state that said defendants were entitled to 30 days' time from and after such demand wherein to make the payment demanded. This tender and demand were made on the 27th day of April, 1904, and 30 days thereafter, to wit, on the 28th day of May, 1904, the plaintiff herein made a second tender to said defendants of a conveyance of the property, and again demanded of them the payment of said sum fixed by the court as the amount required for redemption, but said defendants refused, and ever since have refused, to pay the said sum of money so demanded or any part thereof. Thereupon the plaintiff brought the present action. The judgment appealed from determines that the plaintiff is the owner in fee simple absolute of the property, and adjudges that his title thereto be quieted as against any and all of the claims of any of the defendants, that said defendants be enjoined from asserting any claim whatever in or to said land adverse to said plaintiff, and that possession of said land be restored to said plaintiff. The contention of the appellants is that their tender to the plaintiff within 30 days after the entry of judgment in Benson v. Bunting of the amount required for redemption was in itself sufficient to accomplish the redemption, and that, when such tender was refused, it was not necessary thereafter to keep it good, or to pay the amount to plaintiff. If we were dealing with the question of a redemption from execution sale, effected by act of the judgment debtor in the manner and within the period fixed by law, this contention would undoubtedly be sound, and that for the simple reason that the statute expressly so provides. Section 703 of the Code of Civil Procedure declares that, "if the debtor redeem, the effect of the sale is terminated and he is restored to his estate." Section 704 declares that "a tender of the money is equivalent to payment." Speaking of a tender in redemption made within the time prescribed by law, this court, in Leet v. Armbruster, 143 Cal. 663, 77 Pac. 653, said that "the tender operated instantaneously to redeem the property and revest the title in the redemptioner."

But was the redemption authorized by the decree in Benson v. Bunting the redemption provided for in sections 702 et seq. of the Code

of Civil Procedure? As a general rule, the redemption allowed by statute cannot be effected after the expiration of the statutory period allowed therefor. Tilley v. Bonney, 123 Cal. 118, 123, 55 Pac. 798; Davidson v. Gaston, 16 Minn. 280 (Gil. 202). It is well settled, however, that courts of equity may, upon a proper showing of fraud, mistake or other circumstances appealing to the discretion of the chancellor, relieve judgment debtors whose property has been sold on execution from a failure to redeem within the statutory period. In such cases equity "in its discretion will grant relief on a proper bill, and allow the judgment debtor to redeem after the expiration of the redemption period." 17 Cyc. 1330; Graffam v. Burgess, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839; Branch v. Foust, 130 Ind. 538, 30 N. E. 631; Smith v. Huntoon, 134 Ill. 24, 24 N. E. 971, 23 Am. St. Rep. 646. But such redemption, when authorized by the decree of a court of equity, finds its support, not in the provisions of the statute allowing redemption within a given time as a matter of right, but in the provisions of the decree granting to a party the privilege of redeeming upon terms fixed by the court as just. In the case at bar, the decree permitting redemption is described in the complaint, and no issue is made as to the allegations regarding it. Those allegations are that the court adjudged and decreed that certain defendants were entitled to redeem the property within 30 days from the date of entry of said judgment and decree, upon payment to the plaintiff of \$819.89, with interest thereon at the rate of 7 per cent. per annum until payment, subject to certain reductions, and that in said decree it was further ordered and adjudged that, if the said defendants should fail to redeem the property within 30 days, the said action might, upon motion of Bunting, the plaintiff herein, be dismissed. The complaint contains further allegations from which it appears that the decree required the plaintiff to make and deliver to the defendants a deed of conveyance of the property in question.

Assuming that a court of equity may, in granting a right to redeem after the expiration of the statutory period, prescribe in its decree that the redemption so allowed shall be accomplished in the manner and subject to the conditions provided for statutory redemption, we think the decree in Benson v. Bunting should not be construed as giving to the plaintiffs in that action a right to a statutory redemption to be exercised within a new period of 30 days. The redemption authorized by the decree differed in several respects from that allowed by the Code. In the first place, the rate of interest to be computed on the amount required for redemption was not that fixed by law. Code Civ. Proc. § 702. Again, the decree provided for a conveyance by the plaintiff, whereas, in case of a redemption under the statute, payment, or even tender, would "ipso facto work a restoration to the judgment debtor, or his successor in interest,

of his title." *Leet v. Armbruster*, supra. But a more substantial reason for holding that the decree in *Benson v. Bunting* should not be construed as intending to merely extend the statutory right of redemption, which had been lost by lapse of time, is that the decree does not contain any language indicating such intention, and that every consideration of equity demanded of the court that no such relief should be granted. The plaintiffs in *Benson v. Bunting* came into a court of equity asking to be restored to a right which under the law had passed from them. Such relief could properly be granted them only on condition that they themselves did equity. To give to the decree the construction advanced by appellants would be to hold that they, having come into a court of equity and obtained a decree permitting them to redeem property on payment of a certain sum, might merely by reason of a tender once made hold all the substantial fruits of the decree while repudiating the obligations imposed by it upon them. This is not equity, and the decree in the former suit should not be construed so as to permit such result. It must be remembered that that decree was not final. The plaintiff, Bunting, had the right to appeal from it, and did, in fact, appeal. An acceptance of the tender made by defendants would have involved a waiver of his right of appeal. 2 Cyc. 652; *Wolff v. Canadian Pac. Ry.*, 89 Cal. 332, 338, 26 Pac. 825. If the decree had the effect attributed to it by appellants, they by their tender compelled the plaintiff to waive his right of appeal, under penalty of losing the property, if he should decline to make such waiver and the decree should be affirmed. But he was not bound to waive his right of appeal. If the decree were erroneous, the mere tender of the money did not entitle the plaintiffs in that action to redeem, and, while the right of appeal subsisted, Bunting's title could not be finally divested by a tender which was not accepted and was not kept good. No doubt the appellants (plaintiffs in *Benson v. Bunting*) had a right to make the tender within 30 days after entry of the decree, and after so doing they could not be put in default until the plaintiff should tender them a deed and demand payment of the amount due. After the judgment had been affirmed, their right to redeem still existed, but it was a right to redeem upon the condition fixed by the decree, which was that the money should be paid by the defendants. This condition they refused to comply with, and, that refusal having persisted after demand for the period of 30 days allowed them, the court below properly concluded that they had lost their right of redemption, and that the title vested in plaintiff by the commissioner's deed was unaffected by any adverse claim arising from the proceedings in *Benson v. Bunting*.

Appellants rely on section 1504 of the Civil Code, providing that "an offer of payment * * * stops the running of interest on the

obligation, and has the same effect upon all its incidents as a performance thereof." We think this section has no application here. As we construe the decree in *Benson v. Bunting*, it gave to the defendants a mere option to redeem. That option imposed no "obligation" upon them, and neither the title to the land nor its possession was an "incident" to any obligation, within the meaning of this section.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

152 Cal. 428

KATZ v. FITZGERALD et al. LESSER v. DORNIN. (S. F. 4,747, 4,205.)

(Supreme Court of California. Dec. 2, 1907. Rehearing Denied Dec. 30, 1907.)

1. ELECTIONS — PRIMARY ELECTION LAW — CONSTITUTIONALITY.

The primary election law is not violative of Const. art. 2, § 2½, empowering the Legislature to determine the conditions on which electors may participate in any primary election, in that secrecy in voting is not preserved; that the law arbitrarily classifies voters and discriminates between the classes so made; that it destroys the right of self-preservation of political parties; that it impairs the right of citizens to assemble together and to instruct their representatives; and that it invests state officers with judicial functions.

2. SAME.

Const. art. 2, § 2½, empowers the Legislature to determine the conditions on which electors may participate in primary elections. *Held*, that the primary election law is not invalid because declaring that political parties shall be, as to their mode of holding conventions and nominating candidates for public office, regarded as public bodies, whose methods are to be controlled by the state.

3. SAME.

Pol. Code, § 1188, relating to nominations of candidates for public offices, and authorizing the clerk or other officer with whom the petition of any independent candidate is filed to strike from the list of names of candidates nominated by petition the names of those who have voted at any primary election, is not unconstitutional as vesting judicial powers in the Secretary of State, clerks, and others officers, since no judicial function is exercised in determining that one who voted at a primary election is the same person whose name is appended to a petition.

4. SAME.

Pol. Code, § 1190, prohibiting one who has voted at a primary election from signing a petition for another candidate, is not unconstitutional as providing an arbitrary classification of voters.

5. SAME.

Const. art. 2, § 2½, empowers the Legislature to determine the conditions on which electors may participate in primary elections, and provides that such conditions may be different from the conditions required at other elections authorized by law. *Held*, that Pol. Code, § 1361, extending the operation of the primary law to such political parties only as have polled 3 per cent. of the total vote, is not invalid as discriminating between large and small political parties, or as conferring any special privilege on parties which have cast more than 3 per cent. of the vote which is not conferred on all such parties.

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Proceedings by A. B. Katz against George Fitzgerald and others and by M. Lesser against George W. Dornin. Judgment for defendants in each proceeding, and plaintiffs appeal. Affirmed.

Lewis & Royce, for appellants. J. E. McElroy, for respondents.

HENSHAW, J. These cases both represent attacks upon the constitutionality of the primary election law, and may be considered and disposed of together.

The propositions advanced against the law are: Secrecy in voting is not preserved. The law arbitrarily classifies voters and discriminates between the classes so made. It destroys the right of self-preservation of political parties, and impairs the right of citizens to assemble together and to instruct their representatives, and invests state officers with judicial functions. These objections, for the most part, were advanced and answered in the case of Schostag v. Cator (Cal.) 91 Pac. 502, and Rebstock v. Superior Court, 146 Cal. 308, 80 Pac. 64, decided by this court in bank since the appeals in the present cases were taken and the briefs therein filed. In the Schostag Case it is said that the evils sought to be remedied by the adoption of section 2½ of article 2 of our Constitution were the corrupt practices by which, in the absence of proper public control, primary elections were made to defeat, instead of to express, the will of political parties. It is further pointed out that the state has a general interest in guarding the purity of primary elections, since party elections have become an essential feature of our system of choosing public officers, and at the same time each political party has a special interest in reserving to its own members the control of its own affairs. In none of these respects does it appear that the legislative enactments violate the spirit or intent of section 2½ of article 2 of the Constitution. While primary election laws are now conducted under the law, and, are to that extent, a part of the elective system of the state, it is the secrecy of the ballot which the law protects, and not secrecy as to the political party with which the voter desires to act. The primary law does not prevent him from voting secretly. We cannot perceive where this law exposes any person advocating doctrines distasteful to any section of the community to its enmity any more than such a person would be exposed if he cast his ballot at a primary election held under the direction of the party managers without control of the law. Nor do we perceive that the right of self-preservation of a political party is destroyed. For, in addition to the tests which the Legislature has prescribed, it remains with the managing bodies of the political parties to require additional tests of qualification before a citizen may be allowed to vote the party ticket.

93 P.—8

To the objection that it makes a public body of that which is, in its essence, a private association of citizens to accomplish a public purpose, it is sufficient to say that the conception that a political party is merely a private association of citizens, a conception which in the past found wide acceptance, has, under the development of modern political parties, been very generally abandoned, and, where not abandoned, the conception itself has been destroyed, as in this state by force of the Constitution and the statutory laws enacted under it. By virtue of the constitutional provision the state has seen fit to declare that political parties shall be as to their mode of holding conventions and nominating candidates for public office, regarded as public bodies whose methods are to be controlled by the state. Against the constitutionality of sections 1188 and 1190 of the Political Code, it is urged that judicial powers are vested in the Secretary of State, clerks, and other officers, in that they are empowered to strike from the list of names of candidates nominated by petition the names of those who have voted at any primary election. We perceive no force in this objection. Ordinarily the identity of the person will be established by the identity of names, and, even if other facts are required for the establishment of such identity, it will scarcely be said that a judicial function is exercised in the determination that the John Smith, who voted at a primary election, is the same John Smith whose name is appended to a petition.

As little force attaches to the objection that there is an arbitrary classification of voters by the provision prohibiting one who has exercised the right to vote at a primary election from signing a petition for another candidate. If it be said that hardship to the individual voter may result in preventing him from petitioning for the nomination of candidates of his choice, if his party should fail to nominate those whom he desires, his individual grief should be more than assuaged by the fact that he is not compelled to vote at a primary election, and that, if the rule were otherwise, it would open the door to endless frauds, and be destructive to all party organization. It would not alone enable vicious electors to vote at the primary of one or another political party, but would permit them, after doing so, to join in the petition for the nomination of any number of men for any number of offices. The provision is one frequently found in the election laws of the states, and when found has always been upheld. 10 Am. & Eng. Ency. of Law, 635; Phillips v. Curtis, 4 Idaho, 193, 38 Pac. 405; Southall v. Griffiths, 100 Ky. 91, 37 S. W. 577.

As to the objection that there is a discrimination between large and small political parties because of the provisions of section 1361 extending the operation of the primary law only to such political parties as have polled 3 per cent. of the total vote, it must be said that the constitutional amendment in

question was framed and adopted after the decisions of this court in *Marsh v. Hanly*, 111 Cal. 371, 43 Pac. 975, *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196, and *Brittain v. Board of Commissioners*, 129 Cal. 341, 61 Pac. 1115, 51 L. R. A. 115, and it was adopted to meet and avoid the very objections to the primary law which this court found were interposed by the Constitution in its then existing form. Under the Constitutional amendment adopted, it must suffice to say that there is no constitutional recognition of any body of men calling themselves a party until 3 per cent. of the vote has been cast by such body. Three per cent. is an exceedingly small percentage. All bodies of men casting less than this percentage are treated alike. Some classification is made necessary, else any two, three, or four men might call themselves a party, and impose the burden of placing the names of their candidates upon the ballot provided by the state law—a condition which could easily be made intolerable to the state, as well as to the voter. Classification becoming necessary, the one here adopted is rational, and does not impose any burden upon one of a class that is not imposed upon all; nor, upon the other hand, does it confer any special privilege upon parties which have cast more than 3 per cent. of the vote, which is not conferred upon all such parties. *Ladd v. Holmes*, 40 Or. 167, 66 Pac. 714, 91 Am. St. Rep. 457.

For the foregoing reasons, the judgments appealed from are affirmed.

We concur: BEATTY, C. J.; LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.; MCFARLAND, J.

153 Cal. 419

PUCKHABER v. HENRY. (S. F. 4,240.)
(Supreme Court of California. Dec. 2, 1907.
Rehearing Denied Dec. 30, 1907.)

1. LIMITATION OF ACTIONS—EFFECT OF BAR—PAYMENT OF DEBT.

A debt is not satisfied or extinguished by mere lapse of time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 650.]

2. PLEDGES—RECOVERY OF PLEDGED PROPERTY—CONDITIONS PRECEDENT—PAYMENT.

In the absence of express provision to the contrary, a pledgor cannot recover possession of the pledged property without paying his debt, even though it is barred by the statute of limitations.

3. LIMITATION OF ACTIONS—EFFECT—BAR OF DEBT AS AFFECTING SECURITY—STATUTORY PROVISIONS—PLEDGES.

Civ. Code, § 2911, providing that a lien is extinguished by the lapse of the time within which an action could be brought upon the principal obligation, applies both to mortgages and pledges, and was adopted as a part of the original Code to declare the rule previously laid down by the courts, to the effect that, when an action on an indebtedness is barred by the statute of limitations, action on a contract given to secure the debt is also barred, but it was not designed to aid a debtor in the recovery of possession of his property, or in removing any cloud upon his title, without paying his

debt, and, while the statute will prevent an affirmative action on the part of a mortgagee or pledgee to enforce his lien after the debt is barred, the fact that a note secured by a policy of life insurance is barred by the statute of limitations does not bar an action on the policy by the pledgee after the death of the insured, if the note has not been paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 651-653.]

4. TRIAL—SPECIAL FINDINGS—IMMATERIAL ISSUES—FAILURE TO FIND.

In an action on a life insurance policy, it appeared that the policy had been assigned and delivered to plaintiff to secure a note. The insurance company paid the money into court, and had the administrator of the insured substituted as defendant. The court found that the note had not been paid, but failed to find whether it was barred by the statute of limitations. *Held*, that the issue was immaterial, since defendant was not entitled to possession of the policy, and the money paid into court should be deemed to be in plaintiff's possession for the purpose of the action.

5. NEW TRIAL—GROUNDS—FAILURE TO FIND ON ISSUES—IMMATERIAL FACTS.

Failure of the court to find on an immaterial issue will not warrant the granting of a new trial.

6. PLEDGES—RIGHTS OF PLEDGEE—STATUTORY PROVISIONS—COLLECTION OF PLEDGED INSURANCE POLICY.

Under Civ. Code, § 8006, providing that a pledgee of an evidence of debt pledged to him may collect it when due, where a life insurance policy was assigned and delivered to plaintiff to secure a note, and the note was never paid, though it became barred by the statute of limitations, plaintiff was entitled to collect the insurance on the death of the insured.

McFarland, Henshaw, and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Charles R. Puckhaber against Kate Henry, administratrix, etc. From an order granting defendant a new trial, plaintiff appeals. Reversed.

See 81 Pac. 1105.

Mullany, Grant & Cushing and Cushing, Grant & Cushing, for appellant. T. Z. Blake-man and Chickering & Gregory, for respondent.

ANGELLOTTI, J. This is an appeal from an order granting defendant's motion for a new trial. The action was originally one against the Mutual Life Insurance Company of New York, a corporation, to recover the amount due on a policy of insurance issued by that company to John P. Henry, upon the life of said Henry; the plaintiff alleging that said policy had been assigned to him by Henry on August 22, 1896. Henry died on January 9, 1902, and the action was commenced May 8, 1902. The insurance company, admitting the validity of the policy and alleging that both plaintiff and Kate Henry, administratrix of estate of Henry, claimed the proceeds of said policy, obtained an order substituting said administratrix as defendant, and discharging it from liability to either party upon depositing in court the

amount due on the policy, viz., \$2,511. This deposit was made. Said administratrix, having been substituted as defendant, filed her answer and so-called cross-complaint. By this pleading, she denied the allegations of the complaint as to assignment of the policy. She also alleged that plaintiff's only claim to the policy or any of the proceeds thereof was that he held the policy as security for the payment of a promissory note made and delivered by Henry to Puckhaber in the year 1896 and payable one day after its date, and "that the obligation evidenced by the said promissory note and all thereof had prior to the death of the said John T. Henry become barred by the provisions of the statute of limitations of the state of California, to wit, by the provisions of section 337 of the Code of Civil Procedure of the state of California." She asked that plaintiff take nothing by his action, and that the money deposited be paid to her. Plaintiff answered this so-called cross-complaint, alleging the execution and delivery by Henry to him on August 22, 1896, of a promissory note for \$688.50, together with interest from that date at 8 per cent. per annum, and the assignment and delivery of said policy as security for such payment. He alleged that no part of this note had been paid, and denied that the obligation evidenced by the promissory note or any part thereof had prior to the death of Henry become barred by the statute of limitations, and also alleged that his rights in and to said policy were not barred. The trial court found in accord with these allegations of plaintiff as to the assignment and delivery of the policy as security, and the nonpayment of the amount due or any part thereof. It further found that plaintiff's "cause of action herein" is not barred by any provision of the statute of limitations, but made no finding upon the issue as to the barring by such statute of the obligation evidenced by the promissory note. Judgment was given that plaintiff receive out of the sum deposited in court the amount due on said note, and that defendant receive the balance of such sum. Defendant's motion for a new trial was based upon the grounds, among others, that the evidence was insufficient to sustain the finding that the plaintiff's cause of action was not barred by the statute of limitations, and that the decision was against law, in that the court had failed to find upon the issue as to the obligation evidenced by the promissory note being barred by such statute prior to Henry's death.

The evidence showed without conflict that the obligation evidenced by the said promissory note and all thereof had become barred by the provisions of section 337 of the Code of Civil Procedure prior to the death of Henry. Section 2911 of the Civil Code provides: "A lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." This

section is contained in the article relating to extinction of liens, and by section 2877 of the Civil Code both contracts of mortgage and pledge are expressly made subject to its provisions. In the case of Mutual Life Insurance Co. v. Pacific Fruit Co. et al., 142 Cal. 477, 76 Pac. 67, this court held that, by reason of section 2911, Civ. Code, the pledgee of a life insurance policy situated precisely as is the plaintiff here could not share in the proceeds of the policy. The effect of that decision is that, by reason of this section, a pledgee who has allowed his remedy upon the principal obligation to become barred cannot retain possession of the pledged property. If this decision is to be followed, it necessarily requires an affirmation of the order granting a new trial. This is conceded by counsel for plaintiff; their claim being that the case cited was incorrectly decided and should be overruled.

We are satisfied that this court in that case misconceived the effect of section 2911 of the Civil Code. There can, of course, be no question that under its terms the lien of the pledge is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation. This is all that is said in the opinion as to the effect of this section, and it is apparently assumed from this that, the lien of the pledge being extinguished, the pledgee can no longer retain possession of the pledged property, even though the debt for which it was given as security has not been paid. It is in attributing this effect to the extinguishment of the lien that we think the decision is erroneous. Section 2911, adopted as a part of the original Code in 1872, was designed simply to declare the rule previously laid down by the decisions of this court, to the effect that, when an action upon the indebtedness is barred by the statute of limitations, action on any contract given by way of security for the debt is also barred. This rule was contrary to the rule existing at common law and in many of our sister states, under which an action might be maintained to foreclose a mortgage not barred by the statute, although the debt for which it was given as security was barred. It was, however, thoroughly established by a line of decisions rendered before the enactment of the Codes, commencing with *Lord v. Morris*, 18 Cal. 482, in which the matter was exhaustively discussed in an opinion delivered by Chief Justice Field. It clearly appears from the note of the Code commissioners to the original section that this was the reason for the elimination of the word "not" from the section of the New York Code, when such section was otherwise taken as a part of our own Civil Code, the New York section reading "a lien is not extinguished," etc., which was in accord with the rule theretofore established in that state. The effect of the California rule is undoubtedly to prevent any affirmative ac-

tion on the part of the mortgagee or pledgee to enforce his lien, after the debt is barred by the statute of limitations. In such a case the lien no longer exists. It has been "extinguished." But the section was not designed to prevent the application of the equitable principle which has always been recognized as warranting courts in refusing to aid the debtor in the recovery of possession of his property from the mortgagee in possession or pledgee, or in removing any cloud upon his title created by an instrument in writing given as security, without paying his debt. This is thoroughly established in this state by the decisions in regard to mortgages, to which the section is equally applicable, and between which and pledges of personal property there is no distinction material to the question under discussion. Although the lien of a mortgage is "extinguished" by the barring of the debt by the statute of limitations, the mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee, or maintain ejectment against his mortgagee in possession. This is firmly settled in this state by decisions rendered since the adoption of the Code sections. *Booth v. Hoskins*, 75 Cal. 271, 276, 17 Pac. 225; *De Cazara v. Orena*, 80 Cal. 132, 22 Pac. 74; *Spect v. Spect*, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; *Brandt v. Thompson*, 91 Cal. 453, 462, 27 Pac. 763; *Hooper v. Young*, 140 Cal. 274, 280, 74 Pac. 140, 98 Am. St. Rep. 56; *Burns v. Hiatt*, 149 Cal. 617, 87 Pac. 196. See, also, *Grant v. Burr*, 54 Cal. 298. This is in accord with the practically universal rule. A debt is not satisfied or extinguished by mere lapse of time. "The rights which grow out of the relations existing between mortgagor and mortgagee, as well as the remedies for the enforcement and protection of those rights, are of equitable origin, and are to be determined by the principles of equity, whether the right be asserted or the remedy sought in an action at law or in equity.

* * * Courts look to the substantial rights of the parties for the purpose of determining the remedy to which they are entitled, irrespective of the form of the complaint under which the remedy is sought. Whenever a mortgagor seeks a remedy against his mortgagee, which appears to the court to be inequitable, * * * the court will deny him the relief he seeks, except upon the condition that he shall do that which is consonant with equity. * * * The statute of limitations is a bar to the remedy only, and does not extinguish, or even impair, the obligation of the debtor. It is available in judicial proceedings only as a defense, and can never be asserted as a cause of action in his behalf, or for conferring upon him a right of action." *Spect v. Spect*, supra. It is impossible to reconcile these decisions as to the rights of a mortgagor whose debt has not been paid with the decision under discussion, and no attempt has ever been made

to do so. Section 2911 applies alike to mortgages and pledges. The pledgee is in precisely the position occupied by the mortgagee in possession. Property has been placed in his possession by the debtor as security for the discharge of his obligation. It would be as inequitable to assist him in recovering the possession thereof without paying his debt, as to assist a mortgagor in so recovering his property. It is the general rule enunciated by courts of last resort that a pledgor cannot recover possession of the pledged property without paying his debt, although the debt be barred by the statute of limitations, and this rule is based on the equitable doctrine already stated. This court has announced the same rule in regard to a pledge, although perhaps never in a case where it was necessary to the decision. See *Spect v. Spect*, supra; *Zellerbach v. Allenberg*, 99 Cal. 57, 69, 33 Pac. 786; *Commercial Sav. Bank v. Hornberger*, 140 Cal. 16, 20, 73 Pac. 625. We have no doubt that it is the correct rule in the absence of express provision to the contrary, and that section 2911 of the Civil Code should not be construed as providing to the contrary. To hold otherwise not only implies a legislative intent not shown by the language of the section, but deprives our numerous decisions as to the rights of a mortgagee of real property of the foundation upon which they are based. If *Mutual Life Insurance Company v. Pacific Fruit Co.*, supra, is to be followed, either the decisions as to a mortgagee in possession must be overruled, or, accepting the doctrine of those cases as established as a rule of property which should not now be changed, we shall have two diametrically opposed constructions of section 2911, one for the mortgagee in possession and the other for the pledgee. We cannot see that property rights can by any possibility be injuriously affected by our now declaring what we are satisfied is the true rule in this matter, and declining to follow the decision under discussion.

The case of *Conway v. Supreme Council*, 131 Cal. 437, 63 Pac. 727, is cited in the opinion in *Mutual*, etc., *Co. v. Pacific*, etc., *Co.*, supra, as sustaining the views therein enunciated. The opinion in the *Conway* Case fails to show that the claimants had received or were in possession of the policy, or that they had anything more than a mere equitable lien. The decision goes no further than to hold that in such a case it was essential to the claimant's rights to obtain possession from the beneficiaries of proceeds of the policy, that the lien had not been extinguished by the barring of the principal indebtedness. In this case, as in *Mutual*, etc., *Co. v. Pacific*, etc., *Co.*, supra, the position of the beneficiary is clearly that of the pledgor or his successor seeking to recover possession of the pledged property from the pledgee without paying the debt for which it was pledged. The money paid into court as proceeds

of the policy has merely taken the place of the policy held in possession by the plaintiff, and for all the purposes of this action should be deemed to be in the possession of the plaintiff. It follows from what we have said that the issue as to the debt being barred at the time of the death of Henry was an immaterial issue in this action, and the failure of the court to find on an immaterial issue would not warrant the granting of a new trial. It also follows that the evidence without conflict showed that plaintiff's "cause of action herein" is not barred.

There was no conflict in the evidence upon the proposition that Henry assigned and delivered the policy to plaintiff in pledge as security for the debt evidenced by the note. The right of the plaintiff to collect from the insurance company the amount of the policy when it fell due followed as a matter of law. Civ. Code, § 3006. A new trial could not therefore be granted on the ground of insufficiency of evidence to support the finding as to these matters. There is no other point made in support of the order granting a new trial. It is evident that the new trial was granted by the lower court solely because of the decision of this court in *Mutual, etc., Co. v. Pacific, etc., Co.*, supra.

The order granting a new trial is reversed.

We concur: SHAW, J.; SLOSS, J.

BEATTY, C. J. I concur in the judgment, and also in the opinion, except that portion thereof referring to the case of *Conway v. Supreme Council*, 131 Cal. 437, 63 Pac. 727, which case was again before this court on a second appeal (137 Cal. 384, 70 Pac. 223). I think the effect of the opinion in this case is to overrule, not only the decision of this court in the *Mutual, etc., Co. v. Pacific, etc., Co.*, 142 Cal. 477, 78 Pac. 67, but also the *Conway Cases*.

McFARLAND, HENSHAW, and LORIGAN, JJ. We dissent. In our opinion the law on the point at issue was correctly declared in the case of *Mutual Life Ins. Co. v. Pacific Fruit Co.*, 142 Cal. 477, 77 Pac. 67, and cases cited in the opinion filed in said case.

152 Cal. 515

BOARD OF EDUCATION OF THE CITY & COUNTY OF SAN FRANCISCO v. HYATT. (S. F. 4,832.)

(Supreme Court of California. Dec. 6, 1907.)

1. SCHOOLS AND SCHOOL DISTRICTS—CONSTITUTIONAL PROVISIONS—CONSTRUCTION.

Under Const. art. 9, § 6, providing that the public school system shall include primary and grammar schools and such high schools, evening schools, commercial schools and technical schools as may be established by the Legislature or by municipal or district authority, the words "evening schools" were merely intended to obviate doubt as to the power to provide for schools holding evening sessions, so that the section did not prevent the conduct of an even-

ing high school as a part of the public school system.

2. SAME—HIGH SCHOOLS IN CITIES—ESTABLISHMENT—NECESSITY OF VOTE—STATE HIGH SCHOOL FUND—RIGHT TO SHARE.

Pol. Code, § 1616, declares that boards of education shall be elected in cities under the laws governing such cities, and their powers and duties shall be as prescribed therein, except as otherwise provided in such chapter. St. 1871-72, p. 846, c. 576, § 1, conferred on the board of education of San Francisco power to maintain public schools as then organized, and to establish additional ones as required, etc. *Held*, that high schools being a part of the public school system, as provided by Const. art. 9, § 6, the San Francisco board of education had power to establish high schools, which thereupon became entitled to share in the benefits of the state high school fund, if otherwise qualified, as provided by Act March 6, 1905, p. 58, c. 65, conferring such benefits on high schools organized under the laws of the state, or recognized as existing under the high school laws of the state, though such high schools were not organized pursuant to an election held in the manner prescribed by Pol. Code, § 1670.

3. STATUTES—LOCAL AND SPECIAL LAWS.

St. 1871-72, p. 846, c. 576, authorizing the board of education of the city of San Francisco to establish high schools, having been passed before the adoption of Const. 1879, was not affected by the restriction therein, prohibiting the passing of local or special laws.

4. SCHOOLS AND SCHOOL DISTRICTS—ORGANIZATION OF HIGH SCHOOLS—DEFECTS—CURATIVE ACTS—HIGH SCHOOL FUND—RIGHT TO SHARE.

A high school having been established by the board of education of the city of San Francisco in October, 1897, any defects existing in such organization were cured by St. 1901, p. 299, c. 140, providing that all proceedings for the establishment of high schools in previously established, incorporated cities were thereby declared legal, and by Acts 1905, amending Pol. Code, § 1671, subd. 11, legalizing all proceedings for the formation of high school districts, and the establishment of district high schools, so that such school became "duly organized under the laws of the state," regardless of defects, within St. 1905, p. 58, c. 65, § 5, providing for the distribution of the high school fund only among schools so organized.

5. MUNICIPAL CORPORATIONS—POWERS—CURATIVE ACTS—POWER OF LEGISLATURE.

The Legislature has power to pass acts curing a failure to comply with statutory requirements that might originally have been dispensed with in the proceedings of municipal corporations.

6. SCHOOLS AND SCHOOL DISTRICTS—HIGH SCHOOLS—LENGTH OF SESSIONS—RIGHT TO FUNDS.

There being no statute providing a minimum duration of daily sessions of high schools, the fact that the sessions of an evening high school were only two hours per day did not prevent it from participating in the benefits conferred on regularly established high schools by Act March 6, 1905, p. 58, c. 65.

7. SAME—COURSE OF STUDY.

Act March 6, 1905, p. 58, c. 65, providing for the distribution of the state high school fund, limits the distribution to schools which have maintained the grade of instruction required by law, and have had at least two duly certified high school teachers, and a regular average attendance of 20 or more pupils, and Pol. Code, § 1670, subd. 12, prescribes that the course of study shall be such as will prepare graduates therein for admission to the State University. *Held*, that where an evening high school offered two courses of study, only one of which complied with University admission requirements,

such school was only entitled to participate in the high school fund if it maintained two or more regularly certified high school teachers and an average attendance of 20 or more pupils in such course; the right of a school to share in the fund being determined only according to those teachers and pupils engaged in high school work.

8. SAME—LENGTH OF COURSE.

Under Pol. Code, § 1670, subd. 12, providing that the high school course fitting students for entrance to the State University shall not be less than three years, the fact that an evening high school course, intended to meet University requirements, extended for five years, did not affect the right of such school to participate in the distribution of state high school funds, as provided by St. 1906, p. 58, c. 65, § 5.

In Bank. Application by the board of education of the city and county of San Francisco for a writ of mandamus against Edward Hyatt, as superintendent of public instruction. Petition dismissed.

Wm. G. Burke, City Atty., and A. S. Newbergh, Asst. City Atty., for petitioner. U. S. Webb, Atty. Gen., for respondent.

SLOSS, J. Upon an application to this court by the board of education of the city and county of San Francisco for a writ of mandate to compel the state superintendent of public instruction to include the Humboldt evening high school in said city and county among the schools participating in the apportionment of the state high school fund, an alternative writ issued. The respondent appeared, and, after filing a demurrer and an answer, entered into a stipulation with the petitioner, agreeing upon the essential facts. By section 1 of the act entitled "An act creating a fund for the benefit and support of high schools and providing for its distribution," etc., approved March 6, 1905 (St. 1905, p. 58, c. 65), provision is made for the annual levy of a tax for the support of regularly established high schools of the state. The money so collected is to be turned into a "State High School Fund," created by the act and is appropriated for the use and support of regularly established state high schools. Sections 3, 4. Section 5 of the act directs the superintendent of public instruction to apportion the fund to high schools of the state upon this basis: One-third of the annual amount equally among the county, district, city, union, or joint union high schools of the state, irrespective of the number of pupils enrolled or in average daily attendance therein, and the remaining two-thirds pro rata according to the average daily attendance for the last preceding school year, "provided that such high schools have been organized under the law of the state, or have been recognized as existing under the high school laws of the state and have maintained the grade of instruction required by law for the high schools; and provided, that no school shall be eligible to a share in said state high school fund that has not during the last preceding school year employed at least two regularly certificated high school

teachers for a period of not less than one hundred and eighty days with not less than twenty pupils in average daily attendance for such length of time. * * * ; and provided, that before receiving state aid, each school shall furnish satisfactory evidence to the superintendent of public instruction of the possession of a reasonably good equipment of building, laboratory, and library and of having maintained, the preceding school year, proper high school instruction for a term of at least one hundred and eighty days. * * * " It appears from the stipulation above referred to that the Humboldt evening high school was established and organized by the board of education of the city and county of San Francisco in October, 1897, at a time when said city and county was governed by the provisions of the consolidation act and the amendments thereto. In the establishment and organization of said school no election, as provided by sections 1670 and 1671 of the Political Code, was held. The sessions of said school are held in the evening only and continue during two hours of each of five evenings per week.

The respondent contends, in the first place, that under the Constitution of this state no high school holding evening sessions only can be established. This contention is based upon section 6 of article 9 of the Constitution, providing that "the public school system shall include primary and grammar schools, and such high schools, evening schools, normal schools and technical schools as may be established by the Legislature, or by municipal or district authority." The argument is that the Constitution, by enumerating the various classes of schools and making evening schools a distinct class in this enumeration, distinguished such evening schools from all other classes enumerated, and that an evening school could not therefore at the same time be a high school, since high schools form a class separately provided for in the section. But this argument proves too much. It would lead equally well to the conclusion that an evening school could not be either a primary, a grammar, a normal, or a technical school, a conclusion which seems on its face to be untenable. We are satisfied that the framers of the Constitution, in including in this section the words "evening schools," intended to obviate any doubt that might exist as to the power to provide for schools which should hold their sessions in the evening, and that it was not intended thereby to make a separate class of such schools in the sense that evening schools could not, as to the nature of the course of study pursued, possess the character of primary, grammar, high, normal, or technical schools.

Further, it is objected that the Humboldt evening high school was not organized pursuant to an election held under the provisions of section 1670 of the Political Code. By section 5 of the act of March 6, 1905, the benefits of the "state high school fund" are im-

ited to high schools that "have been organized under the laws of the state, or have been recognized as existing under the high school law of the state." By this provision the act furnishes its own definition of the phrase "regularly established high schools of the state," used in the earlier sections, and impresses the character of regularly established high schools upon schools which comply with either of the last quoted requirements of section 5. As appears from the stipulation, the Humboldt evening high school was established by the board of education of the city and county of San Francisco in October, 1897. Section 1616 of the Political Code reads: "Boards of education are elected in cities under the provisions of the laws governing such cities, and their powers and duties are as prescribed in such laws, except as otherwise in this chapter provided." Under section 1 of an act entitled "An act to provide for the support of the common schools of the city and county of San Francisco and to define the powers and duties of the board of education thereof," approved April 1, 1872 (St. 1871-72, p. 846, c. 576), the board of education of the city and county of San Francisco is given power "to maintain public schools as now organized in said city and county, and to establish additional ones as required, and to consolidate and discontinue schools, as may be deemed best for the public interest." That high schools may properly be included within the term "public schools" will hardly be questioned. Indeed, article 9, § 6, of the present Constitution, quoted above, expressly makes them a part of the "public school system." This statute, therefore, in conferring upon the board of education of the city and county of San Francisco power to establish public schools, gave to it the power to establish high schools. The act, having been passed before the adoption of the Constitution of 1879, was not affected by the restrictions contained in that instrument prohibiting the passing of local or special laws. *Nevada School Dist. v. Shoecraft*, 88 Cal. 372, 26 Pac. 211. It would appear clear, therefore, that the Humboldt evening high school is a school that has "been organized under the law of the state." But, if there were any doubt as to the legality of the original organization of the school, two curative acts, passed after its establishment, had the effect of obviating any defects existing at the outset, or, at least, of making it a school "recognized as existing under the high school laws of the state." An act of March 15, 1901 (St. 1901, p. 299, c. 140), provides that "all proceedings for the establishment of high schools heretofore established in incorporated cities are hereby declared legal"; and in 1905 the Legislature amended section 1671 of the Political Code, including in said section a subdivision 11, providing that "all proceedings for the formation and organization of high school districts and the establishment of county, city and county,

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union, joint union, and district high schools had prior to the passage and approval of this act are hereby validated and declared legal, and said high school districts and high schools are hereby declared to be legally formed, organized and established." It is well settled that the Legislature has power to pass acts curing the failure to comply with statutory requirements that might originally have been dispensed with in the proceedings of municipal corporations. 6 Am. & Eng. Ency. of Law (2d Ed.) 941. In the recent case of *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81, this court fully expressed its views regarding the validity of curative acts. The statute there in question undertook to validate defective proceedings for the collection of taxes, but the principle declared is no less applicable to proceedings of the kind here involved. See, also, *Baird v. Monroe* (Cal. Sup.) 89 Pac. 352. If this school was in all other respects entitled to participate as a high school in the apportionment, these curative acts were clearly sufficient to bring it within the statutory definition of a "regularly established high school."

The further objection is made on behalf of respondent that the shortness of the daily session held in the school in question—i. e., two hours per day—takes the school out of the class of high schools contemplated by the law. While it appears that this session is considerably shorter than that regularly held in day high schools, we find no provision of law regulating the length of the daily sessions, with the exception of section 1673 of the Political Code, which provides that "no school must be continued in session more than six hours per day." No statute provides a minimum duration, and, if the school complies with all the requirements of law, the fact that its sessions are of shorter duration than those of other high schools does not deprive it of the character of a regularly established high school, or prevent it from participating in the benefits conferred upon regularly established high schools by the act of March 6, 1905. But, while the facts already set forth do not, in our opinion, tend to show that the school in question is not a "regularly established high school of the state," and do not, therefore, furnish any reason for excluding it from the apportionment, we think that the stipulation of facts falls to show that the Humboldt evening high school, considered as a high school, complied with the provisions of section 5 of the act of March 6, 1905, as to employment of teachers and average daily attendance. It might be said that the answer, tested by strict rules of pleading, does not raise a clear issue on this point. It may, however, without straining the meaning of words, be construed as raising such issue, and, inasmuch as this is a controversy between public officers, each of whom is doubtless desirous of ascertaining and performing his exact duty under the law, we are not disposed to allow any technical

construction of the pleadings to prevent the consideration of a question whose determination is necessary to a proper understanding of the rights and obligations arising under the statute in question. The petition alleges, and it is not denied, that during the school year 1905-06 the Humboldt school employed 26 teachers for not less than 180 days, and that the average daily attendance was 546 pupils. It appears that graduates of grammar schools have been admitted to said school without examination. Pol. Code, § 1670, subd. 13. A course of instruction, extending over three years, and leading to a high school diploma, is given, but there is no suggestion that this course is such as to prepare graduates for admission to the State University. During the year 1905-06 the school had a course of study known as "course B," which extended for a period of five years, and which was adopted by the petitioner to comply with the admission requirements of the University of California. As we have seen, the act of March 6, 1905, limits the distribution of its benefits to schools which have maintained the grade of instruction required by law for the high schools. That grade of instruction, as declared by subdivision 12 of section 1670 of the Political Code, is "such as will prepare graduates therein for admission into the State University." If a school offers two courses, one of which falls short of this standard, it does not, as to such course, maintain the grade of instruction required by law of high schools. Accordingly, in the case at bar, the Humboldt evening high school is to be considered a high school only so far as concerns the instruction given and received in "course B." But the stipulation does not disclose that it has the requisite number of teachers and pupils in this course. It is true that the parties agree that the school, as a whole, has 26 teachers and 546 pupils, but it nowhere appears how many of these teachers or pupils are engaged in high school work, and how many are occupied in the three-year course, which is not up to the high school standard. Unless that part of the school which can properly be regarded as a high school has two or more regularly certificated high school teachers and twenty or more pupils in average daily attendance, no right to apportionment under the statute arises. Here these conditions are not shown to exist. That, in determining the right of a school to share in the benefits of this act, only those teachers and pupils engaged in high school work can be considered, is made manifest by the manner of the apportionment. Two-thirds of the fund is to go to schools in proportion to the number of pupils in attendance. This must mean the number of pupils who are receiving the grade of instruction required by law. It cannot have been intended to distribute a high school fund to schools maintaining a certain grade

of instruction, and to base this distribution on the number of pupils to whom a lower grade of instruction is being given.

For these reasons, we conclude that the petitioner has on the record before us failed to show any right in the Humboldt evening high school to participate in the allotment of the high school fund. If, however, it shall furnish to the respondent satisfactory evidence of compliance with the requirements of section 5 of the act of March 6, 1905, having regard solely to the teachers and pupils engaged and the equipment employed in "course B" or any other course preparing pupils for admission to the State University, it will then be entitled to an allotment of the state fund, based, as to two-thirds of the fund, on the average daily attendance in such course or courses.

We may add that we attach no importance to the fact that "course B" extends over five years. The only provision of law regulating the length of the course is that it "shall embrace a period of not less than three years." Pol. Code, § 1670, subd. 12. That it may extend over a longer period than three years is clearly shown by subdivision 13 of section 1670, which contains a provision relating to schools "where the course of study embraces a period of four years."

The proceeding is dismissed.

We concur: ANGELOTTI, J.; HENSHAW, J.; LORIGAN, J.; MCFARLAND, J.

SHAW, J. I concur. I agree that the mere fact that the daily sessions of the Humboldt evening high school are of but two hours' duration does not deprive it of its character as a high school organized under the law of the state, or as a high school recognized as existing under the high school laws of the state. But I suggest that, in view of the practically universal custom of holding sessions of the public schools at least five hours each school day, and the manifest inequality and lack of uniformity in the law if it is held to give the same amount for its support to a school in session only two hours daily as is given to one in session three times as long and, during each year, imparting presumably three times as much training and instruction at three times the expense, it may be a serious question, if it ever arises, whether the "average daily attendance" for the "term of at least one hundred and eighty days" required of high schools to entitle them to receive state aid, under the statute, does not mean a daily attendance for 180 days of, at least substantially, the same number of hours as is usual and customary. If the aid can be secured by 2 hours' daily instruction for 180 days—that is, by 360 hours each year—instead of the customary 900 hours each year, why not by means of daily sessions for that period of 1 hour, or less?

6 Cal. App. 730

In re GOODRICH'S ESTATE. (Civ. 310.)
(Court of Appeal, Third District, California.
Nov. 1, 1907.)

1. CONSTITUTIONAL LAW — JUDICIAL POWER — ENCRoACHMENT OF LEGISLATIVE DEPARTMENT.

The judicial department should refrain from any unwarranted invasion of the functions of the legislative department.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 120-132.]

2. SAME — VALIDITY OF STATUTE — PRESUMPTIONS.

All doubts should be resolved in favor of the constitutionality of regularly enacted laws, and courts should be disposed to uphold, rather than overthrow, them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 46.]

3. EXECUTORS—COMPENSATION—FEES — DISCRETION OF COURT.

Where the statutes prescribe the exact rate of compensation to which an executor is entitled, the court has no discretion, and can neither add to nor vary the compensation, based on the degree of good or bad faith displayed in the management of the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 2070, 2132-2136.]

4. SAME—STATUTORY AUTHORITY.

All matters of probate, including rights of inheritance, succession, testamentary disposition, and taxes on inheritances, are subject to statutory control, and a statute regulating the disposition of the property of decedents may prescribe uniform and reasonable fees for the services of executors and their attorneys.

5. SAME.

Act March 22, 1905 (St. 1905, p. 727, c. 561), providing that executors shall be allowed for fees of their attorneys the same amounts as are allowed as compensation for executors for their own services, modifies the previous law on the subject, embodied in St. 1850, p. 396, c. 129, §§ 220, 222 (St. 1851, p. 476, c. 124, §§ 220, 222; Code Civ. Proc. §§ 1616, 1618), authorizing reasonable attorney's fees, etc., and provides a uniform standard, and is valid as providing for reasonable fees.

6. SAME.

Under Act March 22, 1905 (St. 1905, p. 727, c. 561), providing that executors shall be allowed for fees of their attorneys a specified amount, an attorney of an executor has no claim against the estate of the decedent, but the allowance is made to the executor on account of money actually paid by him to the attorney for services actually performed, and, where an executor employs an attorney to perform the legal services for less than the prescribed fees, the executor will only be allowed his actual expenditures, but otherwise he will be allowed for the full amount prescribed and actually disbursed by him.

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Accounting by Clayton A. Douglas and another, as executors of Almon Luther Goodrich, deceased. From an order surcharging the executors, they appeal. Reversed.

F. O. Houskin (Plummer & Dunlap, of counsel), for appellants.

BURNETT, J. Appellants state the case as follows: "The question involved is the validity of the act of the Legislature approv-

ed March 22, 1905 (St. 1905, p. 727, c. 561, § 2), relating to expenditures by administrators and executors for and on account of the services of attorneys retained by them in the matter of the administration of estates.

* * * In the case at bar, the executors, appellants herein, retained as their attorney F. O. Housken, and had the benefit of his services in the conduct of all the legal proceedings pertaining to the said estate, and agreed to pay him for such services the amount fixed by said act of the Legislature, and did pay him such sum therefor, but on the settlement of the account of the executors the court refused to allow the amount paid by them, but allowed the sum of \$150 for such purpose, and surcharged the executors with the amount of \$215.42, the difference between the amount paid by the executors as provided by the statute and the sum allowed by the court." From the portion of the order and decree disallowing the full amount paid for the services of the attorney, the appeal has been taken by the executors.

A brief historical review of the statutory regulation of the fees and expenses allowed executors and administrators is considered not inappropriate. By an act passed April 22, 1850 (St. 1850, p. 396, c. 129), the Legislature provided in section 220 thereof that an executor or administrator "shall be allowed all necessary expenses in the care, management and settlement of the estate and for his services such fees as the law provides," etc. Section 222 of the same act prescribes the commissions to be allowed the executor when no compensation is provided by the will, or when the executor renounces all claim thereto, and provides that an administrator shall be entitled to the same commissions. In 1851 (St. 1851, p. 476, c. 124) said section 220 was re-enacted, as was also said section 222, except that the rate of commission was reduced. On the adoption of the Codes in 1873 said section 220 became section 1616, and said section 222 became section 1618, of the Code of Civil Procedure. There was no change till 1880, when to said section 1616 there was added the following: "Including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in court." In 1905 the phraseology of said section 1616 was changed somewhat, the fees provided in said section 1618 were reduced, and there was added section 1619, which, as far as involved in this proceeding, is as follows: "Executors and administrators shall be allowed for fees of their attorneys for conducting the ordinary probate proceedings, the same amounts as are allowed by the last section as compensation for executors and administrators for their own services." The law as it exists now, it will be observed, provides a uniform standard for the determination of what shall be allowed for the services of an attorney, instead of leaving it, as formerly, to the discretion of the court without any legislative guidance, except the

general limitation that the fees shall be "reasonable." We are not concerned with the wisdom or policy of the law.

However, in view of the striking difference of opinion exhibited by trial judges in their rulings as to what constitute reasonable fees for such services, it would seem to be just and equitable for the Legislature, if practicable, to provide for uniform and proportionate compensation to be paid for similar services in all estates. As to the validity of the act in question, there is no apparent reason why it should not be upheld. It seems to be within the domain of legitimate legislative enactment. The judicial department should, of course, refrain, if possible, from any unwarranted invasion of the function of the legislative department of the government. It has been often held that all doubts should be resolved in favor of the constitutionality of regularly enacted laws, and courts should be disposed to uphold rather than overthrow them. During all the years that the law has been in force, it has not been questioned that it was and is a constitutional exercise of power for the Legislature to provide for definite fees to be awarded to executors and administrators for their own services, and also an allowance to be made to them for their necessary expenses in the administration of the estate, including reasonable attorney's fees. It seems clear that the two sections 1618 and 1619 of the Code of Civil Procedure must stand or fall together. We can see no difference in principle between an act establishing certain fees for the services of an executor and one providing what he shall be allowed as payment for the services of an attorney. The latter is as much a part of the necessary expense of administration as is the former. In fact, under our practice, the services of an attorney are not only essential, but the burden and responsibility of his work are usually much greater than those of the executor or administrator. The effect of the law is simply to allow the executor an additional fee for a certain expense of administration. It is the same as though in one section it were provided that certain fees should be allowed the executor, of which one-half should be for the expense of employing an attorney. There is no more reason, in our opinion, why the court should be clothed with discretion in fixing the value of the attorney's services rather than those of the executor. It is competent for the Legislature to provide, as it has done, for both.

As to the validity of the act fixing the fees of executors the following quotations are sufficient: "The statutes in some jurisdictions prescribe the exact rate of compensation or percentage which shall be allowed, and the courts cannot vary the amount which may be allowed, except so far as they may be authorized to award special compensation for extraordinary services." 2 Am. & Eng. Ency. of Law, p. 1288. And in 2 Woerner on American Law of Administration, § 526, the author

says: "But it would seem that the language of the statute in most states fixing the compensation of executors and administrators precludes all discretion in this respect." "The court can neither add to nor in any wise vary the compensation directed to be allowed by the statute. It can neither allow nor disallow commissions scaled by the degree of skill or of vigilance, of good or bad faith, displayed in the management of the estate, unless such discretion is vested in the court by statute." Again, as suggested by appellant, "all matters of probate, including rights of inheritance, succession, testamentary disposition of property, and taxes upon inheritances, are subject to statutory control." It is by virtue of the statute that the heir or devisee is entitled to receive any of the estate of the decedent, and the authority which thus regulates the disposition of such property can subject it to any reasonable condition or expense. This is the basic principle that justifies the Legislature in providing uniform fees for the services of executors and their attorneys in the proper administration of estates. Of course, we are not to be considered as holding that the courts would not interfere if it were manifest that the allowance was excessive and entirely disproportionate to the value of the services performed. The discretion to be exercised by the Legislature must be within reasonable limits. But we cannot say that the allowance provided for the services of an attorney is unfair or unreasonable, and hence there is no ground here for the revisory action of the court. It may be observed that under the law the attorney has no claim against the estate, but the allowance is made to the executor on account of money actually paid by him to an attorney for services actually performed. There is nothing in the law to prevent an executor from making a contract with an attorney to perform the legal services for the estate for less than the fees provided by the statute, and in that event obviously he would be allowed only his actual expenditure. But here the contract was for the full amount, and it was actually disbursed by the executors, and hence the reduction should not have been made by the court. The order is reversed.

We concur: CHIPMAN, P. J.; HART, J.

6 Cal. App. 715
WILLIAMS v. SAN FRANCISCO & N. W.
RY. CO. (Civ. 375.)

(Court of Appeal, Third District, California.
Nov. 1, 1907. Rehearing Denied by
Supreme Court Dec. 31, 1907.)

1. HIGHWAYS—INJURIES FROM OBSTRUCTIONS
—LIABILITY OF PERSONS CAUSING OBSTRUCTIONS.

Though, as between the public and the traveler the latter, if he leave a portion of the road laid out and prepared for the customary use and travel and go upon the unprepared and

customarily unused part, does so at his own risk, yet he is entitled to the unobstructed use of the entire width of the highway as against the unlawful acts of other persons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 417-422.]

2. NEGLIGENCE—PROXIMATE CAUSE.

Negligence proximate in causal relation to the damage is actionable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 69-77.]

3. SAME — NATURAL AND PROBABLE CONSEQUENCES.

A person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would at the time of the negligent act have thought reasonably possible to follow, if they had occurred to his mind.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 71, 72.]

4. HIGHWAYS — OBSTRUCTION — INJURIES — PROXIMATE CAUSE.

Defendant owned a pile of wood, one corner of which extended over the highway, though not the traveled portion, for about two feet, but there was left sufficient room in the highway for the ordinary use thereof. The highway was parallel to a railroad track, and in close proximity thereto. While plaintiff's wife was driving along the road, the horse became frightened by a train, and started to run. When the woodpile was reached, the buggy struck the part extending into the highway, and was overturned, and plaintiff's wife thrown with such violence as to cause her death. *Held*, that the maintenance of the woodpile, as it was, by defendant, was the proximate cause of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 494-497; vol. 36, Municipal Corporations, § 1669.]

5. SAME—QUESTION FOR JURY.

Whether the maintenance of a woodpile, one corner of which extended over the highway, though not the traveled portion, for about two feet, and against which the buggy in which plaintiff's wife was riding struck while the horse was running away, was negligence, *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 535-537.]

6. APPEAL—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

A verdict resting on evidence in which there is at least a substantial conflict is conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

7. DEATH—ACTIONS — CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In an action for the death of plaintiff's wife, the burden of showing contributory negligence by decedent or plaintiff is on defendant, unless plaintiff's evidence discloses contributory negligence, or that the accident would not have occurred but for the inexcusable fault of decedent or plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 75-78.]

8. TRIAL — SPECIAL FINDINGS — QUESTIONS FOR SUBMISSION—IMMATERIAL ISSUES.

Code Civ. Proc. § 625, requires the court, on request, to direct the jury to find a special verdict. In an action for the death of plaintiff's wife, who was killed by being thrown from a buggy which struck a woodpile, a corner of which extended into the untraveled portion of the highway, her horse having been frightened

by a train, the court refused to submit the following questions requested by defendant, the owner of the wood: "Was the woodpile an obstruction to the free use of the highway in the usual and customary manner? Would the accident have happened if the horse had been under control and driven in the usual and customary manner? Was the accident due to the running away of the horse? Did the woodpile have anything to do with the horse becoming frightened and running away? At the point in question, was the main traveled portion of the highway sufficiently wide and safe for the usual, ordinary, and customary travel thereon by horses under control?" *Held*, that a finding favorable to defendant on any of the questions would not have been inconsistent with the general verdict for plaintiff, and therefore would have been immaterial, so that the court properly refused to present them to the jury.

9. SAME—VERDICT—SPECIAL QUESTIONS—MISLEADING.

Where, in an action for the death of plaintiff's wife, who was killed by being thrown from a buggy which struck a woodpile, a corner of which extended over the untraveled portion of the highway, the horse having been frightened by a train, it was not contended that the woodpile was an obstruction to the free use of the highway in the usual and customary manner, nor that the accident would not have happened if the horse had been under control, nor that the accident was not partly due to the running away of the horse, requested special questions of fact—Was the woodpile an obstruction to the free use of the highway in the usual and customary manner? Would the accident have happened if the horse had been under control and driven in the usual and customary manner of driving horses? Was the accident due to the running away of the horse?—were misleading in form.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 840-845.]

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by John Williams against the San Francisco & Northwestern Railway Company. Judgment for plaintiff, and defendant appeals. *Affirmed*.

Gillett & Cutler, for appellant. Gregor & Connick, for respondent.

HART, J. This is an action for damages for causing the death of plaintiff's wife. The case was tried by a jury and plaintiff secured a verdict and judgment for the sum of \$3,000. From said judgment, upon a bill of exceptions, the defendant presents this appeal.

The facts as established by the evidence and found by the jury are: The defendant corporation owns and operates a steam railroad about 25 miles in length, between the city of Eureka, in Humboldt county, to some point beyond the town of Scotia, in said county. On the line of the road are situated the towns of Fortuna and Singley's Station; the latter being about three miles in a northerly direction from the former. A county road, used for many years by the travelling public as a public highway, runs between and connects these towns or railroad stations. On the 23d day of July, 1903, while the wife of the plaintiff was on her way to Fortuna, in a buggy, drawn by a

horse, driven by herself, and at a point between the two stations mentioned, a train of cars belonging to the defendant came along and the noise produced by the engine and the train caused the animal to become frightened and to start on a wild run over the road toward and in the direction of Fortuna. The right of way and track of defendant adjoin and parallel said public highway for a considerable distance. At a point on said county road, about one mile from Fortuna, was situated on the day the fatal accident occurred a large pile of wood, the property of the defendant. The complaint alleges, and it appears to be satisfactorily shown by the evidence, that one corner of said woodpile extended over and projected into a portion of said public highway for a distance of approximately two feet. When the animal, running at a lively rate, reached the point at which the woodpile was situated, the buggy struck or collided with that portion of the wood extending into the highway, the impact resulting in the overturning of the vehicle, and throwing the deceased to the ground with such violence as to produce fatal injuries, death being almost instantaneous. There does not appear to be any attempt to contradict the claim of the plaintiff that the woodpile with which the buggy collided occupied a part of the public highway, although not the traveled portion; but it is contended by the defendant, and there is no dispute upon the proposition, that that part of said highway so used by the defendant had been thus used by it for many years prior to the day upon which the unfortunate mishap occurred, and that, notwithstanding the existence of the obstruction, there was still left sufficient room in the highway at that point to facilitate and admit of the ordinary and customary use of the road by the traveling public. Those persons who saw the horse start to run and watched the animal running as far as the circumstances by which they were situated would permit them were passengers on the train, the noise from which caused the animal to become frightened. Testifying for the plaintiff, they all stated that the horse ran so fast that he kept up with the speed of the train; that the deceased seemed to be holding the animal with taut reins, and that she appeared to be perfectly calm, cool, and "collected," evincing no signs of the loss of control of her judgment; that "the woman was sitting firmly in the buggy seat," and "I should judge," testified the witness Robertson, "her feet were well braced, and she was holding her arms in a driving position. She had hold of both lines, one in each hand, was holding them tight and was guiding the horse." Some of the witnesses testified that on the day following that upon which the accident occurred they followed the track made by the vehicle used by the deceased from a point a considerable distance from the woodpile to the latter point, and that the buggy was kept in the center of the road un-

til it struck said woodpile. The woodpile consisted of three tiers of "2-foot" wood. The width of the road, measuring from the outer edge of the woodpile to the fence on the opposite side of the highway, was about 20 feet, of which about 12 feet were graveled. On behalf of the defendant testimony was offered to the effect that the projection of the woodpile into the highway did not interfere with or obstruct the customary travel upon it. The witness Newell said that the corner of the woodpile projected upon the graveled portion of the road, and that, "if one was to use the whole of that road that was turnpiked, and graveled, he would get pretty near the edge of the woodpile." It also appears that just a short distance from where the woodpile was situated there is rather a sharp curve in the road, around which the horse ran at a high rate of speed, going in the direction of said woodpile. Newell declared that said curve "was a difficult one to make if the horse was running fast." Testimony was also introduced by the defendant tending to show that the horse driven by the deceased was high-spirited and easily excited, and that the "bridle-bit" used on the animal at the time of the accident was not of the kind which should be used on a horse of an excitable and unruly nature; that it was the "bit" ordinarily used on horses, and with which it would be difficult, if not impossible, to stop a frightened horse in the act of "running away." The witness Quill, a livery man, who sold the mare in question to the plaintiff in the year 1901, testified that the animal was of racing stock and a "saddle horse"; that he had driven her himself, but that no one else had up to the time that he sold her to plaintiff; that he told the latter, at the time of the sale, that the mare was "very high lived, and hard to handle when she got warmed up, and was all right, except when she got excited." This witness said that, after selling the mare to plaintiff, she had foaled a colt, and that he knew "from experience that sometimes having a colt has a quieting effect upon a mare," and that said mare was much quieter after she had the colt; that he had often seen plaintiff drive the mare, and that on such occasions "she was going along like any ordinary horse would." Testimony was introduced in rebuttal to show that the deceased had often driven the mare, taking with her in the buggy at different times certain ladies, who said that the mare always behaved well on those occasions. The deceased was described as a "large, strong, healthy woman," from which fact the inference is that she was capable, in point of physical strength, of controlling the animal. The foregoing embraces, in substance, the principal testimony introduced by both sides, and from which, of course, arise the legal propositions submitted for solution.

The main questions discussed in the briefs involve and revolve around two propositions,

viz.: (1) What was the proximate cause of the accident resulting in the death of plaintiff's wife? (2) Was plaintiff's right to recover barred by negligence contributed either by himself or his wife or by both? An important question is also presented in the contention of appellant that the court committed prejudicial error by its refusal to submit to the jury for findings thereon certain particular questions of fact requested in writing to be so submitted by the defendant. The specific contentions of the appellant upon the merits of the record are: That the direct cause of the accident was the fright and running away of the horse, due, presumably, to the noise made by the locomotive and train; that the horse, after starting to run, became unmanageable, and got beyond the control of the deceased, and that her inability to keep the animal in the middle or center of the road and thus have avoided the collision of the buggy with the woodpile constituted upon her part such culpable negligence as to destroy a right of recovery in plaintiff; that deceased was guilty of negligence in driving an animal claimed to be "high-lifed," nervous, and of an excitable nature. And, in connection with the question of the character of the horse driven by the deceased, it is also charged that the plaintiff himself was guilty of contributory negligence by the act of permitting his wife, unaccompanied by any one capable of lending her effective assistance in the event the horse became frightened and unruly, to drive an animal which, it is contended, was shown by the evidence to be at the time of the accident high-spirited and of a highly nervous temperament, and so known to be at the time by the plaintiff, along or near a railroad track over which a train of cars was likely to pass at any moment. It is also contended that the obstruction did not interfere with the usual and customary use of the highway.

Before proceeding with an examination of the respective positions of the parties to this appeal, these three self-evident and undisputed propositions may be declared: (1) That the defendant had the right to run its train over its track in the usual and customary manner of running railway trains, propelled by steam power; (2) that the deceased had the right to use the public highway in the usual and customary manner in which such highways are used and designed to be used; (3) that no one has any lawful right to maintain an obstruction or purpessure of any character or nature upon a public highway, or road laid out for and dedicated to the purposes of public travel.

In connection with the first of the propositions thus stated, it may be said that there is no claim that the defendant's train of cars, the noise from which it is alleged frightened the horse driven by deceased, made on the occasion of the accident an unusual or unnecessary noise, but it is conceded that the noise thus made was only the usual and ordi-

nary noise necessarily incident to the running of railway trains by means of a steam locomotive.

Was the act of the defendant in maintaining the woodpile upon an untraveled portion of the highway culpable negligence, and if so, was said woodpile the proximate cause of the accident, or, as we think the latter proposition may be as accurately and at the same time more explicitly stated, would the accident have occurred but for the maintenance of the woodpile under the circumstances disclosed by the evidence? The theory of the appellant upon the law of the case may best be presented in the language of the following instruction which was requested by it and refused by the court: "I further instruct you that if you find from the evidence that the wood piled by defendant was off of the main traveled portion of the highway, and at a place where it was not dangerous to persons driving along said highway in the customary and ordinary manner, and if you further find that the horse driven by plaintiff's said wife became frightened some distance from where said wood was piled and ran away, and got beyond her control and was unmanageable, and while so running away and beyond her control left the well-beaten track of the road, and ran to one side thereof and against the end of said wood, thereby causing her death, then I instruct you that the proximate cause of the accident was the fright and running away of the horse, and not the pile of wood against which the buggy collided, and you must find a verdict for the defendant." The portion of the foregoing rejected instruction bearing upon contributory negligence was covered by other instructions of the court; but by the instruction, it will be observed, it was also sought to induce the court to tell the jury that, as a question of law, the fact that the woodpile was "off of the main traveled portion of the highway and at a place where it was not dangerous to persons driving along said highway in the customary and ordinary manner," exculpated defendant from all blame and responsibility for the accident and its consequences. Our attention has been invited to no case decided in California in which the precise question presented by the rejected instruction, or a question arising upon facts substantially corresponding with those here, has been adjudicated. We have, however, devoted much time to an examination of all the cases cited by both sides from other jurisdictions in which a similar question, with its concomitant propositions, and growing out of facts in marked analogy to those of the case at bar, has been considered and decided. While those authorities appear to be (and in a few instances are) widely divergent, and seem to present a contrariety of views upon the application of the principles of law involved in the class of cases to which the one under review belongs, a careful examination, analysis, and comparison of them, as to the facts,

will, we think, show that, generally speaking, whatever apparent difference there may be in the conclusions reached is founded upon a distinction based upon the measure of liability resting upon a town or county, charged with the duty of maintaining public highways, and that attaching to an individual or private corporation, where damage results from a defect in such highways through the fault or default of the one or the other. For illustration, it has been held that the duty of the public authorities is fully discharged when the traveled portion of the road—that part which has been gravelled, turnpiked, or otherwise prepared for the purposes of the customary travel—is kept and maintained in proper repair and in such shape as to admit of the usual, ordinary, and customary use. And while, as between the town or county or public authorities having supervision of public highways and the traveler, the latter will leave the portion of the road laid out and prepared for the customary use and travel and go upon and use the unprepared and customarily unused part at his own risk, he is nevertheless entitled to the unobstructed and uninterrupted use of the entire width of the highway as against the unlawful acts of other persons, either real or artificial. The principle, upholding the distinction suggested, and here sought to be stated, is well explained in *Dickey v. Maine Telegraph Co.*, 46 Me. 485, as follows: “* * * But the right of travelers to use any part of a highway, if they see fit, is not restricted by the limitation of the liability of the town in case of accident. A person may go out of the beaten track at his own risk, as between himself and the town, and yet be entitled to protection against the unlawful acts of other persons or corporations. Any part of the highway may be used by the traveler, and in such direction as may suit his convenience or taste. [Citing *Stinson v. Gardiner*, 42 Me. 248, 66 Am. Dec. 281.] No private person has a right to place or cause any obstruction which interferes with this right on any part of the highway within its exterior limits. The extent of the liability of the town is no measure for such private person's liability. If the owner of the fee in the land, or any other person, should dig a pit, or stretch a cord, or place a pile of stones on the highway near the outer limit, and at a considerable distance from the traveled way, and a traveler passing, using due care, should be injured thereby, it would be no sufficient answer to his claim for damages to aver and prove that, under the circumstances, the town was not liable. The duty of the town is to perform a positive act in the preparation and preservation of a sufficient traveled road. The duty of others is to abstain from doing any act by which any part of the highway would become more dangerous to the traveler than in a state of nature, or than in the state in which the town has left it.” See, also, *State v. Ber-*

detta, 78 Ind. 185, 38 Am. Rep. 117, and *Johnson v. Whitfield*, 18 Me. 283, 36 Am. Dec. 721. In the last-named case it is said: “It is contended that the owner of land adjoining a public highway may lawfully use that part of it which is not prepared for the public travel. His ownership and right of use, so far as may be consistent with the rights of the public, need not be questioned. But it is a mistake to suppose the public rights of travel are restricted to the prepared and usually traveled path. While the town has done its duty when it has prepared a pathway of suitable width in such manner that it can be conveniently and safely traveled with teams and carriages, the citizens are not thereby deprived of the right to travel over the whole width of the way as laid out. And they have the right to do so without being subjected to other or greater dangers than may be presented by natural obstacles, or those occasioned by making and preparing the traveled path.”

The rule as stated in the foregoing authorities is supported by the soundest reason and the most salutary principles of justice, and meets with our approval. The court properly, in our opinion, refused to give to the jury an instruction which would have taken from it the question of whether the act of the defendant was culpable negligence. The situation here, according to the undisputed facts, is that the appellant maintained an unlawful obstruction upon a public highway, paralleling which and in close proximity thereto was its railroad track, over which it operated and ran, by steam, its railroad trains. It is not denied that the buggy in which the deceased was driving collided with said obstruction, and that the collision caused the vehicle to upset and precipitate the deceased to the ground with such force as to cause her death. The rule is that the defendant is answerable in law for negligence proximate in causal relation to the damage; or, in other words, it is liable if the obstruction for the existence of which it was responsible was the direct cause of the accident, with its resulting damages. The difficulty, indeed insuperable, with which the courts and text-writers have been and always will be confronted with regard to the right of action founded in negligence, is to formulate an invariable, iron-clad rule, applicable alike to all cases of personal injury, upon the question of the proximate cause of the damage, or “the connection between the negligent act or omission and the damage.” It should therefore be a case in which there is very clearly wanting, under the evidence, the essential connection between the negligent act or omission and the damage to warrant the court in taking it from the jury, either through a motion for a nonsuit or a direction to find for the defendant or the instructions. “The proximate cause of an event,” say *Shearman and Redfield*, page 27 of volume 1 of the fifth edition of their treatise on the “Law of Neg-

ligence," "must be understood to be that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred." But, say the same authors, very great difficulty has been found in determining what damages should be considered as flowing, in a "natural and continuous sequence," from an act of negligence, especially when it is not a matter of contract liability. The difficulty of laying down a rule which will include all possible cases has caused some of the ablest judges to decline to state any fixed rule; thus indicating a disposition of the courts to leave all doubtful cases to the jury. The authors of the work from which we have just quoted have, however, undertaken to state a general rule as follows: "That a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not) would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind." This formula is sensible and sound. Testing, therefore, the facts of the case at bar by the rule as thus declared, little, if any, difficulty is to be experienced, we think, in tracing the proximate cause of the damage to the negligent act of the defendant. That a horse, howsoever gentle he may be for ordinary driving purposes, is likely to become frightened upon the sudden approach of a steam railway train, producing its customary and necessary noise, is not only a reasonably possible, but, in our opinion, a reasonably probable fact, which all men of experience and prudence must know. It is one of the contingencies which are likely to occur upon a highway adjacent to a railroad track over which a steam railway is operated, and of which a prudent person, familiar with facts existing within the domain of common human experience, must reasonably have known and thought, had it occurred to his mind. It is an event which it was possible would happen at any time under the existing and known circumstances, and one, therefore, which it was the defendant's duty to think of and consider when it established and maintained the obstruction complained of. It is, in other words, one of those probable occurrences under the circumstances shown here which the defendant, having full knowledge of said circumstances, must be held to have reasonably anticipated. The meeting or overtaking of passing teams by a railway train traveling over a track adjoining a public highway is an event which is likely to occur at any moment, and which the owner of the railway must reasonably expect to happen. Therefore, had it "occurred to defendant's mind," fully acquainted, as it must be assumed to have been, with all the circumstances which in fact existed, it would have known that the

consequences which might reasonably follow the frightening and consequent rapid running of the horse, hitched to a buggy, on and over the highway would be the collision of the vehicle with the obstruction maintained by it upon said highway, and resulting damage to either person or property or both, if the frightened animal ran in the direction of the point of obstruction.

As is said in *Borough of Pittston v. Hart*, 89 Pa. 391, so it is true here: "It is true that without the frightening of the horses, there would have been no accident; but the horse is naturally a timid animal, and is so liable to fright that those having charge of the public highways ought to make reasonable provision for a matter so common and so likely to happen at any time. Horses abound, but horses that never frighten, or are never fractious, are exceedingly rare, and, if roads were to be constructed only for such animals, there must needs be but little traveling upon them." The defendant was primarily at fault in maintaining the obstruction upon the highway. Its act was an act of trespass. It had no lawful right to thus use a public highway, although the part obstructed was not customarily used by the traveling public. But in principle it had just as much right to thus use the highway a distance of 10 or 20 feet as 2 feet, although the danger of accident would be greater and the proof of negligence attended with less difficulty in the former than in the latter case. As was said in *Cohen v. Mayor, etc.*, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506: "There is always reasonable ground for apprehending accidents from obstructions in the highways, and any person who wrongfully places them there or aids in so doing, must be held responsible for such accidents as may occur by reason of their presence." This declaration is, of course, subject to the qualification that the plaintiff has not by his own default or negligence, contributed to the damage. And our own Supreme Court, in the case of *McKune v. Santa Clara, etc.*, 110 Cal. 480, 42 Pac. 980, likewise holds that "one who maintains any unauthorized obstruction upon a highway by means of which another, through no fault of his own, is injured in person or property, is responsible in damages therefor."

The question here, it must be understood, is not whether the highway was dangerous only when a horse traveling over it became frightened and "ran away," but whether the highway, as maintained, is shown by the evidence to be dangerous for use as such, and this fact was and is dependent for its establishment upon all the circumstances by which it was maintained and surrounded—its condition, width, closeness to places of danger, the probability of accidents originating primarily through circumstances to which it was peculiarly subject by reason of its unusual situation. Nor is the question here, under the pleadings, whether the obstruction

of the highway by the defendant involved the maintenance of a public nuisance. The defendant is charged in the complaint with actionable negligence in maintaining an unauthorized obstruction, and whether such allegation was true or not depended on what the evidence established. The evidence, it is true, developed facts showing that the obstruction constituted a public nuisance, for the maintenance of which the defendant might have been criminally prosecuted. Pen. Code, § 370. And if the plaintiff, by his averments and proofs, had relied upon the theory of a public nuisance, the negligence so established would be such per se. But, as suggested, the theory of negligence advanced is independent of any consideration of whether the obstruction was a public nuisance, and upon that theory the whole question was one for the jury. "The decision of such questions," says the Supreme Court of Pennsylvania, in *Plymouth Tp. v. Graver*, 125 Pa. 34, 17 Atl. 249, 11 Am. St. Rep. 807, "is most appropriately made by submission of them to the practical judgment and experience of a jury upon a consideration of all the proofs respecting them." The learned judge of the trial court in leaving with the jury the question of negligence imputed to the defendant and the counter charge of contributory negligence pursued the course required by the issues tendered by the pleadings and as developed by the evidence, and declared to the jury the principles of law applicable to all the essential points in the case in language of singular perspicuity. Therefore, as to the claim of the defendant that the plaintiff and the deceased contributed by their own culpable negligence to the accident and its consequences, the answer is that the verdict of the jury resting upon evidence in which there is at least a substantial conflict, although it can well be said that the proofs appear to distinctly preponderate in favor of plaintiff, is conclusive here. The burden of showing such negligence upon the part of the deceased or the plaintiff was upon the defendant, unless plaintiff's evidence itself disclosed contributory negligence, or that the accident and resulting damage would not have occurred but for the inexcusable fault of the deceased or plaintiff. The proof upon the alleged contributory negligence was purely circumstantial, and, in our judgment, exceedingly weak. The evidence fully supports the verdict.

It is submitted that the court below erred to the prejudice of defendant by refusing to present to the jury, at its request, for findings thereon certain special questions of fact. Under the terms of the amendment by the Legislature of 1905 of section 625 of the Code of Civil Procedure, it is undoubtedly mandatory upon a trial court to submit special issues or particular questions of fact to the jury in all cases, when requested to do so in writing by either of the parties. In fact, the amendment is so construed in an opinion

recently filed, and written by the learned chief justice of the Supreme Court, in the case of *Plyler v. Pacific Portland Cement Co.* (Cal.) 92 Pac. 50. It is said in that case, however: "What the judge has to determine, from an examination of the questions themselves, is whether the parties presenting them have a right to demand their submission to the jury in the form in which they are presented, and this depends, alike in the case of an issue and in the case of a special fact involved in the issues, upon two conditions: First, is the question so framed as to admit of a plain and direct answer? and, second, would an answer favorable to the party preferring the request be inconsistent with a general verdict for his adversary?" The "special issues" or particular questions of fact requested by the appellant and refused by the court are as follows: "(1) Was the woodpile an obstruction to the free use of the highway in the usual and customary manner? (2) Would the accident have happened if the horse had been under control and driven in the usual and customary manner of driving horses? (3) Was the accident due to the running away of the horse? (4) Did the woodpile have anything to do with the horse becoming frightened and running away? (5) At the point in the highway where defendant piled its wood was the main traveled portion thereof sufficiently wide and safe for the usual, ordinary, and customary travel therein by horses under control?" Where a finding upon a special issue or a particular question of fact would be so inconsistent with the general verdict as to destroy the effect thereof, the former would certainly control, and the party against whom the verdict went would be entitled to judgment non obstante verdicto. The question here is: Would a finding favorable to the defendant upon any of the foregoing questions of fact have been inconsistent with the general verdict found? We cannot see where or how there could be any incongruity between the conclusion of the jury as manifested by the general verdict and an answer favorable to the defendant to any of the questions proposed, assuming that the jury would have so answered them. However answered, therefore, we think the findings on the proposed special questions of fact would have been immaterial. It is not contended that the woodpile was an obstruction to the free use of the highway in the usual and customary manner; nor that the accident would not have happened if the horse had been under control and driven in the usual and customary manner of driving horses; nor that the accident was not partly due to the "running away" of the horse; nor that the woodpile had anything to do with the horse becoming frightened and running away; nor that the highway, at the point where defendant piled its wood, was not the main traveled portion of the road and not sufficiently wide and safe for the usual, ordinary, and customary travel therein by

horses under control. The contention is, as we hold is his right, that the traveler is entitled to the use of the entire width of the highway as against the interference of private persons and corporations, if he desires to so use it, or in case it becomes necessary to so use it by reason of the happening of such a contingency, so liable to arise at any time upon a highway environed as this, as occurred here. It is not claimed that the deceased was driving the mare, after she started to run, in the "usual and customary" way, in the sense in which those terms are ordinarily or colloquially used and understood; but it is contended that while so driving the mare over the public highway, as she had a right to do, the animal became frightened—an event likely to happen at any time under the circumstances—and that, by reason of such fright, proceeded over the road at an unusual rate of speed, and that, under those circumstances, she was entitled to the free use of the whole width of the highway, unobstructed or uninterrupted by the unauthorized and negligent acts of a private person, in which to manage, control, and probably restore the animal to a state of calmness and composure, without injury to herself or property. It would be absurd to say that the reining or driving of a "runaway" horse would be driving the animal "in the usual and customary manner of driving horses." The jury would probably have treated the question as calling for an answer in the sense in which the words "usual and customary" are commonly accepted and used, and such an answer would obviously have meant nothing more than that the deceased was not driving the animal at the usual gait, and therefore using only the physical force ordinarily necessary to guide an animal, attached to a buggy, over a road. And, if the animal had been "under control" in the usual sense of that phrase, she would not have been running with unusual speed, and it is therefore manifest that the jury could have consistently answered the question in the negative, and yet have intended nothing militating against or impairing the force of the general verdict returned. If the purpose of the special question was to ascertain from the jury, by a categorical answer thereto, whether the deceased had the animal "under control" in the sense that she was guiding and keeping it, while running, in the center of the highway, the question should have been more clearly phrased and specific. In the form in which it was requested it was misleading. The same reasoning applies to special questions 1 and 2, and, as to the third, it is not contended, nor could it be, that the "running away" of the horse was not a contributing cause of the accident and damage. This last question, in the form requested, was also misleading.

The motion for a nonsuit presented by the defendant, upon the close of plaintiff's original case, and denied by the court, was based

upon grounds involving the vital points in the case herein discussed, and the ruling thereon was, of course, under the views we have expressed, proper.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

6 Cal. App. 707

BLAKELEY v. KINGSBURY. (Civ. 384.)
(Court of Appeal, Third District, California.
Nov. 1, 1907.)

1. PUBLIC LANDS—DISPOSAL BY STATE—CONTEST—TIME.

Pol. Code, § 3414, provides that, when a contest arises concerning a certificate of purchase or other evidence of title before the register, the officer must, when either party demands a trial in the courts of the state, make an order referring the contest, etc. *Held* that, in the absence of a question involving the statute of limitations, a contest is in time if begun before the patent has been issued, and as a general rule, after such contest is begun, the state officers have no right to issue the patent, but must abide the judgment of the court having jurisdiction to determine the controversy by reason of the reference.

2. SAME—ADVERSE CLAIMS—RIGHT OF STATE TO PRESCRIBE METHOD OF DETERMINATION.

A state owning lands has the right to prescribe what steps shall be taken by one desiring to secure title and how adverse claims to the same tract shall be determined; and the question is one of legislative regulation and control.

3. SAME—RIGHT TO PATENT—EFFECT OF DELAY—FILING OF CONTEST.

Every intending purchaser of state lands is charged with notice that he must establish certain facts to secure the approval of the Surveyor General and make certain payments, and that, after a certain time, he may demand and secure his patent, providing a contest has not been filed, which imposes the additional duty of proving that the statements in the application to the Surveyor General are true, and, where an application to purchase has been approved by the Surveyor General, and there was a time during which the applicant might have secured the patent by surrendering the certificate of purchase before a contest was filed, by waiting until after the filing of a contest and transfer of the matter to the Superior Court before demanding patent, the applicant was too late.

4. SAME—STATUTORY PROVISIONS—PAYMENT.

Pol. Code, § 3476, relating to reclamation of state lands, provides that whenever the trustees or owners of lands certify that the works of reclamation are completed, or that \$2 per acre has been expended thereon, the board of supervisors must certify such facts to the register. Section 3477 provides that the register must thereupon credit each purchaser in the district with payment in full for such lands, and the purchasers are entitled to patents therefor. *Held*, that these sections do not exclude the operation of section 3414, in reference to contests before the patent has been issued, to determine whether the claimant's verified application is true.

5. SAME—METHOD OF PAYMENT.

Whether a payment for public land has been made directly in coin or by reclamation does not affect the liability to a contest before the patent has been issued.

6. SAME—EFFECT OF PAYMENT.

An applicant to purchase public land cannot, by making complete payment, prevent or nullify a contest, so as to become the real owner of the land and render the state a mere trustee.

tee of the legal title, with the obligation to convey on demand after expiration of the proper time.

7. SAME—MANDAMUS—ISSUE OF PATENT.

Plaintiff made application to purchase certain state lands under Act March 24, 1893 (St. 1893, p. 341, c. 229), relating to sale of previously overflowed lands. She paid 20 per cent. of the purchase money and interest on the balance, and the Surveyor General issued her a certificate of purchase. Afterwards a reclamation district was formed, and the board of supervisors made an order adjudging that the work of reclamation was completed and the land claimed by plaintiff was credited with full payment. Subsequently other persons claimed portions of the land, and filed protests, together with demands that the conflicting claims be referred to the proper court for adjudication. The Surveyor General made an order referring the contests to the superior court, profferts were issued and filed, and within 60 days plaintiff filed in that court complaint against each of the contestants, setting up the facts upon which she relied to establish her right. While these actions were pending she brought mandamus to compel the Surveyor General as register to prepare a patent for the land in question from the state to plaintiff for execution according to law, etc., together with a certificate that the laws in relation to the execution of the patent had been complied with; that payment had been made in full, and that plaintiff was entitled to the same. *Held*, that mandamus would not lie.

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Mandamus by Laura W. Blakeley against W. S. Kingsbury, Surveyor General, etc. From an order granting a peremptory writ, defendant appeals. Reversed.

U. S. Webb, Atty. Gen., and Malcolm Glenn, Asst. Atty. Gen., for appellant. H. P. Brown, Charles G. Lamberson, and Frank Lamberson, for respondent.

BURNETT, J. On the 10th day of December, 1903, plaintiff filed in the office of the Surveyor General and register of the land office her duly verified application to purchase from the state under the provisions of an act entitled, "An act regulating the sale of the lands uncovered by the recession or drainage of the waters of inland lakes and unsegregated swamp and overflowed lands and validating sales and surveys heretofore made" approved March 24, 1893 (St. 1893, p. 341, c. 229), all of section 15, in township 22 south, range 18 east, M. D. M., situated in Kings county, this state. The said application contained the statement of facts required by law. On June 10, 1904, the application was approved by the Surveyor General of the state, and on July 30, 1904, plaintiff paid 20 per cent. of the purchase money and the interest on the balance till January 1, 1905, and on August 5, 1904, the Surveyor General issued to plaintiff a certificate of purchase. Afterwards the board of supervisors of Kings county formed a reclamation district including all of said section 15. Plaintiff paid the assessments levied by said board on her land. On June 5, 1905, after proper proof was received, the said board of supervisors made an order adjudging that the work of reclamation of said district had been fully com-

pleted, and that the lands therein had been fully reclaimed, and the board directed the clerk of the board to certify said facts to the register of the state land office. This was done, and the said register made his return to the treasurer of the county of Kings crediting each tract of said land, including section 15, with full payment. July 26, 1905, C. W. Porter filed in the office of said Surveyor General an application for the northwest quarter of said section 15 with a duly verified protest against the issuance of any further evidence of title to the said quarter to plaintiff, together with a demand that the matter of the conflicting claims to the right to purchase said land be referred to the proper court for adjudication. On July 27, 1905, one R. R. Cadwell filed in the same office a similar protest in reference to the east half and the southwest quarter of said land, and a similar demand for reference. On the latter date the Surveyor General made an order referring said contests to the superior court of Kings county, and profferts were regularly issued and filed, and within 60 days from the order of reference plaintiff filed in the superior court of said county a complaint against Porter and also one against Cadwell, in each of which she set forth the facts upon which she relied to establish her right to purchase all of said section 15. Both actions are still pending and undetermined in said superior court of Kings county. On the 12th day of December, 1905, plaintiff filed in the superior court of Sacramento county her affidavit and petition for a writ of mandate to compel the Surveyor General as register of the state land office "to prepare a patent from the state of California to plaintiff for execution according to law, for the land hereinbefore described * * * together with a certificate that the laws in relation to the execution of such patent have been complied with; that payment in full has been made and that the plaintiff herein is entitled to the same." An alternative writ was issued, and, an answer having been filed, a trial was had and the writ was made peremptory, from which the Surveyor General has appealed.

The law provides that the writ shall issue "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." Section 1065, Code Civ. Proc. The contention of appellant is that under the circumstances of the case the law not only did not impose upon him the duty to issue the patent, but that, by the order of reference, he became divested of authority to proceed any further in the matter of confirmation of plaintiff's title, and that the whole question was relegated to the said superior court of Kings county which thereby acquired exclusive jurisdiction to determine to whom the patent should be issued. The basis for the contention is section 3414 of the Political Code, which provides: "When a contest arises concerning the approval of a survey or location before the Surveyor Gen-

eral or concerning a certificate of purchase or other evidence of title before the register, the officer before whom the contest is made may, when the question involved is as to the survey, or one purely of fact * * * proceed to hear and determine the same; but when, in the judgment of the officer, a question of law is involved, or when either party demands a trial in the courts of the state, he must make an order referring the contest to the district [superior] court of the county in which the land is situated and must enter such order in a record book in his office." As to the subsequent proceedings, section 3415 provides that: "After such order is made either party may bring an action in the superior court of the county in which the land in question is situated to determine the conflict, and the production of a certified copy of the entry, made by either the Surveyor General or the register, gives the court full and complete jurisdiction to hear and determine the action." These provisions have been considered more than once by the Supreme Court. It has been held that the jurisdiction of the court depends upon the order of reference. *Keema v. Doherty*, 51 Cal. 7; *Vance v. Evans*, 52 Cal. 93; *Danielwitz v. Temple*, 55 Cal. 42.

Again, the statute is silent as to when the contest before the Surveyor General must be initiated; but—disregarding the question of the statute of limitations which does not arise here—the contest is not too late if begun before the patent has been issued; and as a general rule applicable to state lands, after such contest is inaugurated the state officers have no right to issue the patent but must await the result of the proceedings brought, in other words, must abide by the judgment of the court having jurisdiction by reason of the order of reference to determine the controversy between the parties. *People v. Carrick*, 51 Cal. 325; *Gilson v. Robinson*, 68 Cal. 539, 10 Pac. 193; *Garfield v. Wilson*, 74 Cal. 176, 15 Pac. 620; *McFaul v. Pfankuch*, 98 Cal. 400, 33 Pac. 397; *Youle v. Thomas*, 146 Cal. 544, 80 Pac. 714. See, also, *Miller v. Engle*, 3 Cal. App. 325, 85 Pac. 159. It is true that before the contests here were filed there was a period of about 45 days during which respondent, by surrendering the certificate of purchase, could have secured the patent. Pol. Code, §§ 3519, 3521. As the application of plaintiff was approved by the Surveyor General June 10, 1904, the course suggested was open to her at any time between June 10, 1905, and July 28, 1905, when Porter's application was filed. But she slept on her rights until October 28th following when she demanded the patent. This was too late, as we have seen, because in obedience to the requirements of the statute the Surveyor General had transferred the matter to the superior court of Kings county.

But respondent's contention is not that she is entitled to a patent because more than one year had expired after the approval of

her application to purchase and before a contest was filed, but when, in the language of her brief, "her application was approved there was then and there a contract entered into between her and the state, by which, if she caused the land to be reclaimed as provided by the laws relating to the reclamation of such land, she would after the statutory period of one year be entitled to the issuance of a patent for said land. And the fact that respondent had thus by the lapse of time become entitled to a patent, coupled with the fact that she had, before the expiration of the year, paid in full for the land by reclaiming it, gave to the respondent the absolute right to a patent for said land." But respondent seems to be begging the question. She assumes the very proposition in dispute, that, when the year has elapsed and she has paid for the land, the Surveyor General must issue the patent, although in the meantime he had transferred the contest to the superior court in consequence of the question having arisen in the orderly way as to whom must be issued "other evidence of title." It is clear that the rights of the plaintiff and the duty of the defendant must be determined by a consideration of the provisions of the statute. The question is one entirely of legislative regulation and control. The state in its sovereign capacity owns these lands, and it has the incontestable right to prescribe what steps shall be taken by an individual desiring to secure title in himself and how adverse claims to the same tract shall be determined.

We are not concerned as to the doctrine of estoppel, nor is it a case where payment alone entitles the claimant to a patent. Every intending purchaser is charged with notice that he must establish certain facts to secure the approval of the Surveyor General, that he must make certain payments, and that, after the expiration of a certain time, he may demand and secure his patent upon the contingency, however, that in the meantime a contest may be filed which shall impose upon the claimant the additional duty of proving to the satisfaction of a superior court that the statements in his application to the Surveyor General are true. These provisions of the law enter into and become a part of the contract with the state. It is true that the Legislature has provided a complete scheme for the reclamation of this species of state lands, and has intrusted to certain local officers the administration of its details, and has required of them important duties and has directed that "whenever the trustees, or owners of lands, if there be no trustees, certify under oath to the board of supervisors who form the district and show to their satisfaction that the works of reclamation are completed, or that two dollars per acre in gold coin has been expended on the works of reclamation, the board of supervisors must thereupon credit each purchaser in the district with payment in full

for such lands and the purchasers are entitled to patents therefor." Pol. Code, §§ 3476, 3477. But there is nothing herein which excludes the operation of the general provision in reference to contests before the patent has been issued to determine whether the claimant has stated the truth in his verified application to the Surveyor General. He is "entitled to the patent" upon the assumption, of course, that he has complied with the law, and has not committed perjury, but, if the issue as before indicated has been properly referred, he must meet it in court. Is there anything in the said act of 1893 excluding the operation as to claimants thereunder of the general provision of the law in reference to contests? The only allusion to the question is found in section 4, which provides that "no application to purchase land under this act shall be approved by the Surveyor General until the expiration of ninety days from the filing thereof in his office and meanwhile the land shall be subject to the adverse claim of any actual settler who has resided thereon when the said application was filed."

In *Wrinkle v. Wright*, 136 Cal. 494, 69 Pac. 150, it is said that "the above provision was only intended for the purpose of giving those who were actual settlers at the time the application was filed the preferred right to purchase"; and it would seem to be contemplated that within the 90 days this preferred right of "actual settlers" might be established before the Surveyor General who would thereupon decline to approve the original application to purchase. In the *Wrinkle Case*, supra, it is further stated in regard to this act that "section 1 prescribes the conditions which entitle a party to purchase; and any applicant to purchase may show in a contest that he possesses the qualifications which entitle him to purchase, and that the party with whom he is contesting does not possess the requisite qualifications. The right to contest follows from the right of a qualified applicant to purchase."

As to the liability of a contest before the patent has been actually issued, the law makes no distinction between a claimant who has paid the purchase price directly in coin, and him who has been subjected to his just proportion of the expense of reclamation, and there certainly can be no difference in principle.

Respondent's argument that she is entitled to a patent because she has a vested right to it by reason of having complied with the requirements of the law would be of compelling force if addressed to the court wherein the aforesaid actions are pending; but, when presented to this forum in this proceeding, it ignores the fact that the Legislature has provided the other course for the determination of whether she has in fact complied with the requirement of the statute. The following cases are cited by respondent as upholding her contention that, after the payment in full for the land, she became the

owner and the state a mere trustee of the legal title, which it was bound to convey on demand. *People v. Shearer*, 30 Cal. 647; *Bludworth v. Lake* (No. 1) 33 Cal. 262; *Pratt v. Crane*, 58 Cal. 533; *McCabe v. Goodwin*, 106 Cal. 488, 39 Pac. 941; *Pioneer Land Co. v. Maddux*, 109 Cal. 640, 42 Pac. 295, 50 Am. St. Rep. 67; *Stark v. Starr*, 6 Wall. (U. S.) 402, 18 L. Ed. 925; *Huff v. Doyle*, 93 U. S. 558, 23 L. Ed. 975; *Wirth v. Branson*, 98 U. S. 118, 25 L. Ed. 86; *Benson Mining Co. v. Alta Mining Co.*, 145 U. S. 432, 12 Sup. Ct. 877, 36 L. Ed. 762. They are not in point here for reasons already stated. When respondent proves in the suits pending in Kings county that she has complied with the statutory requirement, under the authority of those cases, the judgment must necessarily be in her favor; and it must be presumed that the proper officers in consonance with said judgment will do their duty and issue to her the patent. Respondent's argument that because of full payment she has a vested right to the patent would in effect lead to this: Within fifty days after the approval of the application by the Surveyor General (Pol. Code, § 3440) an applicant if he desires may make a complete payment, and thereby prevent or nullify a contest although the patent could not be issued until 10 months thereafter. This view is not countenanced by the decisions we have already considered. Again, the application for a writ of mandate seems an unnecessary proceeding. The suits begun in Kings county afford a specific and adequate remedy for respondent and one which is equally convenient, beneficial, and effective as the proceeding by mandamus. It is true that the Surveyor General is not therein made a party, but the contestants are, and they will be bound by any judgment rendered therein, although not affected by the judgment in the case at bar; and it must be assumed that due effect will be given to the proceedings and judgment in said court. At least the duty of the Surveyor General to prepare the patent and certificate as claimed by respondent is not so clear under the circumstances as to justify the issuance of the writ of mandate.

Besides, since the suit in the said superior court of Kings county was brought by respondent and the questions involved can be properly and finally determined in that proceeding, respondent should be held to have voluntarily selected that forum in which to litigate her rights and she might well be considered as estopped by her own conduct from afterwards seeking to transfer the controversy to another jurisdiction and invoking other forms of relief. *Spelling on Injunction and Other Extraordinary Remedies*, § 1376, and cases cited.

At any rate, we find ourselves unable to agree with the learned trial judge that the writ should issue, and the judgment is therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

SUMMERS v. GEER et al.

(Supreme Court of Oregon. Dec. 17, 1907.)

1. PUBLIC LANDS—DISPOSAL—OFFICES OF LAND COMMISSIONER AND AGENT.

The Governor was made land commissioner in 1873 by Hill's Ann. Laws 1892, § 3595, with power to locate all lands to which the state was entitled. Subsequently, by Act Feb. 18, 1899 (Laws 1899, p. 156), which repealed section 3597 and its amendments of 1895 (Laws 1895, p. 7) and 1899 (Laws 1899, p. 94), providing for an agent's appointment and fixing his duties, the Governor was made land commissioner, with authority to appoint such agents as might be necessary in the performance of his duties, the agents thus having no specified duties other than to aid the commissioner in locating the lands. *Held*, that the commissioner and agents were not agents of the state for the sale of state lands, and, in an action against them for defrauding a person desiring to buy state lands, allegations that they neglected to prepare and keep for public use, a list of base land, and that they refused to receive applications for the purchase of indemnity land, etc., are immaterial, since those matters were not within their duties.

2. SAME—AUTHORITY TO SELL LAND—SELLING LIEU LAND NOT YET SELECTED.

Hill's Ann. Laws 1892, § 3597, as amended in 1895 (Laws 1895, p. 7), makes it a duty of the state land board to proceed immediately to select lieu lands and perfect title thereto in the state, and keep a list of such as are for sale, etc. B. & C. Comp. § 3296 (amendment of 1899), provides that applications to purchase state lands can be made only to the state land board by filing the application with its clerk. Hill's Ann. Laws 1892, § 3619, authorizing a prospective purchaser to ascertain lands lost to the state, and have the land board select other lands desired by him in lieu thereof, was repealed in 1895, since which time the law has not contemplated sales of indemnity lands or applications for their purchase until they have been selected and title perfected in the state. *Held*, that the land agent or board has no authority to make contracts for the state to sell lieu land not yet selected and to which title has not been perfected, and, if it were optional with the state land agent or board to select such lieu land as a prospective purchaser suggests, upon base to be established by the purchaser, board, or agent, the approval by the United States Land Department of the selection would be at the applicant's risk.

3. FRAUD—ACTION—COMPLAINT—SUFFICIENCY.

In an action for fraud against a state land commissioner and agents, a count of a complaint which alleges that plaintiff was led by two of the defendants to buy information of the other that certain school sections lost to the state were mineral in character, when, in fact, they were not mineral in character, and the information was false, and that having selected lieu land thereon his application was not approved by the United States Land Department, but does not allege that the defendants by whom he was induced to purchase the information knew the kind of information possessed by the one selling it, nor in any way became liable as guarantors of or parties to the representations made him, does not state a cause of action against them.

4. PLEADING—DUPLICITY.

A count of a complaint in an action for fraud alleged that one of the defendants, a state land agent, with intent to defraud plaintiff, falsely represented himself to be in possession of private records and information as to mineral lands for which the state was entitled to indemnity selections, which information he offered to sell to plaintiff, and pretended that for a certain sum he would furnish to the other land agent for plaintiff information as to the whereabouts of certain available mineral base land

for which indemnity lands were due the state, and which would be approved by the Land Department and Secretary of the Interior, all of which was done with knowledge of its falsity, and that he thereby fraudulently obtained plaintiff's money. *Held* that, though the terms of a contract are set up as constituting part of the means by which the fraud was consummated, the count was not duplicitous, since recovery was sought only upon the fraud and deceit, while to render a pleading duplicitous it must appear that two or more causes of action are relied upon for a single recovery.

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Action by George Summers against T. T. Geer and others. Judgment for defendants, and plaintiff appeals. Affirmed in part, and reversed and remanded in part.

See 85 Pac. 514.

This suit is brought to recover as damages money obtained from plaintiff by conspiracy and fraud. The complaint consists of 340 pages, and is even too lengthy to include the first count in this statement. It will be sufficient to state generally the ground of plaintiff's claim. From January, 1890, to January, 1903, defendant T. T. Geer was Governor and ex officio land commissioner of the state of Oregon, and defendants L. B. Geer and W. H. Odell were state land agents, appointed by the Governor. During that time, especially in 1902, defendants conspired for the purpose of defrauding all persons desiring to purchase indemnity lands from the state by withholding information from them as to the state's rights to indemnity lands in lieu of section 16 and 36, lost to the state by the creation of forest and Indian reserves, adjustment of state boundaries, and survey of nonnavigable lakes, of which there were 82,000 acres, called "lieu land" base. Defendants announced to the public that the state had exhausted its supply of such base lands, and, for the purpose of aiding defendant W. H. Odell in the sale of information of such sections lost to the state by reason of their mineral character, called "mineral" base, it was the custom of the said T. T. and L. B. Geer to require applicants for the purchase of indemnity lands to furnish base at their own expense, and to refer them to W. H. Odell for information as to such base, to refuse applications for the purchase of lieu land, except through W. H. Odell, and to refuse to give information to applicants as to nonmineral base—all alleged to have been done pursuant to such conspiracy and for the purpose of aiding W. H. Odell to sell such information as to pretended mineral base, and with knowledge of the facts, that T. T. and L. B. Geer failed to prepare and keep for public use a list of such base lands for which indemnity is due the state. The said L. B. Geer was accustomed to receive the applications to purchase, and collect from such applicants the first payment of the purchase money, and also the compensation to W. H. Odell for such information prior to the selection of said lieu lands, and hold

and retain the same until the indemnity lists were furnished the United States Land Office, and when approved by the local land officers to file such applications with the clerk, and cause certificates of sale to issue thereon to such purchaser before such selections were approved by the General Land Office. The allegations of the complaint relating to the conspiracy on the part of T. T. and L. B. Geer were alleged at great length and with particularity. The complaint further states that, pursuant to such conspiracy, W. H. Odell fraudulently represented to the plaintiff that he had information and knowledge of 320 acres of mineral base which he would furnish to plaintiff for \$480, and that by reason of the acts and representations of defendants, and relying upon the same and believing them to be true, plaintiff paid to said defendant W. H. Odell the said sum of \$480 for such information of alleged mineral base, viz., the E. $\frac{1}{2}$ of section 16, township 14 S., range 31 E., W. M., and, based thereon, plaintiff applied to said L. B. Geer for the purchase of 320 acres in section 32, township 11 S., range 14 E., W. M., from the state as lieu land, and said L. B. Geer procured from the clerk a certificate of sale therefor in favor of plaintiff; that plaintiff was ignorant of the fact that W. H. Odell was an agent of the state; that said base, so furnished by W. H. Odell, was not mineral in character, and had not been lost to the state, and could not be used as base for the purchase of lieu lands; and plaintiff's application was rejected, and the certificate issued to him canceled. Plaintiff claims damages in the sum of \$480, with interest, and punitive damages in the sum of \$1,000. There are 25 other counts in the complaint, all based upon the same allegations as the first, except that they are upon claims in favor of other persons and assigned to plaintiff. Motions were filed to strike out all the allegations which alleged any acts of defendants T. T. and L. B. Geer tending to show their custom with, or representations to, the public, the greater portion of which were sustained. A general demurrer to the complaint was filed by the defendant, W. H. Odell, on the ground that several causes of action have been improperly united, and that it does not state facts sufficient to constitute a cause of action, also by the defendants T. T. and L. B. Geer, for the reason that it does not state facts sufficient to constitute a cause of action against them, which were sustained by the court, judgment being rendered thereon dismissing the action.

M. E. Pogue, for appellant. Geo. G. Bingham, John W. Reynolds, and A. O. Condit, for respondents.

EAKIN, J. (after stating the facts as above). It becomes necessary to notice the provisions of the statute as to the power and duties of the land commissioner and land

agent. The Governor was first made land commissioner in 1878, with power to locate all lands to which the state was entitled (Hill's Ann. Laws 1892, § 3595), and by section 3597 he was authorized to appoint an agent to select state lands. This latter section was amended in 1895 by giving more specific directions as to the powers and duties of such land agent, and also requiring the state land board to ascertain all the losses sustained by the state by reason of the occupation of the sixteenth and thirty-sixth sections and to select lieu lands therefor, and "that a list of such lands so selected be kept in a book accessible to every one, in the clerk's office * * * accurately describing the lands for sale and the land for which it was taken in lieu." This section is a part of chapter 52 of Hill's Annotated Laws of 1892, and was again amended by the Legislature in 1899 with additional duties upon the state land agent as to such lieu lands and giving to him general supervision of all lands acquired by the state by foreclosure of mortgages, etc. This amendment was approved and became a law February 17, 1899. Laws 1899, p. 94. At the same term of the Legislature a new act was passed relating to the selection and sale of state lands, which was approved by the Governor and became a law on February 18, 1899 (Laws 1899, p. 156), expressly repealing chapter 52, of which section 3597 was a part. This act of February 18, 1899, appointed the Governor as land commissioner, and empowers him "to locate the lands to which the state of Oregon is entitled," and he "is authorized to appoint such agent or agents as may be necessary in the performance of his duties."

Applications to purchase state lands can be made only to the state land board, and must be filed with the clerk of the board, and the purchase price paid to him, but since February 18, 1899, until February, 1907, the state land agent has had no specified duties other than to aid the commissioner in locating the lands to which the state is entitled. Therefore the allegations in the complaint that the defendants T. T. and L. B. Geer neglected to prepare or file, and keep for public use, a list of such base land, and that they refused to receive applications for the purchase of indemnity lands, or required applicants to furnish base at their own expense, and other matters with reference to certain customs and usages of defendants, are wholly immaterial, as these matters were not within their duties or province. They were not agents of the state for the sale of state lands. Section 3597, Hill's Ann. Laws 1892, as amended in 1895 (Laws 1895, p. 7), made it a duty of the state land board to proceed immediately to select such lieu lands, and perfect title thereto in the state, and keep a list of such that are for sale, together with the base upon which the selection is made. This, however, was to be a list of selections to which title had been perfected and of the

lands for sale. By section 3296, B. & C. Comp. (amendment of 1899), applications to purchase state lands can be made only to the state land board by filing the same with the clerk of the board. It is alleged that T. T. and L. B. Geer directed and advised the clerk of the state land board to refer all applicants for lieu lands to L. B. Geer; but the clerk was not the clerk of the Governor or agent, and they had no control or authority over him. The burden of plaintiff's allegations upon the matter of the fraud of T. T. and L. B. Geer is that it was their custom and usage to represent to the public and plaintiff that there was no available non-mineral base and to refer all applicants to W. H. Odell for information as to mineral base, and that plaintiff, having knowledge of this custom, applied to W. H. Odell for such information to his damage.

In 1902 there was no law authorizing a prospective purchaser to ascertain lands lost to the state, and based thereon have the board select other lands desired by him in lieu thereof. The act of 1887 (Hill's Ann. Laws 1892, § 3619) did authorize such a proceeding, but this was repealed by the act of 1895, supra, since which time the law has not contemplated sales of indemnity lands or applications for their purchase until the same have been selected and title thereto perfected in the state. It was not within the power or authority of the agent or board to make contracts for the state to sell lieu lands not yet selected and to which the state had not perfected title. It may have been optional with the state land agent or board to select such lieu land as some prospective purchaser might suggest upon base to be established by such purchaser, board, or agent; but such was not made their duty, and the approval by the United States Land Department of such selection would be at the risk of such applicant. Much that is alleged as against T. T. and L. B. Geer is immaterial by reason of the terms of these statutes. Plaintiff seeks to recover, not because he was induced or compelled to pay for information as to available base, but because of the fraud by which he was led to buy information that certain school sections were mineral, when, in fact, such information was false, and such lands were not mineral in character, and because of his consequent loss of the money paid therefor and failure to secure lieu land thereon. It is not alleged as against T. T. and L. B. Geer that they knew the kind of information possessed by W. H. Odell as to the mineral character of the land, or that they represented that the land was mineral, or in any way made themselves liable as guarantors or parties to the representations of W. H. Odell. Therefore the complaint is insufficient to create a liability as against T. T. and L. B. Geer; and the demurrer was properly sustained.

As to the sufficiency of the complaint as against W. H. Odell, it is alleged that, with

intent to defraud plaintiff, he falsely represented himself to be in the possession of private records and information as to the whereabouts of large tracts of mineral lands, for which the state of Oregon was entitled to indemnity selections, which information he offered to sell to the plaintiff; and that he falsely represented and pretended to plaintiff that for the sum of \$480 he would furnish for plaintiff to L. B. Geer, state land agent, information as to the whereabouts of 320 acres of available mineral base land, and that such lands were mineral in character and valid base, for which indemnity lands were due the state of Oregon, and would be approved by the Land Department and Secretary of the Interior, all of which, it is alleged, was done with knowledge of its falsity, and that he thereby fraudulently obtained plaintiff's money. It is claimed that this was objectionable for duplicity in alleging upon breach of contract and upon fraud and deceit. To constitute duplicity in pleading, it is not enough that it appears therefrom that the plaintiff has more than one cause of action. It must appear that he relies on more than one as the ground of a single recovery. It is not objectionable because he sets up the terms of a contract as constituting part of the means by which the fraud was consummated, so long as he does not seek to recover upon it. *Bingham v. Lipman*, 40 Or. 363, 67 Pac. 98; *Raymond v. Sturgis*, 23 Conn. 134. But we think the complaint clearly shows that the plaintiff is relying upon the fraud and deceit, and not upon a breach of contract. We understand the rule to be that a pleading is duplicitous only when it so alleges both the contract and deceit that, upon the trial, one recovery may be had upon either the contract or the deceit; but the complaint here plainly discloses that the recovery is sought only for the deceit, and states a good cause of action against W. H. Odell, and his demurrer was improperly sustained.

The judgment, therefore, will be sustained as to T. T. and L. B. Geer, and reversed as to W. H. Odell, and remanded to the lower court for such further proceedings as may be proper and not inconsistent with this opinion.

SUTHERLIN v. BLOOMER.

(Supreme Court of Oregon. Dec. 17, 1907.)

1. APPEAL—EXCEPTIONS—TRIAL DE NOVO.

Under the express terms of B. & C. Comp. §§ 406, 535, on appeal suits in equity are triable de novo on the transcript and evidence accompanying the appeal, and accordingly exceptions to the rulings on such suits are unnecessary, except in the instance provided for by section 406, where the court may refuse to permit testimony offered to be taken over its rulings sustaining objections thereto, in which event an exception to such refusal appearing in the record is sufficient to show no waiver of the right claimed is intended. Hence in equity appeals a bill of exceptions is unnecessary, and one cannot be considered, and, when accompanying the tran-

script, must be treated as surplusage, except in so far as the testimony there certified may be applied in determining the issues involved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3637-3644.]

2. SAME—EQUITY—OBJECTIONS TO TESTIMONY—NECESSITY FOR.

In equity suits, in order that objections to the admission of testimony may be of avail on appeal, they must be taken and noted in the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1258-1277.]

3. SAME—RECORDING TESTIMONY OVER RULING.

Where, in equity cases, testimony is tendered, but objections thereto are sustained, the party offering it may have it taken and recorded over the court's rulings by offering to pay the additional expense incurred thereby in the event the proffered testimony shall finally be held inadmissible.

4. SAME—REMANDING FOR ADMISSION OF EVIDENCE.

Where, in equity cases, testimony is proffered, objections thereto sustained, and notwithstanding a request that it be taken and recorded, as provided in B. & C. Comp. § 406, the court refuses to permit the testimony to be taken, and it appears on appeal that the rejected testimony is essential to a proper determination of the issues, the case may be remanded, with directions to admit the testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4392.]

5. SAME.

When, in an equity case, objections are sustained to testimony offered but recorded regardless of such ruling, and, relying upon the correctness of the ruling, no proof is offered in response to the testimony, and on appeal it shall be determined that the court erred in sustaining the objections thereto, the cause may be remanded for further proceedings, if deemed essential to a proper determination of the parties' rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4392.]

6. SAME—REVIEW—QUESTIONS PRESENTED.

Where defendant in an equity suit manifested no desire to have testimony reported over the trial court's rulings, as might have been done under the express terms of B. & C. Comp. § 406, questions as to the admissibility of the excluded testimony are not presented on appeal, except in so far as necessary to a review of other errors assigned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2905-2909.]

7. ACCORD AND SATISFACTION—SETTLEMENT OF CAUSES—CONSIDERATION.

Any action, suit, or proceeding may be settled by accord and satisfaction thereof by a separate agreement, if made for a valuable consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Accord and Satisfaction, §§ 14-20.]

8. SAME—INTENTION.

Whether an agreement for the settlement of a suit or the performance thereof shall constitute a satisfaction depends upon the intention of the parties thereto; the rule applying to oral contracts, if executed, as well as written ones.

9. EVIDENCE—PAROL—ADMISSIBILITY TO AFFECT WRITING.

Parol testimony is inadmissible to contradict, add to, detract from, or vary a written contract which is clear and explicit, and contains no latent ambiguities.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1756.]

10. SAME—CONSIDERATION.

Where the statement in a written agreement as to the consideration consists of a

specific promise to perform certain acts, it cannot be modified by parol evidence; and so, where a written agreement recited the release of attachments as a consideration, but states no basis for an inference that the actions were to be dismissed, parol testimony is inadmissible to show the latter fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1912-1928.]

11. PLEADING—ANSWER—INSUFFICIENCY—FAILURE TO DEMUR.

The insufficiency of an answer may be urged in opposition to defendant's motion for judgment on the pleadings in the lower court or on appeal, though no demurrer was filed thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1339, 1375.]

12. SAME—PLEA IN ABATEMENT—CONSTRUCTION.

Since pleas in abatement do not question the merits, but merely tend to delay the remedy, they are not favored, and much strictness is applied to them, and they will not be aided in construction by any intendments. With them correctness of form is a matter of substance, and any defect of form is fatal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 219.]

13. SAME.

Where matter concludes in bar, it must be so treated, and its character must be determined not from the subject-matter of the plea, but from its conclusion or prayer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 219-230.]

14. SAME—WAIVER OF PLEA.

By not pleading a contract in abatement, defendant waived any right to rely upon it for that purpose, and may not insist that under the contract the decree against him was premature.

15. APPEAL—REVIEW—HARMLESS ERROR—FINDINGS.

Under B. & C. Comp. § 406, requiring findings on all material issues in equity cases, and providing that on appeal the cause shall be tried anew without reference to such findings, failure to make findings is not reversible error, where the transcript discloses all the proceedings had and evidence taken below, and especially where the complaining party does not appear to have been prejudiced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4234-4239.]

16. TRIAL—FINDINGS AND CONCLUSIONS OF LAW—WHEN NOT NECESSARY.

B. & C. Comp. § 406, requiring the court in equity cases to make findings of fact and conclusions of law, does not contemplate that findings of fact and conclusions of law be made by the trial court, where judgment is had on the pleadings or for want of an answer.

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Suit by R. Sutherland against Thomas C. Bloomer to foreclose a chattel mortgage. From a decree for plaintiff, defendant appeals. Affirmed.

This is a suit to foreclose a chattel mortgage on furniture and other property owned by, and in the possession of, the defendant, as mortgagor; the chattels involved being in what is known as the "McClallen House," in Roseburg, Or., which was at the time the proceedings were begun being conducted by him as a hotel under an unexpired lease thereon. The complaint is in the usual form, and demands judgment for \$5,000, with interest, costs, and disbursements, including \$250 attorney fees, together with a decree of

foreclosure to satisfy the sums demanded. Three months after service of summons defendant answered, admitting that on the date of the filing of the suit he was indebted to plaintiff in the sum mentioned in the complaint, except as to attorney fees, concerning which he denies that \$250, or any other sum, is reasonable to be adjudged by the court for the prosecution of the suit. For a further, separate, and affirmative answer he alleges: "That on the 19th day of August, 1905, the said plaintiff and the defendant herein, and one Chan Hi, the Douglas County Bank, and the H. Marks Company mutually entered into an agreement in full accord and satisfaction of the said indebtedness set forth in plaintiff's complaint, which agreement was in writing and was in words and figures as follows, to wit: 'This indenture, made and entered into this 19th day of August A. D., 1905, by and between Thos. C. Bloomer, of Roseburg, Douglas County, Oregon, the party of the first part, and J. R. Sutherlin, Chan Hi, the H. Marks Co., a corporation, and the Douglas County Bank, a corporation, the parties of the second part, witnesseth, that whereas each of said parties of the second part is a creditor of the party of the first part; and whereas on the 16th day of August, 1905, the three last named of the parties of the second part filed in the circuit court of the State of Oregon for Douglas County actions at law against said party of the first part and that writs of attachment have been issued therein in favor of the H. Marks Co., and the Douglas County Bank and all the property of the party of the first part has been levied upon under said writs of attachment: Now, therefore, in consideration of the release of said writs of attachment aforesaid by the Douglas County Bank and by H. Marks Co., the said Thos. C. Bloomer has sold, assigned, set over and delivered to all of the said parties of the second part in trust for each of said parties jointly and severally, that certain lease of the McClallen House property which said lease of said property was executed by Electa McClallen, on the 9th day of May, 1901, in favor of M. Schmidt, and by said M. Schmidt on the 18th day of November, 1903, assigned to J. R. Sutherlin, and thereafter and on the 31st day of March, 1904, assigned by said J. R. Sutherlin to Thos. C. Bloomer, the first party named herein. Now the conditions of this sale and assignments are such that: whereas, there is due to the said J. R. Sutherlin, one of the parties of the second part, named herein, on a certain note given by the party of the first part to said J. R. Sutherlin on the 31st day of March, 1904, for the sum of \$5000, bearing interest at the rate of 8 per cent. per annum an unpaid balance of ——— dollars; and whereas there is due to Chan Hi, one of the parties of the second part named herein, from the party of the first part the sum of \$1355; and whereas there is due from the party of the first part to the H. Marks Co., the sum of \$781.83 bear-

ing interest at the rate of 8 per cent. per annum from August 15, 1905; and whereas, there is due from the party of the first part to the Douglas County Bank, one of the parties of the second part herein, an unpaid balance of a promissory note of \$300 bearing interest at 6 per cent. per annum after July 31, 1905: Now, therefore, should the party of the first part continue in the conduct and management of the said McClallen House property and conduct the same as a first-class hotel and after defraying all current expenses necessary in the conduct of said business, and of the net proceeds of said business pay into the Douglas County Bank for the pro rata use and benefit of the said second parties, according to the amount of their respective claims, until each and all of such claims are fully paid, satisfied, and discharged, together with all costs heretofore incurred and which may hereafter accrue by reason of such claims; then this sale and assignment shall be null and void, otherwise to remain in full force and effect. It is hereby fully agreed and understood and made a part of this contract and one of the conditions to its faithful performance, that Bert Westbrook, the present clerk of the said McClallen House, is to remain in his present position as agent of the parties of the second part; that he, the said Bert Westbrook, is to keep the books of the said McClallen business, under the terms of this contract and to see that the payments herein conditioned are fully and fairly made; that any violation of this last condition will work a forfeiture of this entire contract. Given under our hands and seals this 19th day of August, 1905. Thos. C. Bloomer. [Seal.] J. R. Sutherlin. [Seal.] Chan Hi. [Seal.] H. Marks Co. [Seal.] Douglas County Bank, by J. H. Booth, Cashier. [Seal.] Signed, sealed, and delivered in the presence of W. W. Cardwell.' That the said plaintiff accepted the said agreement and security in full satisfaction of said claims set out in said complaint, which said claims mentioned in said complaint are the same as set forth in said agreement. That said agreement is still in force and effect and defendant has not violated the terms thereof, and that plaintiff has accepted part payment under the terms thereof. That all moneys due under said agreement have been paid in accordance with the terms thereof, and that there is nothing now due under said contract. Wherefore defendant prays judgment and decree herein dismissing plaintiff's complaint and for such other and further relief as may be meet and equitable and defendant will ever pray." Some time after the filing of the answer, and during a regular term of court, defendant moved for judgment on the pleadings, alleging failure on the part of plaintiff either to reply or demur to the answer. Afterwards, during the same term, but prior to the disposal of the motion, plaintiff filed a demurrer to the answer, which, together with defendant's motion, was overruled. Plaintiff then replied,

admitting the execution of the contract as alleged, but denying that it was executed or accepted in satisfaction of the claim involved. At the trial plaintiff introduced evidence relative to attorney fees, and rested. Defendant then offered testimony tending to prove that the contract set out was intended to be given in full satisfaction of the claim and mortgage mentioned in the complaint; that the written agreement given in his answer was accepted by plaintiff in full satisfaction thereof; and that, as an additional consideration to that stated in the written instrument for its execution, plaintiff agreed to dismiss the foreclosure suit. Objection was made to this testimony as being an attempt to vary by parol the terms of a written instrument. Defendant, for the same purpose, also offered proof as to the value of the lease assigned to plaintiff and referred to in the contract, which offer was objected to as being incompetent, irrelevant, and immaterial. Plaintiff's objections to all the testimony offered by the defendant were sustained, and the evidence offered was excluded by the court. A decree was entered for plaintiff, from which defendant appeals. The errors assigned and here urged are (1) the overruling of the motion for judgment on the pleadings; (2) the excluding of the testimony offered by defendant; (3) the failure of the court to make any findings upon which to base a decree.

Albert Abraham, for appellant. W. W. Cardwell, for respondent.

KING, C. (after stating the facts as above). This cause appears to have been tried, evidence offered, exceptions taken to the court's rulings thereon, and brought here on a bill of exceptions as in actions at law. However, our statute clearly provides that suits in equity on appeal shall be tried *de novo* on the transcript and evidence accompanying it. B. & C. Comp. §§ 406, 555; Robson v. Hamilton, 41 Or. 246, 69 Pac. 651; Powers v. Powers, 46 Or. 481, 80 Pac. 1058. It accordingly follows that exceptions to the rulings of the court in equity suits are unnecessary, save in the particular instance designated in B. & C. Comp. § 406, where the court may refuse to permit testimony offered to be taken over its rulings in sustaining objections thereto, in which event an exception to such refusal appearing in the record is sufficient to indicate that no waiver of the right claimed is intended. A bill of exceptions in suits in equity, therefore, cannot be considered on appeal, and, when accompanying the transcript, must be treated as surplusage, except in so far as the testimony there certified to may be applied in determining the issues involved. The objections taken as to evidence offered, if urged on appeal, may be considered; and where testimony is tendered, but objections to the interrogatories are sustained, and the party offering the testimony demands that it be taken and recorded over the court's rulings,

as provided in B. & C. Comp. § 406, but, notwithstanding such request, the court refuses to permit the proffered testimony to be taken, the cause may be remanded, with directions to admit the desired testimony, provided the testimony rejected shall appear admissible or necessary to a proper determination of the issues involved; but, in no event, is a bill of exceptions necessary in equity appeals. Again, if the court sustains objections to interrogatories, but permits the witness to answer, and allows the response to be recorded over its rulings, and the opposite party, relying upon the correctness of the court's action, offers no proof in response to the testimony thus taken, and on appeal it shall be determined that the court erred in sustaining the objections thereto, the appellate court may, if deemed essential to a proper determination of the rights of the litigants, remand the cause for further proceedings. Robson v. Hamilton, 41 Or. 246, 69 Pac. 651. The record in this cause discloses all the evidence introduced by plaintiff, together with the questions asked by counsel for defendant with objections made thereto. The answers were not taken over the rulings of the court, nor did defendant so request, but proceeded as in a law action. Had defendant demanded that the questions be answered, and offered to pay the additional expense incurred thereby, then, since the questions asked appear with the court's ruling thereon together with counsel's statement as to the purpose of the interrogatories, to which objections were sustained, he would be in position to urge the alleged erroneous rulings of the court in this respect as grounds for remanding the cause for further proceedings; but, since he manifested no desire to have the testimony taken and reported over the rulings of the court, the question as to the admissibility of the excluded testimony is not properly before us for determination, except in so far as it may become necessary to a decision upon the first error assigned; and, since the transcript includes all proceedings except the points urged under the bill of exceptions, the points presented by the transcript of the judgment roll, including testimony taken, will be considered so far as entitled thereto under the record.

It is maintained that, inasmuch as the plaintiff was in default in pleading to the answer, the defendant's motion for judgment on the pleadings should have been sustained. This position appears to be based upon the theory that, notwithstanding the complaint alleges reasonable attorney fees, which is denied by the answer, the affirmative allegations in the answer are sufficient to preclude plaintiff's recovery of any portion of the claim named in the foreclosure suit, including attorney fees; and not having been denied by filing a reply, and no showing having been made as to the cause of the delay, a decree should be entered accordingly. The question as to whether it was within the

power of the court to overrule the motion and allow plaintiff to file a reply or otherwise plead could be material here only in the event the answer states sufficient facts to entitle defendant to a dismissal of the foreclosure suit.

The question accordingly arises as to whether the affirmative allegations of the answer, which the failure to reply, for the purpose of the motion, admitted, state sufficient facts to entitle the defendant to a decree thereon. It appears well settled by the authorities that any action, suit, or proceeding may be settled by accord and satisfaction thereof by a separate and distinct agreement, if entered into for a valuable consideration; and as to whether the agreement or the performance thereof shall constitute a satisfaction depends upon the intention of the parties thereto. 1 Cyc. 336. And this is the rule with an oral contract, if executed, as well as when reduced to writing, but it is equally as well settled that when a contract between the parties is reduced to writing and such writing is clear and explicit, containing no latent ambiguities, parol evidence is not admissible, either to contradict, add to, detract from, or vary its terms. *Edgar v. Golden*, 36 Or. 448, 48 Pac. 1118, 60 Pac. 2; *Ruckman v. Imbler Lbr. Co.*, 42 Or. 231, 70 Pac. 811; *Hilgar v. Miller*, 42 Or. 552, 72 Pac. 319. But it is argued that since the answer avers that there was a prior agreement whereby the contract set out in the answer should be accepted in full satisfaction of the claim specified in the suit, and that such agreement was a part of the consideration given to defendant by plaintiff, whereby defendant executed the instrument, and under which he permitted plaintiff to receive the lease to the hotel, and whereby he let plaintiff's agent, named in the writing, look after the collection of Sutherlin's pro rata of the moneys coming to him under its terms, that this is sufficient, if true, to entitle him to a dismissal of the suit. While these facts are alleged, it will be observed that the answer also avers that the agreement entered into between plaintiff and defendant, together with Chan Hi, the H. Marks Company, and the Douglas County Bank, for the purpose of such accord and satisfaction, consisted of the written instrument quoted in the answer, thereby restricting the agreement relied upon to the one there specified. This clearly indicates that the contract, by which the satisfaction of the claims mentioned in the complaint was to be accomplished, is the written instrument referred to, and that it contains all the terms of an agreement between the parties, except the reference to the alleged additional consideration concerning the dismissal of the suit. It is true that this allegation is followed by one to the effect that plaintiff accepted the written contract and security referred to therein in full satisfaction of his claims; but when this statement is construed together with the averment relative to the dismissal of the suit, which it is urged was omitted from, and should have

been included in, the contract, it can have reference only to the covenants contained in the writings between them as set out in full in the answer, and a careful examination of this instrument fails to disclose any intention of dismissing the original suit. In fact, it is clearly stated therein that the consideration on the part of plaintiff and others signing with him consisted of the release of the writs of attachment mentioned, and nothing is there stated from which it could be inferred that any of the suits or actions should be dismissed. On the contrary, it is especially provided, not only that all costs theretofore incurred, but all costs which might thereafter accrue, by reason of the claims involved in the suit and actions pending, should be paid by defendant, thereby indicating, by inference at least, that the suit and actions there named should remain in statu quo until the claims were fully paid in the manner specified in the written contract, or at least until a reasonable time had elapsed, or until the contract should become forfeited through some failure to comply with its terms. From any point of view, therefore, we can find nothing in the contract from which it can be inferred that there was any intention of dismissing either this suit or the actions mentioned prior to a full payment of the claims in controversy. But it is argued that it is always permissible to show by parol other and additional consideration than that specified in the contract, and that the averments are sufficient for that purpose; and this position is tenable where a monetary consideration is specified. *Burkhart v. Hart*, 36 Or. 586, 60 Pac. 205. But, in the case before us, the consideration specified in the written contract consists of certain acts to be performed, and the authorities are practically unanimous in holding that, where the statement in the written instrument as to the consideration is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to perform certain acts, it cannot be changed or modified by parol or extrinsic evidence. A party has a right to make the consideration of his agreement of the essence of the contract, and, when this is done, the consideration for the contract, with reference to its conclusiveness, must stand upon the same footing as its other provisions, and accordingly cannot be affected by the introduction of parol or extrinsic evidence. 17 Cyc. 661; *Hilgar v. Miller*, 42 Or. 555, 72 Pac. 319; *Walter v. Dearing* (Tex. Civ. App.) 65 S. W. 380; *Cheesman v. Nicholl*, 18 Colo. App. 174, 70 Pac. 797; *Ind. Union R. Co. v. Houlihan*, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; *Trice v. Yoeman*, 60 Kan. 742, 57 Pac. 955; *Sayre v. Burdick*, 47 Minn. 367, 50 N. W. 245.

The recital in the contract that it was entered into in consideration of the attachments being released, together with the manner of paying the indebtedness, etc., as there detailed, excludes the idea that any other agreements were to be performed, or of there being

any other consideration. Then, conceding all the facts disclosed by the answer to be true, which the absence of a reply at the time of the motion admitted, it appears that defendant would not be entitled to a decree of dismissal. The same rule must prevail as to answers in this respect as in a complaint, from which it follows that it is immaterial that no demurrer was filed, for its insufficiency can be urged in opposition to the motion, whether in the court below or on appeal. *B. & C. Comp. 72; Moore v. Halliday, 43 Or. 250, 72 Pac. 801, 99 Am. St. Rep. 724.*

It is also maintained, in effect, that the contract discloses that the sums involved were to be paid out of the net proceeds of the business under the management there agreed upon, and that all payments due under these terms are alleged to have been paid, which is not denied, for which reason it is suggested that the decree is premature. The allegation that the payments due have been paid has reference only to the payment out of the net proceeds, so far as they have accumulated, and not that the claims specified therein have been fully paid. Plaintiff does not rely upon this instrument for recovery, but upon the original contract as contained in the mortgage. Hence it was unnecessary for him either to allege or prove a failure on the part of defendant to comply with the terms of the new agreement. The defense that the decree is premature could avail the defendant only if pleaded in abatement; and, while the facts as alleged may have been sufficient to abate the suit, if pleaded for that purpose, they are pleaded in bar. This not only appears from the prayer of the answer, but it has been treated throughout the case by defendant as a plea in bar. Pleas in abatement, since they do not question the merits, but merely tend to delay the remedy, are not favored. Much strictness is accordingly applied to them, and they will not be aided in construction by any intendments. With them correctness of form is a matter of substance, and any defect of form is fatal. *1 Ency. Pl. & Pr. 23.* Where matter in abatement concludes in bar it must be so treated (*Morgan's Estate, 46 Or. 242, 77 Pac. 608, 78 Pac. 1020*), and its character must be determined, not from the subject-matter of the plea, but from its conclusion or prayer. *1 Ency. Pl. & Pr. 27; Lyman v. Cent. Vt. R. Co., 59 Vt. 167, 10 Atl. 346; Pitts Sons' Mfg. Co. v. Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156; Collette v. Weed, 68 Wis. 428, 32 N. W. 753.* Defendant, not having pleaded the contract in abatement, necessarily waived any right to rely upon it for that purpose, and accordingly is not in a position to insist that the decree was prematurely entered. *Chamberlain v. Hibbard, 26 Or. 428, 38 Pac. 437.*

The next point to which our attention has been directed is that the court below made no findings of fact, and it is urged that this duty is made imperative by our Code. *B. & C. Comp. § 406,* provides that the court, in ren-

dering its decision in suits in equity, shall set out in writing its findings of fact on all material issues presented by the pleadings together with its conclusions of law, each of which shall be stated separately from the decree and be filed with the clerk, thereafter constituting a part of the judgment roll of such cause; and that the findings of fact shall have the same force and effect as a verdict of a jury in actions at law. These provisions are followed by an exception and qualification thereof, to the effect that on appeal the cause shall be tried anew without reference to such findings. Under this exception, it is clear that a failure to make findings should not constitute reversible error; nor can we conceive of any reason why it should have such effect when all the evidence offered and properly admitted is before the appellate court. It is true that where the evidence has been taken in the presence of the trial judge, and the court has prepared its own findings, they may be of material assistance to this court in reaching its conclusion on close questions of fact. But, since our statute expressly declares that this court shall try the cause anew without reference to the findings of the lower court, it is obvious that the absence thereof cannot be deemed fatal on appeal, even though the statute directs such findings to be made; for, while findings of fact and conclusions of law may, in some instances, be useful and convenient as a part of the records of the circuit court, it does not follow that they are essential here; and especially should the want of such findings not constitute reversible error, nor the cause be remanded on that account, when it does not appear that the complaining party is prejudiced by reason thereof. It is not contemplated by the act that findings shall be made where no issues are tried, and it appears, as a result of the conclusions here reached, that the only material issue made and tried in this cause, under the pleadings in the court below, was in reference to the attorney fees claimed by plaintiff, as to which all the evidence bearing on that question is before us, while the conclusion of the circuit court thereon is contained in the decree. While the findings of fact in some instances might be material and of importance, the want thereof, when appealed, is not reversible error where the transcript discloses all the proceedings had and evidence taken in the court below.

There being no error disclosed by the record, the decree of the circuit court should be affirmed.

II. MARKS CO. v. BLOOMER.

(Supreme Court of Oregon. Dec. 17, 1907.)

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by the H. Marks Company against Thomas C. Bloomer. From a decree for plaintiff, defendant appeals. Affirmed.

Albert Abraham, for appellant. W. W. Cardwell, for respondent.

KING, C. This is an action to recover a balance of \$781.83, with interest, alleged to be due plaintiff from defendant on a promissory note, and was argued and submitted at the same time as the case of *Sutherland v. Bloomer*, 93 Pac. 125, in which an opinion is filed at this time. With the exception of the third error assigned in that suit, the points presented and urged in this action are the same as in that proceeding.

In disposing of the question there argued as to the sufficiency of the answer to entitle defendant to a decree of dismissal, we necessarily determined all questions involved in this appeal adversely to defendant's contention.

Based on the authority of that case, we find there was no error in the proceedings of the court below; and its judgment must accordingly be affirmed.

DOUGLAS COUNTY BANK v. BLOOMER.

(Supreme Court of Oregon. Dec. 17, 1907.)

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by the Douglas County Bank against Thomas C. Bloomer. From a judgment for plaintiff, defendant appeals. Affirmed.

Albert Abraham, for appellant. W. W. Cardwell, for respondent.

KING, C. This is an action by the Douglas County Bank against defendant to recover \$300, with interest, alleged to be due plaintiff on a promissory note, in which the points involved are, in effect, the same as in *Sutherland v. Bloomer* (decided on this date), 93 Pac. 135, except as to the third error there urged.

The judgment of the trial court must accordingly be affirmed.

CHAN HI v. BLOOMER.

(Supreme Court of Oregon. Dec. 17, 1907.)

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by Chan Hi against Thomas C. Bloomer. From a judgment for plaintiff, defendant appeals. Affirmed.

Albert Abraham, for appellant. W. W. Cardwell, for respondent.

KING, C. This is an action at law by plaintiff for the recovery of a balance of \$1,350, alleged to be due him from defendant on a contract for labor. The bill of exceptions discloses the same questions to be involved here as urged in *Sutherland v. Bloomer* (decided on this date) 93 Pac. 135, except as to the third error therein assigned.

That case having determined the points here involved adversely to defendant's contention, it follows that the judgment of the circuit court in this action must be affirmed.

KUNZ v. OREGON R. CO.*

(Supreme Court of Oregon. Dec. 17, 1907.)

1. RAILROADS—INJURIES AT CROSSINGS—AGTIONS—EVIDENCE—VIOLATING SPEED ORDINANCE.

In an action for the killing of a person at a crossing, the fact that the engine was traveling 20 or 30 miles an hour across a public grade road in a city where the lawful speed was 6 miles an hour is a circumstance from which the railroad's negligence might reasonably be inferred by the jury, especially where, in consequence of obstructions to a view of the train, a person was prevented from seeing a locomotive at any

great distance until he came within about 50 feet of the crossing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1120, 1143.]

2. SAME—VIOLATION OF SPEED ORDINANCE.

To authorize a recovery for a personal injury on the ground of a railroad's negligence in violating a speed ordinance, it must appear that the hurt was caused by the unlawful speed without contributory negligence of the injured person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1009, 1095.]

3. SAME—RIGHT OF PERSON TO USE RAILROAD CROSSING.

A traveler on a public road that intersects a railway at grade is entitled to use the crossing, subject to the railroad company's superior right of way, to which when he has notice of the approach of a train he must yield.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 956.]

4. SAME—DUTY TO LOOK AND LISTEN.

A traveler before undertaking to cross a railroad must look along the track in each direction for an approaching train, and if the view is at all obstructed, he must listen, and if he fails to do so without a reasonable excuse, he is negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1043-1056.]

5. SAME—VIOLATION OF SPEED ORDINANCE—PRESUMPTION THAT TRAINS RUN AT LEGAL RATE.

In the absence of evidence to the contrary, a person approaching a railroad crossing in a city may presume that the railroad will not run its trains at a greater rate of speed than allowed by the city ordinance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1071-1074.]

6. SAME—TRIAL—QUESTIONS FOR JURY.

Though the negligence of one party cannot be set up by the other as an excuse for the want of care on his part, yet when, in an action for a personal injury, it appears from plaintiff's testimony that the harm was caused by the negligence of defendant railroad in operating a train, a judgment of nonsuit should not be given unless it is manifest that the person injured was negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1167-1189.]

7. SAME.

Whether decedent, killed at a railway crossing, was negligent at the time, *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1167-1189.]

Appeal from Circuit Court, Multnomah County; J. B. Cleland, Judge.

Action by Martha M. Kunz, administratrix of the estate of David H. Kunz, against the Oregon Railroad & Navigation Company. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial ordered.

This is an action by Martha M. Kunz, as administratrix of the estate of her husband, David H. Kunz, against the Oregon Railroad & Navigation Company, a corporation, to recover damages occasioned by his death which was caused November 21, 1904, by his being struck by a locomotive drawing a passenger train as he was crossing the defendant's railroad at grade on a public highway within the corporate limits of the city of Portland. The negligence alleged as a basis for the recovery is, in effect, that the defendant's agents, without giving any warning of approaching the crossing, operated the engine, which caused

*Rehearing denied March 17, 1908.

the injury, at the unlawful and dangerous velocity of about 40 miles an hour, in violation of municipal regulations limiting the rate of speed of railroad locomotives within the corporate limits of the city to 6 miles an hour, and prescribing a penalty for a violation thereof; that if such agents had carefully observed the track they could have seen the interstate crossing in front of the engine and checked its speed, thereby avoiding any injury; and that, because of a curve in the railroad and of such unlawful speed, it was impossible for the decedent, or any ordinarily prudent person, to have seen the train or heard its approach until it was too late to prevent a collision with it. The complaint states in detail the situation of the public crossing, and avers its constant use by many persons, which facts were well known to the defendant; that the city of Portland is duly incorporated, and its common council, pursuant to a legislative grant, enacted ordinances, limiting the rate of speed of railroad locomotives as mentioned, copies of which municipal law are set out; and further alleging the several duties imposed on the defendant's agents in operating the engine, and their neglect to comply with such requirements. The answer denied the material allegations of the complaint, and averred, *inter alia*, that the intestate lost his life in consequence of his own negligence. The reply put in issue the allegations of new matter in the answer, and the cause coming on regularly for trial the court, upon the motion of defendant's counsel, granted a judgment of nonsuit at the close of the testimony introduced by the plaintiff, and she appeals.

Ralph R. Duniway, for appellant. Arthur C. Spencer, for respondent.

MOORE, J. (after stating the facts as above). Numerous errors are assigned by plaintiff's counsel on the ground that the court rejected testimony which he offered, and also admitted on the cross-examination of his witnesses testimony which the defendant's counsel was permitted, over objection and exception, to elicit. If it be conceded that the court's rulings in these respects were erroneous, the action complained of would not be prejudicial, provided the judgment of nonsuit was properly given. To determine this question, the locus in quo will be particularly described, and the testimony introduced by the plaintiff's counsel, together with the cross-examination of his witnesses, to which no objection was interposed, will be detailed, from which may be inferred the degree of care exercised by the decedent.

Considering the courses respectively pursued by the train and by Kunz at the time and place of the accident, as they proceeded toward Portland, the defendant's railroad, within the limits of that city, is constructed northwesterly at the place where it is crossed at grade by the Sandy Road, a public highway extending southwesterly at the acute angle of 49 degrees and 45 minutes, as disclosed

by a blue print received in evidence. At a point in the center of the Sandy Road 90 feet southwesterly from its intersection with the railroad the Barr Road, another public highway, commences and extends due east, intersecting the railroad at a point 170 feet southeasterly from the Sandy Road crossing. A cattle guard has been constructed across the railroad 350 feet southeasterly from the Sandy Road intersection, and in the same direction, at a point 1,500 feet from such crossing, a whistling post has been set at the side of the railroad. This post indicates the place where the warning signal should be given to announce the approach of a locomotive from the east toward the crossings mentioned. A short distance southeasterly from the whistling post the railway is again intersected by the Wiberg Lane. The railroad is construed through a cut which commences near the cattle guard and gradually grows deeper as it extends toward the whistling post, the northerly bank attaining at the highest place an altitude of 10 or 14 feet. A hedge has been planted on the south side of the Barr Road for some distance east from its intersection with the railroad. A dwelling, occupied at the time of the accident by W. H. Moss, stands on the southerly side of the Sandy Road, 405 feet from the crossing, and between this dwelling and the intersection, on the same side of the public road, is situated another house, which at that time was vacant. From a point on such highway 583 feet north-easterly from the crossing a person can look over the hedge and bank mentioned and see a locomotive coming west as it emerges from the cut at a point 633 feet from the Sandy Road crossing, but the smokestack of the engine can be seen farther away. It will thus be seen that, in consequence of the excavation and also of the houses mentioned, an extended view of the railroad east of the crossing cannot be obtained by a person traveling on the Sandy Road toward Portland, but when he reaches a point on that highway about 50 feet from the crossing the testimony discloses that he can behold the track almost to the whistling post.

The admitted facts are that on November 21, 1904, about 8 o'clock in the morning of a fair day, Kunz drove toward Portland a pair of horses hitched to a wagon that was loaded with farm produce, and as he attempted to cross the railway at the Sandy Road intersection a locomotive drawing a passenger train which was about on schedule time, and also going in the same direction, collided with him, which resulted in killing the horses, breaking the wagon and harness, scattering the produce, and injuring him so that in a few hours thereafter he died.

W. H. Moss, who, it will be remembered, resided near the Sandy Road crossing, testified for the plaintiff that on the morning of the collision he saw Mr. Kunz pass, driving his team at the rate of two, or possibly three, miles an hour; that when Kunz was probably within 40 or 50 feet from the track, the danger whistle was sounded by the engineer

just beyond the cattle guard near the Barr Road; that the train was then running from 20 to 30 miles an hour. In answer to the question, "How much time elapsed between the sounding of this danger whistle right at the cattle guard and the engine hitting the horses?" the witness replied: "Well, it was very quick. Of course, I could not tell you the exact time. All my recollection is I looked around when the locomotive blew the alarm whistle, I looked around, and saw the train's momentum slackening, and I looked instantly back and his team was standing square on the crossing, right on the crossing of the track—standing there—and he just made a motion as if he was rushing his horses forward or back, and he was gone that quick (the witness slapping his hands together)." On cross-examination Mr. Moss was asked, "How soon after Mr. Kunz drove up on that morning was it before you heard the whistle of the train?" and answered: "Well, I heard the whistle of the train just as he passed by my house. I heard them whistling on up above, towards Montavilla when he passed by the house. Q. Did you see or observe him as he continued to drive from your house down to the track? A. Yes, sir; I observed him. Q. Did you notice whether he was looking or listening for the approach of that train? A. Well, I didn't see him looking, or notice him do anything in particular at all. * * * He was smoking along leisurely, and I didn't see that he paid any attention at all. That is what caused me to stop and remain on the platform looking at him, wondering why he wasn't spurring up his team, or something of that kind, because I heard the whistle coming down along the road above there. Q. And did you hear them at the whistling post above there? A. Well, we didn't know where it was. I did not. Q. They were up in that location up there? A. Yes; I could not tell whether it was the Wilberg Lane, or where it was. Q. There is not much difference between the Wilberg Lane and the whistling post? A. No, not at all. Q. Anyway, it was whistling rapidly coming down through there, was it not? A. Yes; I heard a whistle two or three times before the accident. Q. Did you see him turn his head, or not? A. No. Q. Now he was walking his team as he went along the road there as he passed your house? A. Yes, sir. Q. What is the fact as to whether he got them into a trot or not? A. That I could not say, because I never seen the horses trotting, by my recollection. They might have trotted a little down toward the bottom of the grade, but not to my recollection. * * * Q. And you saw the engine coming down in full sight, and whistling before he got onto the crossing? A. Just as I tell you. As he was just going up to the—approaching to the—railroad crossing, I heard the alarm whistle, and of course I turned my head that way instantly, and I turned back instantly as quick as I had look-

ed, and seen the train was so close to him, and then, as I said before, the horses was right on the track." The plaintiff's counsel, on redirect examination of the witness, in referring to the first alarm he observed on the morning of the accident, inquired, "How far above your house on the railroad was that whistling that you heard?" and received the following answer: "Well, I should judge it was somewhere in the neighborhood of $2\frac{1}{2}$ miles or 3 miles. Q. And at the time you heard that whistling above Montavilla, $2\frac{1}{2}$ miles or so away, whereabouts was Mr. Kunz, and what was he doing? A. He was driving along the road. Q. Between your house and the railroad crossing at Sandy? A. Yes, sir. * * * Q. From the time you heard the whistle up above the Wilberg Lane, which caused you to be apprehensive of a disaster at this point, how long was it, and when was it that you next heard a distinct whistle from the engine, which you can recall? A. Well, the next whistle that I heard was the alarm whistle which was very shortly after the last whistle. Q. Where was the position of the engine at that time? A. Right above the cattle guard at the Barr Road. * * * Q. At this time did you hear the bell on the engine ringing? A. Not to my recollection. Q. Now counsel asked you about Mr. Kunz looking or listening. You were standing back of Mr. Kunz as he went down towards the railroad track? A. Yes, sir. Q. And you had a view of the back of his head? A. Yes, sir. Q. You could not see his eyes, as to whether they were open or not? A. No, sir. Q. State whether or not as Mr. Kunz went past your house and down towards the Sandy Road, whether this Sandy Road crossing was right in front of him for 200 or 300 feet? A. Why, of course it is in plain view of him there, certainly. Q. Then what is the fact as to whether it was necessary for Mr. Kunz to turn his head in order to see 200 or 300 feet of that railway in front of him? A. Well, it wasn't absolutely necessary for him at that time, but after he passed that house—that little house that obstructed the way, the view—then it would be necessary for him to turn around in that direction to look up the track (witness illustrating)."

Mrs. W. H. Moss, as plaintiff's witness, testified that she saw Mr. Kunz on the morning of the accident driving slowly down towards the track, and was asked: "State whether or not you heard the whistle of the train away up above, about Montavilla, at that time? A. Well, I heard whistles all the way up that way. I don't know where they were." On cross-examination this witness was interrogated as follows: "You heard the train whistling up above? A. Yes, sir. Q. And you saw Mr. Kunz driving for that crossing? A. Yes, sir. Q. You noticed that he was not paying a bit of attention to the fact that the train was coming? A. He didn't seem like it." This witness, on redi-

rect examination was asked: "Mrs. Moss, when you say the man was paying no attention, isn't it a fact that he was driving toward this crossing with his eyes right toward it, and you could see only the back of his head? A. Well, he didn't seem to notice that there was a train coming, although we did— Q. Yes, but the fact— (The defendant's counsel, interrupting, said: "Let her finish her answer.") The witness, continuing, said: "But we could hear the train. We could hear it coming, although we never stopped to see it. We didn't see it, but we knew the train was coming. We could hear the noise." The court thereupon inquired: "You mean you could hear the noise of the train? A. The roar of the train coming; yes, sir. Q. Mr. Kunz gave no sign of hearing it himself? A. I don't think so. He didn't seem to. Q. But Mr. Kunz, as he drove down there, could see the crossing right in front of him, could he not, without turning his head? A. Yes, sir; he could see the crossing; yes, sir. Q. And you don't undertake to say as to whether or not he used, or did not use, his sense of hearing, as he was going down there, do you? A. No; I don't know. Q. That you could not say? A. No. Q. When the last danger whistle was given, just before the train hit him, what, if anything, did Mr. Kunz do? A. Well, there is a little slope there before the track, and the horses trotted. I don't know whether he made the horses trot. Anyway, they trotted on that little slope, and then he got on the track and he tried to make the horses go ahead, and they would not go ahead, and he tried to make them come back, and they would not go back, and he waived his hand, and then the alarm whistle, you know, the danger whistle. Q. Was that alarm whistle before or after he moved his hands? A. No; it was after. Q. That was after? A. I think it was after. I could not say for sure. Q. You are not sure about that? A. No; I was excited."

The testimony shows that at the time of his death Mr. Kunz was 41 years old, possessed all his faculties, and was in perfect health and happy; that he was a farmer, and knew how to manage horses; that the team which was killed was gentle, good, and true; and that four or five times a week he drove over the Sandy Road to Portland. It is fair to infer that the train runs down grade from the whistling post mentioned to the crossing where Kunz was injured, for O. Pullen, as plaintiff's witness, testified that after the engineer passes Wiberg Lane, going towards Portland, he seems to shut off steam, and the locomotive does not emit such a quantity of smoke as is discharged by it at that place when going in an opposite direction.

The foregoing testimony, and the legitimate inferences that are deducible therefrom, fairly present the manner in which the defendant's servants operated the engine and train as they approached the crossing on the day

of the accident, and also show the attention which Kunz paid to the dangerous instrumentality as he drove his team to the place where the collision occurred.

The acts of the defendant's servants in permitting an engine operated by them to attain a velocity of 20 or 30 miles an hour across a public road at grade in the city of Portland, where the rate of speed of a locomotive had been limited to 6 miles an hour, is a circumstance from which negligence might reasonably have been inferred by the jury, and particularly so, when, in consequence of a deep cut and of other obstructions to a view of the train going towards that city, a person on the highway was prevented from seeing a locomotive at any great distance until he reached a point on the public road about 50 feet from the crossing. 23 Am. & Eng. Ency. Law (2d Ed.) 760; 4 Cur. Law, 1208; Beck v. Vancouver Ry. Co., 25 Or. 33, 34 Pac. 753; 2 Shearman & Redfield, Neg. (5th Ed.) § 467; Correll v. Burlington, etc., Ry. Co. 38 Iowa, 120, 18 Am. Rep. 22; Karle v. Kansas City, etc., Ry. Co., 55 Mo. 476; Kolb v. St. Louis Trans. Co., 102 Mo. App. 143, 76 S. W. 1050; Crosby v. New York Cent., etc., Ry. Co., 88 Hun, 196, 34 N. Y. Supp. 714; Gratiot v. Missouri Pac. Ry. Co. (Mo.) 16 S. W. 384. Though the courts of last resort differ as to the degree of negligence which they declare will result from a violation of a statute or of a municipal ordinance regulating the rate of speed of railroad locomotives, the adjudications on this subject are quite uniform in holding that, to authorize a recovery for a personal injury, it must satisfactorily appear that the hurt was caused by such unlawful speed, without any direct contributory negligence on the part of the person sustaining the harm. 23 Am. & Eng. Ency. Law (2d Ed.) 760; Pierce, Railroads, 354; Wood, Railroads (Minor's Ed.) 1515.

A traveler on a public road that intersects a railway at grade is entitled to use the crossing; but as passengers and freight, when transported by rail, must be carried with speed, a locomotive and the cars which it draws have the right of way to which a person, desiring to cross the track, and having reasonable notice of the near approach of a train, must yield on the ground that in doing so the greatest good will result to the greatest number. Pierce, Railroads, 342; Wood, Railroads (Minor's Ed.) 1510; Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. Ed. 403. If a contrary rule prevailed, the operations of trains would be practically prevented across streets at grade in cities where many persons are constantly passing. This standard of care makes it incumbent upon a traveler, before undertaking to cross a railroad, to look along the track in each direction for an approaching train, and if the view is at all obstructed, he must listen; and a failure to comply with these requirements, without a reasonable excuse, is deemed negligence. Durbin v. O. R. & N. Co., 17 Or. 5, 17

Pac. 5, 11 Am. St. Rep. 778; McBride v. N. P. R. Co., 19 Or. 64, 23 Pac. 814; Hecker v. Oregon R. Co., 40 Or. 6, 66 Pac. 270.

It might appear from an examination of the testimony hereinbefore set out that Kunz did not look in either direction along the railroad before attempting to cross it; but, as disclosed by the sworn statements of Mr. and Mrs. Moss, his back was towards them as he drove his team further away, and this being so, a turn of his head to the left, sufficient to overcome the acute angle formed by the county road and the railway, may not have been observed by them. It will be remembered that Moss first heard the whistle of the locomotive about $2\frac{1}{2}$ or 3 miles distant, when the train approached Montavilla, and next heard it near the whistling post, 1,500 feet from the Sandy Road crossing. As Kunz possessed all his faculties, it is right to infer, since he was nearer the track than either Mr. or Mrs. Moss, that he also heard the alarm blasts that had been given, and in the absence of any evidence to the contrary he was authorized to presume that the defendant's agents would obey the municipal requirement and not run the train at a greater rate of speed than 6 miles an hour. Moore v. Chicago, etc., Ry. Co., 102 Iowa, 595, 71 N. W. 509; Cleveland, etc., Ry. Co., v. Harrington, 131 Ind. 426, 30 N. E. 37. Assuming that the first whistle was given $2\frac{1}{2}$ miles east of the crossing and at a time when the team was less than 405 feet distant therefrom, the train necessarily traveled more than 32 times faster than the horses, so that if Kunz had looked easterly along the track when the first opportunity occurred, which presents itself at a point within 50 feet of the intersection, he could not have seen the engine which then must have been east of the whistling post and beyond a curve in the railway. If the testimony of Mr. Moss is controlling, however, the judgment of nonsuit was properly given, for it appears from his sworn statements that Kunz was about 40 or 50 feet from the crossing when the danger whistle was sounded right above the cattle guard, near the Barr Road, and that the speed of the train was immediately slackened. It would thus appear that, while the team traversed this 40 or 50 feet to the place of collision, the train passed over 400 or 500 feet of the railway to the same locality, thus making the sworn statements of this witness consistent; that the speed of the team and of the train was, respectively, 3 and 30 miles an hour. Moss admits that the team was standing on the track, and that Kunz made a motion as if he was rushing his horses forward or backward. It is impossible to determine the length of time the team stood on the crossing, but that the horses halted at all on the railroad track tends to show that the estimate of the distance relatively traveled by the team and train may have been incorrect. It will be remembered that Mrs. Moss, in answer to the inquiry as to what Kunz did after

the danger whistle was sounded, replied that his horses trotted down an incline of the public road towards the crossing. It might, at first, appear from this answer that it corroborated the testimony of her husband to the effect that the team had not reached the railroad when the last blast of the whistle was given. When her entire testimony is considered, however, we think it is evident that she understood the danger whistle, to which her attention was called, to mean the warning given by the engineer at the whistling post near the Wiberg Lane, and not the alarm sounded near the cattle guard, for after answering the inquiry as indicated, she said that when the team refused to start forward or backward across the track Kunz signaled the engineer before the alarm whistle was sounded. She subsequently qualified that statement by declaring that she thought the whistle was given after he waived his hand, and thereafter further restricted her testimony by saying that she was not sure about the matter, because of being excited at the time. It is fairly to be inferred from her sworn statements that Kunz had reached the crossing before he saw the approaching train; that the horses unexpectedly halted at the intersection; and that as he observed the locomotive bearing down on him he waived his hand, whereupon the engineer gave the alarm whistle and began to check the speed of the train. No testimony was introduced at the trial tending to show that more than three whistles were given or heard—the first probably east of Montavilla, the second near the Wiberg Lane, and the third, or danger, signal, near the cattle guard. If the team was standing on the railroad track when the danger signal was given, Kunz could not well have been 40 or 50 feet from the track at that time, as stated by Mr. Moss.

Considering as true, all the favorable testimony given by plaintiff's witnesses, and all reasonable inferences deducible therefrom that tend to support the cause of action, as is required to be done in passing upon a motion for a judgment of nonsuit, we think a fair construction of such evidence leads to the following conclusion: That when the whistle was sounded near the Wiberg Lane, Kunz heard the signal, and presumed, as he had the right to do in the absence of any evidence to the contrary, that the train would not be run at a greater velocity than 6 miles an hour, which would allow him ample time to cross the track; that he attempted to do so, when his horses unexpectedly balked on the railroad and could neither be urged forward nor forced backward; and that in this situation he saw the train rapidly approaching and signaled the engineer to stop the locomotive. The horses driven by Kunz being gentle, good, and true, as disclosed by the testimony, it is reasonably to be inferred that he could not have supposed that the team would refuse to proceed across the railroad track when the place of danger had been reached. Whether

or not the engineer saw the team on the track at such a reasonable distance that he knew the horses had sufficient time to pass over the crossing before the locomotive could reach that place and hence had the right to assume, in the absence of any knowledge to the contrary, that Kunz was in the possession of all his faculties and had seen or heard the approaching train, and that the horses were tractable and would proceed across the intersection, is not disclosed by the testimony. If the facts thus supposed were true, and the engineer, seeing the team standing on the track, under the circumstances mentioned, immediately used all available appliances to stop the train, the question as to the measure of such care would nevertheless be for the jury to determine.

Though the negligence of one party cannot be set up by the other as an excuse for the want of care on the part of the latter (Wood, Railroads, 1537), yet, when, in the trial of a cause instituted to recover damages for a personal injury, it appears from plaintiff's testimony that the harm was caused by the negligence of the agents or servants of a railway company in operating a train, a judgment of nonsuit ought not to be given unless it is manifest that the person hurt was guilty of contributory negligence. 7 Am. & Eng. Ency. Law (2d Ed.) 434; *Bluedorn v. Missouri Pac. Ry. Co.*, 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615. As this degree of proof is not disclosed by the construction which we have given to the testimony of Mrs. Moss, the judgment is reversed, and a new trial ordered.

(76 Kan. 767)

BAUGHMAN v. HARVEY et al.

(Supreme Court of Kansas. Dec. 7, 1907.)

TAXATION—TAX DEED—VALIDITY.

In this case it is held that a tax deed which had been of record more than five years before any suit was commenced attacking it is not void on its face because it omits the word "publicly" from the clause in the statutory form reading "at the sale begun and publicly held," etc.; or because it substitutes the words "no person bid" for the words "said property could not be sold," in stating the necessity for a sale to the county; or because instead of using the statutory language relating to the assignment of the tax sale certificate and all the right, title, and interest of the county in the property it merely states that the county clerk duly assigned all the right, title and interest of the county in the property. *Bowman v. Cockrill*, 6 Kan. 311 (1870), and numerous subsequent cases decided by this court cited and followed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1510, 1515.]

(Syllabus by the Court.)

Error from District Court, Seward County; Wm. Easton Hutchison, Judge.

Action between John W. Baughman and A. B. Harvey and wife. From the judgment, Baughman brings error. Affirmed.

Geo. L. Hay, for plaintiff in error. Thos. A. Scates, W. W. Sutton, and W. L. Harvey, for defendants in error.

BURCH, J. The principal question in this case is whether a tax deed which had been of record more than five years before it was attacked is void on its face. It deviates from the statutory form in several particulars. One of the recitals in the statutory form is as follows: "Whereas, the treasurer of said county did on the — day of —, A. D. —, by virtue of the authority in him vested by law, at the sale begun and *publicly* held on the first Tuesday of May, A. D. —, expose to public sale at the county seat of said county," etc. The deed omits the word "publicly," italicized for emphasis in the extract from the statute. The statutory form contains the following: "Whereas, at the place aforesaid said property could not be sold for the amount of taxes and charges thereon and was therefore bid off by the county treasurer for said county for the sum of — dollars and — cents, the whole amount of taxes and charges then due." The tax deed states that, "Whereas, at the said sale no person bid the said amounts of taxes and charges on said tracts of land and the said tracts were bid off to the county of Seward for the total amount of taxes above stated, which was the least quantity bid for." Another prescribed recital is this: "And, whereas, for the sum of \$ — paid to the treasurer of said county on the — day of —, the county clerk did assign the certificate of sale of said property and all the interest of said county in said property to said — of the county of — and state of Kansas." The deed falls to state in so many words that the county clerk assigned the certificate of sale, but it states that he duly assigned all the right, title, and interest of the county in the land.

In numerous cases in this court similar questions have been presented. An examination of them will disclose the policy of the court in dealing with tax deeds which have been of record and unassailed for five years or more, the rules of interpretation which have been applied to them and the reasons which have led to the upholding of departures from the statutory form when the substance of the form has been preserved.

In the case of *Bowman v. Cockrill*, 6 Kan. 311, decided in 1870, the deed used the word "named" where it should have used the word "made" in the following clause: "In substantial conformity with all the requirements of the statute in such cases made and provided." The blank following the words "for and in consideration of the sum of" was filled, but with a sum less than the proper amount; and the deed used the words "subject however to all the rights of redemption as provided by law" instead of "subject however to all rights of redemption provided in this act." In holding the instrument valid on its face the court called attention to the fact that the law nowhere requires that a tax deed shall be in the exact language of the

statute. All that is necessary is that it shall be in substantial conformity to the model given. The statute to the effect that no mere irregularities of any kind shall invalidate the title conveyed by a tax deed was applied to the tax deed itself as a part of the proceedings whereby the landowner is divested of his property, so that the foundation was laid for the statement in *Morrill v. Douglass*, 17 Kan. 291, that "a mere irregularity counts for nothing as against a tax deed in Kansas." Words meaning the same thing were said to be equally as good as those found in the statutory form. It was held that an inaccuracy in stating the consideration which could do no possible injury to the original landowner would not render the deed void on its face; and decisions from states whose Legislatures have enjoined literal compliance with the prescribed form were rejected as having no authoritative application here where no such requirement is made.

The case of *Haynes v. Heller*, 12 Kan. 381, decided in 1874, involved a tax deed executed under the law of 1862, prescribing a form which, in respect to the offer to purchase, reads thus: "And whereas at the time and place aforesaid," etc. The deed omitted the words "time and." The court, speaking through Justice Brewer, said that a tax deed like any other instrument is to be construed as a whole. If any uncertainty in one part is made certain by another the deed as a whole is sufficient, and a tax deed is to be construed according to the ordinary and natural meaning of the words used. Premising so much, the learned justice analyzed a public sale into its constituent parts of offer for sale, bid, striking off, and payment of price, and said: "Now, of these four parts, the first three must be contemporaneous. The bid must be made while the property is being offered for sale, otherwise the sale, if made, is a private, and not a public, sale; and for the same reason the property must be struck off to the bidder before the public offer is withdrawn or ended. So that a deed which recites the time at which property is offered for sale at public sale, and then that a bid therefor was made and the property struck off to the bidder, shows the time of these last two acts as clearly as though it recited that the bid was made at 'said time,' and the property struck off at 'said time.' The deed in controversy recites the time that the sale for delinquent taxes commenced, and the day upon which this particular lot was put up for sale. It does not say that it was exposed for sale upon this and subsequent days; nor under the rule, '*expressio unius, exclusio alterius*,' can there be any other understanding of the words of the deed than that the property was put up for sale only upon that day. It then says that certain parties bid for the property and it was struck off to them. As heretofore stated, these two acts must have taken place during

the time of the offer, and therefore on the day named, or the sale was not a public sale. But it may be said, is not the language used consistent with the idea that no offer or sale was made at the time it was exposed to public sale, and that thereafter an offer was made and a private sale effected? Not at all. To speak of property sold at private sale as having been struck off to the highest bidder is, to say the least, an extraordinary and unnatural use of language."

The significant feature of this decision is that from recitals enjoined by the statutory form and shown in the deed the substance of other prescribed recitals may be deduced, although not expressly appearing.

The case of *McCauslin v. McGuire*, 14 Kan. 234, related to a tax deed witnessed by one witness. The statutory form contained the word "witnesses" at the bottom where witnesses to instruments usually sign, and the law provided that a tax deed "duly witnessed and acknowledged shall be prima facie evidence," etc. The court said: "It will be perceived that the statute quoted does not expressly require that a tax deed shall be witnessed, nor does the statute state how it shall be witnessed, whether by one, two, or a dozen witnesses. The statute simply says that 'such deed duly witnessed,' etc., 'may be recorded with like effect as other conveyances.' Now what does 'duly witnessed' mean? We think it means 'witnessed according to law.' And how does the law require that a deed of conveyance should be witnessed? It in fact does not require that a deed of conveyance shall be witnessed at all. The common law never did require that deeds of conveyance should be witnessed by attesting witnesses. * * * And no statute can be found in this state that requires any such thing. Tax deeds were unknown to the common law, and our statutes do not require that they shall be witnessed in any different manner from other deeds, but leave the matter entirely optional with the parties executing and receiving them. The statutes above quoted were borrowed almost literally from Wisconsin, where attesting witnesses were necessary to all deeds; and this accounts for the words 'witnessed' and 'witnesses' being used. In this state the certificate of the officer taking the acknowledgment of a deed, with his signature, and seal if he has one, is considered as sufficient attestation of any deed; and with such a certificate and deed may be read without other proof."

In the case of *Stebbins et al. v. Guthrie and Horton*, 4 Kan. 353, it had been said that a tax deed duly acknowledged is sufficient without witnesses, so that by the two decisions something which appeared to be a part of the statutory form was virtually eliminated. A recitation in the McGuire deed that the certificate of sale which had been issued to the county was duly assigned was held to raise the presumption that the purchase

money and all that was necessary had been paid, the argument being that the certificate and all the right, title, and interest of the county in the land could not have been "duly assigned" unless the purchase money were paid. Although in the same deed the word "at" was omitted before the words "an adjourned sale of the sale begun," etc., and although the pronoun "me" was inserted instead of the name of the acknowledging officer in the blank left for the purpose in the certificate of acknowledgment, it was said the deed plainly exhibited the necessary facts and that its meaning was unmistakable. This decision was rendered in opposition to the following argument in the brief for McCauslin (page 237): "A tax deed is not substantially in the form required by statute when it omits any averment therein required. The phraseology may be changed in many respect without substantially changing the form, provided equivalent averments are inserted; but when the fact to be required to be inserted is omitted, it loses a part of the substance. If courts can dispense with one requirement they can, with equal propriety, dispense with another, which they may think the Legislature has unwisely or unnecessarily required, and thus by gradual steps assume the entire legislative powers upon the subject."

In the case of *Morrill v. Douglass*, 14 Kan. 293, it was in effect held that whatever is ascertainable by a mathematical calculation from data furnished by the law and the deed is as clearly shown as if the result of the calculation were stated. Indeed it was queried whether, under such circumstances, an erroneous amount inserted in the deed would vitiate it, the true sum being present in the data for the calculation. The principle of this case was applied in the case of *Fullington v. Jobling*, 75 Kan. 817, 88 Pac. 968.

In the case of *Harris v. Curran*, 32 Kan. 580, 4 Pac. 1044, the tax deed recited that the land was sold on May 6, 1870, "at the sale begun and publicly held on the first Tuesday of May, 1870." The first Tuesday of May, 1870, was May 3d, and May 6, 1870, fell on Friday. In denying that this deed was void on its face, the court said that the sale made on May 6th was "obviously" at a sale begun and publicly held on the first Tuesday of May and continued to May 6th.

In the case of *Mack v. Price*, 35 Kan. 184, 10 Pac. 521, the words "of the sale" were omitted from the following sentence of the statutory form, "at an adjourned sale of the sale begun," etc., the recitation being that "the treasurer of said county did on the 15th day of May, 1863, by virtue of the authority in him vested by law at an adjourned sale begun and publicly held on the first Tuesday of May, 1863, expose to public sale," etc. Also, in the conclusion of the deed, the words "by virtue of authority aforesaid" and the words "the official seal of said county" were omitted so that it read

as follows: "In witness whereof I, Charles W. Rust, county clerk as aforesaid, have hereunto subscribed my name, and affixed my official seal on this 7th day of December, 1869. Chas. W. Rust, County Clerk." From the fact that the deed showed an adjourned sale succeeding the first Tuesday of May, 1863, the court concluded that the sale must of necessity have been an adjourned sale of the sale begun on that day. Because Charles W. Rust signed the deed as county clerk, it was said "my official seal" evidently referred to his official seal as county clerk, and therefore "the official seal of said county"; and the substance of "by virtue of authority aforesaid" was held to be fully expressed in other recitations, considering all parts of the deed together.

In discussing another subject the word "duly" was given the same force as in *McCauslin v. McGuire*, 14 Kan. 234, and it was held the words "was the least quantity bid for" should be omitted in deeds based upon sales to the county. The court also referred at length to the fact that no equities existed in favor of the original owner who had abandoned the land, paid no taxes, and made no effort to regain possession, for 20 years.

In the case of *Hell v. Redden*, 38 Kan. 255, 16 Pac. 743, the syllabus reads as follows: "A tax deed is valid upon its face, when its only irregularity is the omission of the word 'remaining,' where it should be stated that the land is offered for sale for the payment of the taxes, interest and costs then due and [remaining] unpaid." The deed followed the statutory form in all respects except the one noted, and the court, in the opinion, said: "We do not feel inclined to attempt to discover a distinction between taxes, etc., then due and unpaid at the time of offering for sale and the taxes then remaining due and unpaid, while at the same time the other recitals in the deed are full and complete; at most, it was but an irregularity that certainly ought not to be regarded as a defect that could be raised after the five years contemplated by the statute have passed."

In the case of *Sanger v. Rice*, 43 Kan. 590, 23 Pac. 633, the tax deed stated that "the said county of Bourbon did, on the 15th day of September, A. D. 1881, duly assign the certificate of sale," etc., the sale having been made to the county. The law and the statutory form contemplate an assignment by the county clerk. The court said that the deed showed by necessary implication that the tax certificate was assigned by the county clerk, because it could not be duly assigned by Bourbon county unless it was assigned by the county clerk. The deed in this case having been of record more than five years before it was attacked the court said: "Ordinarily, tax deeds should be strictly construed, but under the circumstances of this case we think the present tax deed ought to be liberally construed for the purpose of up-

holding and enforcing it." The rule that public officers are always presumed to do their duty was also invoked.

In the case of *Douglass v. Bishop*, 45 Kan. 200, 25 Pac. 628, 10 L. R. A. 857, the opinion reads: "In the certificate of acknowledgment to the tax deed, under which H. P. Bishop claims, the words 'in and for said county' were omitted. The question presented is whether this omission renders the deed invalid. We think not. The caption shows that the acknowledgment was taken in Jackson county, and in this state, and the certificate also shows that the tax deed was assigned by E. D. Rose, the county clerk of Jackson county in this state, and that as such clerk he appeared before W. S. Hoaglin, a justice of the peace, in Jackson county and the state of Kansas, and acknowledged the execution of the tax deed, as clerk of Jackson county, in this state, for the purpose therein expressed. We think that, even in the absence of the words 'in and for said county,' the presumption is that W. S. Hoaglin exercised his functions as a justice of the peace within his jurisdiction, that is, within his township, in the county of Jackson and state of Kansas." This decision was adhered to in the case of *Douglas v. Carmean*, 49 Kan. 674, 31 Pac. 371.

In the case of *Neenan v. White*, 50 Kan. 639, 32 Pac. 381, the deed contained the following recital: "And whereas, the said J. J. Locker did, on the 10th day of June, A. D. 1869, duly assign the certificate of the sale of the property as aforesaid, and all his right, title and interest to said property, to Saml. Gard, of the county of Atchison and state of Kansas; and whereas, Hugh D. Fisher, administrator, did, on the 17th day of December, A. D. 1869, duly assign the certificate of the sale of the property as aforesaid, and all his right, title and interest to said property, to P. L. Hubbard, of the county of Atchison and state of Kansas." It was claimed that no assignment from Gard to Hubbard was shown. The court held that the deed was entitled to a liberal interpretation, for the purpose of upholding it and protecting the equities of claimants of the land in possession under it. The facts implied were the death of Gard, that Fisher was the administrator of Gard, probate proceedings resulting in the appointment of Gard, and an order authorizing Gard to assign the certificate. True, evidence was introduced on the trial in the district court showing the death of Gard and the appointment of Fisher as his administrator, but the decision, which sustained the deed, is apparently rested upon the ground stated, the question being if the deed was void on its face. In the case of *Morris v. Bird*, 71 Kan. 619, 81 Pac. 185, however, it was held that a clear break in the chain of assignments rendered the deed there under consideration void on its face.

In the case of *Penrose v. Cooper* (on rehearing) 71 Kan. 725, 84 Pac. 115, express

recitals of the amount for which the land was bid off, that it was bid off for the county, and that separate tracts were offered for sale separately, were omitted, but it was held that the substance of such recitals might be supplied by inferences drawn from other statements in the deed liberally construed to that end. Following this case it was held in *Gibson v. Trisler*, 73 Kan. 397, 85 Pac. 413, that a deed left no room for doubt that the land was bid off for the county although the recital to that effect prescribed by the statutory form was omitted. The same ruling was made in the case of *Fullington v. Jobling*, 75 Kan. 817, 88 Pac. 963.

In the case of *Ham v. Booth*, 72 Kan. 429, 83 Pac. 24, the legal presumption that a corporation resides in the state of its creation was indulged to supply the omission of an express recital of the residence of an assignment of the tax-sale certificate. As a part of its due execution a tax deed must bear the seal of the county. *Reed v. Morse*, 51 Kan. 141, 32 Pac. 900. But in *Clarke v. Tilden*, 72 Kan. 574, 84 Pac. 139, it was held that the presence of the words "seal of the county clerk of Decatur county, Kansas," in the center of the seal affixed to a deed, did not overcome other indications that the instrument was properly executed. This decision was followed in *Kruse v. Fairchild*, 73 Kan. 308, 85 Pac. 303. A tax deed must show upon its face the time of the sale or it is void. *Haynes v. Heller*, 12 Kan. 381. In *John v. Young*, 74 Kan. 865, 86 Pac. 295, the blanks in the statutory form "did on the — day of —, A. D. 189—" were not filled, but immediately following the blanks the deed recited that the sale was begun and held on the first Tuesday of September, A. D. 1896. The court declined to presume that the sale extended beyond the day named, or that the land was sold on any other day than the one named, and held that the time of the sale was indicated with substantial certainty.

In the case of *Havel v. Decatur County Abstract Co.* (Kan.) 91 Pac. 790, the blanks left in the statutory form for stating the residence of the assignee of the tax-sale certificate were not filled. It was held that the matter indicated by the blanks is not a recital in the proper sense of the term, and may be omitted without prejudice to the landowner and without vitiating the deed. This decision forecloses any possible inference to the contrary which might be drawn from a casual observation made by the writer of the opinion in the case of *Kruse v. Fairchild*, 73 Kan. 308, 811, 85 Pac. 303. Whenever in stating the facts with reference to a tax sale words of the statutory form which, under the circumstances, are inappropriate, happen to be retained in a deed, they may be rejected as surplusage. *Thompson v. Colburn*, 68 Kan. 819, 75 Pac. 508; *Clarke v. Tilden*, 72 Kan. 574, 84 Pac. 139; *Fike v. Nagle*, 74 Kan. 833, 85 Pac. 948, 88 Pac. 876.

In the light of these decisions it is clear the deed involved in this case is not void on its face. The treasurer could not expose the land to public sale, as the deed says he did, unless such sale were publicly held. To speak of a private sale as publicly held would involve an "extraordinary and unnatural use of language." *Haynes v. Heller*. The words "no person bid" contain the necessary implication that the land "could not be sold" to a private bidder. They express the precise idea to be conveyed by the statutory recital, and are, therefore, "equally good." *Bowman v. Cockrill*. The recital in the statutory form that the county clerk "did assign the certificate of sale of said property and all the interest of said county in said property" is not the statement of two independent facts, but of a single fact with its legal consequence. An assignment of the certificate operates as an assignment of all the right, title, and interest of the county, and an assignment of all the right, title, and interest of the county necessarily involves an assignment of the certificate. A recital of either one includes the other. Besides this, the inference regarding the manner in which the title and interest of the county was assigned is strengthened by the use in the deed of the word "duly." True, the county clerk exercises a naked statutory power, and it is not enough that he state his mere conclusion that he has complied with the law. The deed should recite facts and not opinions. *Duncan v. Gillette*, 37 Kan. 156, 14 Pac. 479. But under the rule of liberal interpretation which must be applied to all tax deeds which have been recorded for five years, the word "duly" frequently has some descriptive force. *McCauslin v. McGulre*; *Mack v. Price*; *Sanger v. Rice*. Thus, in *Sanger v. Rice* the statement that the certificate was duly assigned by the county was held to be a substantial statement of the fact that the assignment by the county was by the county clerk. So here, the statement that the right, title, and interest of the county was duly assigned is a substantial statement that such assignment was accomplished by an assignment of the certificate of sale. In the *Sanger Case* the agent was indicated. In this case the instrument is indicated. The sale having been made to the county, the words "which was the least quantity bid for" are surplusage and should be disregarded.

A minor question presented is decided adversely to the plaintiff in error, because the writings exhibited do not disclose a contract of sale.

The judgment of the district court is affirmed.

(78 Kan. 221)

MISSOURI PAC. RY. CO. v. BENTLEY.

(Supreme Court of Kansas. Dec. 7, 1907.)

1. TRIAL—DEMURRER TO EVIDENCE—WAIVER.

Error in overruling a demurrer to evidence is of no avail, where the defendant, instead of

standing upon the demurrer, offers proof which supplies the deficiencies of plaintiff's evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 981.]

2. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A track repairer who omits to look and listen for approaching trains while engaged in the line of his duty at work on the track is not necessarily guilty of contributory negligence as a matter of law. Whether such omission constitutes negligence is ordinarily for the jury to determine under all the circumstances.

3. SAME—INSTRUCTION.

In an action for damages for the death of a railroad employé who was run over by an engine while at work on the track, where there is no evidence to show whether he looked and listened, an instruction that, if the employé in charge of the engine could by the exercise of reasonable diligence have seen the deceased on the track in sufficient time to have stopped the engine and thus avoided the injury, plaintiff would be entitled to recover notwithstanding the deceased was negligent in failing to see the approach of the engine, is erroneous. In view of the other instructions as to contributory negligence and the special findings of the jury, the giving of such an instruction in this case is held not to have been prejudicial error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1148-1161.]

4. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

An instruction which leaves the impression upon the jury that the defense of contributory negligence must fail, unless established by defendant's own testimony, is erroneous. An instruction open to this objection held not prejudicial for reasons stated in the opinion.

(Syllabus by the Court.)

Error from District Court, Sumner County; C. L. Swarts, Judge.

Action by Paulina Bentley against the Missouri Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. H. Richards and C. E. Benton (C. E. Elliott, of counsel), for plaintiff in error. W. T. McBride and Ivan D. Rogers, for defendant in error.

PORTER, J. Plaintiff recovered judgment for the death of her husband, who was an employé of the railroad company. Defendant brings error.

On January 28, 1904, Robert T. Bentley, a track repairer, was run over and killed by an engine and tender in the yards of the company at Conway Springs. At the time of the accident, the railroad company maintained at Conway Springs a roundhouse situated on a switch leading to the main track, and on the main track a coal chute and storage bins where engines were supplied with coal. The chute was a high, covered structure, having a track extending through the center, equipped with pockets in which various amounts of coal were placed for the purpose of dumping the same into the tenders of engines when needed. The main track extended east and west, and the chute was on the north side of this track. The switch leading to the roundhouse joined the main track at a point 750 feet west of the place

where the deceased was struck, which was on the main track near the coal chute. For 600 feet west of this place the track was straight, thence curving slightly to the north. It was the custom each morning at about 8 o'clock for an engine to leave the roundhouse, enter the main track at the switch, and go to the chute for coal. After entering the main track, the whistle would be sounded, the number of blasts indicating to the men at the chute the number of tons of coal required. Thereupon one of the men in charge at the chute would quit his work, and descend by a stairway from the chute, and take a position in front of the pocket containing the required amount of coal. The morning of the accident was cold, with a strong wind blowing from the northwest. The engine left the roundhouse in charge of the roundhouse foreman and a hostler's helper. After entering the main line, it started east, and four blasts of the whistle were sounded as a signal for the amount of coal required. Steam was cut off, and the engine was running at four to five miles an hour. The track was slightly downgraded to the place where the accident occurred. The deceased had been at work that morning with other employes at a point near where he was struck. The foreman was not with them at that time. There was some difficulty found in tightening one of the bolts, and they left this place, and were all at work on the track, about 250 feet west of the chute, when the foreman returned. The deceased took the foreman back to the former place to show him where the trouble was, and the testimony of the foreman, who was a witness for defendant, is that, after examining the bolt, he directed the deceased to go to the hand car, which stood 165 feet east, and get a track chisel. This was two minutes before the accident. After giving the order, he turned and left deceased there, and never saw him again alive. The foreman was walking along the track 250 feet west of where he left the deceased when the engine passed him going for coal. The testimony showed that the track chisel had not been taken from the hand car. The track wrench, with which deceased had been at work, was found lying north of the rail near the place where the bolt was out, and some spots of blood were found on the north rail a few feet east of the same place. The deceased was not seen by any one until his body was discovered under the engine by the man who had left the coal chute upon hearing the signal for coal, and who had come down to the ground and taken a position at one of the coal pockets.

It is contended that the evidence failed to show that deceased was at work on the track at the time he was struck; that the inference from plaintiff's testimony is that deceased was either walking upon or stepped upon the track directly in front of the approaching engine, and was therefore guilty

of contributory negligence. It is argued on these grounds that the court should have sustained a demurrer to the evidence. We think there was sufficient evidence to warrant the court in submitting to the jury the question whether the deceased was at work on the track, and also whether there was contributory negligence. Defendant not only failed to stand upon the demurrer, but offered proof showing that the deceased had been at work at this place on the track within two minutes of the time he was struck, and that he was specially interested in tightening the bolt there. It is conceded in the brief that defendant's testimony "served to clear up some of the circumstances surrounding the accident." As the situation of the deceased could only be shown by circumstantial evidence, we think defendant supplied any deficiency there might have been in plaintiff's proof, and is not in position to claim error in overruling the demurrer. *Plne v. Bank*, 63 Kan. 462, 465, 65 Pac. 960; *Woodmen Circle v. Stretton*, 68 Kan. 403, 75 Pac. 472.

In answer to special questions the jury found that the engine was running at from four to five miles an hour; that no other signal was given, except the signal for coal, which was sounded from 550 to 750 feet west of the place of accident; that the employes in charge of the engine failed to keep a lookout, and never saw deceased; that he had not gone after the chisel, but was at work on the track at a point about 40 feet west of the coal chute, and was prevented from hearing the approach of the engine by the wind blowing about the coal bins and chute. We are asked to say that as a matter of law the deceased was guilty of contributory negligence. This we cannot do. The evidence, though circumstantial, supports the finding of the jury that he was at work on the track in the discharge of his duty. True, his position was one of danger, but whether he was negligent in failing to take such precautions as would warn him of the approach of the engine was a question for the jury to determine under the circumstances in evidence. *Comstock v. U. P. Ry. Co.*, 56 Kan. 228, 42 Pac. 724. The same degree of diligence is not required of one whose duty compels his presence upon the track as is required from a traveler about to cross. *Ominger v. N. Y. C. & Hudson R. R. Co.*, 4 Hun (N. Y.) 159; *Goodfellow v. Boston, Hartford & Erie Railroad Company*, 106 Mass. 461; *Baltimore, etc., R. Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044; *McMarshall v. Chicago, R. I. & P. Ry. Co.*, 80 Iowa, 757, 45 N. W. 1065, 20 Am. St. Rep. 445; *Jordan v. Chicago, St. P., M. & O. Ry. Co.*, 58 Minn. 8, 59 N. W. 633, 49 Am. St. Rep. 486; *Noonan v. N. Y. Cent. & H. R. Co.*, 62 Hun. 618, 16 N. Y. Supp. 678; *St. Louis, I. M. & S. Ry. Co. v. Jackson*, 78 Ark. 100, 93 S. W. 746, 6 L. R. A. (N. S.) 646; *Austin v. Fitchburg Railroad*, 172 Mass. 484, 52 N. E.

527; *Northern Pacific Railroad v. Everett*, 152 U. S. 107, 14 Sup. Ct. 474, 38 L. Ed. 373; *Shoner v. Pennsylvania Company*, 130 Ind. 170, 28 N. E. 616, 20 N. E. 775; 2 Thompson's Commentaries on the Law of Negligence, § 1756. This author says, in reference to the duty of track repairers, track walkers, and similar employes: "As a general rule, it is not contributory negligence as a matter of law for a person so employed not to be on a constant lookout for approaching trains." A fair statement of the law is that the employé must exercise such care as the danger of his surroundings would suggest to a man of ordinary prudence and caution; and it is obvious that conduct which would be negligent on the part of one who is about to cross a railroad track, though an employé at work in the yards, might not constitute negligence on the part of one whose duty requires him to remain upon the track. *Dyerson v. Railroad Co.*, 74 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132. "Nor does the principle apply to employes whose duties require their presence upon the track, the performance of which duties necessarily precludes their paying the strictest attention to the approach of trains." 23 A. & E. Enc. of Law, 768. In the case cited, *supra* (Baltimore, etc., R. Co. v. Peterson, Adm'r), the following language is used: "The mere fact that a track repairer omits to look and listen for approaching trains while engaged in the line of his duty on the track does not render him guilty of contributory negligence as a matter of law; the question whether such omission constitutes negligence being for the jury." From what has been said it is manifest that the court properly refused the request for a peremptory instruction to find for defendant.

Complaint is made of the refusal to give a number of other instructions asked; but the propositions involved therein appear to have been fully covered in the instructions given. Two of the instructions given require comment. Instruction No. 9 told the jury that, if the employé in charge of the engine could, by the exercise of reasonable diligence, have seen the deceased on the track in sufficient time to have stopped the engine, and thus avoided the injury, plaintiff would be entitled to recover notwithstanding the deceased was negligent in failing to discover the approach of the engine. In other words, it informed the jury that plaintiff might recover notwithstanding the negligence of the deceased was of the same character as the negligence of the man in charge of the engine, or even if his negligence was of a higher degree than that of the other employé. It is said in the brief that this instruction follows the law declared in *Railway Co. v. Arnold*, 67 Kan. 260, 72 Pac. 857. But the doctrine of "the last clear chance" obviously has no application to the facts of this case. There was no evidence showing when the negligence of Bentley ceased, if he were negligent, nor was there any evidence to show

that, after it ceased, the negligence of defendant continued. In *Dyerson v. Railroad Co.*, *supra*, Mr. Justice Mason, in commenting upon *Railway Co. v. Arnold*, *supra*, and the doctrine of "the last clear chance" as stated in 20 American and English Encyclopedia of Law, 137, used the following language: "This may be accepted as a correct statement of a principle of universal application, according with both reason and authority, provided the words 'after its occurrence' be interpreted to mean after the person concerned had ceased to be negligent. The rule that, under the circumstances stated, the neglect of one party to discover the omission of the other is to be held to be the sole proximate cause of a resulting injury is not an arbitrary, but a reasonable one. The test is: What wrongful conduct occasioning an injury was in operation at the very moment it occurred or became inevitable? If just before the climax only one party had the power to prevent the catastrophe, and he neglected to use it, the legal responsibility is his alone. If, however, each had such power, and each neglected to use it, then their negligence was concurrent and neither can recover against the other." The opinion further quotes the following extract from volume 2 of the Supplement to the American and English Encyclopedia of Law, p. 64: "This so-called exception to the rule of contributory negligence (i. e., the doctrine of 'the last clear chance') will not be extended to cases where the plaintiff's own negligence extended up to and actually contributed to the injury. To warrant its application, there must have been some new breach of duty on the part of the defendant subsequent to the plaintiff's negligence." The instruction was erroneous as applied to the facts of this case, but we are unable to say that it was prejudicial in view of the other instructions as to contributory negligence, and especially in view of the findings of the jury. In substance, to the effect that Bentley was not negligent in failing to discover the approach of the engine. The jury found that he was engaged at work on the track, and did not hear the whistle or the approach of the engine on account of being "busy at work," and the wind whistling through, around, and under the coal bins. If he was not negligent at all, the instruction had no application, and must be held to have had no effect upon the general verdict.

Instruction No. 14 was as follows: "The burden of proof is upon the defendant to show negligence upon the part of the deceased, Robert T. Bentley, which contributed to his death." An instruction very similar, though slightly different in language, was held to be reversible error in *Railway Co. v. Merrill*, 61 Kan. 671, 60 Pac. 819, because it left the impression upon the jury that the defense of contributory negligence must fail, unless established by defendant's own testimony. In that case plaintiff was a wit-

ness, and testified at great length in respect of his actions and conduct at the time he received the injury. There was much room in that case for the jury to be misled by the instruction. In *Railroad Co. v. Johnson*, 74 Kan. 83, 86 Pac. 156, we refused to extend the doctrine of *Railway Co. v. Merrill* to a case where there was no evidence offered by plaintiff which showed contributory negligence, and where the jury could not have been misled. In the present case it is difficult to see how the instruction could have prejudiced defendant. There was no sharp conflict between the evidence of plaintiff and that of defendant on this proposition. No person saw the deceased immediately before the accident, and neither the evidence of plaintiff nor that offered by defendant told the jury what his conduct was. The evidence of both practically left him at work on the track a very short space of time before the accident. The presumption is that he failed to see or hear the approach of the engine. Whether he was negligent in this is a matter of inference arising from all the circumstances, aided by natural presumptions. In other words, if the instruction had been qualified as it should have been, and the jury had been told that they might find from the evidence of plaintiff alone that deceased was guilty of contributory negligence, the result must have been the same. The fact could only be determined from all the circumstances by inferences and presumptions; and the circumstances shown by plaintiff did not differ from those shown by defendant. The jury were quite fully instructed as to what would constitute contributory negligence of the deceased and prevent a recovery by plaintiff, and were expressly told in instruction No. 8 to consider all the evidence in the case in determining this question.

For these reasons, we are not inclined to reverse the judgment for the errors in these two instructions. The case was otherwise fairly tried. There is evidence to support the verdict and special findings, and the judgment must be affirmed.

(76 Kan. 336)

ST. LOUIS & S. F. R. CO. v. MORRIS.

(Supreme Court of Kansas. Dec. 7, 1907.)

1. MASTER AND SERVANT—INJURY TO SERVANT—APPLIANCES.

Where the rules of a railroad company require the employes in case of danger to the company's property to unite to protect it, and where, in a case of apparent danger to such property, a conductor orders his brakeman to stop a moving car from which such danger by an impending collision with a pile driver may be fairly anticipated, the brakeman, if he has no knowledge or notice to the contrary, may act upon the assumption that such car is furnished with the ordinary and proper appliances for the safety of employes in performing their duties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 675-677.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where a master orders a servant into a situation of danger, and in obeying the command

the servant is injured, he will not be charged with contributory negligence or with an assumption of the risk, unless the danger was so glaring that no prudent man would have encountered it, even under such orders, provided he acts with reasonable prudence in executing such orders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 648-651, 778-788.]

3. SAME—EVIDENCE.

Whether the hazard is so great that a reasonably prudent man would not undertake the service required, and whether, when undertaken, the employé proceeded with reasonable care, are, where the evidence is conflicting as in this case, questions of fact for a jury, and the finding of a jury thereon, where proper instructions were given, must be sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1129; vol. 3, Appeal and Error, §§ 3935-3937.]

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by H. J. Morris against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff in the district court, H. J. Morris, suffered personal injuries causing the loss of his leg below the knee. The action was for damages for the injury. He alleged negligence on the part of the defendant company as follows: "In failing to provide suitable handholds and brakes and apparatus on the car which he was directed to handle, * * * and in carelessly handling said cars and sending plaintiff to a place of danger, and requiring him to act in an emergency without warning and without taking proper precaution against injuring him; * * * that paragraph 5 of the general rules of the Frisco System provided, 'in case of danger to the company's property, employes must unite to protect it'; * * * that punishment was provided for servants disobeying said rule; * * * that the plaintiff undertook to stop the moving car in question in accordance with, and in obedience to, said rules, and in accordance with his general duties as brakeman, and with the direction of the conductor of his train; * * * that the car which plaintiff tried to stop was a freight car, which was then and there in use by the work crew in charge thereof, and said car was without any proper handholds, brakes, or appliances usual and necessary for use by brakemen in handling, controlling, or stopping such car; that the hand brake had been removed therefrom and no air brake was accessible or available, and plaintiff first ascertained these facts when he reached the end of the car for the purpose of applying the brakes. * * * Plaintiff says that if the handholds or the brake itself had been on said car, in proper condition, he could have held the same and stopped the car, and saved himself, as well as defendant's property, from injury." The plaintiff was a brakeman on the local freight train of the defendant railroad company running

from Wichita to Ellsworth. This train was standing on the main track at Burton, while the track in front or to the north was being cleared of flat cars, part of a work train consisting of a pile driver and accompanying tool cars and flat cars used in carrying piles. The pile driver and two tool cars stood on the side track west of the local train, and about two or three car lengths south of the engine of the latter. The engine of the work train was shoving a flat car from the main track about 400 feet north of the pile driver to the side track. The pile driver stood on this side track with the leads or guides in front, so that a car coming down the track from the north, if not stopped, would collide with these guides, and might injure the pile driver. On the west side of the side track, and just north of the pile driver, were piles to be loaded on the flat cars. When the engine had pushed the flat car past the connecting switch, and upon the side track, it was cut off by order of the conductor, and the car was left to roll down the track—there being a slight downgrade there—towards the guides of the pile driver. As the car passed by the side of the local train, the conductor and a brakeman of that train were walking along with it and on the east side of the moving car, thrusting blocks under the wheels endeavoring thereby to stop it, but apparently without success. It was moving at the rate of about four miles per hour. The plaintiff, Morris, passed around in front from the east side of the engine of the local train to the west side. As to what then occurred he testified as follows: "Just as I got there, I saw somebody about the car. Somebody had lost control of it, and was trying to stop it with chunks, and my conductor said, 'For God's sake, stop that car.' It was going towards the guides on the pile driver. I ran over. I thought the brake was laying down on the car, as they often do on flat cars, and, when I got around the end, I turned and grabbed for the brake. There was no brake, and I grabbed for the handhold, and there was no handhold, and I grabbed the chain, and it was still fastened to the brake rod, but disengaged from the lever, and it came all at once and I fell, and scrambled along a few feet, and I fell and caught this leg and crushed it right across there." The brake staff had been removed for convenience it seems in loading piles, and this was known to the conductor. The handhold had been broken off or removed in some way, but when the evidence does not show. There was an uncoupling rod with pin lever on that end of the car. The car was stopped immediately after the plaintiff was injured. The cries of the plaintiff attracted the attention of the trainmen, who found him just outside of the west rail, having pulled back the mangled leg before the second wheel could reach it. It appears that upon a former trial the plaintiff had testified that it was his purpose to steady himself by the handhold with one hand, and try to stop the car by pulling

on the chain with the other, when, the chain coming "all at once," he stumbled and fell. On this trial on cross-examination he admitted that he had so testified, and that in taking hold of the chain he thought he could assist in stopping the car in that way; that it naturally came into his mind to do so; and that he was walking backward, pulling the chain, when he so stumbled and fell. In further explanation of the occurrence the plaintiff testified: "Q. Now, why did you go in to stop that car? A. Well, the rules demand that I should protect the company's property in case of danger to it, and my conductor ordered me to do so. Q. What property were you seeking to protect? A. Company's property. Q. What property? A. The pile driver, in particular. Q. What use did you seek to make of this handhold when you grabbed for it? A. To steady myself. Q. In what way? A. Well, just to keep from—that is what that is naturally therefor. Q. What is a handhold for? A. For that purpose, to steady yourself and to protect you from falling underneath the cars. Q. And working between the cars? A. And working between the cars. Q. Well, if there had been a handhold there, after you found there was no brake, what use could you have made of that handhold? A. Could have held myself up easily. * * * A. No; I got clear across the track and came up to the car, could see that the brake wasn't there just as I turned around and saw the beam there. It all came to me all at once. In looking for the brake staff, there the car came up to me, and I grabbed for what was there. No grab iron and no brake staff. * * * A. When I ran around the car, the first thing I looked for was the wheel on the outside of the end of the car, saw the wheel was not there, and naturally my eye would glance on toward the injured part of the car to see what the rest of the defects was, and, when it got closer up, I grabbed for the grab iron. Q. You had considered when you went there, whether the grab iron was there? A. I was considering it. In the impulse grabbed for the brake wheel. Grabbed for that; naturally would be the first thing that stuck out from the car. I glanced, and it was not there, and glanced along where the brake staff would have been laid, and seen the brake staff completely gone, and, as the car came up to me, I grabbed for the grab iron, and it was gone too, and the first thing my hand fell on was the chain. * * * Q. You did not attempt to step west of the car? A. Well, I attempted to shove myself away from the car. Q. How much? A. Of course, the car coming toward me nothing there to get hold of to spring against to get away, any more than putting your hand against a flat surface and shove yourself sideways from it. * * * Q. You say you lost your balance? A. Yes, sir. Q. How did you come to lose your balance? A. Naturally, when you come to the car, you take hold of the grab iron. There was no grab iron

there, and I grabbed hold of the chain, and in order to use the chain to steady me, and lost my balance for the reason that the chain came all at once, and I fell down. Could probably have steadied myself much better if I hadn't grabbed hold of the chain, if I had thrown my hand against the car or something; but grabbed hold of the chain, and the whole chain coming—the whole thing being disconnected was really what lost my balance. Q. Is that the way you lost your balance? A. It is. Q. Cannot tell just how you lost your balance? A. Yes, sir. I grabbed the chain to steady myself. * * * Q. If that brake wheel had been bent down, would not the brake wheel have been west of the west line of the car? A. A few inches. Yes, sir. Q. Three inches west of the west alignment of the car? A. Yes, sir. Q. And to attempt to turn that brake wheel for the purpose of winding the brake chain and setting the brake shoes on the wheels upon it properly, and so as to take hold of the brake wheel with both hands to turn it? A. That is probably true; but there was piling laying outside the rail, so I could not walk along this piling and do that." The plaintiff noticed that the brake staff was not standing when he started around the car, but supposed that he would find it laying down. He had been in railroad service about ten years—three years as brakeman. The conductor, Sheuerhoff, testified that he did not give the order to stop the car, and the conductor and the brakeman of the work train testified that they did not hear such an order given, and the brakeman at the front wheels testified that he did not remember such an order. The conductor of the work train, and the plaintiff's fellow brakeman, testified that the plaintiff said, when they went to him after the injury, in response to an inquiry, that he had climbed on the brake beam, pulled the brake chain, and slipped and fell. The fireman of the local train said that, looking out of his cab window, he saw him climb on the car, pull the chain, and fall off. On the other hand, the brakeman who was at the front wheels on the opposite side of the car, and nearest to him said that plaintiff did not ride the brake beam, adding: "I do not think that he did."

The jury found for the plaintiff, assessing his damages at \$2,000, and returned the following findings: "Q. 1. When plaintiff first discovered the absence of the brake staff from the car, had he approached so near to the moving car that he could not safely attempt to get away from the car? A. Yes; could attempt, but not safely. Q. 2. When the plaintiff discovered the absence of the brake staff from the moving car, was the car moving more rapidly than plaintiff could walk? A. Yes; in his position. Q. 3. When the plaintiff discovered the absence of the brake staff from the moving car, did he attempt to get away from the car? A. Yes. Q. 4. If the foregoing question three is an-

swered in the affirmative, then state in what manner the plaintiff attempted to get away from the car. A. By grabbing for handhold to steady himself. Q. 5. When plaintiff discovered the absence of the brake staff from the moving car, what distance was the car from the pile driver as near as you can determine from the evidence? A. 40 to 50 feet. Q. 6. When plaintiff discovered the absence of the brake staff from the moving car, did he take hold of the brake chain with his hand? A. Yes; to steady himself. Q. 7. When plaintiff discovered the absence of the brake staff from the moving car, did he take hold of the brake chain, and pull it? A. Yes. Q. 8. After plaintiff discovered the absence of the brake staff from the moving car, did he take hold of the brake chain intending to pull the chain while moving along in front of the car. A. No; to steady himself. Q. 9. When plaintiff took hold of the brake chain, did he at the same time discover that the handhold was not on the car? A. Yes; at the same time. Q. 10. When plaintiff pulled the brake chain, had he looked to see whether or not the handhold was on the car? A. Yes; at the same time. Q. 11. Did plaintiff lose his balance when he pulled on the brake chain? A. No; previous to that time. Q. 12. When plaintiff lost his balance, did he struggle to protect himself from falling in front of the car? A. Yes. Q. 13. Did plaintiff fall in front of the car while struggling to protect himself from such fall after he had pulled the brake chain? A. Yes."

A motion for judgment for the defendant on the findings was overruled. Also a motion for a new trial. The company assigns error upon these rulings; also upon the refusal of the court to give the following instruction: "The jury are instructed that, in order to justify a finding in this case against the defendant that it was negligence to omit having a handhold in the usual place on the end of the car when plaintiff attempted to stop said car, it must appear from the evidence to the satisfaction of the jury; (a) that it was bound to anticipate that its trainmen would seek to stop such a car by the use of the means adopted by the plaintiff in this case; (b) and that it was necessary that a handhold be provided in the usual place on the end of the car in order to protect such employé from injury while attempting to stop the car by such means; (c) and that it would be dangerous to attempt to stop the car by the use of such means without such handhold or some equivalent device being provided at the usual place of such handhold on the end of the car where such attempt might be expected to be made; (d) and that defendant failed to provide such handhold or any other device which could with reasonable safety be used for the purpose of protecting such employé from injury while attempting to stop the car by the use of the means adopted by the plaintiff in this case as shown by the evidence."

C. F. Parker, H. C. Sluss, and W. F. Evans, for plaintiff in error. Houston & Brooks, for defendant in error.

BENSON, J. (after stating the facts as above). The first error specified by the defendant company is in refusing the instruction requested and quoted above. The instruction, if given, would have limited the province of the jury in determining the question of negligence to a situation where the company would be bound to anticipate just such an accident occurring in the precise manner that this occurred. This rule, if adopted, would unduly restrict the functions of a jury. It may be conceded that the defect, in order to be the basis of an action, should be such that injuries therefrom might reasonably be anticipated; yet it is not necessary that the particular circumstances attending such injuries should be anticipated. The unusual nature of the accident and the attending circumstances are factors to be considered by the jury in determining the master's exercise of due care. *Labatt, Master & Servant*, § 145. The instructions given were clear and comprehensive, and fairly presented the issues to the jury in the light of all the evidence, and no error is presented in the refusal to charge further as requested.

It is urged that judgment for the defendant should have been rendered upon the findings. It is argued that the first five findings, taken in connection with the admissions of the plaintiff in his testimony, would support such a judgment. It is stated that the plaintiff ran in front of the car without looking to see whether there was a brake or handhold upon it or not, and that he negligently went so close to the car that he could not get away without injury, or that he negligently failed to attempt to get away. A careful reading of the evidence, in connection with the findings, leads to the conclusion, however, that the findings have their warrant and support in the evidence, although the evidence is conflicting.

The principal reliance of the defendant company in asking for a reversal seems to be the alleged error of the court in refusing a new trial. It is claimed that the plaintiff failed to show any negligence of the company, and upon all the evidence contributory negligence on his part was shown. Attention is called to the fact that the absence of a handhold does not prove negligence, because there was no evidence as to the time when it had been removed, and the rule announced in *Railway Co. v. Dorr*, 73 Kan. 486, 85 Pac. 533, that unless the defects were of such a nature or had existed for so long a time that they should have been discovered and remedied, applies. In this case, however, if the theory of the plaintiff was sustained by the evidence, the employé was suddenly called to a place of danger by the order of his superior. In such a situation the master is presumed to know whether the place or instru-

mentality is reasonably safe, and the servant may rely upon that assumption, unless the danger is so obvious that a prudent man in the same circumstances would not encounter it, even with the assurance that such presumption affords. The servant, acting in good faith, upon an order of his superior, may rely upon the instrumentalities being in their usual condition and fit for use, where he does not have knowledge, and is not chargeable with notice, to the contrary. In such a situation he may rightly rely upon the assumption that his employer has done his duty by furnishing reasonably safe machinery, appliances, and surroundings. *Thompson on Negligence*, § 3765; *Mo. Pac. Ry. Co. v. Barber*, 44 Kan. 612, 24 Pac. 969. The order is considered to be an implied assurance that there is no abnormal danger. *Labatt, Master & Servant*, § 440c. Whether the plaintiff was negligent in the performance of the duty assigned to him must be determined in the light of the situation in which he was placed. If his act was such as a reasonably prudent man would have done, it was not negligent, although some other course would have been absolutely safe. *Brinkmeier v. Railway Co.*, 69 Kan. 738, 77 Pac. 586. It must be remembered that this was a sudden call to a dangerous service which had to be performed then, or not at all. He was bound to use the discretion and judgment that a prudent man would in that situation. If it was a palpably reckless or foolhardy risk, he cannot be excused. If it was such as a prudent man would have performed, he might undertake it, although hazardous. The same rule applies to the manner in which the service was performed. Called to the service, he was bound to use such means as reasonable prudence dictated in the emergency in which he was placed. Whether he ought to have undertaken the work, and whether he made use of reasonable means in performing it, were questions properly submitted to the jury.

Labatt on Master & Servant, § 358, says: "In other cases the essence of the situation to be considered is that the servant was confronted by a serious danger; that he had not sufficient time to deliberate upon the comparative safety to the alternative courses of action open to him for the purpose of avoiding injury; and that the alarm or nervous excitement produced by the conjuncture impaired his reasoning faculties to such a degree that it was unjust to gauge the quality of his conduct by the ordinary standards. It is well settled that a servant who is suddenly exposed to great and imminent danger is not expected to act with that degree of prudence which would otherwise be obligatory; or, as the doctrine is also expressed, a servant is not necessarily chargeable with negligence because he failed to select the best means of escape in an emergency." Where a conductor ordered a brakeman to cut off cars from a moving train, it was held that, even

if he was not directed to go in between the cars, he might nevertheless do so, if such a mode appeared to him, in the exercise of ordinary care to be necessary. *Hannah v. Connecticut River Railroad*, 154 Mass. 529, 28 N. E. 682. The same rule was applied when on a dark, stormy night a brakeman, who was required to act promptly, complied with an order to use a defective link. *Denver, T. & G. R. Co. v. Simpson*, 16 Colo. 55, 26 Pac. 339, 25 Am. St. Rep. 242. In *Wurtenberger v. Railway Co.*, 68 Kan. 642, 75 Pac. 1049, it was held: "Where a master orders a servant into a situation of danger, and, in obeying the command, he is injured, the law will not charge him with contributory negligence, or with an assumption of risk, unless the danger was so glaring that no prudent man would have encountered it, even under orders from one having authority over him." In *Railroad Co. v. Langley*, 70 Kan. 453, 78 Pac. 858, it was said: "Again, where one, by the negligent act of another, is placed in a position of danger which requires immediate and rapid action, without time to deliberate as to the better course to pursue, he is not held to the strict accountability that is required of one situated in more favorable circumstances. Contributory negligence is not necessarily chargeable to one who fails to exercise the greatest prudence, or best judgment, in a case where he is required to act suddenly or in an emergency." The following cases are illustrative of the duties of a railroad company and its employes in similar cases: *Settle v. St. L. & S. F. Ry. Co.*, 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633; *Fox v. C., St. P. & K. C. Ry. Co.*, 86 Iowa, 368, 53 N. W. 259, 17 L. R. A. 239; *Mason v. Railroad Co.*, 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814; *Coates v. Boston & Maine Railroad*, 153 Mass. 297, 28 N. E. 864, 10 L. R. A. 769. The company by its rule required the plaintiff to unite with other employes to protect its property. He was suddenly called to that duty by his superior. He was not only bound to use ordinary care, but he was also bound to make all reasonable effort to save his employer's property. He was required to be loyal as well as to be careful.

The facts were fairly submitted to a jury, and, finding no error in the proceedings, the judgment is affirmed.

(76 Kan. 826)

MOORE et al. v. HERD.

(Supreme Court of Kansas. Dec. 7, 1907.)

WILLS — ELECTION — RIGHTS OF SURVIVING HUSBAND.

The statute (Gen. St. 1901, § 7979) requiring a widow to elect whether to accept the provisions of her deceased husband's will or to take what she is entitled to under the law of descents and distributions applies also to a husband for whom provision is made by the will of his deceased wife. In view of its origin and its intimate connection with the act relating to descents and distributions, it must be deemed to

be affected by the language of section 28 thereof (Gen. St. 1901, § 2529) that provisions of that act in relation to the widow of a deceased husband shall be applicable to the husband of a deceased wife.

(Syllabus by the Court.)

Error from District Court, Douglas County; C. A. Smart, Judge.

Action between Albert G. Moore and others and James Herd. From the judgment, Moore and others bring error. Affirmed.

W. J. Sturgis and Bishop & Mitchell, for plaintiffs in error. John Q. A. Norton, for defendant in error.

MASON, J. The parties to this proceeding agree that it turns upon this question: Does the statute relating to the election by a widow to accept the provisions of her husband's will, or to take what she is entitled to under the law of descents and distributions, apply, also, to a husband for whom provision is made by the will of his deceased wife? The statute reads: "If any provision be made for a widow in the will of her husband, and she shall not have consented thereto in writing, it shall be the duty of the probate court, forthwith after the probate of such will, to issue a citation to said widow to appear and make her election, whether she will accept such provision or take what she is entitled to under the provisions of the law concerning descents and distributions, and said election shall be made within thirty days after the service of the citation aforesaid; but she shall not be entitled to both." Gen. St. 1901, § 7979. A section of an Iowa statute substantially similar to this, so far as relates to the matter under consideration, was held to require an election by a husband who wished to take the benefit of his wife's will. *Everett v. Croskey*, 92 Iowa, 333, 60 N. W. 732, citing *Shields v. Keys*, 24 Iowa, 298. That section, however (section 2452, Iowa Code 1873), was a part of a chapter in another portion of which (section 2440) this language occurred: "All provisions made in this chapter in regard to the widow of a deceased husband shall be applicable to the surviving husband of a deceased wife." Practically the same language is found in the Kansas act concerning descents and distributions (Gen. St. 1901, § 2529), which was adopted in 1859 (chapter 63, p. 381, Laws 1859), being taken with but slight changes from the Iowa statute. In this state, however, the whole subject of wills, including the matter of the election by the widow, is treated in a different chapter, enacted at a later date. It is therefore difficult to find in the bare words of the statute justification for extending to the husband a provision relating in terms only to the wife. When, however, the matter is considered broadly, in the light of the history of this particular enactment and of the spirit of equality and uniformity which pervades all our legislation affecting the parties to the

marriage contract, it is difficult to reach any other conclusion than that the real intention of the Legislature was that their reciprocal rights should be precisely the same with regard to wills, as in all other matters. There would be less occasion to depart from the literal reading of the statute if nothing more were involved than the manner of election—if the question were merely whether the husband should indicate his choice formally, as is required of a widow, or might do so by any method ordinarily open to a devisee who has rights inconsistent with the terms of a will, one, for instance, whose property the testator assumes to dispose of. But the issue is more important than this. The question is not how the husband shall elect, but whether he shall be required to elect at all.

The Kansas act relating to wills (chapter 117, Gen. St. 1901) was framed by the commissioners appointed for the revision of the statutes in 1868, and passed in that year. It was borrowed very largely from the Ohio law. Chapter 123, Rev. St. Ohio, 1860. There was inserted, however, a new section (section 7972, Gen. St. 1901), forbidding either spouse to bequeath away from the other, except by written consent, more than one-half of the property of the testator. The section of the Ohio statute upon which that now under consideration was based read as follows: "If any provision be made for a widow, in the will of her husband, it shall be the duty of the probate judge, forthwith after the probate of such will, to issue a citation to said widow to appear and make her election, whether she will take such provision, or be endowed of the lands of her said husband, and said election shall be made within one year from the date of the service of the citation aforesaid; but she shall not be entitled to both, unless it plainly appears by the will to have been the intention that she should have such provision in addition to her dower." Section 43, c. 123, Swan & Critchfield's Rev. St. Ohio, 1860. It will be observed that two of the changes made were rendered necessary by the addition of the new section referred to, and by the fact that the estate of dower had already been abolished in Kansas. The words, "and she shall not have consented thereto in writing," were added, and for the phrase, "or be endowed of the lands of her said husband," there was substituted, "or take what she is entitled to under the provisions of the law concerning descents and distributions." The only other change aside from that reducing the time for election from 1 year to 30 days was the dropping of the words, "unless it plainly appears by the will to have been the intention that she should have such provision in addition to her dower," thereby making the rule absolute that the widow could not have the benefit of the will and the law both. The Legislature cannot have regarded the provisions relating to

this rule either as surplusage, or as merely declaratory. At common law the wife was permitted to claim her dower while accepting devises under her husband's will. 2 Underhill on the Law of Wills, § 744; 1 Jarman on Wills (Bigelow's Ed.) 463, star p. 429. "It is well established, as general doctrine, that, since dower is a legal right, the intention to exclude that right, by a devise or bequest of something else, must be demonstrated, if not by express words, at least by (what appears to the court to amount to) necessary implication. It is only where the claim of dower would be inconsistent with the will, or plainly tend to defeat some other part of the testator's disposition of his property, that the widow can be compelled to elect whether she will take her dower or the interest devised to her." 1 Cooley on Blackstone (1st Ed.) p. 138, note 34. The same is said to be true as to a statutory right granted in lieu of dower. "It is a general rule in equity, as regards the widow's dower, that the court will not compel her to elect between her dower or other statutory right and interest which she may have in the estate of the testator, and a provision made for her in the will, unless, first, it shall appear in express terms that the bequest or devise was given in lieu or satisfaction of her dower; or, second, unless it appears by clear and manifest implication on the circumstances of the case that the testator intended her to elect. She will not be compelled to elect unless her claim of dower is plainly inconsistent and irreconcilable with the will of the testator, and so repugnant to it that both her claim of dower and the devise in the will cannot consistently be upheld. She has a right to take both, despite the fact that the benefit given by the will may be much greater in fact than her dower." 2 Underhill on the Law of Wills, § 744.

It seems naturally to follow that if, in the absence of a statute to the contrary, a wife might claim the half of her deceased husband's estate under the law of descents and distributions and also take the benefit of his will, the husband could do the same with respect to his deceased wife's estate, where the law gives each the same interest in the other's property. If the section now under consideration is to be applied to the widow exclusively, it must be upon the assumption that the lawmakers intended to deny such a privilege to the wife, while suffering the husband to continue in its enjoyment. Such an intention ought not to be imputed to the Legislature if any reasonable alternative is presented; for it is entirely at variance with the purpose manifested in every other part of the Kansas statutes affecting the relations of husband and wife—a purpose to give the same property rights to each. Rather than accept such an interpretation, the court may well conclude, and does conclude, that the framers of the act regarded it as so intimately connected with the chapter on de-

scents and distributions, as to be affected by the rule there laid down, that provisions in relation to the widow of a deceased husband should be applicable to the husband of a deceased wife. Of course, if the statute is to be construed as forbidding the husband as well as the wife to take under the will and under the law at the same time, it necessarily follows that all its provisions relating to the election, including the method by which it shall be made known, must be held to apply in the one case as well as in the other. If the revision commissioners in 1868 had undertaken to draft in their own language a statute regarding election adapted to the rights of the husband and wife as they exist in Kansas, they would doubtless have made it refer, in terms, to both spouses. But they evidently chose to accomplish their purposes by making only such changes in the Ohio law as seemed necessary to that end. Proceeding in this manner, it is not surprising that they should have omitted an express mention of the privileges and duties of the surviving husband, upon the assumption that other parts of the statutes would make it clear that they were the same as those specified in the case of the widow.

This view of the question discussed requires an affirmance of the judgment of the district court.

(76 Kan. 928)

STATE v. WAY.

(Supreme Court of Kansas. Dec. 7, 1907.)

1. INFORMATION—CONVICTION OF LESSER OFFENSE.

A conviction for an offense less than that defined in the statute upon which a prosecution is primarily based may be sustained, if the information alleges the existence of all the essential facts constituting such less offense; and under such circumstances a more liberal construction is allowed than is ordinarily applied to criminal pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 580, 581.]

2. SAME—VERDICT—ABSENCE OF ACCUSED.

The right of the defendant to be present when a verdict is returned, secured to him by the statutory provision that "no person indicted or informed against for felony can be tried unless he be personally present during the trial," is one that may be waived, and if, while at liberty on bond, he is voluntarily absent, without having been excused by the court, when the jury reaches an agreement, a verdict against him may lawfully be received in his absence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1469, 1478.]

(Syllabus by the Court.)

Appeal from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Grant Way was convicted of betting on a game of chance, and appeals. Affirmed.

H. A. Scott and J. B. Tomlinson, for appellant. F. S. Jackson, Atty. Gen., and J. R. Charlton, for the State.

MASON, J. Grant Way was prosecuted upon a charge of setting up and keeping a gam-

bling device, and was convicted of the inferior offense of betting upon a game of chance at a gambling resort. He appeals, and presents two grounds of error: (1) That the court erred in instructing the jury that the information charged a violation of the statute upon which the verdict was based; and (2) that the verdict should have been set aside because it was returned in the absence of the defendant. These contentions will be considered in their order.

The information was obviously drawn under section 2228 of the General Statutes of 1901, reading as follows: "Every person who shall set up or keep any table or gambling device commonly called ABC, faro bank, EO, roulette, equality, keno, wheel of fortune, or any kind of gambling table or gambling device, adapted, devised and designed for the purpose of playing any game of chance for money or property, or shall induce, entice or permit any person to bet or play at or upon any such gaming-table or gambling device, or at or upon any game played at or by means of such table or gambling device, either on the side of or against the keeper thereof, or shall keep a place or room to be used as a place for playing any game of cards for money or property, or keep a common gaming-house or keep a house, room or place to which persons are accustomed to resort for the purpose of gambling, shall, on conviction be adjudged guilty of felony, and punished by imprisonment and hard labor for a term not less than one year nor more than five years." The verdict as obviously referred to section 2232, for it pronounced the defendant guilty of "betting money on a game of chance with cards and chips at a place where persons were accustomed to resort for gambling purposes." This section reads: "Every person who shall either directly or indirectly bet any money or property at any common gaming-house, or at any place to which persons are accustomed to resort for gambling purposes, or at any place kept for the purpose of being used as a place for gambling, whether such betting be upon any game of skill or chance, either with or without cards or dice, or by use of any kind of device or contrivance whatsoever for determining chances, shall be guilty of a felony, and upon conviction shall be punished by imprisonment at hard labor in the penitentiary for a term not less than one year nor more than three years." The information charged that the defendant: "Did * * * keep, set up and maintain * * * a gambling device and devices composed of playing cards and red, white and blue celluloid chips, commonly known as poker chips, said cards and chips then and there being adapted, devised, and designed for the purpose of playing a game and games of chance, commonly known as poker, for money and property and * * * did * * * induce, solicit, request, and permit persons to bet, offer, and wager lawful money of the United States of America and to play with, and by

means of said gambling device and devices, the game commonly known as poker with and against said defendants, and that through this gambling device, and devices, lawful and current money of the United States of America and property were lost and won by chance."

From this statement of the statutes, the information, and the verdict, it appears that the section upon which the conviction was had is directed against betting under certain circumstances, and that the defendant was not in direct and express terms charged with having bet upon anything. A conviction may always be had upon any less offense which is included within that charged (Gen. St. 1901, § 5564), or, as said in *State v. Burwell*, 34 Kan. 312, 8 Pac. 470: "Wherever a person is charged upon information with the commission of an offense under one section of the statutes, and the offense charged includes another offense under another section of the statutes, the defendant may be found guilty of either offense." Some liberality of interpretation is permitted in such cases. The rule is thus stated in 22 Cyc. 467: "While it is not necessary to make a specific charge of all the offenses included in the charge for which the indictment is drawn, a conviction cannot be had of a crime as included in the offense specifically charged, unless the indictment in describing the major offense contains all the essential averments of the less, or the greater offense necessarily includes all the essential ingredients of the less." In several instances it has been held that words used in the statute defining the inferior offense need not be used in the information, where the statements there made in charging the greater offense necessarily show the existence of all the facts essential to constitute the less. For example, a conviction under a statute (section 2029, Gen. St. 1901) against administering medicine with the intent to procure abortion has been sustained under an information which did not use the word "abortion," being drawn under a statute forbidding the giving of medicine to a woman pregnant with a quick child with the intent to destroy such child; the reasoning being that the destruction of a quick child necessarily involved the procuring of an abortion. *State v. Watson*, 30 Kan. 281, 1 Pac. 770. The exact question to be here determined is therefore whether the acts charged in the information necessarily involved those found in the verdict. The allegations that the defendant set up a gambling device, and induced persons to play for money by means thereof, sufficiently imply that the place where it was maintained was one to which persons were accustomed to resort for the purpose of gambling, and which was kept for that purpose. And to say that the defendant "did * * * induce * * * and permit persons to bet and to play by means of said gambling device (cards and chips) * * * the game commonly known as poker with and

against said defendant, * * * and that through this gambling device * * * money and property were lost and won by chance," is to say, in effect, that the defendant bet money on a game of chance played with cards and chips. "If two persons play at cards for money, they are said to be gambling or gaming; but they are gaming because they lay a wager or make a bet on the result of the game, and therefore to say they are betting is equally appropriate." *People v. Welthoff*, 51 Mich. 203, 210, 16 N. W. 442, 445, 47 Am. Rep. 557. "The legal meaning of the term 'bet' is the mutual agreement and tender of a gift of something valuable, which is to belong to one of the contending parties according to the result of the trial of chance or skill, or both." *Mayo v. State* (Tex. Cr. App.) 82 S. W. 515. If the defendant permitted others to play with him in a game at which money was lost and won by chance, he necessarily bet money upon a game of chance. The court concludes that, although the crime for which a conviction was had was not charged with the directness and distinctness that should ordinarily characterize criminal pleadings, the defendant suffered no substantial prejudice thereby; all the essential constituents of that crime being included in the graver charge upon which the prosecution was primarily based.

The record shows these to have been the circumstances attending the reception of the verdict: The case was submitted to the jury at about 5 o'clock in the afternoon. At about 6 o'clock the court took a recess, as stated in the journal entry, "to await the return of the verdict," or, as recited in the bill of exceptions, "contingent upon the incoming of the jury." At about 6:45 the jury announced that they had agreed and were brought into court. The defendant, who was out upon bond, was absent, as were also his attorneys. By order of the court, the bailiff "went to the window and called in a loud voice" each of them; but none of them appeared. They had not been excused from attendance, and had left no word with the court as to where they could be found. The verdict was then received in their absence. The defendant, in support of a motion for a new trial, made an affidavit stating that, in pursuance of the instructions of his attorneys, he had held himself in readiness to be called and to be present whenever the jury should return, and that he was within half a block of the courthouse when the verdict was received, but did not hear the bailiff call him. It is clear from this statement that the defendant was voluntarily absent from the court without permission, and thereby waived his right to be present when the verdict was received, if that right can ever be waived. The statute provides that "no person indicted or informed against for a felony [and the conviction here was for a felony] can be tried unless he be personally present during the trial." Gen. St. 1901, § 5649. The effect of the adjudica-

tions on the subject is thus stated in 12 Cyc. 527: "Some of the courts have held that the right to be present during the trial of an indictment for felony cannot be waived by defendant in a capital case, and some have applied the same rule in the case of any felony, whether capital or not, so that a trial or any material step therein, or reception of the verdict, in defendant's absence, in such cases is error, although he has escaped or is otherwise voluntarily absent. Most of the courts, however, have held that defendant may waive his right to be present when the felony is not capital; that he does so if, having been released on bail, he absconds or is voluntarily absent after his arraignment and plea; and that in such a case the trial may proceed, and the verdict be received notwithstanding his absence." In notes appended to this text, the cases are very fully collected and classified. Some of those holding that a verdict may properly be received without the presence of the defendant if his absence is voluntary turn upon constitutional or statutory provisions less explicit than that quoted, which, however, is regarded as but declaratory of the common law. Other recent cases supporting the view that the defendant's conduct does not affect the matter are *Wells v. State* (Ala.) 41 South. 630, from which it appears that in Alabama the reception of a verdict in the defendant's absence is tantamount to an acquittal, and *State v. Mannion*, 19 Utah, 505, 57 Pac. 543, 45 L. R. A. 639, 75 Am. St. Rep. 733; while *State v. McGinnis*, 12 Idaho, 336, 85 Pac. 1089, has a contrary tendency. See, also, notes in 5 L. R. A. 835 and 2 Am. St. Rep. 303.

In *Commonwealth v. McCarthy*, 163 Mass. 458, 40 N. E. 766, which is based upon a statute substantially the same as ours, it is said: "It is a general rule, both in England and in this country, that a trial for a felony cannot be had without the personal presence of the accused. * * * The trial is not concluded until the verdict is received and recorded. * * * In this commonwealth, we have a statute which embodies the same general rule. Pub. St. 1882, c. 214, § 10. * * * Under this statute, as well as at the common law, it may well be held that, when a defendant is in custody under an indictment for a felony, the verdict cannot properly be taken in his case without his personal presence, even if he has been in attendance in all previous stages of the trial, and that, whether he is in custody or on bail, the trial cannot properly be begun in his absence. But whether a defendant who is on bail, and who has been present during his trial until the case has been given to the jury, can nullify the whole proceedings by absenting himself until it becomes necessary to discharge the jury, is a very different question. We have seen no well-considered case that decides this question in the affirmative. In most of the reported cases the defendant was in custody, and the failure of the authorities to have

him present when the verdict was taken deprived him of a right. * * * But it has been repeatedly held, upon careful consideration, that while it is a right of the defendant indicted for a felony to be present when the verdict is rendered, as well as during the earlier parts of the trial, and while it is irregular and improper to begin the trial in such a case without the presence of the accused, yet if he is on bail, and is present at the commencement of the trial, and afterwards voluntarily departs without leave, and is absent when the verdict is returned, he may be defaulted, and a verdict which will be binding upon him may be taken in his absence. * * * Such a case is treated as an exception to the general rule, and as a waiver by the defendant of his right to be present. * * * It would be unreasonable to hold that he can attend until the case is given to the jury, and, when he sees indications that the verdict is to be against him, can make it impossible to complete the trial, and thus nullify all that has been done by absconding. If he could do this, it would be necessary upon his return to try him again *de novo*, when perhaps it would be impossible to procure the evidence which was introduced at the first trial, and when, if he were again admitted to bail, he might a second time defeat the ends of justice by again departing. His departure, under such circumstances, ought to be deemed a waiver of his right to be present at the taking of the verdict. If the commonwealth has done all that it can reasonably be required to do to secure him his rights, our statute, and the common law of which it is declaratory, ought to be so construed as to prevent the return of the verdict. * * * No detriment can ever come to a defendant from this construction of our statute, and a different construction of it would make it in some cases an instrument of great injustice."

In *Frey v. Calhoun*, Circuit Judge, 107 Mich. 130, 64 N. W. 1047, involving a similar statute, the court reaches the same conclusion upon a full review of the authorities, saying: "The general rule is that a trial for a felony cannot be had without the personal presence of the accused. We have a statute which recognizes and embodies this rule. How. Ann. St. § 9568. It is also well settled that the trial is not concluded until the verdict is received and recorded. There are cases which hold that a verdict rendered in the absence of the prisoner, whether he be in custody or out on bail, is void. * * * Few cases will be found which go to this extent, and, in nearly all of the cases where a verdict rendered in the absence of the accused has been held erroneous, the respondent has been in custody, and has therefore been prevented from attending. When, however, the absence of the prisoner is not an enforced absence, but is voluntary, as when he is out on bail, and has been present pending the trial, but voluntarily leaves the court-

room pending the deliberations of the jury, or neglects to appear at the adjourned hour of the court, the clear weight of authority favors the rule that a verdict, rendered under such circumstances, is valid and binding."

The substance of the argument employed by the Massachusetts court is thus forcibly stated in *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743: "It is the right of the defendant in cases of felony * * * to be present at all stages of the trial, especially at the rendition of the verdict, and, if he be in such custody and confinement by the court as not to be present unless sent for and relieved by the court, the reception of the verdict during such compulsory absence is so illegal as to necessitate the setting it aside on a motion therefor. * * * The principle thus ruled is good sense and sound law, because he cannot exercise the right to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into the court by its order. But the case is quite different, when, after being present through the progress of the trial and up to the dismissal of the jury to their room, he voluntarily absents himself from the courtroom, where he and his bail obligated themselves that he should be. * * * And the absolute necessity of the distinction, or the abolition of the continuance of the bail when the trial begins, is seen, when it is considered that otherwise there could be no conviction of any defendant, unless he wished to be present at the time the verdict is rendered. From the charge of the court, from the countenances of the jury, from the course of the argument, from the hints or misgivings of counsel, from information leaking out of the jury room, the defendant might see that the jury would convict him, and absent himself until the verdict was rendered, and thus have its rendition made entirely nugatory by his own act. The forfeiture of the bond is nothing. Appearance at the next term would save his bail, and trivial costs only would be the penalty paid, while the whole case must be tried again, or the defendant be discharged altogether. A second trial at the next term could be made at his option, to result in the same way at the same trivial costs, and so on ad infinitum. Can this be the law? We think that it cannot be is as certain as that it ought not to be."

There seems to be no escape from the force of this reasoning. It is true that in Kansas the bail is only exonerated from liability upon surrendering his principal after a default, if he presents a satisfactory excuse therefor. Gen. St. 1901, § 5591. But this results from a recent amendment, and therefore cannot affect the interpretation of the statute under consideration. That the practical evils of the rule so vigorously denounced by the Georgia court are not exaggerated is shown by what is said of its application in *People v. Beauchamp*, 49 Cal. 41: "It appeared that the verdict by which the

prisoner was found guilty of the felony charged in the indictment had been received by the court below, and recorded in its minutes, and the jury discharged, while the prisoner was not personally present in court. The statute (Pen. Code, § 1148) distinctly provides that, in order to the validity of such a verdict, the prisoner must be personally present in court when it is returned. In this case the prisoner seems to have absconded after the cause was given to the jury, and before their return into court. The growing frequency of occurrences of this character, thwarting the administration of criminal justice, would suggest the propriety in all trials for felony of promptly ordering the prisoner, regardless of his previous admission to bail, into actual custody, at the commencement of the trial, or immediately upon the retirement of the jury to consider their verdict." The Supreme Court of Missouri, from which state the statute was transplanted to Kansas in 1855, held that under it the voluntary absence of the defendant in a felony prosecution vitiated the verdict (*State v. Braunschweig*, 36 Mo. 397); but the decision was not made until 1865, and therefore has no controlling force here. The law was subsequently changed by legislation; the proviso being added "that in all cases the verdict of the jury may be received by the court, and entered upon the records thereof, in the absence of the defendant, when such absence on his part is wilful and voluntary." This addition is said to have been made "to prevent a defendant from securing a mistrial and continuance by escaping, if in custody, or absconding, if on bail, after the cause has been submitted to the jury, and before verdict rendered." *State v. Hope*, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 608.

The question has not heretofore been directly passed upon by this court. In *State v. Adams*, 20 Kan. 311, 328, in holding that a defendant could waive his constitutional privilege to appear and defend in person in all prosecutions, attention was called to the difference between the language of the Constitution and that of the statute—in the one case, "he shall be allowed"; in the other, "no person can be tried." But no ruling was necessary or was made against the right to waive the benefit of the statutory provision. In *State v. Myrick*, 88 Kan. 238, 16 Pac. 330, it was held that the absence of the defendant during a part of a felony trial was not cured by the presence of his counsel and their consent to the proceeding. There, however, the defendant was at the time confined in the county jail, and knew nothing of the matter. To hold that his statutory privilege could be regarded as waived under such circumstances would be to say that representation by an attorney is in all respects a complete substitute for personal presence, the right to which is guaranteed by the statute. In *State v. Smith*, 44 Kan. 75, 24 Pac. 84, 8 L. R. A. 774, 21 Am. St. Rep. 266, *State v.*

Jarrett, 46 Kan. 754, 27 Pac. 146, and State v. Clifton, 57 Kan. 448, 46 Pac. 715, which follow the Myrick Case, the defendants were all in confinement while the proceedings complained of took place. In State v. Moran, 46 Kan. 318, 26 Pac. 754, the verdict was set aside because a witness had been permitted to testify in the absence of the defendant. The decision is rested squarely upon State v. Myrick, without further discussion, and fails to disclose any intention to enlarge the doctrine of that case. The report does not clearly show whether or not the defendant was in custody, but the record indicates that he had given bail. However, the opinion recites that he was absent with the consent of the court, and the record contains the statement that his absence was necessary. The situation was therefore entirely different from that here presented. Excusing the defendant temporarily from attendance upon the court for a necessary purpose fairly implies that the trial is not to be proceeded with until his return. He would be justified in so understanding, and his withdrawing, under such circumstances, cannot be said to be a voluntary absence during a part of the trial. So in State v. Mulr, 32 Kan. 481, 4 Pac. 812, a misdemeanor case, it was held to be error to receive a verdict on Sunday, in the absence of the defendant and his counsel, without their being called, but expressly upon the ground that, except upon notice, they were not bound to be in attendance upon the court on a nonjudicial day. The question therefore being an open one in this state, the court prefers to follow what is clearly the weight of authority, as well as what seems to be the better reason, and to decide that the right of the defendant to be present during a felony trial is one that may be waived, and that if, while at liberty on bond, he is voluntarily absent, without having been excused by the court, when the jury reaches an agreement, a verdict against him may lawfully be received in his absence. On all accounts reasonable exertion should always be made to procure the attendance of the defendant, but it cannot be said that in the present instance any effort in that direction was omitted to which he was entitled as a matter of right.

The judgment is affirmed.

(76 Kan. 920)

SEAVERNS v. STATE.

(Supreme Court of Kansas. Dec. 7, 1907.)

APPEAL—DISMISSAL—INCONSISTENT PROCEEDINGS.

The occupant of a tract of state school land instituted proceedings to purchase it as a settler. The probate court denied his petition, and he appealed. He then purchased the land of the state at a public sale. Subsequently the district court dismissed his appeal. *Held*, the conduct of the appellant in purchasing the land at public sale was inconsistent with a claim of error in the judgment of the probate court, and the appeal was rightfully dismissed.

(Syllabus by the Court.)

Error from District Court, Wallace County; J. H. Reeder, Judge.

Proceedings by W. H. Seaverns against the state of Kansas to acquire land as a resident settler. Petition denied, and appeal to the district court. Petition dismissed, and petitioner brings error. Affirmed.

Lee Monroe and Geo. A. Kline, for plaintiff in error. F. S. Jackson, G. E. Ward and Roark & Roark, for the State.

BURCH, J. About the year 1889, the plaintiff in error, W. H. Seaverns, entered upon a tract of state school land, and in the years following occupied and improved it. In the year 1902 he leased the land from the state under a lease expiring in January, 1906. Before the expiration of his lease, he assisted in circulating a petition to the county superintendent of public instruction to expose the land to sale, in consequence of which appraisers were appointed, who, on January 22, 1906, returned the land as unimproved and of the value of \$1.25 per acre. At that time he estimated the value of his improvements at \$2,000. Following the return of the appraisal, Seaverns instituted proceedings to acquire the land as a resident settler, alleging settlement thereon as of March 1, 1905. After a hearing in the probate court, his petition was denied, and on February 23, 1906, he duly perfected an appeal to the district court. Before the hearing in the probate court occurred, the county treasurer made the first publication of a notice that he would on February 26, 1906, sell this land, and other tracts, to the highest bidder. After taking his appeal, Seaverns objected to a sale of the land, told the county treasurer not to sell it, and stated to the treasurer that he intended to carry his case through. The treasurer, however, held a public sale, as advertised, at which Seaverns caused the land to be bid in by an agent at the price of \$6.17½ per acre. The treasurer gave a receipt for the first installment of the purchase price, which reads as follows: "No. 44. March 7, 1906. By whom paid.—W. H. Seaverns. Description of land, S. W. ¼ of 36-15-39. First annual installment, \$98.80. Paid under protest." Subsequently, when the appeal was reached in the district court, it was dismissed on the ground that, after it had been perfected, Seaverns had voluntarily purchased the subject-matter of the litigation from the state of Kansas at public auction, and thereby had waived the right to urge that error had been committed in the proceedings of the probate court. Because of the order dismissing his appeal, Seaverns prosecutes this proceeding in error.

Quite early in the history of this court, the position was taken that a party who complains of a judgment must be consistent in his conduct with reference to it, and, if he recognizes its validity, or acts contrary to the assumption that it is erroneous, he will not be heard to say on appeal that it is er-

roneous. *Babbitt v. Corby*, 13 Kan. 612. In applying this rule, less liberality of conduct has been permitted to appellants than many other courts of last resort are disposed to allow when dealing with the same subject; but manifestly the case must be determined according to those principles which have long been adopted and followed here. Appellant cites no decision of this court favoring his estimate of his rights, although the general question has been considered many times. In the following cases, which present the question of estoppel in various ways, it was decided that the parties appealing from adverse judgments had assumed inconsistent attitudes respecting them: *Bradley v. Rogers*, 33 Kan. 120, 5 Pac. 374; *Price v. Allen*, 39 Kan. 476, 18 Pac. 609; *State Journal Co. v. Commonwealth Co.*, 43 Kan. 93, 22 Pac. 982; *Railroad Co. v. Murray*, 57 Kan. 697, 47 Pac. 835; *Samuel v. Samuel*, 59 Kan. 335, 52 Pac. 889; *Sheldon v. Motter*, 59 Kan. 776, 53 Pac. 127. In the following cases, the inconsistent conduct lay chiefly in the acceptance of some benefit from the judgment: *Babbitt v. Corby*, 13 Kan. 612; *Hoffmire v. Holcomb*, 17 Kan. 378; *Wolf v. McMahon*, 26 Kan. 141; *Savings Bank v. Butler*, 56 Kan. 267, 43 Pac. 229; *Perkins v. Bunn*, 56 Kan. 271, 43 Pac. 230. In the following cases the inconsistency arose from a compliance with the judgment either in whole or in part: *Fenlon v. Goodwin*, 35 Kan. 123, 10 Pac. 553; *State v. Conkling*, 54 Kan. 108, 37 Pac. 992, 45 Am. St. Rep. 270; *York v. Barnes*, 58 Kan. 478, 49 Pac. 596; *Knight v. Hirbourn*, 64 Kan. 563, 67 Pac. 1104; *Waters, Treas., v. Garvin*, 67 Kan. 855, 73 Pac. 902. In the cases of *Rasure v. McGrath*, 23 Kan. 597, and *Zelgler v. Hyle*, 45 Kan. 228, 25 Pac. 568, the controversies were settled, and the court refused to hear the appealing parties further. Under the peculiar facts of *Newman v. Lake*, 70 Kan. 848, 79 Pac. 675, it was held that a partial compliance with an order of court did not defeat a proceeding in error challenging the validity of the order, and in the following cases it was decided that the conduct of the appealing party was not inconsistent with a claim of error in the proceeding sought to be reviewed: *Headrick v. Yount*, 22 Kan. 344; *Seckler v. Delfs*, 25 Kan. 159; *Mack v. Price*, 35 Kan. 134, 10 Pac. 521; *Railway Co. v. Bagley*, 65 Kan. 188, 69 Pac. 189, 3 L. R. A. (N. S.) 259.

In the probate court, the position of Seaverns was that, having complied with certain provisions of the law, he possessed an exclusive right to purchase the land as a settler, and that the state was under an obligation to him not to dispose of the land to any other person or in any other way. By undertaking to sell the land at public auction, the state impliedly asserted that the judgment of the probate court denying Seaverns' right to purchase as a settler was valid, conclusive, and just. By attending the public sale, engaging in competitive bidding with others, and buy-

ing the land, Seaverns necessarily abandoned his special claim as a settler and acknowledged the right of the state to sell to any one who would bid the highest price. The purpose of the appeal was to reopen the controversy adjudicated in the probate court. After the land had been purchased by Seaverns at public sale, all controversy regarding his right to purchase as a settler was at an end, and he had no standing to assert the contrary. The situation of Seaverns is very like that of the plaintiff in error in the case of *Sheldon v. Motter*, 59 Kan. 776, 53 Pac. 127. The opinion in that case is not printed in the Kansas reports, but it appears in 53 Pac. 127, and reads as follows: "This proceeding is brought in this court to review an order confirming a sale of real estate at which the defendant, Motter, was the purchaser. Since the petition in error was filed, the plaintiff in error and her husband have accepted a lease from Motter for the land sold, and have attorned and paid rent to him for the same. This is a recognition of his title inconsistent with the prosecution of this proceeding. The petition in error will therefore be dismissed." The confirmation of the sale cut off Sheldon's rights, and gave title to Motter. So, here, the judgment of the probate court cut off Seaverns' rights as a settler, and left the state at liberty to sell at public sale. The act of taking a lease from Motter necessarily involved a recognition of his title. The act of purchasing from the state at public sale necessarily involved a recognition of the state's right to dispose of the land in that manner. After leasing from Motter, Sheldon could not on appeal reopen the question of title. After buying at public sale, Seaverns could not on appeal reopen the question regarding his right to purchase as a settler. In the case of *State Journal Co. v. Commonwealth Co.*, 43 Kan. 93, 22 Pac. 982, a part of the relief prayed for was the foreclosure of certain chattel mortgages given by the defendant, and upon the application of the plaintiff a receiver for the mortgaged property was appointed. A motion was made to set aside the appointment of the receiver, which was denied; but the court ordered that, upon the filing of a bond to satisfy any judgment the plaintiff might recover, the receiver should be discharged, and the property restored to the defendant. The defendant voluntarily gave the bond and was given possession of the property. In a proceeding in error in this court, it was held the defendant could not claim the order appointing the receiver was erroneous. The propriety of a sequestration of the property having been recognized by giving a bond which took the place of the property, consistency forbade that the original order should afterward be assailed. In the case of *Samuel v. Samuel*, 59 Kan. 335, 52 Pac. 889, a husband brought an action against his wife for a divorce. The wife also asked for a divorce and a division of the property. No divorce was granted, but the property was divided, and the

plaintiff appealed. Afterward he commenced another action for a divorce against his wife in Oklahoma, which went to judgment in his favor, and his wife was barred of all interest in his property. The proceeding to reverse the first judgment was dismissed by this court because the plaintiff had renounced his right to relief and had undertaken to remedy the state of his affairs in another way. Other decisions of this court cited above are equally conclusive against the plaintiff in error in the pending proceeding.

It is true that, in buying the land at public sale, Seaverns obeyed no express command of the probate court, and he took no benefits under the judgment of that court, for it gave him none; but neither of these facts is essential to an estoppel. It is sufficient that he yielded to the state's contention and to the judgment adverse to him, and undertook to obtain the land in a manner incompatible with the maintenance of his former attitude. He had the option to abide by his appeal, or to renounce the right which it conserved and adopt a different course to further the interests. Having elected, he must endure the consequences.

It is urged that the conduct of the treasurer in bringing on a public sale of the land coerced Seaverns to purchase in order to protect himself from loss. The sale, however, was not a forced judicial sale, which would pass title to a purchaser whatever became of the appeal. If the appeal were well founded, the appellant could not lose the land. The objection and protest of Seaverns against that to which he nevertheless voluntarily determined to submit was, of course, nugatory. *Price v. Allen*, 89 Kan. 476, 18 Pac. 800; *The State v. Conkling*, 54 Kan. 108, 87 Pac. 992, 45 Am. St. Rep. 270.

The judgment of the district court is affirmed.

(76 Kan. 862)

BRUNER et al. v. MARTIN.

(Supreme Court of Kansas. Dec. 7, 1907.)

1. LIMITATION OF ACTIONS—CAUSE ARISING IN FOREIGN STATE.

The words "when a cause of action has arisen" in a foreign state, as used in the statute of limitations (Code Civ. Proc. § 22, Gen. St. 1901, § 4450), mean when the cause of action has accrued in a foreign state, or, in other words, when the plaintiff has the right to sue the defendant in the courts of such foreign state, and they have no reference to the origin of the transaction out of which the cause of action arose.

2. SAME.

An action on a promissory note cannot be maintained here under section 22 of the limitation act (Gen. St. 1901, § 4450), where both the plaintiff and the defendant were nonresidents of Kansas when the cause of action accrued, and the defendant resided in a foreign state until the cause of action was barred by the laws of that state.

(Syllabus by the Court.)

Error from District Court, Meade County; E. H. Madison, Judge.

Action by Jennie S. Martin against Esther Bruner and others. Judgment for plaintiff. Defendants bring error. Reversed and remanded.

E. L. Foulke and Vandever & Martin, for plaintiffs in error. Francis C. Price, for defendant in error.

PORTER, J. Action by Jennie S. Martin against Esther Bruner et al., to foreclose a mortgage on real estate. Judgment for plaintiff, and defendants bring these proceedings in error.

The sole question involves the construction of the statute of limitations. There was a stipulation as to the facts, from which it appears that the plaintiff resides in New Jersey and has never been a resident of Kansas. She acquired the note and mortgage by purchase from another nonresident. The note and mortgage were executed in Kansas, July 2, 1888, by Charles and Lucy B. Veatch, husband and wife, who were the owners of the real estate. The note was payable five years after date at the city of New York to the Kansas & New Jersey Loan Company, a Kansas corporation, and contained a clause providing that it should be construed in all respects according to the laws of Kansas. The mortgage was duly recorded in Meade county, Kan., where the land is situated. It contained the usual conditions. In 1889, before the maturity of the note, Charles Veatch and wife, makers of the note and mortgage, conveyed the real estate to Francis M. Bruner, and removed to the state of Missouri, where they have since resided, and have never returned to or been within this state. The note and mortgage were before maturity indorsed and transferred to a nonresident of Kansas, and by subsequent indorsement and transfer became the property of plaintiff. The limitation laws of Missouri bar an action upon a promissory note 10 years after the cause of action thereon accrues. The principal defendants are the heirs of Francis M. Bruner, who purchased the land from Charles Veatch, subject to the mortgage. They are all residents of the state of Iowa, and have resided there continuously. The defense relied upon is the statute of limitations. The answer alleged that the cause of action for the foreclosure of the mortgage arose at the time the note became due, and was therefore barred by the five-year statute of limitations; that the cause of action upon the note arose in Missouri, where the makers resided at the time the note matured, and set out the provisions of the Missouri statute of limitations. Section 22 of the Civil Code (Gen. St. 1901, § 4450), in so far as it is directly involved, reads as follows: "Where the cause of action has arisen in another state or country, between nonresidents of this state, and by the laws of the state or country where the cause of action arose an action cannot be maintained thereon by reason of lapse of time, no action

(can be) maintained thereon in this state." In its last analysis the case turns upon the meaning of the words "cause of action has arisen" and "cause of action arose" as used in the foregoing section. The trial court construed the word "arisen" to mean "originate," and upon this construction held, and it is the contention of defendant in error, that the cause of action in this case arose within the state of Kansas where the contract was made, and that section 22 has no application, but that the preceding section 21 applies. The latter section reads as follows: "If when a cause of action accrues against a person he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if after the cause of action accrues he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

There is a conflict of authority upon the precise question involved, and has never, we believe, been decided in this state. Some courts in construing statutes containing the exact language of ours, and others in construing statutes of almost identical language, have held that a different meaning attaches to the words "cause of action has arisen" as used in section 22 and the words "cause of action accrues" used in section 21. These courts have declared that a cause of action arises when and where the transaction occurs from which it originates, that is, where the contract is made. See the following authorities: *Chevrier v. Robert*, 6 Mont. 319, 12 Pac. 702; *John Shillito Co. v. Richardson*, 102 Ky. 51, 42 S. W. 847; *Powers Mercantile Co. v. Blethen*, 91 Minn. 339, 97 N. W. 1056; *Doughty, Receiver, v. Funk*, 15 Okl. 643, 84 Pac. 485, 4 L. R. A. (N. S.) 1029. The Oklahoma statute, construed in the latter case, is copied literally from the Kansas statute, and the opinion which cites the cases upholding this view presents the reasons thereof as well as any to which our attention has been called. The decisions referred to are against the better reasoning, in our opinion, and unquestionably opposed to the great weight of authority. The phrase "cause of action" has often been defined. It cannot exist without the concurrence of a right, a duty, and a default; or, stated differently, an obligation must exist upon one party in favor of the other, the performance of which is refused. *Bouvier* defines it as a right to bring an action. To the same effect see *Bucklin v. Ford*, 5 Barb. (N. Y.) 393; *Myer v. Van Collem*, 28 Barb. (N. Y.) 230; *Lewis v. Hyams*, 26 Nev. 68, 63 Pac. 126, 64 Pac. 817, 99 Am. St. Rep. 677. "Cause of action is the right to prosecute an action with effect." *Douglas v. Forrest*, 4 Bing. 686. In *Veeder v. Baker*, 83 N. Y. 156, is defined as follows:

"It may be said to be composed of the right of the plaintiff and the obligation, duty, or wrong of the defendant; and these combined, it is sufficiently accurate to say, constitute the cause of action." *Pomeroy* in his *Code Remedies*, § 453, uses the following language: "Every judicial action must therefore involve the following elements: A primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated, or however simple, must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the Codes of the several states. They are the legal cause or foundation whence the right of action springs." Many other definitions by courts and text writers, which are substantially the same, may be found collated in the able dissenting opinion of Mr. Justice Young in *Colonial & U. S. Mortg. Co. v. Northwest Thresher Co.*, 14 N. D. 147, 103 N. W. 915, 70 L. R. A. 814, 823-824.

It would be difficult to find a better or more apt statement of where and when a cause of action arises than is found in the following extract from the opinion in *Durham v. Spence*, L. R. 6 Exch. 46: "Now the cause of action must have reference to some time as well as to some place. Does then the consideration of the time when the cause of action arises give us any assistance in determining the place where it arises? I think it does. The cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done. But the time when the cause of action arises determines also the place where it arises; for when that occurs which is the cause of action, the place where it occurs is the place where the cause of action arises." In *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384, the court said: "Nor is there room for difference as to what is meant by the phrases 'cause of action has accrued,' or 'cause of action has arisen,' since the death of the testator. They do not mean the contracting of the indebtedness, for a cause of action does not accrue or arise from the making of the indebtedness alone, but out of the nonperformance of it as well." In *Lewis v. Hyams*, supra, the same question was involved, and it was there held that the phrase "when the cause of action has arisen" means exactly the same as if the statute had said "when the cause of action has accrued." In a further opinion upon an application for a rehearing (*Lewis v. Hyams*, 26 Nev. 68, 63 Pac. 126, 64 Pac. 817) it is stated that after an exhaustive and careful re-examination the

court was unable to reach a different conclusion.

The New York Code of Civil Procedure provides that an action may be maintained by one foreign corporation against another "where the cause of action arose within the state." The words "where the cause of action arose within the state" were construed in *Shelby Steel-Tube Co. v. Burgess Gun Co.* (Sup.) 40 N. Y. Supp. 871. The goods were ordered by letter from Buffalo. The acceptance was in the state of Ohio. The court, after stating that the contract was actually made in Ohio, used the following language: "It does not follow, however, that because the contract was not made within this state a cause of action could not arise there. No cause of action arose anywhere upon this contract until the defendant had made some default in the payment of the contract price of the goods purchased."

The statute of Washington is substantially the same as ours. It was construed in reference to these phrases in the case of *Freundt v. Hahn*, 24 Wash. 8, 63 Pac. 1107. The contention there was that the words "has arisen" and "arose" were used in the sense of "originated," and with a meaning entirely different from "accrued" as used in the other section. The court in a well-considered opinion, construed the words to mean the same thing, and that the cause of action arose where and at the time it accrued. To the same effect see the following cases: *Osgood v. Artt* (D. C.) 10 Fed. 865; *Hower v. Aultman*, 27 Neb. 251, 42 N. W. 1069; *Minneapolis Harvester Works v. Smith*, 36 Neb. 616, 54 N. W. 978; *Harrison v. Union National Bank*, 12 Neb. 490, 11 N. W. 752; *Humphrey v. Cole*, 14 Ill. App. 56; *Luce v. Clarke*, 49 Minn. 356, 51 N. W. 1162; *Drake v. Bigelow*, 98 Minn. 112, 100 N. W. 664; *Orr v. Wilmarth*, 95 Mo. 212, 216, 8 S. W. 258; *Zoll v. Carnahan*, 83 Mo. 85; *Scroggs v. Daugherty*, 58 Mo. 497; *Frost v. Witter*, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53. The case of *Osgood v. Artt*, supra, opinion by Judge Blodgett, follows *Hyman v. McVeigh*, 10 Chic. Leg. N. 157. The latter case is followed and approved in *Hyman v. Bayne*, 83 Ill. 256; *Berry v. Krone*, 44 Ill. App. 82; *Wooley v. Yarnell*, 142 Ill. 442, 82 N. E. 891; and in *Strong v. Lewis*, 204 Ill. 85, 68 N. E. 556, where the words "cause of action has arisen" are held to mean, "when the plaintiff has the right to sue the defendant in the courts of such foreign state, regardless of the place where the cause of action had its origin."

The transaction by which a promissory note is executed and delivered creates no cause of action, nor can a cause of action be said to originate thereby. If, as in the vast majority of instances, the note is promptly paid at maturity, no cause of action exists. If there be a default when the note matures, and the payee is dead, no cause of action ex-

ists until an administrator be appointed, for the reason that before there can be a cause of action there must be a party entitled to enforce some obligation owing to him by some one who refuses to perform. In a case where the note is not paid when it matures, and the payee is alive, or, if dead, there is a personal representative, a cause of action arises out of the failure of the payor to perform the obligation. The place where it arises is the place where some court has jurisdiction of the subject-matter and the party against whom the cause of action has arisen. The cases referred to, holding that the cause of action arises where the contract was entered into, ignore the true definition of a cause of action, and confuse the cause with the subject of the action. The execution of the note is but a part of the transaction out of which the cause of action arises. The failure to keep the obligation and to perform the promise is the main thing which creates the cause of action, and unless there be such a failure no cause of action ever arises. "The true test, therefore, to determine when a cause of action has accrued, is to ascertain the time when plaintiff could first have maintained his action to a successful result." 25 Cyc. 1067. In the language of the court in *Freundt v. Hahn*, supra: "If the notes had been paid at maturity, no legal cause of action would have existed. It could neither have originated nor arisen until the breach of the contract to pay the money." A cause of action cannot be said to have arisen until it actually exists. In other words, a cause of action has not arisen until it has accrued. The words are synonymous. The subject of the action in this case was the promissory note and mortgage. They were executed in Kansas. The subject of the action originated in Kansas, but there was no cause of action until the maker failed to pay at maturity.

It is insisted that this construction destroys the effect of section 21; that the Legislature by the use of different expressions in the two sections intended by section 21 to furnish protection to citizens of Kansas and also to persons temporarily within the state with whom contracts should be executed in the state under Kansas laws; that by section 22 it was intended to provide protection for the citizens of this state who made contracts in another state with citizens of such other state upon which a cause of action arose in the other state. The same reason is assigned by the court in *Chevrier v. Robert*, supra, for the holding in that case, and the same contention was urged in many of the other cases cited, where the courts construed the two sections as we construe these. We find no difficulty in giving to section 21 the effect and operation given to it every day, and which it has always had. It applies only to cases where defendant resides in the state when the cause of action accrues, but

is either out of the state or has absconded or concealed himself. It provides that the time of his absence or concealment shall not be computed in his favor. In *Orr v. Wilmarth*, supra, it is held that the provision of the Missouri statute, which is practically the same as our section 22, has no application to cases where the defendant was a nonresident when the cause of action accrued, and that the section corresponding with our section 21 only applies to those cases where the defendant resided in the state when the cause of action accrued—citing *Thomas v. Black*, 22 Mo. 330; *Scroggs v. Daugherty*, supra; *Fike v. Clark*, 55 Mo. 105. To the same effect is *Berry v. Krone*, supra. In *Wooley v. Yarnell*, supra, the note was held not barred for the express reason that when it matured the maker was a resident of Illinois. The case is, upon this ground, distinguished from *Hyman v. Bayne*, and *Hyman v. McVeigh*, supra.

We conclude, therefore, that as the action was barred by the statute of Missouri where the cause of action arose, no action can be maintained thereon in this state by reason of the provisions of section 22 of the limitation act. It is unnecessary to cite authorities to the effect that the note being barred no action can be maintained upon the mortgage.

For these reasons the judgment is reversed, and the cause remanded for further proceedings.

(76 Kan. 723)

HENLEY et al. v. MYERS.

(Supreme Court of Kansas. March 11, 1907.
On Rehearing, Dec. 7, 1907.)

1. CORPORATIONS — STOCKHOLDERS — DOUBLE LIABILITY—JUDGMENT FOR TORT.

The statute (sections 1302 and 1315 of the General Statutes of 1901) which declared the double liability of stockholders to be an asset of an insolvent corporation, and authorized the appointment of a receiver to enforce it for the benefit of corporate creditors, protected the owner of a judgment founded on tort, as well as claimants whose demands originated in contract.

2. SAME — ENFORCEMENT — JUDGMENT FOR TORT.

In virtue of the general saving clause (Gen. St. 1901, § 7342, par. 1), which provides that the repeal of a statute shall not affect any right which accrued under it, the holder of a judgment rendered against a Kansas corporation in an action founded on tort, upon which an execution had been issued and returned nulla bona before the repeal of the act (Gen. St. 1901, § 1302) providing that under such circumstances the liability of stockholders might be enforced for the benefit of creditors by means of a receiver to be appointed for that purpose, may have such remedy notwithstanding such repeal.

3. SAME—APPOINTMENT OF RECEIVER.

The statute (Gen. St. 1889, §§ 1200, 1204) which authorized an action to be brought on a corporate debt directly against the stockholder of a corporation that had ceased business for a year conferred no right of action upon one having a claim founded on tort against a corporation whose operations ended January 15, 1899,

for the reason that such statute was repealed January 11, 1899, and after its repeal no remedy against stockholders remained to such a claimant, excepting that by the appointment of a receiver.

4. SAME—LIMITATIONS.

Under the statute (Gen. St. 1901, § 1302) which authorized the appointment of a receiver of an insolvent corporation to enforce the personal liability of stockholders for the benefit of corporate creditors whenever an execution on a judgment against the corporation should be returned nulla bona, in the absence of special circumstances demonstrating insolvency in some other manner, the statute of limitations did not begin to run against a creditor who wished to invoke that remedy until the rendition of a judgment and the issuance and return of an execution, provided he showed reasonable diligence in causing these steps to be taken. Where the court at the time of giving judgment stayed execution for five months pending the making of a case for review, the fact that the plaintiff consented to such stay will not be deemed to show a want of diligence; and an action was begun in time if brought within three years from the expiration of such stay.

5. SAME—TRANSFER OF STOCK—EFFECT.

The statute (Gen. St. 1901, § 1283) providing that as soon as a transfer of stock is shown upon the books of a corporation the president and secretary shall file with the Secretary of State a statement of such change, and that no transfer of stock shall be legal or binding until such statement is so made, imposed upon those who at the time of its enactment owned corporate stock, and thereafter sold it, the duty, in order to relieve themselves of liability for debts of the company, of procuring a record thereof to be made in the office of the Secretary of State; and although one who sold stock caused a transfer thereof to be duly entered on the books of the company, thereby charging the corporate officers with a duty under the statute to cause the public record to be made, unless he took some further step to secure the performance of such duty, he remained chargeable with the corporate debts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 960-962.]

6. CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS.

So interpreted, the statute did not so impair the obligation of the stockholder's contract resulting from his ownership of the stock as to render it obnoxious to the federal Constitution.

On Rehearing.

7. CORPORATIONS—LIABILITY OF STOCKHOLDERS—"DUES."

In the provision of the Kansas Constitution (section 2, art. 12, repealed in 1906) that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder," the word "dues" was used in a sense broad enough to cover a judgment rendered against a corporation in an action founded upon tort.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 920, 925.

For other definitions, see Words and Phrases, vol. 3, pp. 2258, 2259.]

8. SAME—JUDGMENTS FOR TORTS.

In view of such interpretation of the constitutional provision referred to, section 1192 of the General Statutes of 1889 (repealed in 1899), authorizing the owner of a judgment against a corporation upon which an execution had been returned unsatisfied to proceed against any of the stockholders and hold them liable thereon to the extent of the amount of their stock, ap-

plied to judgments founded on tort as well as upon contract, notwithstanding that elsewhere in the same act the person to whom the right is given is described as a creditor of the corporation and the claim against it as a debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 920, 925.]

9. SAME—EXTENT OF LIABILITY.

Said section imposed upon the stockholder a liability for the payment of corporate obligations, including those founded upon tort, to the extent of the stock owned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 920.]

10. SAME—ACTION BY RECEIVERS—CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.

Section 1302 of the General Statutes of 1901 (repealed in 1903), which substituted for all other methods of enforcing the individual liability of stockholders an action to be brought by a receiver, was available against stockholders who became such prior to its enactment. Its application to them did not constitute an impairment of the obligation of the contract arising out of their membership in the corporation, even although the new remedy might be more efficient than the old, and might incidentally under some circumstances prove somewhat more burdensome, so long as it involved no actual increase in their liability.

(Syllabus by the Court.)

Error to District Court, Douglas County;
C. A. Smart, Judge.

Action by E. E. Myers, receiver, against A. Henley and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Geo. J. Barker, W. W. Nevison, and Bishop & Mitchell, for plaintiffs in error. R. E. Melvin, for defendant in error.

MASON, J. May 1, 1900, W. H. Stevenson recovered a judgment against the Consolidated Barb Wire Company, a Kansas corporation, in an action founded upon a tort. December 7, 1900, an execution was issued, which was returned unsatisfied January 2, 1901, because no property could be found on which to levy. June 27, 1903, Stevenson filed a motion for the appointment of a receiver to close up the affairs of the corporation. September 12, 1903, E. E. Myers was appointed as such receiver. October 6, 1903, the receiver sued several stockholders to collect the amounts for which they were liable in addition to their subscriptions; the action being based upon sections 1302 and 1315 of the General Statutes of 1901 (now repealed), which authorized such procedure for the benefit of creditors. He recovered a judgment, from which the defendants prosecute error.

The most difficult question presented is whether the statute referred to protected the owner of a judgment founded on tort, as well as claimants whose demands originated in contract. So much of it as is here important reads as follows:

"Sec. 1315. The stockholders of every corporation, except railroad corporations or corporations for religious or charitable purposes, shall be liable to the creditors thereof for any unpaid subscriptions, and in addi-

tion thereto for an amount equal to the par value of the stock owned by them, such liability to be considered an asset of the corporation in the event of insolvency, and to be collected by a receiver for the benefit of all creditors."

"Sec. 1302. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property upon which to levy such execution, such corporation shall be deemed to be insolvent; and upon application to the court from which said execution was issued, or to the judge thereof, a receiver shall be appointed, to close up the affairs of said corporation. Such receiver shall immediately institute proceedings against all stockholders to collect unpaid subscriptions to the stock of such corporation, together with the additional liability of such stockholders equal to the par value of the stock held by each. All collections made by the receiver shall be held for the benefit of all creditors, and shall be disbursed in such manner and at such times as the court may direct."

This statute was enacted while section 2 of article 12 of the state Constitution was in force, reading: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes." The constitutional provision was not self-operating (*Woodworth v. Bowles*, 61 Kan. 509, 60 Pac. 331), but may aid in the interpretation of the act passed in pursuance of it.

A similar question arising upon similar statutes has frequently received the attention of the courts, but the authorities are not in entire harmony on the subject. In 1 *Cook on Corporations*, § 217, it is said: "The statutory liability imposed upon the stockholders in corporations is a liability exclusively for debts and demands accruing against the corporation by reason of its contracts. It cannot, therefore, be enforced to pay damages recovered against the corporation in an action in tort." And in 26 *A. & E. Encycl. of L.* 1024, 1025: "Unliquidated damages arising from the commission of a tort by the corporation or its agents are usually held not to be 'debts,' within the meaning of that term as used in the statutes imposing liability upon stockholders. But in Ohio and South Carolina they have been held to be 'dues,' within the purview of their statutes." On the other hand, the discussion of the subject in the valuable article on Corporations by the late Seymour D. Thompson in the *Cyclopedia of Law and Procedure* (10 Cyc. 684) includes this statement: "A judgment against a corporation is certainly a debt of the corpora-

tion, without reference to the question whether it was founded upon a tort or upon a contract. Hence, where it is sought merely to subject what remains unpaid by the shareholder in respect to his shares, it is clear that any demand against the corporation which has been reduced to a judgment will be available as a basis of such a proceeding, without reference to the nature of the original claim. If it is merged in the judgment, it becomes a 'debt of record' in the language of the common law; and upon this point there will be no difference of judicial opinion. So, as already seen, constitutional provisions and statutes securing to creditors dues from corporations by a superadded individual liability of their shareholders are remedial in their nature, and hence embrace judgments against the corporation for damages in actions for its torts."

Manifestly the question whether a stockholder must respond to a demand of the character here involved depends upon the language of the constitutional or statutory provisions in virtue of which the liability is asserted. The decisions for the most part turn upon the force to be given to the word "debt." While the statute under consideration does not use that word, much the same effect is produced by its employment of the term "creditors" to describe those for whose benefit the remedy is furnished. The word "debt" has several recognized meanings. Any financial obligation is a debt in a broad and general sense; but, where the term is used technically and restrictively, it implies an ascertained amount, and sometimes, as well, a foundation in contract. The same distinction exists in the use of the word "creditor," which may mean one having any character of claim against another, or one having a liquidated demand based on an agreement. Illustrations of the various uses of these words may be found in 2 Words and Phrases Judicially Defined, 1713, 1714, 1718-21, 1891, 1892; 8 Words and Phrases Judicially Defined, 7628. The cases in which stockholders have been held not liable for demands against the corporation arising out of tort are collected in the works from which the foregoing quotations are made. They proceed upon the theory that such liability exists only with respect to obligations originating in contract. Where that view prevails, it can make no difference that the claim has been placed in judgment, although that consideration is often spoken of as affecting the matter; for a judgment is not a contract in the sense that it can be regarded as in the nature of an agreement. 23 Cyc. 673, 674. Nearly all of these cases are controlled by one or the other of these two reasons: (1) That the statute to be construed is penal, the stockholder's liability being incurred only as a penalty for some act or omission of the directors, and on that account a strict construction is required; (2) that the statute uses

some expression beyond the mere word "debt"—for instance, "debt contracted"—indicating that only contractual obligations are within its purview. Neither of these reasons can have any application here. The statute quoted is clearly remedial, and beyond the bare use of the word "creditors" there is nothing in its language to suggest a limitation of its benefits to any particular class of claimants; indeed, the clause making the double liability an asset of the corporation tends strongly against such restriction.

In *Ward v. Joslin*, 44 C. C. A. 456, 105 Fed. 224, it was held that under the Kansas laws as they existed prior to 1899 a judgment against a corporation, to be available as a demand against a stockholder, must have been based, not only upon a contract, but upon such a contract as the corporation had legal authority to make; and the decision was affirmed by the supreme court. 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1093. The statute there considered (section 1200, Gen. St. 1889) provided that if any execution against a corporation proved fruitless liability should attach to the stockholders; but in other sections of the same act (sections 1204, 1206, Gen. St. 1889) the liability was described as one for the payment of debts. In each opinion the word "dues," occurring in the Constitution, was treated as relating only to contractual obligations. The statute now under consideration differs materially from the earlier one, and the presence of the provision making the double liability an asset of the corporation affords especial ground for applying the arguments thus made in favor of giving the word "dues" a broad meaning in *Rider v. Fritchey*, 49 Ohio St. 285, 30 N. E. 692, 15 L. R. A. 513: "Can the stockholders of an Ohio corporation be held for obligations of the corporation growing out of torts? It follows, from what has already been stated, that we must assume that this street railroad company was organized under a law which imposed upon stockholders just such liability as the constitutional provision requires. We look, therefore, to the Constitution as our guide. The provision (section 3, art. 13) is: 'Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but in all cases each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock.' The question turns upon the import of the word 'dues.' It has been contended that provisions creating individual liability on the part of the stockholders are in derogation of the common law, and are therefore to be construed strictly. Authorities in support of this rule are not wanting, and, in so far as such liability is attached by way of penalty for the omission of some act required by the statute, as in some of the states, it is prob-

able that the weight of authority favors the proposition. But all concede that this is a remedial provision, and to hold that there must be applied to it the same test as if it were a penal law is to hold that all remedial laws must be so construed; for every remedial law must of necessity be in derogation of the common law. Where the provision is simply remedial, though it does impose an obligation which did not attach at common law, we see no reason to insist upon what is called a strict construction, but believe that the ordinary rule, which requires the court to inquire simply as to the intent of the lawmakers, reading the provisions as they were intended to be read, will best attain the ends of justice. This leads us to look to the intent of the section quoted. Speaking in general terms, it must be manifest that the intent was to provide that those who derive advantage from the authority of the state given by our incorporation laws shall at the same time assume responsibility for the acts of the artificial creature which they have called into legal being, affecting the rights of others. Having in mind this general intent, and the provision being remedial, it should, we think, be construed with a view to remove the evil and extend the benefit proposed. * * * It would seem to be the undoubted duty of the court to give the word 'dues,' as found in the section quoted, such construction as will secure the apparent object of the Constitution makers in its adoption. Constitutions are necessarily couched in terse language, and we look there for the use of words in a broad, comprehensive sense. * * * It is difficult to see any reason why the framers of the Constitution should intend to afford one who gives credit for goods or money to a corporation a right to demand compensation of the stockholders in case of insolvency, and deny a like right to one who intrusts it with the care of his person, as in the case of a passenger, or to one, even a stranger, who, without fault on his part, is injured by the negligence of the corporation's agents. It may well be asked: Are the rights of things more sacred than the rights of persons? Is there any rule of public policy which would justify the protection of rights arising ex contractu, which would not equally call for protection of rights arising ex delicto, or any claim for unliquidated damages? * * * As a conclusion we are of the opinion that the word 'dues' should receive a beneficial construction—one which will include within its scope as well a demand for unliquidated damages for a tort as a claim for a debt arising upon contract."

This reasoning is approved and adopted in *Flennikin v. Marshall*, 43 S. C. 80, 20 S. E. 788, 28 L. R. A. 402. We regard it as sound and convincing, and in principle decisive of the question here presented in favor of the view taken by the trial court.

A further contention made by plaintiff in

error is that, granting a judgment against a corporation for a tort to be an obligation for which, under any circumstances, a stockholder might be held upon his additional liability, the present action cannot be maintained, because the section referred to was repealed before its benefit had been invoked by the making of an application for a receiver. See chapter 152, p. 284, Laws 1903, effective March 17, 1903. As the judgment was not based upon a contract, the Legislature doubtless had power, by taking away the remedy, to deprive the creditor of the means of enforcing its payment. *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936. But such power was not attempted to be exercised in this instance; for, while the repealing act itself contains no saving clause, there must be read into it a reservation in favor of any right accrued, as well as of any proceeding commenced, in consequence of the first paragraph of section 7342 of the General Statutes of 1901, which reads: "The repeal of a statute does not * * * affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed." When the judgment had been rendered and the insolvency of the corporation had been demonstrated by the issuance and return of an execution nulla bona, a right at once accrued to its owner, under the existing statute, not only to have a receiver appointed for the corporation, but by this means to enforce the stockholders' liability to him. This right, by the terms of the statute quoted, survived the repeal, although no proceeding had been begun to assert it. This proposition is substantially covered by the decision in *Wire Co. v. Stevenson*, 71 Kan. 64, 79 Pac. 1085, although there the question presented was only whether a receiver could be appointed; his right to maintain an action against the stockholders not being involved.

It is next claimed that, if any cause of action of the character here presented ever existed against the defendants, it had been barred by the statute of limitations before steps were taken to enforce it. The corporation permanently suspended business January 15, 1899. It is argued that with the expiration of one year from that date a right accrued to Stevenson to bring action directly against the stockholders of the corporation under sections 1200 and 1204 of the General Statutes of 1889, which authorized such a proceeding; that this right was barred by limitation, because not exercised within three years; and that under the authority of *Cottrell v. Manlove*, 58 Kan. 405, 49 Pac. 519, when the bar was permitted to fall against this remedy, it excluded every other as well. A fatal fault with this argument is that the section referred to was repealed January 11, 1899, several days before the corporation ceased to do business, and more than a year before such

cessation had continued long enough to warrant a direct action against the stockholders. Section 17, c. 10, p. 36, Laws 1898. Therefore no right of action accrued to Stevenson under it prior to its repeal, and after its repeal the only remedy against stockholders left to corporate creditors whose claims were based upon torts was that by the appointment of a receiver. *Henley v. Stephenson*, 67 Kan. 4, 72 Pac. 518. To pursue this remedy it was necessary that he should first of all reduce his claim to judgment. This he accomplished May 1, 1900, and no want of diligence can be attributed to him prior to that time.

It is further contended, however, that it was incumbent upon Stevenson to cause the commencement of an action against the stockholders, or at least to apply for the appointment of a receiver, within three years from the time judgment was obtained. The application was not made until September 12, 1903, and the action was not begun until October 6, 1903. Before he could ask for a receiver, however, it was necessary that the insolvency of the corporation should be exhibited by the issuance and return of an execution. It was within the power of the judgment creditor to cause these preliminary steps to be taken at any time, and he could not extend the statute of limitations indefinitely by neglecting to act. It was incumbent upon him to perfect his right of action within a reasonable time, which could never be more than the statutory period. *West v. Bank*, 66 Kan. 527, 72 Pac. 252, 63 L. R. A. 137, 97 Am. St. Rep. 385. He took out an execution December 7, 1900. Whether this would under all circumstances be deemed reasonable promptness need not be determined. Pending the settlement of a case-made, a stay of execution was granted, which expired October 9, 1900. Until that time, therefore, no attempt could have been made to enforce the judgment. The record shows that the plaintiff consented to the stay order; but, even if this can be regarded as a voluntary submission to a suspension of proceedings, the delay so occasioned, in view of its purpose to facilitate a review, cannot be deemed an unreasonable one. The interval between the expiration of the stay and the issuance of an execution—from October 9th to December 7th—was hardly long enough to show a lack of diligence; but even this need not be decided, for the present action was begun, not only within three years from the return of the execution, but within three years from the end of the stay, and was, therefore, brought within due time, irrespective of any further allowance for the taking of the preliminary steps.

The defendants were stockholders in the Consolidated Barb Wire Company from some time in 1887 until January 15, 1899, when they sold their stock in good faith. The transfer was duly entered upon the books

of the company, but no statement of such change of ownership was ever filed with the Secretary of State. Section 1283 of the General Statutes of 1901, which took effect January 11, 1899, provides: "It shall also be the duty of the president and secretary of any such corporation organized under the laws of this state, as soon as any transfer, sale or change of ownership of any such stock is made as shown upon the books of the company, to file with the Secretary of State a statement of such change of ownership, giving the name and address, of the new stockholder or stockholders, the number of shares so transferred, the par value, and the amount paid on such stock. No transfer of such stock shall be legal or binding until such statement is made as provided for in this act." In the original act (section 12, c. 10, p. 32, Laws 1898) there followed this proviso, which has since been repealed, but which is of importance as indicating clearly that the restriction on the transfer of stock was intended to affect the matter of the personal liability of stockholders: "Provided, however, that no transfer of stock shall release the party so transferring from the liability of the laws of this state as to stockholders of corporations for profit, for ninety days after such transfer and the filing and recording thereof in the office of the Secretary of State."

The ground of the claim against the defendants is that by reason of the statute quoted the sale of their stock was not effective to relieve them from liability for the debts of the corporation because no record of it was ever made in the office of the Secretary of State. English and federal cases hold that, where one who has transferred his stock remains charged with corporate debts because the transfer is not properly registered, it is upon the principle of negligence on his part, and that he can relieve himself from liability by showing that he has been reasonably diligent in the matter and that the fault has been that of the company's officers. 10 Cyc. 716, 717. The statute here involved is too explicit to leave room for construction. It makes the liability absolute until the required statement is filed. The duty to supply such record is imposed upon the president and secretary, and not upon the stockholders; but this is true as well of the ordinary requirement that, to be effective, transfers must be entered in the books of the company. In either case it can hardly be doubted that the transferor can, if necessary, have the aid of the courts to see that the duty is performed. 19 A. & E. Encycl. of L. 881, 882. Probably, if a stockholder were driven to that remedy, the registration, when made in pursuance of an order so obtained by him, would by relation be effective from the time his proceeding was begun; or it may be that any affirmative action on his part—a mere request or demand that the officers perform their

duty—might relieve him from liability. But no such question is here presented, for it is not shown that any step was taken by the defendants to compel or to urge a compliance with the law.

The argument is strongly pressed, however, that the statute is invalid as to those who already owned corporate stock at the time of its enactment, for the reason that it seeks to change their contractual liability—to impair the obligation of the contract which resulted from such ownership. We cannot agree to this contention. Before the act was passed one who had sold stock of a corporation, in order to relieve himself from liability for its debts, was obliged to see that the transfer was noted by its officer upon its books. The enactment merely imposed an additional duty to see that a similar notation was made upon a public record. The change imposed no restraint upon the transfer of the stock, but related only to the means by which it should be accomplished and the manner in which it might be evidenced. It is essentially a matter of method, of procedure, rather than of ultimate substantial rights. "Whether the state may impose added conditions or duties upon individuals with regard to their contracts depends upon the nature of such requirements. If they amount to a change of the obligation itself, they are, of course, ineffectual; but an obligation cannot be said to be impaired by a statute which merely imposes an additional duty on the owner in order that he may preserve it. Therefore recording acts and acts of kindred nature are constitutional." 8 Cyc. 994.

The judgment is affirmed. All the Justices concurring.

On Rehearing.

In the original opinion in this case, in holding that the plaintiffs in error as stockholders could be held upon their double liability for the payment of a judgment against the corporation founded upon a tort, some stress was placed upon the fact that the statute of January 11, 1899, provided that such liability should be considered an asset of the corporation in the event of insolvency. Gen. St. 1901, § 1315. The court overlooked the consideration, which seems sufficiently obvious, that to base the decision upon the language of that statute would involve an assumption that the Legislature could change the essential character of the liability of one who had already become a stockholder. Upon this phase of the matter being suggested, a rehearing was granted with special reference to this question: "Under the Constitution and statutes of Kansas as they existed prior to January 11, 1899, could a stockholder ever be held liable beyond the amount of his subscription for the payment of a corporate obligation which originated in tort?" The affirmance of the judgment of the trial court was based, as the opinion

showed, upon an approval of the reasoning of the Ohio court in giving a broad meaning to the word "dues" as used in the Constitution. The language of the statute of 1899 expressly providing that the stockholders' liability should be deemed a corporate asset was referred to as affording a special ground for applying the arguments quoted from *Rider v. Fritchey*, 49 Ohio St. 285, 30 N. E. 692, 15 L. R. A. 513, and also as a basis for distinguishing the present case from *Ward v. Joslin* (C. C.) 100 Fed. 676, 44 C. C. A. 456; *Id.*, 105 Fed. 224, 44 C. C. A. 456, affirmed 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1093. The effect of the decision in that case, however, was somewhat overstated. The precise matter there determined was that a stockholder could not be compelled to contribute to the payment of a judgment against the corporation founded upon a contract which the corporation had no power to make, but against which it was estopped to defend. Such a liability was said not to be one of those the risk of which was assumed by the contract of membership in the corporation; and, while the argument employed might be thought to apply as well to the case of a corporate liability based upon tort, that question was not involved or directly discussed.

Upon the grounds indicated in the original decision this court is of the opinion that the word "dues," as used in the Constitution, was not intended to be limited to contractual obligations. Granting that no liability could be fastened upon the plaintiffs in error by the act of 1899, the question remains whether they were liable under the statute which that act superseded. So far as here important it read: "If any execution shall have been issued against the property or effects of a corporation, * * * and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment." Section 1192, Gen. St. 1889. "If any corporation, created under this or any general statute of this state, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit." Section 1204, *Id.* "Any * * * corporation shall be deemed

to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year." Section 1200, Id. "No stockholder shall be liable to pay debts of the corporation, beyond the amount due on his stock, and an additional amount equal to the stock owned by him." Section 1206, Id. The language of section 1192 in terms covers an execution in any case regardless of the character of the claim out of which the judgment grew. Two of the other three sections refer to "debts" in describing the obligations for which stockholders shall be held, and the third refers to the claimants as "creditors." As all are parts of the same chapter, doubtless the subsequent sections should be looked to in interpreting the first one. Therefore, although that purports to be complete in itself, perhaps it should be interpreted as though it, too, described the remedy it provided as one for the enforcement of corporate debts. Even so, in view of the meaning already assigned to the constitutional provision, the word "debts" must be deemed to have been used in a broad sense, so as to include judgments founded upon torts.

Upon the rehearing the plaintiffs in error seek to press the argument with regard to the impairment of the obligation of their contract one point further. They not only maintain that the legislation of 1899 could not make them liable for the torts of the corporation, if they had previously been liable only for its contracts, but they also contend that the procedure it provided for the enforcement of whatever liability did exist is not available against them, because it is more burdensome than that of the earlier statute which was in effect when they acquired their stock. This exact contention was upheld in *Evans v. Nellis* (C. C.) 101 Fed. 920, decided by the United States Circuit Court for the Northern District of New York. It was there held that the later law visited additional hardships upon the stockholder, first, in depriving him of the right to avail himself of any defense he might have against the particular creditor pursuing him; second, in subjecting him to an action for the full amount of his stock, whether the corporate indebtedness was large enough to require so large a payment or not; and, third, in compelling him to pay a part of the expenses of the receivership. That case having been taken by writ of error to the Circuit Court of Appeals, the questions involved were from there certified to the Supreme Court, where the matter was disposed of by answering only one question—whether the receiver was entitled to maintain the action; the court saying, upon the authority of *Waller v. Hamer*, 65 Kan. 168, 69 Pac. 185, that he could not do so, because

no action had been brought against all the stockholders. The court expressed no opinion regarding the validity of the statute as applied to conditions existing at the time of its enactment. *Evans v. Nellis*, 187 U. S. 271, 23 Sup. Ct. 74, 47 L. Ed. 173. It is settled that a corporate creditor who became such while the earlier statute was in force could not be deprived of his right to proceed thereunder by the enactment of the new law. *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331. But it does not follow that one who became a stockholder prior to 1899 is exempt from being proceeded against under the later act. The constitutional prohibition against legislation impairing the obligation of a contract protects a creditor from a change of procedure that makes his remedy substantially less effective, but does not protect a debtor against a change that merely affords better facilities for compelling him to perform his engagement. *Phelps v. Trust Co.*, 62 Kan. 529, 64 Pac. 63; *Trust Co. v. Phelps*, 66 Kan. 775, 71 Pac. 1129; 8 Cyc. 995, note 15. The state Constitution, prior to its amendment in 1906, contained this provision: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law." At the time the plaintiffs in error became members of the corporation a statute had been passed in pursuance of this provision fixing the individual liability of stockholders at double the amount of their stock. The act of 1899 did not affect the measure or character of their liability, but merely changed the manner of its enforcement. The change did not make their contract more burdensome, except as any change of remedy might incidentally do so. In a particular case some possible hardship might result; but in its general application the new procedure was obviously more equitable than the old, and better adapted to protect the rights of the stockholders.

Substantially the question here presented has been considered in a series of cases arising upon a change in the Minnesota statute providing remedies for the enforcement of the stockholders' liability for debts of the corporation. Of this question it was said, in *Straw & Ellsworth Mfg. Co. v. L. O. Kilbourne B. & S. Co.*, 80 Minn. 125, 83 N. W. 36 (adhered to after reargument in *London & N. W. A. M. Co. v. St. P. P. O. Co.*, 84 Minn. 144, 86 N. W. 872): "There is no merit in the claim of counsel that the statute of 1899 impairs the obligation of a contract, because as to stockholders who became such prior to its passage it makes a radical and unwarranted change from the former practice of an action in equity to enforce the shareholder's double liability. The power of the Legislature to modify or change a remedy, provided no substantial right is impaired,

cannot be questioned. And there is no such thing as a vested right to a particular remedy. The Legislature may always alter the form of administering right and justice. No substantial right is affected by the law in question, for in no manner does it increase the liability of the stockholder. It may afford a new remedy—a different course of procedure; but this fact does not make it obnoxious to the fundamental law which forbids the impairment of contracts." The court then quoted from *Commonwealth v. Cochituate Bank*, 85 Mass. 42: "It will at once be perceived that no objection to a change of remedy can be successfully urged on account of its being more speedy and effectual. That objection might be urged as to all changes in the forms of proceeding or the organization of legal tribunals to act thereon. Every statute extending the equity powers of this court would be obnoxious to objections of this character. The objection, to be tenable, must go beyond this, and show that the statute increased the actual liabilities of the stockholder, and was something more than a change in the mode of enforcing a pre-existing liability. * * * The proceedings under this statute may require the action of the court upon the estimated value of such assets, rather than an absolute ascertainment of the amounts; but the principle to be applied is the same, varying only in the mode of arriving at the result as to the deficiency chargeable upon stockholders."

The same statute was involved in *Converse v. Aetna Nat. Bank*, 79 Conn. 163, 64 Atl. 341. The court there said: "It [the stockholder, itself a corporation] therefore incurred, by becoming a shareholder in a Minnesota corporation, a liability to perform such contractual obligations as were attached by the laws of Minnesota to the ownership of its capital stock. * * * One of these obligations was to be answerable for the debts of the corporation, in case of a deficiency of corporate assets to the extent of the par value of its shares of stock. * * * The amount of this liability could not be thereafter increased by subsequent legislation. The mode of enforcing it could be varied within reasonable limits. * * * To enlarge the remedies of its creditors, whether against the corporation or its shareholders, impairs the obligation of no contract." A part of the new statute, however, was held to be inoperative, upon the theory that it added to the liability of the stockholder by compelling him to respond to an assessment the amount of which was increased by an estimate of expenses to be incurred in prosecuting future actions. But in *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, the Supreme Court of the United States upheld even this portion of the later act, saying: "By becoming a member of a Minnesota corporation, and assuming the

liability attaching to such membership, he [the stockholder] became subject to such regulations as the state might lawfully make to render the liability effectual. * * * It is further urged that, in imposing upon the stockholder the additional expense in a proceeding where the expenses incident to the enforcement of the liability in other states and against other parties are taken into consideration and included in the estimate, there is an unwarranted increase in the amount which could be recovered against the stockholder under the former statute. But, remembering at all times that the obligation of the shareholder was the creature of the Constitution of Minnesota, we think the fact that the additional expenses were included in the assessment cannot operate to defeat it. Such expenses are incident to the ascertainment of the trust fund, which it is necessary to realize from the liability of stockholders, and as long as these expenses are kept within the amount of the original liability no legal right is violated."

A special consideration based upon the history of this litigation would of itself compel a denial of the contention of plaintiffs in error that the procedure of the act of 1899 cannot be invoked against them. *Stevenson*, the judgment creditor, originally attempted to reach them under the provisions of the repealed statute, claiming, under the authority of *Woodworth v. Bowles*, *supra*, that the repeal was not effective as to him. But this court held that, as he had not shown that his judgment was founded upon a contract, he was not within the rule there declared, and denied him relief, saying that the only remedy open to him was that given by the new law. *Henley v. Stevenson*, 67 Kan. 4, 72 Pac. 518. Pursuant to this ruling he instituted the present proceeding. Under these circumstances the question of his right to do so cannot be regarded as still open.

In the original opinion it was said that sections 1200 and 1204 of the General Statutes of 1889 were repealed by the act of 1899. Upon the rehearing attention was called to the fact that section 1200 has never been repealed. The statement referred to was technically inaccurate, but substantially correct so far as affects the present case. Section 1204 provided that if a corporation should be dissolved, leaving debts unpaid, suits might be brought thereon directly against the stockholders. Section 1200 in its original form (Gen. St. 1868, c. 23, § 40) undertook to tell how a corporation might be dissolved, mentioning but two ways—by the expiration of the time limited in its charter, and by a decree of a court. In 1883 it was amended by adding a provision that for the purpose of enabling a creditor to prosecute suits against the stockholders to enforce their individual liability a corporation should be deemed to be dissolved whenever it had sus-

pended business for more than one year. This addition manifestly referred to suits brought under the provisions of section 1204, and when that section was repealed the new part of section 1200 necessarily became entirely inoperative; there being nothing left to which it could apply. The section itself was not repealed, but appears as section 1310 of the General Statutes of 1901. That portion of it which defines generally the methods by which a corporation may become extinct is still in force. But the rest of it, which merely fixed a time when a cause of action should arise under section 1204, for all practical purposes disappeared when that section was wiped out.

In the course of the first opinion it was

remarked that, as the judgment was not based upon a contract, the Legislature doubtless had power, by changing the law, to deprive the creditor of the means of enforcing its payment, citing *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936. The court held that the Legislature had not attempted this. Therefore the question whether such an attempt could have been successful was, of course, outside of the case. The expression could not have amounted to a decision, and was intended rather as a concession for the purpose of the argument than as even an intimation of opinion. As it has been brought in question in the re-argument, it may be regarded as withdrawn.

The judgment is affirmed.

(76 Kan. 806)

HALL et al. v. HALL.

(Supreme Court of Kansas. Dec. 7. 1907.
Rehearing Denied Jan. 16, 1908.)

1. GIFT—INTER VIVOS—PERSONALTY.

The unconditional delivery of personal property by the owner to another, with intent that such other shall immediately and permanently become the owner thereof, and acceptance of the same by such other, constitutes a gift *inter vivos*.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 1-4.]

2. SAME—DELIVERY.

Where the donee is absent or unable to take the gift personally, delivery as above stated to a third person for the benefit of such donee will make the gift complete and valid as if accepted by the donee in person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, § 86.]

3. TRUST—GIFT TO THIRD PERSON.

A gift made to a third person for the benefit of another creates a trust which will be administered and controlled like other ordinary trusts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 95; vol. 24, Gifts, § 86.]

(Syllabus by the Court.)

Error from District Court, Linn County; Walter L. Simons, Judge.

Action by Amos Hall and others against Edith Hall. Judgment for defendant, and plaintiffs bring error. Reversed, with directions.

James D. Snoddy, for plaintiffs in error.
John H. Crain and John C. Cannon, for defendant in error.

GRAVES, J. Austin W. Hall and Carolin F. Hall were husband and wife, and resided at Trading Post in Linn county. Carolin F. Hall died September 24, 1884, leaving personal property of the value of \$4,016.50. This property passed into the possession of her husband, Austin W. Hall, who retained it until his death. After his death the defendant, Edith Hall, his surviving widow, was appointed administratrix of his estate. The plaintiffs in error are the children of Austin W. Hall and Carolin F. Hall, and on July 2, 1903, they commenced this action in the district court of Linn county to recover the value of the personal property left by their mother, Carolin Hall, claiming that before her death she gave said personal property to them, leaving it in the hands of a trustee for them; that their father obtained possession of it from such trustee, and converted it to his own use. The only questions presented here are whether or not the transaction relied upon by the plaintiffs as a gift from their mother constitutes a gift *inter vivos*, or a gift *causa mortis*, and if the former, for how much is the defendant in error liable. The facts which are claimed to constitute the gift, briefly stated, are these:

Prior to the transaction in controversy Carolin Hall received the personal property in question from her father, and for that reason she prized it very highly and guarded its safety with great anxiety. She refused to

let her husband take charge of it, or have it in his possession. She had a sister who resided at Montpelier, Vt., to whom she was deeply attached, and in whom she had great confidence. This sister's name was Marguerite Carlton, and was familiarly known as "Marg." In September, 1884, Carolin Hall was sick, which sickness she believed would prove fatal. She sent for her sister "Marg" to come to visit her. On the 19th of September her sister had started and was on her way to Trading Post. Mrs. Hall grew worse and feared that she would not live until "Marg" would get there. The personal property in question consisted of notes and mortgages, kept by Mrs. Hall in a tin box which fastened with a padlock. During her sickness she kept this box near her all the time, under her personal control. When she decided that death was near at hand, her mind turned to her box and its contents. At this time Mrs. Noyes, a cousin of Mrs. Hall, was at the house assisting in caring for her, and Mrs. Thompson, formerly Owens, who had, for several years before her marriage, been employed by Mrs. Hall, and who was then her trusted friend, was also present giving her assistance. Other friends and neighbors were constantly present, also, to watch and wait upon her. Upon this 19th of September Mr. A. W. Hall was also present. Mrs. Hall feared that she might not live until "Marg" would come, or, if alive, might be unable to make known her wishes as to this property. She stated to those present, including her husband, that she wanted the property to go to her boys, the plaintiffs in error, who, at that time, were of the ages of 11, 8, and 4 years, respectively. To cover contingencies she prepared a written memorandum of her wishes, which reads: "I want the contents of this trunk to be evenly divided evenly between my three boys and want their father and my sister Mrs. Carlton to be the ones to decide about the best way of dividing it for them and it is all mine from my father but the mortgage is not on record at town clerk office for the Gibson farm but Austin says that shall be done immediately and other securities turned in satisfy the outstanding indebtedness on the place and I want Marg to use the interest as far as it will go for the children every year after the debts are all paid for the children until of age. Praying that what I have said is right an affectionate mother Carolin." When this paper was written, she handed it to her husband, who read it and said: "There, that will do. I presume. I will see after it"—and returned it to Mrs. Hall. She placed this memorandum with the notes and mortgages in the box, and locked it. She then handed the locked box to Mrs. Noyes, with the request to keep it until "Marg" comes and then give it to her. The key to the box she delivered to Mrs. Thompson, with a like request to keep it until "Marg" comes and then give it to her. Mrs. Noyes never allowed the box to be out

of her possession after she received it. She carried it with her from room to room, and kept it at all times within her reach. Mrs. Thompson kept the key in the same way until "Marg" came, when both the box and the key were delivered to her in the presence and sight of Mrs. Hall, who was not yet in a seriously weakened condition, either physically or mentally, although she died within five days thereafter. "Marg" kept possession of the box from the time she received it until after the death of Mrs. Hall. Nothing was said or done by Mrs. Hall after the box was delivered to Mrs. Noyes to indicate any desire to change the disposition of this property from that then made.

After the burial of Mrs. Hall, and Mrs. Carlton was about to return to her home at Montpelier, Vt., she had a talk with A. W. Hall, who stated that it was his desire to carry out in every particular the wishes of his deceased wife with respect to the personal property, which Mrs. Carlton then held, and would, to the best of his ability, work to that end. Mrs. Carlton thought Mr. Hall was in earnest and would conscientiously do as he said. She therefore concluded that the wishes of her deceased sister could be better carried out by him than by herself, and arranged to deliver the property to him as administrator of the estate of Mrs. Carolyn Hall. They together visited the probate judge of Linn county, and presented the whole matter to him. A. W. Hall told the probate judge that he desired to carry out the wishes of his wife in every particular. Mrs. Carlton stated that she believed that Mr. Hall would do so, or she would not consent to let him have the property. There was no occasion for the judge to object, and Hall was then and there appointed administrator of the estate of Carolyn F. Hall, deceased, and received from Mrs. Carlton the notes and mortgages from the tin box, and gave a receipt therefor, which receipt, with the memorandum made by Mrs. Carolyn F. Hall at the time she last locked the box, was placed therein. Mrs. Carlton retained possession of these and took them with her when she returned home. A. W. Hall returned an inventory of the property of Carolyn F. Hall, received by him from Mrs. Carlton, at the value of \$4,016.50. Afterwards, and during the administration of the estate, which closed July 6, 1887, he received as interest on the notes the additional sum of \$474.72, making the aggregate sum of \$4,491.22. Out of this he paid in taxes and in releasing a mortgage on real estate belonging to the plaintiffs in error the sum of \$1,418, leaving a balance due them on that date of \$3,073.22. On the same day, July 6, 1887, he was appointed guardian for the plaintiffs in error, who were minors, and, as such, received the funds remaining in his hands as administrator. Upon the order of distribution made at the close of administration A. W. Hall was recognized as an heir of Carolyn F. Hall, and was award-

ed one-half of the estate in his hands. As the boys reached the age of majority, each received the amount due him as shown by the guardian's account. They owned a farm from which rent was collected, taxes paid thereon. Interest collected on notes, all of which were mingled in the account so that it is difficult to ascertain from the facts before us what the true state of the account is. Out of this property Mr. Hall erected a monument to the memory of his wife, the expense of which was paid out of the personal property in controversy; also the educational expenses of a part of the boys. The youngest son, John A. Hall, lived with his aunt, Mrs. Carlton, at Montpelier, and afterwards at Lacygne, Kan. August 9, 1901, Mrs. Carlton died. A few days prior thereto she told John the story of his mother's death and of the tin box, and then delivered to him the box with his mother's memorandum therein. In December afterwards he informed his brothers. He, at that time, was attending school in Michigan, and his brothers were in Kansas. This was the first information either of the boys ever had concerning their mother's dying solicitude for their welfare. Mrs. Carolyn Hall left in addition to the personal property in question 250 acres of land which A. W. Hall conveyed by quitclaim deed to the plaintiffs in error.

From these facts we conclude that Mrs. Carolyn F. Hall conveyed all of her title to the personal property in controversy to the plaintiffs in error; that the transaction constituted a gift *inter vivos*, being an absolute, unconditional delivery of personal property by the donor to a third person as trustee for the donees, with the intent that such property should immediately and permanently vest in such donees. The only resemblance it bears to a gift *causa mortis* is that the donor realized that she was about to die, and probably if she had not believed that death was near at hand the gift would not have been made at that time. A person has the right to give away his property at any time while life lasts. Contemplation of the near approach of death is, no doubt, very often the cause which induces gifts to be made *inter vivos*. A. W. Hall knew when he received this property that it belonged exclusively to the plaintiffs in error, and he held it as trustee for them. He or his estate is responsible therefor. The probate court has no jurisdiction to administer the property of these minors as the estate of Carolyn F. Hall, and the action taken in such proceeding is not binding on the plaintiffs in error. The appointment of A. W. Hall as guardian, however, was proper, and whatever of this property went into the guardian's hands must be regarded as accounted for; but the guardian had no right to expend this trust fund for his own purposes, nor in payment of that for which the plaintiffs in error were not liable. They may have been pleased, as children, to have an expensive monument erected at the

grave of their mother, but they were not liable therefor. Money paid to relieve their other property of liens and incumbrances would be equivalent to the payment of so much money. We have not been called upon to interpret the memorandum of Mrs. Hall, which accompanied the gift, as to how far its provisions might authorize expenses for educational purposes, and have not done so. We only decide that Mrs. Hall conveyed to these plaintiffs in error the property in controversy by a gift inter vivos, and it vested permanently in them before her death.

The judgment of the district court must therefore be reversed. We are not sufficiently advised to direct the proper judgment in favor of the plaintiffs in error. The judgment is reversed, with direction to enter judgment in favor of the plaintiffs in error for such amount as may, upon inquiry, in accordance with the views herein expressed, be just and proper.

(76 Kan. 612)

HARPER v. IOLA PORTLAND CEMENT CO. et al.*

(Supreme Court of Kansas. Nov. 9, 1907.)

MASTER AND SERVANT—DANGEROUS PREMISES—DUTY OF MASTER—NEGLIGENCE OF FELLOW SERVANT.

The decision in the case of *Brick Company v. Shanks*, 69 Kan. 306, 76 Pac. 856, to the effect that a master's duty requires him to make and carry out regulations to render the work of his employes reasonably safe, that an employe does not impliedly assume the risk of injury from dangers against which the master has expressly undertaken to protect him, and that the fellow-servant rule has no application when the negligent employe is charged with a duty which the master is bound to fulfill, applied to a personal injury case growing out of the operation of a stone quarry.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, §§ 885, 491.]

(Syllabus by the Court.)

Error from District Court, Allen County; Oscar Foust, Judge.

Action by George Harper against the Iola Portland Cement Company and Dan Lang. Judgment for defendant Lang, and plaintiff brings error. Reversed and remanded.

Bennett & Bennett and Lucas & Lucas, for plaintiff in error. Baxter D. McClain, for defendant in error.

BURCH, J. The defendant operates a stone quarry in connection with its cement manufactory. The quarry presents a face of solid rock some 20 feet in height. Rows of holes are drilled some distance back from the edge and loaded with dynamite, which is exploded with a battery. These "battery shots" disengage irregular fragments of rock, numbers of which are too large to be loaded at once into cars and transported to the crusher, and which must therefore be reduced. Many cannot be broken by use of the sledge, and these are blown to pieces by dynamite,

the holes drilled for the purpose being called "pop holes," and the explosions being called "pop shots." Frequently a battery shot does not discharge all the battery holes, and fragments of rock thrown into the pit of the quarry will contain highly dangerous charges of unexploded dynamite. The plaintiff was an employe of the defendant, and his duty consisted in drilling pop holes. While he was so occupied, he exploded the charge of an unshot battery hole, and was injured. He sued the defendant for damages, claiming a violation of the duty to furnish him a reasonably safe place to work. The defendant denied that it was negligent, and pleaded contributory negligence and assumption of risk. A demurrer to the plaintiff's evidence having been sustained, he prosecutes error.

There was sufficient evidence to go to the jury that at the time of the accident the plaintiff's work was confined to the drilling of pop holes in fragments of rock which had been dislodged by battery shots, and had nothing to do with the drilling, loading, or shooting of battery holes; that, under regulations adopted by the defendant governing work in the quarry, it was the duty of the employe who loaded and shot battery holes to report the number loaded to the quarry foreman; that the foreman or the shooter, or both, counted the explosions as they occurred, to ascertain if all loaded holes were shot; that, if the charge in any hole failed to explode, it was the duty of the shooter to find it and explode it, and if he could not explode it at once to mark it, tell the workmen of its location, and do so at the next shooting; and that the plaintiff had been advised of this rule, and was working in reliance upon it when he was injured.

Further evidence was adduced to show that the plaintiff had no knowledge of the existence of the unexploded charge which injured him, and had no way of determining whether the rock upon which he undertook to work was loaded. It looked like any of the others there. Its surface was covered with a coating of ice, into which pieces of stone were frozen, and the quarry was not lighted sufficiently to make visible indications of a hole having been drilled in the rock if any had existed. Under this evidence the case is in all respects identical in principle with that of *Brick Co. v. Shanks*, 69 Kan. 306, 76 Pac. 856. The commonest kind of humanity required that pop drillers should not be sent unwarned to drill into rocks containing concealed charges of dynamite, and the law clearly required the defendant to adopt some kind of a regulation for their protection. If unexploded charges were readily discoverable by drillers of ordinary capacity perhaps they might be hired with the understanding they should locate such perils themselves; but, even then, the employment would be harsh, if legitimate, and not the kind in which plaintiff was engaged. The defendant expressly undertook to make the

*For opinion on rehearing, see 32 Pac. 242.

place where plaintiff was required to work safe by the adoption of the regulation described, and an implied agreement to assume the risk guarded by the regulation cannot be recognized. "There is no room for any implied agreement of the employé to assume the risk of danger in the presence of an express regulation upon the subject established by the pit boss for the very purpose of protecting him." *Brick Co. v. Shanks*, supra.

For the reasons stated at length in the case just cited, the plaintiff was not a fellow servant of the employé who was charged with the duty of discovering unexploded charges of dynamite, marking them, and warning other workmen of their location. No matter to whom the task might be assigned, or what the rank or grade of his service, the duty was one the master was bound to fulfill, and failure to do so constituted actionable negligence. Although the plaintiff was, as he admitted, familiar with the quarry and with the details of the various kinds of work performed there, his conduct, under the circumstances stated, was not such as to charge him with contributory negligence. In other respects, a cause of action was established, and the case should have been submitted to the jury.

The judgment of the district court is reversed, and the cause remanded.

(76 Kan. 779)

MCKINNEY v. GRANT et al.

(Supreme Court of Kansas. Dec. 7, 1907. Rehearing Denied Jan. 16, 1908.)

1. SALE — CONTRACT — CONSTRUCTION—CONSIGNMENT.

The contract, copied in the statement of facts, is held to be an agreement providing for the consignment of musical instruments by the presumptive owner thereof to an agent for sale, and not a contract of sale and purchase.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 17, 18.]

2. REPLEVIN—QUESTION FOR COURT.

In a replevin action, either party is entitled to the verdict of a jury, under proper instructions, in the determination thereof. When, however, the parties in the trial of such action agree upon the determinative facts thereof, the judgment to be entered becomes a question of law for the court.

(Syllabus by the Court.)

Error from District Court, Geary County; O. L. Moore, Judge.

Action by W. S. McKinney against J. U. Grant and A. A. Flower. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

The plaintiff in error brought this action against the defendants by filing an ordinary petition in replevin to recover two pianos. The defendants joined issue by a general denial. The plaintiff claimed that he had the title and right of possession to the pianos, and that he had placed them in the possession of one W. J. Shillito for the purpose of sale only in accordance with the terms of a written contract, a copy of which is as follows:

"December 9, 1902. The McKinney Music Co.—Gentlemen: I will take your pianos and organs on consignment for Junction City, Kan., and vicinity, to be accounted for at agreed prices, and upon the following conditions: First. The instruments and proceeds of sale are your property, subject to your order and free from any claim whatsoever. I agree to take good care of all instruments consigned to me and to be responsible for the safe keeping of the same; also to keep them insured for your benefit, with the policies made payable to you in case of loss, to an amount not less than the consignment price of same. Second. I agree to send the cash to you for each and every instrument separately, as soon as sold. Third. I agree to furnish all necessary funds for the payment of freight charges and other expenses connected with the handling of your goods, or expense incurred on account of your having consigned said goods to me, and will make no charge for repairing pianos or organs, or for such services as are for our mutual benefit, unless the charge be agreed upon and authorized in writing previous to the rendering of such service. Fourth. I agree to pay interest at 8 per cent. per annum on all goods unsold and on hand after three months from date of shipment, but it is expressly understood that the charging of said interest and the payment thereof shall in no sense be construed as constituting a sale of said goods to me. Fifth. Upon your demand or that of your authorized representative, I will deliver, as you may direct, free of charge, or expense to you of any kind, including return freight to Cincinnati, all of said consigned goods remaining unsettled for at the time of said demand. I agree, in addition to returning the said stock, to pay you an amount, for depreciation of value at the rate of 8 per cent. per annum, from date of original shipment, on the consignment prices quoted on said stock. Sixth. On the first of each month, I agree to send you a report of all instruments consigned and unsettled for, in stock and in the possession of prospective customers, giving the style and number of each instrument and its location, and will not expect orders for additional stock to be filled while such report is overdue. It is further understood that you reserve the right, without notice, to reject any request from me for consignments. Seventh. This agreement may be terminated at any time, by either party, by notice being given in writing of such termination. W. J. Shillito.

"Accepted: The McKinney Music Co.

"In consideration of the above, and the modifications or changes of the same, if any, and one dollar, I or we, or either of us guarantee that the said — will faithfully perform — part of the agreement, duly account for all money, notes, contracts, and property of whatsoever nature, belonging to the McKinney Music Company which may come into — hands, and further agree to hold, without litigation, the McKinney Music

Company harmless from loss in their dealings with the said ———, my liability or our liability not to exceed ——— dollars. I or we or either of us, hereby waive the benefit of all homestead and exemption laws. This guaranty to be valid and binding upon the party or parties executing the same without regard to their number.

“—————.” [Seal.]
 “—————.” [Seal.]
 “—————.” [Seal.]

The defendants, on the other hand, claim, and the court, ruling on the demurrer of defendants to plaintiff's evidence, which it sustained, held that the contract amounted to a sale of pianos by plaintiff to Shillito, with the not unusual reservation of title as security for the purchase price. A great deal of evidence, both oral and written, was introduced by both the plaintiff and the defendant, the transcript of which covers 78 pages of the record. Among the items of evidence the defendants introduced an admission of plaintiff's counsel, in substance, that defendants became surety for a debt of \$1,525 to a bank, and that to secure them against loss thereby Shillito (who had prior thereto sold a one-half interest in his business and stock of merchandise to one Day) gave them a bill of sale of his one-half interest in the stock of merchandise and accounts, and that defendants immediately took possession of the stock, including the two pianos in question, and thereafter the defendants bought of Day his undivided one-half interest in the stock, including the two pianos, and took possession thereof; also that the defendants had no knowledge of the written agreement, and the same was not recorded.

Humphrey & Humphrey, for plaintiff in error. Roark & Roark, for defendants in error.

SMITH, J. (after stating the facts as above). We are unable to agree with the construction in the written opinion, filed in connection with its instruction to the jury to return a verdict for the defendant, of the written contract under which the pianos appear to have been consigned by plaintiff to Shillito. On the other hand, we see nothing therein, unless it be the agreement in the fourth and fifth paragraphs to pay interest on the value of the pianos upon certain contingencies, to indicate that the contract is other than the plaintiff claims for it, an arrangement under which the plaintiff could consign musical instruments to Shillito to be sold by him as the agent of the plaintiff. The provision requiring Shillito to pay interest on the value of the instruments, in certain contingencies, while perhaps unusual, is not sufficient to characterize the transaction as a sale in opposition to the expressed intention to the contrary and to several other provisions strongly indicating a contrary intention. The most that could be claimed for this provision for interest is that it rendered the contract ambigu-

ous. It is evident from the whole contract, and especially considering the fifth paragraph thereof, that the word "interest" in the fourth paragraph was not used in the sense of rent for the use of money, but was used to designate a compensation for the deterioration in the value of the instruments incident to being kept in stock and exposed to sale.

Viewed in this light, the contract is not ambiguous. It did not create the relation of creditor and debtor between the plaintiff and Shillito when the instruments were consigned and received under the contract, and no money indebtedness then existed as a principal upon which interest, in the ordinary meaning of the word, could be computed. Shillito, by the terms of the contract, was to send the cash (the cash received) for each instrument separately, as soon as sold. This fairly implies that the instruments were to be sold only in the usual course of trade and for cash. That the contract does not prescribe the price at which the consigned instruments were to be sold is not unusual in a contract of this character, which contemplates the consignment of numerous articles of different values. In short, we interpret the contract to be an unambiguous agreement, and to be for the consignment of musical instruments by the presumptive owner thereof to an agent to sell for cash only, at prices to be agreed upon. Shillito, then, had no title under the contract in the pianos in question, and no right of possession thereto which was not terminable by the demand of the plaintiff therefor. The defendants derived all their claims of right thereto from Shillito, and the stream cannot rise higher than its source.

The judgment of the district court is therefore reversed, and the case is remanded, for further proceedings in accordance with the views herein expressed.

(76 Kan. 816)

BOARD OF COM'RS OF JOHNSON COUNTY v. HEWITT.

(Supreme Court of Kansas. Dec. 7, 1907. Rehearing Denied Jan. 16, 1908.)

1. TAXATION—PERSONAL PROPERTY—SITUS.

Promissory notes belonging to a resident of Kansas, given by residents of Missouri, and secured by trust deeds of real estate in Missouri, which never have been brought into Kansas, but which are left for safe keeping only in the vault of a bank in Missouri, constitute personal property in this state, which has its location in the county, township, and school district of the residence of its owner, within the meaning of the act relating to the assessment and collection of taxes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 439-441.]

2. SAME—CORRECTION OF FALSE STATEMENT—ASSESSOR'S RETURN.

If, by proceedings instituted and conducted under section 7599, Gen. St. 1901, authorizing the correction of false tax statements, it be discovered that an owner who appears and resists the inquiry omitted to list specific items of taxable personal property in the statement which he gave to the assessor, and such property is duly valued, and the proper amount of taxes

thereon is charged against the owner on the tax roll, an omission of the county clerk formally to correct the assessor's return is a mere irregularity, which does not vitiate the tax.

(Syllabus by the Court.)

Error from District Court, Johnson County; W. H. Sheldon, Judge.

Action by C. B. Hewitt against the Board of County Commissioners of Johnson county. Judgment for plaintiff, and defendant brings error. Remanded, with instructions to modify.

Chas. C. Hoge, John T. Little, and J. P. Thorne, for plaintiff in error. Brown, Harding & Brown and J. W. Parker, for defendant in error.

BURCH, J. The plaintiff sued to recover taxes paid under protest upon certain promissory notes and real estate mortgages securing them. The district court made findings of fact and conclusions of law as follows:

"Findings of Fact.

"1. On the 1st day of March, 1903, the plaintiff, C. B. Hewitt, was, and at all times since has been, a resident of School District No. 32 in Mission township, Johnson county, Kan.; and for the year 1903 he was assessed by the township assessor of said township and listed for assessment and taxation certain personal property.

"2. On March 1, 1903, plaintiff was the owner of certain promissory notes amounting to \$3,600, which were executed and delivered to him in Jackson county, Mo., by parties living in said county and state. These notes were all secured by trust deeds, executed and delivered to plaintiff in said county and state, and the land covered by said trust deeds was all in Jackson county, Mo. On March 1, 1903, all of said notes and trust deeds were in a box, in the vault of the First National Bank of Kansas City, Mo., in Jackson county, where they had theretofore been left by plaintiff, and have ever since remained, said notes and trust deeds never having been actually in the state of Kansas.

"3. The notes and trust deed mentioned in finding No. 2 were not listed by plaintiff with the assessor of Mission township, Johnson county, Kan., for the purposes of taxation for the year 1903, when he was assessed and listed other personal property for that year.

"4. On March 1, 1904, plaintiff was the owner of certain promissory notes, amounting to \$3,600, which were executed and delivered to him in Jackson county, Mo., by parties living in said county and state. These notes were all secured by trust deeds, executed and delivered to plaintiff, in said county and state, by parties living in said county and state, and the land covered by said trust deeds was all in Jackson county, Mo. On March 1, 1904, all of said trust deeds were in a box, in the vault of the First National Bank of Kansas City, in Jackson county, Mo., where they had theretofore been

left by plaintiff, and have ever since remained, said notes and trust deeds never having been actually in the state of Kansas.

"5. The notes and trust deeds mentioned in finding No. 4 were not listed by plaintiff with the assessor of Mission township, Johnson county, Kan., for taxation for the year 1904, when he was assessed and listed other personal property.

"6. The notes and trust deeds referred to in findings of fact Nos. 2 and 4 were left in this box in the vault of the First National Bank of Kansas City, Mo., by the plaintiff, and were kept there by permission of the officers of the bank, the plaintiff having had the use of said box in said vault for about 10 years. The bank has a key to the vault, and the plaintiff a key to the box in which the notes and trust deeds were left for safe keeping by plaintiff, and to which box he gains access by obtaining the key to the vault from the officers of the bank, then using the key he has to open the box in which the notes and trust deeds are kept.

"7. March 1, 1903, the notes referred to in finding No. 2 were worth and of the value of \$3,600; and the notes mentioned and referred to in finding No. 4 were worth and of the value of \$3,600 on March 1, 1904.

"8. The rate of taxation in School District No. 32 in Mission township, Johnson county, Kan., for the year 1903, was 81.7 mills on the dollar, and for the year 1904 it was 38.1 on the dollar.

"9. In the years 1903 and 1904 the basis of valuation agreed upon by the assessors of Johnson county, Kan., was, on horses, mule, and cattle, one-third of their cash value; on money, shares of stock in bank, stock in any company or corporation, personal notes and mortgages, 40 per cent. of their cash value.

"10. The testimony does not disclose whether any of the notes owned by plaintiff, and in said box in 1903, were there in 1904, or whether they were different notes.

"11. Plaintiff did not pay tax on said notes and trust deeds in Missouri in 1903 and 1904.

"12. During the time hereinafter mentioned, Roscoe Smith was the county clerk of Johnson county, Kan., A. E. Moll was county treasurer, as well had the county a board of county commissioners, made defendants herein.

"13. In January, 1905, Roscoe Smith, county clerk of Johnson county, Kan., being advised that plaintiff owned certain notes and trust deeds on March 1, 1903, and on March 1, 1904, that he had not listed for taxation with other personal property returned to the assessor of Mission township in said county, and on the 11th day of January, 1905, he caused written notice to be served upon plaintiff that on January 19, 1905, he would have a hearing at the office of the county clerk of Johnson county, Kan., touching the question as to whether said notes

and trust deeds had not escaped taxation and should be entered by him upon the tax roll of Johnson county, Kan., for taxation for said years; and in pursuance of said notice plaintiff appeared before said county clerk at said hearing, and objected to said notes and trust deeds being entered by said county clerk for taxation in said county and state.

"14. As a result of said hearing before said county clerk, and on February 20, 1905, Roscoe Smith, county clerk of Johnson county, Kan., entered up against the plaintiff under the name of Calvin B. Hewitt, in a book kept by the officers of said county, designated as "Omitted Personal Property Tax Roll," the following entries:

No.	Date	Name	School Dist.	Year	Valuation	Rate	Total tax.
6	Feb. 20 1905	Calvin B. Hewitt	32	1903 1904	1440 2640	\$1.7 38.1	45.64 100.58

"The county clerk made no further or other record or entry of said matter in his office at said time. Afterwards an entry was made in said Omitted Personal Property Tax Roll, as follows:

Am't Paid	Date	By whom	Costs paid	Remarks
\$150.52	7-14-05	C. B. Hewitt	\$4.30	Paid under protest.

"This roll, designated as an 'Omitted Personal Property Tax Roll,' was a book kept for the purpose of entering omitted personal property by said county clerk and the entering of the payment of tax by the county treasurer when the tax was paid. Said Omitted Personal Property Tax Roll was delivered to the county treasurer that he might collect the taxes so as aforesaid by the county clerk entered against plaintiff, and plaintiff was notified by the county clerk that he had entered said notes and trust deeds for taxation.

"15. The plaintiff did not appear before the board of equalization of said county at the June meeting of said board in 1905, and make complaint as to the valuation on said notes and trust deeds entered by the county clerk on said Omitted Personal Property Tax Roll.

"16. On July 14, 1905, plaintiff, under protest, to avoid forcible collection under a tax warrant, paid to defendant, A. E. Moll, county treasurer of Johnson county, Kan., \$150.52, the amount so charged against him for taxation, for tax and costs, and by said county clerk so as aforesaid entered up against plaintiff on said Omitted Personal Property Tax Roll, and said county treasurer gave him a receipt therefor with the indorsement thereon, 'Paid under protest.'

"17. At the time, and immediately before paying said sum of \$150.52 to said county treasurer on July 14, 1905, plaintiff delivered to said county treasurer a written protest against the payment of said tax and costs, claiming that it was illegal and void.

"18. On July 27, 1905, plaintiff filed with and in the office of the county clerk of John-

son county, Kan., and presented against said county, a bill and demand, duly verified, asking the allowance and repayment to him of said sum of \$150.52 so as aforesaid paid by him under protest to the county treasurer of Johnson county, Kan., on the 14th day of July, 1905, which claim was not allowed, but was by said board of county commissioners rejected; and this action was commenced August 8, 1905. The case was tried before the court January 25, 1906, both parties asking the court to make separate findings of fact and conclusions of law. Just before the trial commenced defendants in open court offered to let plaintiff take judgment for the sum of \$4.30, with interest thereon from July 14, 1905, at 6 per cent. per annum, being the amount of costs charged against plaintiff by the county clerk on said hearing to discover omitted property and interest thereon, which offer plaintiff declined to accept.

Conclusions of Law.

"1. That the tax paid by plaintiff to the county treasurer of Johnson county, Kan., under protest, July 14, 1905, was illegal.

"2. That the notes and trust deeds upon which said tax was levied were not subject to taxation in Mission township, Johnson county, Kan., for the years 1903 and 1904.

"3. Said tax having been paid under protest, the plaintiff should recover in this action from the defendant county the sum of \$150.52, with interest thereon from July 14, 1905, at the rate of 6 per cent. per annum, and costs."

A judgment was rendered according to the conclusions of law, to reverse which the commissioners prosecute this proceeding in error.

The statute providing for the assessment and collection of taxes declares that all property in this state, real and personal, not expressly exempt therefrom, shall be subject to taxation in the manner prescribed. Personal property is defined to include every tangible thing which is the subject of ownership, not forming part or parcel of real property; also tax-sale certificates, judgments, notes, bonds, and mortgages, and all evidences of debt secured by lien on real estate. All personal property must be listed and taxed each year in the township, city, and school district in which it is located on the 1st day of March, except in certain specified instances not material to this controversy. Gen. St. 1901, §§ 7502, 7503, 7509.

The plaintiff contends that the judgment of the district court should be upheld, because the property taxed was not in this state, and had no location in Mission township in Johnson county. It will be observed the statute places tax-sale certificates, judgments, notes, bonds, and mortgages and all evidences of debt secured by lien on real estate in the same category for purposes of taxation, and distinguishes them from tangible personal

property. In the case of *Kingman Co. v. Leonard*, 57 Kan. 531, 46 Pac. 960, 34 L. R. A. 810, it was demonstrated that a judgment rendered by a court of this state has no independent situs of its own, and that for purposes of taxation it must, under the statutes of this state, be regarded as attending its owner at his place of residence, although that be in a foreign state. In the case of *Mecartney v. Caskey*, 66 Kan. 412, 71 Pac. 832, it was decided that tax-sale certificates issued by a county treasurer of this state have no independent situs of their own, and that, like judgments, their situs for purposes of taxation must be deemed to be the domicile of their owner although he be a nonresident.

The doctrine that the debt, evidenced by a note or secured by a mortgage, is the substantial element of the owner's taxable property, that the note or mortgage is merely evidence, and that generally the debt and its evidence have no independent situs of their own, is now so strong in its own credit that it needs no sureties by way of citations of authority. From the statute, the decisions referred to, and the legal doctrine stated it must follow that the property taxed in this case had its situs at the domicile of its owner in Mission township, Johnson county, unless some substantial reason exists for making an exception in its favor. Only one matter worthy of consideration can be suggested. In the cases cited, which involved the right to tax intangible property belonging to non-residents of this state, it was intimated that such property might acquire a situs here for purposes of taxation. Notes, mortgages, tax-sale certificates, and the like might be brought into the state for something more than a temporary purpose, be devoted to some business use here, and thus become incorporated with the property of this state for revenue purposes. Such a situs has aptly been termed a "business situs." *Herron, Treas. v. Keeran*, 59 Ind. 472, 477, 26 Am. Rep. 87; *In re Jefferson*, 35 Minn. 215, 28 N. W. 256.

Conceding for the purpose of argument that a resident of this state, who is the owner of intangible property like that assessed in this case may give it a business situs in a foreign state, and that it was the intention of the Legislature to regard property so located as outside the state and not subject to taxation here, the question remains whether the conduct of the plaintiff was sufficient to accomplish such a result. It is not necessary to determine precisely what facts will be sufficient in every case to establish an independent business situs for notes and mortgages; but, generally, the element of separation from the domicile of the owner, and fairly permanent attachment to some foreign locality, should appear, together with some business use of them, or some power of managing, controlling, or dealing with them in a business way. A merely transitory pres-

ence in a foreign state, or a naked custody for safe keeping, is not enough. *Hunter v. Board of Supervisors*, 83 Iowa, 376, 11 Am. Rep. 133; *Herron, Treas. v. Keeran*, 59 Ind. 472, 26 Am. Rep. 87; *Mecartney v. Caskey*, 66 Kan. 412, 414, 71 Pac. 832. Indeed it has recently been held by the Supreme Court of the United States in the case of *Buck v. Beach*, 200 U. S. 392, 27 Sup. Ct. 712, 51 L. Ed. 1106, that the Legislature of a state cannot disregard the rule that the situs of intangible property is at the domicile of its owner, in order to subject to taxation notes and mortgages owned by a nonresident but kept in a safe within the state by an agent who transacted no business regarding them and made no use of them other than to send them to the state of the owner's domicile for the purpose of delivering them on full payment, or to have indorsements of principal or interest made on them. In the opinion it is said: "The question still remains, was there any property within the jurisdiction of the state of Indiana, so as to permit that state to tax it, simply because of the presence of the Ohio notes in that state? It was not the value of the paper as a tangible thing, on which these promises to pay the debts existing in Ohio were written, that was taxed by that state. The property really taxed was the debt itself, as each separate note was taxed at the full amount of the debt named therein or due thereon. And jurisdiction over these debts for the purpose of taxation was asserted and exercised solely by reason of the physical presence in Indiana of the notes themselves, although they were only written evidence of the existence of the debts which were in fact thereby taxed. * * * Under such rule, the debts here in question were not property within the state of Indiana, nor were the promissory notes themselves, which were only evidence of such debts." The conclusion of the court, however, that the Legislature lacked power to take cognizance of the physical presence of the securities in Indiana for revenue purposes, may not command universal approval.

In this case the findings of fact show that the notes and mortgages taxed were merely left in the vault of a bank in Kansas City, Mo., for safe keeping. They were connected with no business enterprise. The depositary did not even have access to them, much less any power of business use or control over them. In strictness they were not even severed from the personal possession of the owner. Therefore the legal situs of the property was at the owner's residence in Kansas. The cases of *Wilcox v. Ellis, Treas.*, 14 Kan. 588, 19 Am. Rep. 107, and *Fisher v. Com'rs of Rush Co.*, 19 Kan. 414, are cited in opposition to this view. In the *Wilcox* Case the notes taxed were necessarily detained in the foreign state by an agent of both the maker and the owner for the completion of the business transaction out of which they arose. Something of an lustrance of a business situs

is thus presented. If it does not meet all the requirements of a proper standard, it certainly goes far beyond the facts of the present controversy. In the Fisher Case promissory notes, and a mortgage securing them, were payable in Iowa, and were left there for the purpose of collecting the moneys due upon them. Probably the weight of authority would not now sustain a holding that the property had a business situs in Iowa, because it was left there for collection. If such were true, every attorney in this state having in his office on the 1st day of March, for collection, notes and mortgages of nonresident clients, would be obliged to list them for taxation. See *Myers v. Seaberger*, 45 Ohio St. 232, 12 N. E. 796. But the object of the deposit was the accomplishment of a business purpose which made the presence of the paper in Iowa indispensable. Therefore the case is wholly dissimilar from the one now under consideration.

Although much confusion still exists, legal thought upon the subject of the taxation of intangible property has been considerably clarified since the opinions in *Wilcox v. Ellis* and *Fisher v. Com'rs* were written, and many of the arguments there advanced would now be regarded as unsatisfactory. It is clear that the laws of Kansas may and do afford a resident owner of notes and mortgages kept or even used elsewhere substantial securities, privileges, and advantages with reference to them, so that the reciprocal relation between protection and taxation is sufficiently preserved. As shown by *Mr. Justice Allen in Kingman v. Leonard*, 57 Kan. 531, 46 Pac. 960, 34 L. R. A. 810, intangible property may none the less have its situs for purposes of taxation in this state, although another state may afford the owner remedies respecting it. It is no longer debatable that the question whether a resident owner of debts evidenced by notes and mortgages has property in this state is not to be determined by the locality in which the debts were created, nor by the place where the security lies, nor by the residence of the debtors. And it is impossible to believe that the Legislature intended to regard notes given by nonresidents and secured by mortgages on property in another state as outside its jurisdiction, merely because the resident owner, returning home after the conclusion of the business transaction producing them, left them just beyond the state line. Since, however, as already shown, the results reached in the cases adverted to do not conflict with a holding that the notes and mortgages involved in this case were taxable in Kansas, it is not necessary to discuss those decisions further.

It is urged that the taxes charged against the plaintiff's property are void because the record contains no official return of a listing and valuation of described items of property. By his own wrong the defendant made it necessary for the county clerk to resort to the exceptional proceedings authorized by section

7599, Gen. St. 1901, to bring omitted property upon the tax roll. The course prescribed by the statute was strictly pursued, except that the return of the assessor, incorrect because of the defendant's conduct, was not formally corrected in accordance with the facts developed at the hearing in which the defendant participated. This omission was a mere irregularity, and does not vitiate the tax. According to the decision in the case of *Com'rs v. Lane (Kan.)* 90 Pac. 1092, the taxes paid under protest for the year 1903 were recoverable.

The cause is remanded to the district court, with instructions to modify its judgment in accordance with the views herein expressed.

SMITH v. OGDEN & N. W. R. CO.

(Supreme Court of Utah. Dec. 9. 1907.)

1. RAILROADS—FIRES—COMBUSTIBLE MATERIAL ON RIGHT OF WAY.

A railroad company must keep its right of way free from combustible material, and when it negligently permits such material to accumulate thereon, and the same takes fire from a passing engine, and it is communicated to adjoining property, which is injured, without the negligence of the owner, the railroad company is liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1673–1676.]

2. SAME—RAILROAD TRACK ON HIGHWAY.

A railroad company maintaining its track on a public highway must keep at least such portions of the highway as it occupies and uses in the operation of its railroad, and such portions as may be properly regarded as its right of way, free from combustible material.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1673.]

3. SAME—ACTIONS—INSTRUCTIONS.

Where, in an action against a railroad company maintaining its track on a public highway for fire set by sparks from its engines and communicated from combustible material in the highway to adjoining property, there was evidence justifying a finding that the fire originated on the right of way, a charge that the railroad company was not responsible for the combustible material in the highway, and was not liable for the damages sustained, was reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1754.]

4. APPEAL—REVIEW—INVITED ERROR.

A party cannot complain on the ground that the court charged on a subject neither presented by the pleadings nor the evidence, where he requested the court to charge on the subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3602.]

5. SAME.

A party requesting the court to charge on a subject may complain that the court erroneously stated the law, where it was not stated as requested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3602.]

6. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Plaintiff is not required to allege and prove, in the first instance, freedom from contributory negligence, and the burden of proving contributory negligence is on defendant, unless it is shown by plaintiff's evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 220–234.]

7. SAME.

Where contributory negligence is shown by plaintiff's evidence, defendant may interpose a motion for nonsuit on that ground, though there is no plea of contributory negligence.*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 277.]

8. SAME.

Where there is sufficient evidence, whether supplied by plaintiff or by defendant, on which a charge of contributory negligence may be predicated, the court, at the request of either party, should charge on the subject, though there is no plea of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 365.]

9. SAME.

Where there is a plea of contributory negligence, but there is no evidence on which to predicate a charge on contributory negligence, such a charge should not be given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 365.]

10. SAME.

The general denial puts in issue such of the general averments of the complaint as plaintiff must prove to maintain the action, and under it defendant may introduce any evidence disproving the negligence charged against him, or the causal connection of his negligence and the injury; but a plea of contributory negligence is essential to entitle defendant to introduce evidence of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 201, 210.]

11. RAILROADS — FIRES — ACTIONS — PLEADING AND PROOF — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE.

A railroad company, in an action against it for fire set by sparks emitted from its locomotives, may, under the general issue, prove that it was not guilty of the negligent acts charged, that the fire was occasioned by persons over whom it had no control, or that plaintiff caused it, and may prove its acts of caution in guarding against the spread of fire, and that the fire, though negligently started, did not reach plaintiff's land, or that an independent cause intervened between its acts and the injury; but it cannot show that plaintiff was guilty of contributory negligence in suffering combustible material to remain on his property in close proximity to the track, or that plaintiff after the discovery of the fire negligently failed to make reasonable efforts to save his property, such acts not being available, unless specially pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1706.]

12. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

The duty rests on one who discovers that a fire is advancing towards his property to make every reasonable effort to prevent its destruction.

13. RAILROADS—FIRES—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action against a railroad company for fire set by sparks emitted from its locomotives, evidence held insufficient to show negligence of plaintiff or his employees in charge of the property destroyed by fire, based on a failure to save the property from destruction after discovery of the fire and its advance towards the property.

14. EVIDENCE — OPINIONS — SUBJECTS OF EXPERT TESTIMONY.

Where, in an action against a railroad company for fire set by sparks from its locomotives, it was not impracticable to put the jury in possession of all the facts, it was error to allow hypothetical questions calling for the opinion of

witnesses as to the degree of diligence which should have been exercised by plaintiff and his employees in saving the property from destruction after discovering the fire.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2316.]

15. TRIAL—INSTRUCTIONS—EVIDENCE.

Where, in an action against a railroad company for fire set by sparks emitted from its locomotives, there was no evidence of an independent cause intervening between the negligent acts of the railroad company and the injury, and evidence that its negligent acts were the proximate cause of the injury, an instruction that if, after the commission of the negligent acts, there intervened an independent act which caused the injury, the acts were interrupted and were too remote, was erroneous, because of the absence of evidence on which to base it.†

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

Appeal from District Court, Second District; J. A. Howell, Judge.

Action by A. R. C. Smith against the Ogden & Northwestern Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed, and remanded for new trial.

George Halverson and T. N. Kimball, for appellant. Richards, Rolapp & Pratt, for respondent.

STRAUP, J. This action was brought to recover damages for the destruction of property by fire alleged to have been caused by the negligence of the defendant in the operation and management of its engine. The particular negligence charged against the defendant was in permitting dry grasses and weeds to be and remain upon its right of way, in failing to equip its engine with a proper spark arrester, and in the manner of handling and operating the engine. The answer was a general denial. A trial before the court and a jury resulted in a verdict for the defendant. Plaintiff appeals.

The defendant's track was maintained upon a public street or highway. Plaintiff's land was 80 or 100 rods north of the track. A Mr. Stephens and a Mr. Ellis owned two parcels of land lying between plaintiff's land and the track. The highway and defendant's right of way were covered with dry June grass, which, at the time of the fire, about the middle of July, readily ignited. There were also June and other dry grasses on lands adjoining the track and lying between the track and plaintiff's land. On the day in question, as defendant's engine was propelled and operated over its road, a number of fires were started from sparks and coals which were emitted from the engine, one of which fires started at the Stephens land, and others to the east and west of that place. The fire which started at the Stephens land spread from there to plaintiff's land where it destroyed his hay in the stack, his pasturage, and his fences. None of the other fires reached his land. That all the fires were caused by sparks and coals emitted

*Bunnell v. Railway Co., 13 Utah, 314, 44 Pac. 927; Clark v. Railroad Company, 20 Utah, 401, 59 Pac. 92; Holland v. Railroad Co., 28 Utah, 209, 72 Pac. 244.

†Belnap v. Widdison, 90 Pac. 232.

from the defendant's engine, there is no substantial conflict in the evidence. That some of the fires which started to the west and the east of the Stephens land originated on the defendant's right of way is also beyond dispute. Whether the particular fire which spread to plaintiff's land started from sparks thrown on the defendant's right of way, or from sparks thrown on the Stephens land adjoining the street and right of way, the evidence is conflicting; but there is sufficient evidence in the record to justify a finding by the jury that it started on defendant's right of way. The court charged the jury: "You are instructed that the defendant's railroad, where it passes along the road in the vicinity of the premises sued for by the plaintiff as having been damaged, was in the public highway, over which defendant had no control further than to maintain and operate its railroad, and that if there was dry grass or other combustible material growing in said highway and along the said defendant's said railroad track, or in the fields adjoining such highway, the defendant was not responsible therefor, and cannot be held liable for any damage sustained by the plaintiff, if you find that the plaintiff was damaged, by the setting on fire of such dry grass or other combustible material growing in said public highway, or in the fields adjoining the same, by the sparks from its said engine, provided the said engine was supplied with the most approved apparatus for the prevention of the emission of sparks and coals of fire, and that the engine was in good repair at that time, and operated by a competent engineer with reasonable care and skill at the time the fire was started by said engine, if you find that the engine started the fire."

Plaintiff's exception to this charge must be sustained. From this, as well as other portions of the charge, it will be seen that the court restricted the jury's finding on the question of the defendant's negligence to the allegations with respect to equipment and management of the engine, and entirely took from their consideration the alleged acts of negligence with respect to permitting dry grass and combustible matter to accumulate and remain on and along the defendant's railroad track. That it is the duty of a railroad company to keep its right of way free from dry grasses and other combustible materials in order that fire may not be set out on its right of way, and if it negligently permits dry grasses and other combustible material to accumulate and remain on its right of way, and the same takes fire from one of its passing engines and is communicated to an adjoining farm, where it destroys the property of the owner without negligence on his part, the railroad company is liable, is not questioned by the respondent. As is said by the authorities, the removal of such combustible substances is quite as much a means of preventing the communication of fire from locomotives as is the use of inven-

tions for preventing the escape of fire from the locomotives themselves. The charge evidently was given on the theory that, inasmuch as the defendant maintained its track upon a public highway over which it had no control, no duty was imposed upon it to keep its right of way clear of such combustible substances. But the duty imposed upon it in such case is the same as though it owned the right of way, at least to such portions of the highway occupied and used by it in the operation of its railroad and to such portions as may be properly regarded its right of way. *Lake Erie & W. R. Co. v. Middlecoff*, 150 Ill. 27, 37 N. E. 660. This principle of law is not, in this court, seriously controverted by the respondent. It is, however, contended by it that the error was harmless, because, as it claims, the evidence shows that the particular fire which spread to plaintiff's land did not start on the right of way, but started from sparks thrown on the Stephens land, and hence its alleged negligence in permitting dry grasses and other combustible material to be and remain on its right of way was not a contributing cause of the injury. Upon this point we have carefully examined the transcript, and while it may be said the evidence pertaining to it is not very direct, still we are of the opinion that there is sufficient evidence to justify a finding that this particular fire originated on the defendant's right of way. The charge of the court was therefore erroneous and prejudicial.

A further complaint is made by the plaintiff because of the court's charging the jury on the question of contributory negligence. This complaint is based upon the ground that contributory negligence was not pleaded, and on the further ground that there was no evidence to justify a finding of such negligence. The plaintiff, however, is not in a position to make such claim, for the reason that he himself requested the court to charge upon the subject. While the plaintiff may still be heard to complain that the court erroneously stated the law, if it was not stated as requested by him, nevertheless he cannot be heard to complain upon the ground that the court charged upon a subject which was neither presented by the pleadings nor the evidence when he himself requested the court to do so. As the judgment must be reversed, and a new trial granted because of the assigned error already reviewed, and as the questions of contributory negligence attempted to be presented are likely to arise on a new trial, we have concluded to consider them. The rule obtains in this jurisdiction that the plaintiff is not required to allege nor prove in the first instance his freedom from negligence. He is required to allege and prove negligence on the part of the defendant, and that such negligence, as a natural and direct result, occasioned the injury. The burden of proving contributory negligence is upon the defendant, unless it is shown by plaintiff's evidence. When it is shown by his

evidence, the defendant may interpose a motion for nonsuit on that ground, although there is no plea of contributory negligence. *Bunnell v. Railway Co.*, 13 Utah, 314, 44 Pac. 927; *Clark v. O. S. L. Ry. Co.*, 20 Utah, 401, 59 Pac. 92; *Holland v. O. S. L. R. Co.*, 26 Utah, 209, 72 Pac. 940. The plea is not material in support of the motion, for the motion is based on the ground that the plaintiff has not proven the case alleged in his complaint, but has proven facts outside of it and which defeat his right to recover. So, too, whenever there is sufficient evidence in a case, whether supplied by the plaintiff or by the defendant, upon which a charge of contributory negligence may properly be predicated, the court, at the request of either party, should charge upon the subject, although again there is no plea of contributory negligence. Though there be a plea of contributory negligence, yet, if there is no evidence in the case upon which to base a charge of such negligence, none should be given by the court. If there is no evidence either on the part of the plaintiff or the defendant on such issue, the court should not submit that issue to the jury any more than it should submit any other issue to them upon which there is no evidence.

A plea of contributory negligence is essential only to entitle the defendant to introduce evidence in support of such a defense. The general denial puts in issue such of the general averments of the complaint as the plaintiff is bound to prove in order to maintain his action. Under the general issue, the defendant may introduce any evidence which tends to disprove the negligence charged against him, or which tends to disprove the causal connection of his negligence and the injury; but a plea of contributory negligence is essential to entitle the defendant to introduce evidence which does not tend to disprove such facts, but which merely tends to prove negligence on plaintiff's part, concurring and combining with the defendant's negligence, and as a proximate cause contributing to plaintiff's injury. That is to say, the defendant, under the general issue, may not introduce evidence which does not tend to disprove his negligence or its causal connection, or the averments essential to plaintiff's recovery, but which, nevertheless, tends to relieve him of the legal consequences of his negligence. To do so a special plea is necessary. Applying this principle to the kind of case in hand, the defendant, under the general issue, may, among other things, prove: That it was not guilty of the acts charged. That the fire was occasioned by persons over whom, or from causes over which, it had no control, or that the plaintiff himself caused it. The acts of caution exercised by the defendant in guarding against or preventing the spread of fire. That the fire, though negligently started by the defendant, nevertheless did not reach plaintiff's land or destroy his property, or that an independent cause intervened between its alleged acts of

negligence and the injury which was the sole proximate cause; and, of course, all other things and causes which tend to disprove defendant's negligence, or the causal connection of such negligence. But the defendant, under the general issue, may not show that the plaintiff was guilty of what in law is termed "contributory negligence." For instance, he may not show that the plaintiff was guilty of negligence in suffering combustible material to be and remain upon his property, or in close proximity to the railroad track, or, after the plaintiff or his servants in charge discovered the fire, they negligently failed to make reasonable efforts to prevent its spreading to plaintiff's property or to save it from destruction. Such acts amount to negligence on plaintiff's part, which concurred and combined with the negligence of the defendant, while the latter's negligence was still continuing and causal, and which, together with the plaintiff's negligence, directly, concurrently, and proximately contributed to the injury. While such evidence tends to prove that the plaintiff's negligence was a concurrent and proximate cause, it does not tend to disprove the concurrent and proximate cause of defendant's negligence. It, therefore, does not controvert the facts which plaintiff must establish in order to sustain his action, but only avoids the legal consequences of such facts. And whenever such is the only effect of the proffered evidence a special plea is essential. For these reasons the general rule obtains that the defense of contributory negligence is not available as a defense, if not specially pleaded, unless plaintiff's evidence discloses such negligence. As has been shown, however, the court is not under all circumstances precluded from charging on such subject, because there was no such plea.

This, then, brings us to the further claim made, that there is no evidence in the case tending to show the plaintiff guilty of such negligence. That there is a total want of evidence tending to show the plaintiff guilty of negligence in the first instance is conceded. That is, there is no evidence showing that the plaintiff had anything to do with causing the fire, or that he was in any particular responsible for it, or that he was negligent in maintaining combustible substances upon his premises or near the railroad track, or that he otherwise made a negligent use of his property, or that he was even guilty of negligence in preventing the fire spreading to his land. The only claim made by the respondent in this respect is that the employees of the plaintiff (10 in number) working in his hayfield stacking hay at the time of the fire, had they not devoted so much effort in attempting to save the hay stacks, and had they directed more attention to the fire along the fence, some or most of the fence posts might have been saved. The law undoubtedly is that when a fire is once started and is discovered by the plaintiff, a duty is resting upon him to make every reasonable effort to

save his property. After discovering that the fire has started, and that it is advancing towards his property, the plaintiff cannot negligently stand still and allow the fire to advance and destroy his property, when, with reasonable efforts, he might prevent such destruction, and then be permitted to recover for such a loss. The property owner is bound to use all reasonable efforts to save his property and to minimize his loss, and if, by the use of such efforts, all damages could have been prevented, no recovery can be had. If after discovering the fire all the property could not have been saved, but with reasonable efforts some of it could have been saved, the plaintiff may not recover for the loss of that which could have been saved by such efforts. The evidence shows that a brisk wind was blowing towards plaintiff's property, and that the fire spread to it like a prairie fire. The plaintiff was not in his field at the time of the fire, but was at his house. What distance that was from the fire is not made to appear. When plaintiff first discovered the fire, it had swept over the fields and was consuming his haystacks. So far as made to appear, there was not anything that he could have done which would have saved his property. Conceding that the record sufficiently shows that the plaintiff's employees in the field were in charge of his property, and that its care had been intrusted to them in the sense that their negligence should be imputed to plaintiff (*Railroad Co. v. McKay*, 69 Miss. 139, 12 South. 447), yet, from an examination of the record we have been unable to find any evidence tending to show a lack of diligence on their part. To the contrary, we find evidence showing that they did all in their power to arrest the progress of the fire and to save the property. The transcript of the record consists of over 900 pages of typewriting, and it may be that we have overlooked some of the evidence on this point. But neither party has called our attention to any evidence which would justify a finding that plaintiff's employees did not use all reasonable efforts and diligence in such regard. The only matters to which our attention has been directed consist of answers made over plaintiff's objections by some of the defendant's witnesses to certain hypothetical questions propounded to them. These rulings are also assigned as error, and will be considered later. But, with the answers in the record, the evidence, in our judgment, is wholly insufficient to justify a finding that plaintiff's employees were guilty of negligence in failing to arrest the progress of the fire, or in saving the property. One of the hypothetical questions propounded to defendant's witnesses by its counsel, and which was permitted to be answered over plaintiff's objections, is as follows: "Q. Assuming that upon a field out here a fire was started in one field and passed along from that on to the next upon which there were 10 men working hay, and after the fire crossed onto the field where they

were working, and observing that it was coming, the haystacks, they tried to fight it from the haystacks, but being unable to prevent the burning of the stacks, if they had directed their attention to the fighting of the fire and putting out the posts, the fire had communicated from the June grass stubble to the lucern stubble, growing in the field, in your opinion would 10 men have been able to put out the fire that attacked or started from that field fire in the fencing?" Another was: "Q. Now, assuming Mr. Smith had 10 men working upon his place stacking his hay at the time that the fire came over from Mr. Ellis' field to his field and burned up that way, and the fire traveling so rapidly that they were unable to do anything towards saving the hay further than to throw it off two wagons and get the wagons out of the way, I will ask you if those men had directed their attention toward extinguishing the fire along the line of those fences of Mr. Smith's where the posts took fire and burned out, if the fire could have been extinguished in those posts in time to have saved them?" The first question was answered in the affirmative. The second was answered: "A. If I understand your question that, that is, that those men would have directed their attention towards saving the posts? Q. The fire came so fast that they discovered they couldn't save the hay, and running the two wagons off on which the hay was standing, to save them, if those men had turned their attention toward the saving of the posts that took fire and had followed the fire up, whether or not those 10 men could have put the fire out as it caught the posts in the fence and saved the posts from burning up, so they would have been practically saved? A. Yes; I think they could." Questions of like kind were also propounded to and similar answers made by other witnesses. Some of these witnesses also testified that, in their opinion, had less attention been given to the stacks and more to the posts, some or most of them might have saved by beating and whipping them with sage brush. Some of them also testified that, had they been there, they would have tried to save the haystacks instead of the posts. Such evidence does not tend to show that plaintiff's employees were guilty of negligence. It only tends to show that if the men had not devoted so much effort to the haystacks they might have saved some or most of the posts. One haystack and wagons were saved. Had more attention been given to the fence, these might have been lost. In such case the hypothetical questions could have been propounded on the theory that too much attention had been given to the fence. Lack of diligence cannot be predicated on the fact that plaintiff's men made more effort to save what appeared to be the most valuable part of the property, and which was most likely to be consumed by the fire, than was made to save property of less value, or, because of mere error of judg-

ment, they did not pursue the wisest course. We, therefore, do not find any evidence upon which a charge of contributory negligence could properly be based.

We pass now to the rulings made admitting this testimony. In the first place, we find that the witnesses did not qualify so as to entitle them to speak on the subject. In the next place, the subject-matter of inquiry was not of such character as to call for expert or opinion evidence, nor did it involve matters of fact which could not be detailed and described to the jury, nor was it impracticable to put the jury in possession of all the primary facts upon which the opinion of the witnesses was founded. Again, the questions embraced and called for the opinion of the witnesses as to the degree of diligence and care, which, under the circumstances, could or should have been exercised by plaintiff's men, the judgment of which matters was within the province of the jury and not the witnesses. We think plaintiff's objections to these questions ought to have been sustained. We see no ground upon which the rulings can be upheld.

Complaint is also made of the following charge on the question of an intervening cause: "Even the natural and probable consequences of a wrongful act or omission are not in all cases to be charged to the misfeasance or nonfeasance complained of. They are not thus to be charged where there is a sufficient and independent cause operating between the wrongful act complained of and the injury. If, after the commission or omission of the original act complained of, there intervenes an independent act of other persons, which, in itself, caused the injury complained of, then, in contemplation of law, the original act is interrupted and in law considered too remote, and the intervening act is considered the proximate cause." No complaint is made of the statement of the law in the abstract; but complaint is made that there is no evidence upon which such a charge could properly be predicated. There does not seem to be any evidence of an independent cause intervening between the alleged negligent acts of the defendant and the injury. The injury appears to be the result of the natural and proximate cause of the defendant's negligent act. Nothing is made to appear that the causal connection and continuous sequence of its acts were unbroken or interrupted by any new and efficient cause without which the injury would not have occurred. The only matter to which our attention has been directed as evidence of such a cause is based upon the answers made by the witnesses to the hypothetical questions just considered. But, as we have seen, such evidence does not tend to show an independent and intervening cause. The questions do not assume that plaintiff's men could have prevented the fire from reaching his property, or that they could have saved it after they had discovered the fire advancing to-

wards it. The questions propounded called for, and the answers made thereto expressed, the opinion that some of the posts could have been saved had more attention been given to them and less to the haystacks. Whatever probative effect ought to be given such evidence, it cannot have the effect of proving an independent and intervening cause. There being no evidence upon which such an instruction could be based, it ought not to have been given. What we have said on this question in the case of *Belnap v. Widdison* (Utah) 90 Pac. 393, to a great extent, applies here.

For the foregoing reasons, the judgment of the court below is reversed, and the cause remanded for a new trial. Costs to appellant.

MCCARTY, C. J., and FRICK, J., concur.

ANDERSON v. MAMMOTH MINING CO.

(Supreme Court of Utah. Dec. 9, 1907.)

MASTER AND SERVANT—PERSONAL INJURIES—UNSAFE PLACE FOR WORK—INSTRUCTIONS.

In an action by an employé for injuries, plaintiff testified that while oiling machinery in defendant's mill he stepped on an unfastened plank in a platform provided for oiling the machinery and was injured. The evidence warranted a finding that the plank was not fastened when laid, or that defendant by ordinary care could have discovered its unfastened condition prior to the accident, and should have fastened it. *Held*, that the court properly instructed that, if plaintiff's testimony was believed, the plank was a place furnished by defendant for plaintiff to work on; that it was defendant's duty to use ordinary care to make it reasonably safe; and that it was not reasonably safe, and by ordinary care it could have been made so, and plaintiff, while using ordinary care for his own safety while at work, was injured by reason thereof, the jury should find for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1150-1154.]

Appeal from District Court, Fifth District; Joshua Greenwood, Judge.

Action by Peter Anderson against the Mammoth Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Edwards, Smith & Price, for appellant. Powers & Marioneaux, for respondent.

STRAUP, J. This is an action for personal injury, alleged to have been suffered by plaintiff through the negligence of the defendant. The defendant was engaged in the business of mining and milling. It maintained a number of vanners at its mill, which were operated by shafts, belts, and pulleys about 20 feet above the floor upon which the vanners stood. The plaintiff was in the defendant's employ. His duties were attending the vanners and oiling the shafts and other machinery. It was alleged that it was the duty of the defendant to provide and maintain a platform or walk to enable the plaintiff to move along the shafts and about the machinery in the

performance of his duties; that the defendant's duty was not performed, in that it negligently suffered a plank of the walk to be and remain unfastened; and that the plaintiff, in the discharge of his duties, stepped on the unfastened plank and was precipitated to the floor below, a distance of about 20 feet. That there was a platform or walk provided by the defendant, and for the purposes alleged, is not disputed. Such walk consisted of two boards or plank laid side by side and fastened to the timbers or the framework of the building, and so extended along the shafts and other machinery above the floor. On behalf of plaintiff there is evidence tending to show that at the time of his injury one of the boards of the walk was, and for three or four days prior thereto had been, loose. Plaintiff's testimony also shows that in moving about from place to place oiling the shafts and other machinery he stepped on the loose board and was thrown to the floor of the building, and that prior thereto he was without knowledge of the loose condition of the board. On behalf of the defendant there is evidence tending to show that the plaintiff, at the time of his injury, was not making use of the walk, but was attempting to move about from place to place on the timbers, the framework of the building, and in doing so, slipped and came in contact with the belts. Among other things the court charged the jury: "(5) You are instructed that if the plaintiff had the choice of two or more ways of performing his duties, the one safe and the other dangerous, it was his duty both to himself and to his employer to select the safer way to perform his duty; and if, in selecting the safer way of doing his work, he proceeded in the manner attendant with greater risk, and as a result received the injury complained of in this action, and if he knew or ought to have known of the safer way to perform his duties, you will find for the defendant." "(7) You are instructed that the plank testified to by plaintiff, upon which he claims he was required to walk in order to do his oiling was, if his statement was believed by the jury, a place furnished by the defendant company upon which plaintiff was to do his work, and it was the duty of the defendant to use ordinary care to make it reasonably safe for the plaintiff to walk thereon in the manner that he was required to walk. If you believe from the evidence that it was not reasonably safe for that purpose, and that by ordinary care it could have been made reasonably safe, and that the accident happened because the plank was not made secure by nailing or otherwise, while plaintiff was properly walking thereon, in and about his work, and that the plaintiff was injured while using ordinary care for his own safety, then your verdict should be for the plaintiff in such damages as under the instructions given in the case you believe would compensate him for

the injury sustained." Plaintiff had judgment. The defendant appeals.

It is urged by defendant that the court erred in giving instruction No. 7. The only reason given in support of the alleged error is that the evidence without conflict shows that "the board from which the plaintiff fell was not a place furnished by the defendant upon which plaintiff was to do his work"; that is to say, it is claimed the loose plank was not in the pathway, and was no part of the walk, and when the plaintiff stepped on the plank he was entirely outside of and away from the walk provided by the defendant. And the further contention is made that the defendant was not responsible for the unfastened condition of the plank. We must hold against the defendant on these contentions. If the testimony of the plaintiff is to be believed, the loose plank was in the pathway and a part of the walk provided and maintained by the defendant for the purpose of which the plaintiff was using it. The evidence is also sufficient to warrant a finding that the plank was not fastened when laid, or that the defendant in the exercise of ordinary care could have discovered the unfastened condition prior to the accident and ought to have fastened it. The instruction was therefore applicable to plaintiff's theory of the case. No error was committed in giving it.

It is further urged that the jury disregarded instruction No. 5. It is claimed the evidence, without conflict, shows that the defendant had provided a reasonably safe walk or platform, but instead of using it, the plaintiff chose a dangerous way of passing from place to place by moving along the timbers of the building. This is but presenting the same question in another form. If the plaintiff did what is assumed by the defendant, the verdict is not only contrary to the charge, but also to the evidence. If, however, the testimony of the plaintiff and his witness is true, he was using the walk; the loose plank was a part of it, and rendered the walk not reasonably safe; and plaintiff's injury resulted by reason of such condition, while he was in the performance of his duties. The claim made, upon which it is assumed there is no conflict, is not sustained by the record.

The judgment of the court below is therefore affirmed, with costs.

McCARTY, C. J., and FRICK, J., concur.

Ex parte SMITH. (Cr. 1428.)

(Supreme Court of California. Dec. 16, 1907.)

1. HOLIDAYS—CRIMINAL LAW — SENTENCE — VOID SENTENCE—EFFECT.

A sentence pronounced on a legal holiday is void for all purposes, but does not have the effect of vacating the bench warrant under which the arrest was made on the filing of the information.

2. COURTS—OVERRULING OF PREVIOUS DECISION.

The construction of Const. art. 6, § 5, providing that the superior courts shall always be open, legal holidays and nonjudicial days excepted, by a decision of the Supreme Court as leaving the Legislature at liberty to allow or disallow the transaction of all or any class of judicial business on legal holidays, will not be set aside in deference to the supposed views of framers of the Constitution, expressed in the debate which took place when an amendment was offered to that section, providing that injunctions and writs of prohibition may be issued and served on legal holidays, which debate, it is claimed, shows that in the opinion of the members of the convention the part of the section first quoted positively prohibited the transaction of any judicial business on legal holidays, since the construction given by the decision is in evident accordance with the terms of the section, and, where there is nothing in the language of the members necessarily implying that they were actuated in supporting the amendment by any desire except to guard against a legislative enactment, forbidding all judicial business on legal holidays, and the decision was made after the Legislature had amended Code Civ. Proc. § 134, relating to the power of the courts to do business on holidays, to conform to their understanding of the Constitution, and the court, therefore, did but follow the contemporaneous construction by the Legislature.

3. HOLIDAYS—JUDICIAL PROCEEDINGS—STATUTORY PROVISIONS.

Code Civ. Proc. § 134, as amended March 19, 1907 (St. p. 681, c. 358, § 1), provides that no court other than the Supreme Court "must" be open on any of the holidays mentioned in section 10, except to give instructions to juries on their request, to receive a verdict or discharge a jury, or for the exercise of the powers of a magistrate in a criminal action, and that injunctions and writs of prohibition may be issued on any day. Previous to the amendment of 1907 the section read no court "shall" be open nor shall any judicial business be transacted, etc., provided that the Supreme Court and the superior courts shall always be open for the transaction of business, and that injunctions and writs of prohibition may be issued on any day. Among the holidays mentioned in section 10 is any day appointed by the Governor for a holiday. Section 133 provides that courts of justice may be held and judicial business transacted on any day except as provided in section 134. Section 135 provides that, if any day mentioned in section 134 happens to be the day appointed for the holding of a court or to which it is adjourned, it shall be deemed appointed for or adjourned to the next day. *Held*, that section 134 as amended March 19, 1907, still means what it has always meant, that the superior court shall not on a legal holiday transact any judicial business outside of the constitutional and statutory exceptions, notwithstanding the substitution of the word "must" for "shall"; and hence a sentence pronounced on a day appointed by the Governor as a legal holiday was void.

In Bank. Habeas corpus by John B. Smith against Carroll Cook, judge of the superior court of the city and county of San Francisco. Prisoner remanded to the custody of the sheriff to await the further action of the superior court upon the verdict of the jury.

Milton Newmark, Charles A. Strong, and John Cotter Quinlan, for petitioner. W. H. Langdon, Dist. Atty., and William Hoff Cook, Asst. Dist. Atty., for respondent.

BEATTY, C. J. The prisoner in whose behalf this proceeding was instituted, having

been convicted of the crime of burglary, was arraigned for sentence on the 29th day of November last. He objected to the proceeding upon the ground that, the Governor having appointed that day a legal holiday, the court was without authority to perform any judicial act except those enumerated in section 134 of the Code of Civil Procedure. This objection was overruled, and the judge pronounced sentence, upon which a commitment was issued to the sheriff requiring him to deliver the prisoner to the proper officers of the state prison at San Quentin. The contention is that said judgment and commitment are void, and that the prisoner must be discharged. It does not by any means follow that the prisoner must be discharged if the judgment and commitment are void; for it appears from the return to the writ that on the filing of the information charging him with the crime of which he was found guilty a bench warrant was issued in the usual form under which he may be lawfully detained until it is superseded. The contention on the part of the prisoner that the sentence pronounced on November 29th is utterly void for the purpose of committing him to the state prison, but is nevertheless valid for the purpose of vacating the bench warrant, and ending the felony case, is illogical in the last degree, and finds no support in the decisions which he cites. In *Ex parte Kelly*, for instance (65 Cal. 154, 3 Pac. 673), it was not a question involved, and, of course, was not decided either expressly or by implication, that a judge by pronouncing a void sentence thereby deprives himself of the authority—otherwise unquestioned—to proceed in disregard of his void act to pronounce a valid sentence. It was not decided there, or in any of the cases, that a void act has any positive force in itself, or that a void judgment under which a prisoner could not be held would have the effect of vacating other valid process under which he could be held. The only point involved or decided was that a judgment of imprisonment unauthorized in part was wholly void, and could not be enforced as to the portion which the court was competent to pronounce. Upon that point it was overruled by the decision of this court in bank (*In re Fil Kl*, 80 Cal. 201, 22 Pac. 146), and in many cases since it has been uniformly held that a judgment of imprisonment for too long a time or including provisions not warranted by law could be enforced to the full extent of the power of the court to render it. The case of *Ex parte Bernert*, 62 Cal. 524, has no more bearing on the point to which it is cited than *Ex parte Kelly*, but that case, questioned in *Ex parte Soto*, 88 Cal. 628, 26 Pac. 530, was finally overruled by the unanimous decision of the whole court in *Ex parte Joseph Reed*, 143 Cal. 634, 77 Pac. 660, 101 Am. St. Rep. 138. Without further reference to the cases cited by counsel for petitioner, it is sufficient to say that there is no decision of

this court which stands opposed to the plain and common-sense proposition that, if the sentence pronounced by Judge Cook on the 29th day of November was void for the reason that he was forbidden by the Constitution or statute to perform that judicial act on that day it is void for all purposes, and the prisoner is lawfully held to-day, as he was held prior to that time, under the bench warrant issued on the filing of the information, and subject to be again arraigned for judgment at any time when the court is competent to act.

But the prisoner is entitled in this proceeding to have it determined in what capacity and under what process he is lawfully held—whether under the bench warrant for arraignment for sentence, or under the commitment to the penitentiary, and this involves the construction of the constitutional and statutory provisions in respect to holidays and non-judicial days. The only constitutional provisions requiring consideration are contained in section 5, art. 6, and are as follows: (a) "They [the superior courts] shall be always open (legal holidays and non-judicial days excepted). * * *" (b) "Injunctions and writs of prohibition may be issued and served on legal holidays and nonjudicial days." The first of these clauses was considered, and the section construed in *People v. Soto*, 85 Cal. 621, 4 Pac. 664, where it was held that nothing was prohibited to the Legislature except the establishing of terms of court, during which alone judicial business could be transacted; the result being that full liberty remained "to allow or disallow the transaction of all or any class of judicial business upon legal holidays."

It is here contended that this construction was erroneous and would not have obtained if the attention of our predecessors had been called to the debate which took place in the constitutional convention, when an amendment embodying the clause marked "b" was offered to the section as originally proposed—a debate which it is claimed shows that in the opinion of the members of the convention the first clause, "a," standing alone, positively prohibited the transaction of any judicial business on a legal holiday. We are now asked, in deference to these supposed views of the framers of the Constitution, to reopen the question and set aside a decision which has been followed for nearly a quarter of a century. The reasons are very abundant for declining to do so. In the first place, the construction given to the section in *People v. Soto* is in evident accordance with its terms, and courts do not resort to the debates of a constitutional convention in construing a provision which is not, in its terms, ambiguous or uncertain. And, besides, when such resort is had to the debates, it is less for the purpose of learning the opinion of particular members upon points of verbal construction than for informing ourselves historically of the evil which it

was intended to guard against, or the benefit to be secured. Upon these points the debates in and outside of the convention furnish us abundant information. The main object in view was not to hamper the courts by suspending their powers on holidays and during vacations, but to prohibit the Legislature from imposing such limitations in all but the excepted cases (legal holidays and nonjudicial days). On these days the Legislature was by the first clause left at liberty to authorize or forbid the transaction of any or all judicial business, and the only effect of the amendment proposed and adopted (clause "b") was further to restrict that liberty by prohibiting any law disabling the superior courts to issue and cause the service of writs of injunction and prohibition. Outside of these limitations the legislative power was left unrestrained. Moreover, there is nothing in the language of the two members of the convention whose language is quoted in this connection which necessarily implies that they were actuated in moving and supporting the amendment by any desire except to guard against a legislative enactment forbidding all judicial business on legal holidays. It is to be remembered, also, that *People v. Soto* was decided in September, 1884, nearly five years after the Legislature had amended section 134 of the Code of Civil Procedure to conform to their understanding of this provision of the then recently adopted Constitution. The court, therefore, did but follow the contemporaneous construction by the Legislature of a provision, the object and purpose of which was certainly familiar to the professional members of the Senate and Assembly. In view of the long and universal acquiescence which this contemporaneous legislative construction has commanded, we should not feel warranted, even if the question were new, in searching the debates of the convention for a construction of the Constitution not required by its terms, and inconsistent with legislation hitherto unquestioned.

Nothing, therefore, remains to be considered but the proper construction of section 134 of the Code of Civil Procedure as amended March 19, 1907. St. p. 681, c. 358, § 1. It reads as follows: "No court, other than the Supreme Court, must be open for the transaction of judicial business on any of the holidays mentioned in section 10, except for the following purposes: (1) To give, upon their request, instructions to juries when deliberating on their verdict; (2) to receive a verdict or discharge a jury; (3) for the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature. Injunctions and writs of prohibition may be issued and served on any day." Among the holidays mentioned in section 10 is any day appointed by the Governor for a holiday and the 29th of November was so appointed. The judge of the superior court in overruling the objection of the pri-

oner to the passing of sentence on that day based his construction of the section upon the fact that by the last amendment the word "must" in the first line had been substituted for the word "shall" as it had previously read. He concluded that the Legislature would not have changed the word unless the intention had been to change the meaning, and that, since the word "shall" had the effect of forbidding the court to open or transact ordinary business on legal holidays, the substitution of the word "must" was intended to relax that prohibition, so that, although the court could not be compelled to open on a holiday, it might nevertheless be opened if in the discretion of the judge it was deemed necessary that its ordinary business should proceed, without interruption. There is much force in this reasoning, and the rule of construction upon which it is based is unquestioned, but it is not of compelling force in all cases, and we think another explanation will better account for the general revision of the section as re-enacted by the last previous amendment. St. 1897, p. 15, c. 19, § 2. At that time it was made to read as follows: "No court shall be open, nor shall any judicial business be transacted on Sunday, on the first day of January, on the 22nd day of February, on the 30th day of May, on the 4th day of July, on the 9th day of September, on the first Monday of September, on the 25th day of December, on a day upon which an election is held throughout the State, or by the Governor of this State for a public fast, thanksgiving, or holiday, except for the following purposes: (1) To give, upon their request, instructions to a jury when deliberating on their verdict. (2) To receive a verdict or discharge a jury. (3) For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature. Provided, that the supreme court and the superior courts shall always be open for the transaction of business, and provided further, that injunctions and writs of prohibition may be issued and served on any day." The imperfections and self-contradictions of this amendment were so glaring as to call loudly for a thorough revision, and, where so much was to be changed, it is not surprising that a word here and there should have been changed without intending to change the sense. On the other hand, we think it highly improbable that the Legislature, if actuated by the deliberate intention of making so radical a change in the powers and practice of the superior courts as is involved in the construction in question, would have left that intention to be gathered from language of such dubious import, when it could have been made plain and unmistakable by the addition of half a dozen words. We think it a safer construction to hold that the section still means what it has meant from the beginning, i. e., that the superior courts cannot upon a legal holiday transact any ju-

dicial business outside of the constitutional and statutory exceptions. In further support of this view it may be added that our construction is in harmony with, and gives effect to, sections 183 and 135 of the Code of Civil Procedure (which must be considered in connection with section 134), while the construction of the superior court renders them superfluous and unmeaning. They read as follows: Section 183: "Courts of justice may be held and judicial business transacted on any day except as provided in the next section." Section 135: "If any day mentioned in the last section happens to be the day appointed for the holding or sitting of a court, or to which it is adjourned, it shall be deemed appointed for or adjourned to the next day." At the hearing, Mr. Tum Suden, as a friend of the court, suggested the question whether the Legislature can delegate to the Governor the power to appoint a legal holiday. We have not felt at liberty to decide or discuss a question of such serious import when it has not been presented or discussed by any party to the proceeding. For the purpose of this decision, we assume that the Governor has the power to make the appointment, and our conclusion is that the judgment of the superior court is void.

The prisoner is remanded to the custody of the sheriff to await the further action of the superior court upon the verdict of the jury.

We concur: ANGELLOTTI, J.; LORIGAN, J.; SHAW, J.; McFARLAND, J.

152 Cal. 549

RILEY et al. v. NORTH STAR MINING CO.
(S. F. 4,041.)

(Supreme Court of California. Dec. 10. 1907.)

1. MINES AND MINERALS—DEEDS—CONSTRUCTION.

A patentee of a mining claim executed a deed to plaintiff's predecessor in title conveying all that portion of the claim conveyed by the government to the patentee lying east of the west bank of a creek and west of the east line of such survey, being all that portion of the ground and mining claim embraced within the patent. The deed also recited that it was understood that it embraced only that portion of the claim surveyed, applied for, and included in the patent which was included in the Ford and Reilly survey outside of, etc., "together with all mining right, property, possession, claim, and demand whatsoever of the grantor of in or to the premises," "and every part and parcel thereof." Held, that such deed included all the grantor's mining right in the lands conveyed, and estopped such grantor and his successors in interest from subsequently claiming extralateral rights in such ground.

2. SAME—CONTRACT—CONSTRUCTION.

B. having applied for a patent for a mine. P. asserted ownership of a conflicting claim. To avoid an adverse suit a contract was made by which, in consideration of P.'s agreement not to file an adverse, B. on receiving a patent agreed to convey part of the land to P.: the contract providing that that portion of the ground embraced within lateral lines drawn easterly from the northeast corner of the Ford and Reilly

location and the northeast corner of the Stockbridge location should be conveyed, it being understood that the agreement embraced only that portion of B.'s claim as surveyed and applied for and which was included in the Ford and Reilly survey outside and east of the actual lines and boundaries of that location. *Held*, that such contract did not indicate an intention that such conveyance should be of surface rights only, and hence was not in conflict with a deed conveying all of B.'s interest, including extra lateral rights in the ground described.

3. DEEDS—CONTRACT—VARIANCE.

Where a deed is unambiguous, it will govern the contract of sale in so far as the two are in conflict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 286.]

4. EVIDENCE—PAROL EVIDENCE—DEED.

When property is clearly conveyed by deed, the grantee's title cannot be disturbed by extrinsic evidence indicating that the grantor did not intend to convey such property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1719-1728.]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by George E. Riley and another against North Star Mining Company. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

The following is the opinion in department of McFARLAND, J., with whom HENSHAW and LORIGAN, JJ., concurred.

"This action was brought by plaintiffs as owners of certain mining ground and premises to recover judgment against defendant for the value of gold-bearing quartz rock alleged to have been wrongfully taken by defendant from said premises. By its answer defendant denied that it had wrongfully taken any rock from said premises; admitted that it had taken rock, which it avers was of no value, from beneath the surface of plaintiffs' mining ground; but avers that the rock so taken was from a lode or vein of quartz, the apex of which was within the surface ground of the adjoining mining claim of defendant, and which in its downward course dipped laterally under plaintiffs' ground, and that defendant had the right to follow said vein under the surface of plaintiffs' ground and extract rock therefrom. The case was submitted upon a stipulated statement of facts. The court held that upon the agreed facts the defendant had the right to do the acts complained of, because the rock taken was from a lode under the surface of plaintiffs' ground which had its apex in an adjoining mining claim of defendant and dipped laterally under plaintiffs' ground. Upon this theory objections were sustained to evidence offered by plaintiffs to show the value of the rock taken by defendant. A nonsuit was granted, and judgment rendered for defendant. From this judgment the plaintiffs appeal.

"The stipulated facts material to the determination of this appeal are those hereinafter stated. On April 12, 1876, the government of the United States issued its patent to James

K. Byrne for what was known and designated in the patent as the 'Massachusetts Hill Quartz Mine,' situated in Grass Valley mining district, Nevada county, Cal. The patent describes certain surface ground containing about 50 acres as designated in the official survey, which accompanied the application for the patent of said mine; also '2,138.4 linear feet of the said Massachusetts Hill quartz mine, vein, lode, ledge, or deposit for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining'; and also any other veins, etc., throughout their entire depth, the tops or apexes of which lie within the exterior lines of the said survey within the end lines. The Massachusetts Hill quartz mine was a consolidation of several smaller claims which had been located before Congress had passed any statute concerning mining claims or patents. One of the consolidated claims was known as the 'Ford and Reilly' and another the 'Stockbridge.' On September 23, 1878, James K. Byrne, as party of the first part, conveyed by deed to James P. Pollard and others a part of the said Massachusetts Hill quartz mine. The descriptive words of the property conveyed are as follows: 'All and singular that certain portion of the Massachusetts Hill mine and mining claim conveyed by the government of the United States to the said party of the first part by the patent, dated April 12, 1876, and as shown by the survey and plat thereof contained and set out in said patent, which is contained and included within the following lines and boundaries, and which is described as follows, to wit: All that portion of said Massachusetts mining claim which lies east of the west bank of Wolf creek and west of the east line of said survey, being all that portion of said ground and mining claim embraced within said patent, and the survey upon which the same is founded, which lies outside of, or easterly from, that part of said Massachusetts Hill mine, known as the "Ford and Reilly location," as the same was located and claimed as "square claim," * * * It being distinctly understood that this conveyance embraces only that portion of the said Massachusetts Hill mine, as surveyed, applied for, and included in said patent, which was included in the "Ford and Reilly" survey outside of and easterly from the actual lines and boundaries of the "Ford and Reilly" square location, and shall not be so construed as to include any portion of the said Massachusetts Hill mine, so patented, which was heretofore known as the "Stockbridge location." * * * Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, also all the estate, right, title, interest, mining right, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, or in or to the

said premises, and every part and parcel thereof, with the appurtenances.' The land conveyed was a small strip, less than an acre. The words 'mining right' were not part of the printed form of deed used, but were written there by the grantor Byrne. Plaintiff afterwards became the successor in interest of said Pollard and others to the property conveyed by said deed, and defendant became the successor of Byrne in all of the Massachusetts mine not conveyed by said deed; and while the ownership of the two pieces of property was thus respectively in said parties, the defendant, through underground works, followed the Massachusetts Hill mine vein under the surface of the ground described in the said deed from Byrne, and took rock therefrom under the surface of the ground, and for the rock so taken this action is brought. Defendant contends that it had the right to work the Massachusetts Hill vein where it lay beneath the surface of the land conveyed by Byrne to Pollard and others; and plaintiff contends that the deed from Byrne conveyed all of the rock beneath the surface of the conveyed land. In our opinion, the contention of plaintiffs must be sustained.

"A good deal of respondent's brief is devoted to the discussion and elucidation of the principle in mining law and property that the owner of a quartz lode which has its apex in the surface grant has the right to follow and take rock from such lode wherever it goes in its downward course, though it dips and extends beyond his side lines. This principle must, of course, be accepted as beyond controversy. There is also considerable argument in confutation of appellants' position that the Massachusetts Hill mine is a consolidation of a number of 'square' locations, without extralateral rights. We will assume for the purposes of this decision that this contention of appellants is not maintainable, and that, under the United States patent to Byrne, all ordinary extralateral rights attached to the Massachusetts mine, and that the Massachusetts Hill lode had its apex in the surface not conveyed by the deed, and dipped easterly to the east side line of the Massachusetts surface ground. But, in the first place, it can hardly be said that the question of extralateral rights arises in this case, because there is no question here as to any rights existing outside of the Massachusetts Hill side lines, all rights involved being within those lines. Respondent seems to assume that the deed to Byrne of a part of the mine created new extralateral rights between the land conveyed and that not conveyed; but, assuming this to be so, the question is not what is the mining law as to extralateral rights, but what part of the Massachusetts mine was conveyed by the deed? There is nothing about the ownership of that part of a quartz lode which lies at a considerable distance below the surface and departs from the perpendicular more sacred than the ownership of that part of it which lies near or at

the surface. Neither is inalienable. Under the patent Byrne owned all the surface of the Massachusetts mine as surveyed, and all the Massachusetts Hill lode which was within the surface between the apex and the east line of the surface ground, and he could have conveyed any part of that property. He could have conveyed the deeper part of the lode without conveying any surface ground; he could have conveyed part of the surface ground reserving all of the lode which was under it; and if he had simply conveyed surface ground without either mentioning or reserving rights under it, then there might have been a debatable question as to what a mere conveyance of surface ground conveyed. The conveyance, however, which he did make, was different from any above supposed, and the rights of the parties to this action depend entirely upon the meaning and effect of that conveyance.

"What, then, did the deed from Byrne to Pollard and others convey? It is to be noticed that there is no reservation on the face of the deed itself of any part of or rights in the property described as conveyed. There passed therefore to the grantees all property included in the descriptive language of the conveyance. That language is hereinbefore given in full, and we need only here refer to the most material parts of it. It conveys 'all and singular that portion of the Massachusetts Hill mine and milling claim conveyed by the government of the United States to said party of the first part by the patent dated April 12, 1870,' and 'all that portion of said Massachusetts mining claim which lies east of the west bank of Wolf creek and west of the east line of said survey, being all that portion of said ground and mining claim embraced within said patent'; and it also contains this passage, 'it being distinctly understood that this conveyance embraces only that portion of the said Massachusetts Hill mine, as surveyed, applied for, and included in said patent, which was included in the "Ford and Reilly" survey outside of,' etc., together with all mining right, property, possession, claim, and demand whatsoever 'of the said party of the first part, of in or to the said premises, and every part and parcel thereof.' Now, what was the 'Massachusetts Hill mine and mining claim' conveyed by the government of the United States to the said party of the first part by the patent dated April 12, 1870? It included, as described in the patent, 'the Massachusetts Hill quartz mine' with certain described surface ground, and 2,138.4 linear feet of the said Massachusetts 'mine, vein, lode, ledge, or deposit.' Therefore, when Byrne conveyed to Pollard and others 'all that part of the Massachusetts Hill mining claim which lies east of the west line of Wolf creek, west of the east line of said survey,' etc., together with all 'the mining right, property, claim, and demand of the party of the first part, of, in or to the said premises,

and every part and parcel thereof, with the appurtenances,' he clearly conveyed to the grantees all the property and right of every kind which he had in that part of the mine lying between the west bank of Wolf creek and the east line of the surface ground. A part of that portion of the mine lying east of the west bank of Wolf creek was that part of the Massachusetts Hill quartz lode which was within that boundary, and it was conveyed as completely as a deed of the whole Massachusetts Hill lode mine would have conveyed all the said mine. There was no language of reservation; and the words employed included every kind of property and right which the grantor had in that part of the mine mentioned. We do not attach quite as much importance to the words 'mining right' as is given it by appellants, for the previous language of the deed would have been clearly sufficient to include all the grantor's mining right in the land conveyed without the subsequent express use of those words. However, those words are in entire accord with the previous language, and, although not necessary, may be considered as having some significance as 'further assurances' of the thing granted. After a conveyance of all that part of the Massachusetts mine lying east of the line mentioned, together with all of the grantor's 'mining right' therein, there was surely nothing left to the grantor of that part of said mine. Of course, the previous language in a deed might be such as to limit the subsequent use of the words 'mining right'; but there was no language used in the deed here in question suggesting such limitation.

"Respondent contends that the deed should be construed in the light of certain facts and a certain preliminary contract between Byrne and the said Pollard. Those facts and that contract were as follows: After Byrne had made his application for a United States patent for the Massachusetts Hill mine said Pollard asserted the ownership of a mining claim called the 'Norwich,' which conflicted with a part of the Massachusetts claim as surveyed. Thereafter, to avoid the necessity of an adverse suit, a written agreement was entered into between Byrne and Pollard, by which Pollard agreed not to file an adverse claim, and Byrne agreed that after he had received a patent for the Massachusetts Hill mine he would convey a certain part thereof to Pollard. Respondent contends that by this contract Byrne was to convey only a part of the surface of the Massachusetts Hill mine, and was not to convey any part of the Massachusetts Hill lode lying under such surface, and that, therefore, the subsequent deed, whatever its language, is to be construed as not conveying any part of the Massachusetts Hill mine except such surface. But, in the first place, the said contract is by no means certain as to the precise property Byrne was to convey. It clearly contains no reserva-

tion of any underground rights. By the contract Byrne agreed to convey to Pollard 'that portion of said ground embraced within lateral lines drawn easterly from the northeast corner of the "Ford and Reilly location" and the northeast corner of the "Stockbridge location," respectively; it being distinctly understood that this agreement embraces only that portion of the said Massachusetts Hill mine as surveyed and applied for, which was included in the "Ford and Reilly" survey, outside of and easterly from the actual lines and boundaries of the "Ford and Reilly square location."' It thus refers to a part of the Massachusetts Hill mine as well as to the surface ground. Moreover, it may have been understood at that time that as the Ford and Reilly was a 'square' claim a conveyance of surface ground included all beneath it. At all events there was no absolute inconsistency between the contract and the deed which was afterwards executed. Moreover, if there had been any such inconsistency, the deed would prevail. In construing a written instrument, it is permissible to consider preceding facts and surrounding circumstances only when the instrument is itself ambiguous and uncertain. Where, as in the case at bar, the language used in the instrument in question is clear and certain, such language must govern. When property is clearly granted by a deed, the title of the grantee cannot be disturbed by extrinsic evidence tending to show that the grantor did not intend to convey such property. Of course, in a proper case and by a proper proceeding, a deed may be reformed or declared void on account of mistake or fraud; but there is no such issue in the case at bar.

"Counsel on each side have cited a number of authorities, but we do not deem it necessary to notice them at length, for they are not determinative of the question here involved, and deal with facts different from those of the case at bar. However, the views hereinabove expressed were substantially declared in the case of *Central Eureka Co. v. E. Central Eureka Co.*, 146 Cal. 156, 79 Pac. 834, 9 L. R. A. (N. S.) 940. The question there was whether a conveyance of ground by metes and bounds carried a part of the Summit quartz mining lode, which dipped under it, and the court held that it did not. But the court said: 'unquestionably it would have been conveyed by any instrument purporting to grant the Summit quartz mining claim, or the Summit quartz mining ground, for it was part and parcel thereof.' Our conclusion is that the court below erred in sustaining objections to evidence offered by appellants to show the value of the rock taken from the mining ground by respondent, and in granting a nonsuit and rendering judgment for respondent. Upon the agreed statement of facts, if the rock taken by respondent from appellants' land was of any pecun-

lary value as gold-bearing quartz, then appellants were entitled to judgment for such value.

"The judgment appealed from is reversed and the cause remanded, for further proceedings in accordance with this opinion."

Crittenden Thornton and John F. Riley, for appellants. Lindley & Eickhoff, for respondent.

PER CURIAM. After a reconsideration of this case in bank we are satisfied with the conclusion reached and the opinion delivered in department; and for the reasons given in said opinion the judgment appealed from is reversed, and the cause remanded, for further proceedings as directed in said opinion.

BEATTY, C. J. I dissent. The construction given to the conveyance under which the appellants claim can be upheld only by disregarding the radical difference between the relation of a mining claim to its surface description, and that which is included in the surface description of other lands. As to lands generally, a conveyance includes everything above and below the surface of the earth within vertical planes conforming to the surface lines, but this is not true of mining claims. The patent from the United States does not transfer to the patentee everything within the vertical planes extended downwardly through his end and side lines, and it does transfer things outside of such planes; viz., all parts of veins having their apices within his surface lines, though in their descent they are carried by their dip beyond the planes of his side lines. This is the effect of a patent for the entire claim; and when the patentee conveys a part of that claim described by surface lines, the necessary implication is that he reserves all that is embraced within the lines of that portion of the surface claim not conveyed, including the extralateral dip of all veins having their apices within the lines of the part so reserved. To give a deed for a part of a mining claim any other construction is to defeat the intention of the parties 99 times in 100, and the circumstances under which the deed in question here was given afford ample proof that in this case a construction is given to the deed which neither grantor nor grantee intended.

6 Cal. App. 749

PEOPLE v. BOWMAN. (Cr. 62.)

(Court of Appeal, Second District, California.
Nov. 9, 1907.)

1. RAPE—ASSAULT WITH INTENT TO RAPE—EVIDENCE.

Evidence of force and violence accompanying an assault held sufficient to sustain a conviction of assault with intent to rape.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 78-82.]

2. SAME—INTENT—QUESTION FOR JURY.

Where an assault on prosecutrix was clearly proved, coupled with acts indicating a pur-

pose to commit rape, whether such was defendant's intent was for the jury, though he abandoned his design and fled without accomplishing such purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 87.]

Appeal from Superior Court, San Bernardino County; F. E. Densmore, Judge.

Cornelius Bowman was convicted of assault with intent to rape, and he appeals. Affirmed.

Henry M. Willis, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. The defendant was convicted of the crime of assault with intent to commit rape, and appeals from the judgment and an order denying his motion for a new trial.

Appellant urges a reversal upon the ground that the verdict is not supported by the evidence. The only testimony disclosed by the record is that of the prosecuting witness and her husband, and the sole question presented for consideration is whether or not this uncontradicted evidence is sufficient to establish a prima facie case of the crime charged against the defendant. No good purpose can be subserved by any extended reference to the evidence. The prosecuting witness lived with her husband in a tenthouse consisting of two rooms. The defendant entered the same in the nighttime while both husband and wife were asleep. We may concede that he entered the room where the prosecuting witness was sleeping with her husband for the purpose of feloniously obtaining money. He was unable to obtain it, and it appears that he then formed the design to commit the crime with which he is charged. The uncontradicted evidence shows that in response to the defendant's demand for money the husband informed him that they had only 10 or 15 cents in the house, which was in a purse under his wife's pillow; that when she attempted to raise up to get it he placed his hand upon her throat, pushed her down upon the pillow, and said he didn't want it. He had a revolver which he thrust in the faces of both husband and wife, accompanying the exhibition with threats to kill them if they did not lie down and keep in place a blanket which he had thrown over their faces; that while thus intimidating them he clearly stated in the vilest language his purpose to have sexual intercourse with the wife, threw the bed covering from her body, and, notwithstanding her resistance, disarranged her nightdress, and repeatedly placed his hand upon her person; that the husband made his escape by jumping through a window, whereupon defendant abandoned his design and fled from the house. We cannot agree with counsel's contention that the evidence is wanting in proof that force and violence accompanied the attack. It would be difficult to conceive of an assault attended by force and violence of a greater degree than is dis-

closed by the evidence under consideration.

The assault being clearly proven, the intent with which it was committed becomes the vital element in ascertaining the nature of the offense, and the determination of this from all the circumstances and acts of the defendant is the peculiar province of the jury. "In such a case the intent is to be determined by and from the acts committed, and it is not for the judge, but for the jury, to say what particular intent follows from those acts." *People v. Barker*, 137 Cal. 557, 70 Pac. 617. And in *People v. Johnson*, 131 Cal. 511, 63 Pac. 842, the court in a similar case says: "As he did not have sexual intercourse with her, but did assault her, the question as to his intent was to be determined by all the circumstances and by the acts of defendant." To the same effect is *People v. Webster*, 111 Cal. 382, 43 Pac. 1114. Every act and circumstance surrounding the transaction is inconsistent with any inference other than an intent on the part of the defendant to use such force and violence as he might deem necessary to the accomplishment of his expressed purpose. The fact that he abandoned the undertaking when the husband escaped from his perilous position in no wise affects the case. *People v. Stewart*, 97 Cal. 240, 32 Pac. 8. We have carefully read and considered the cases cited in appellant's brief, all of which, however, are readily distinguished from the case at bar.

Judgment and order affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

6 Cal. App. 734

Ex parte JOHNSON. (Cr. 69.)

(Court of Appeal, Second District, California.
Nov. 2, 1907.)

1. INFORMATION — COMPLAINT — CONSTRUCTION — DUPLICITY.

A city ordinance made it unlawful for any person "to keep a saloon, bar," etc., "where any wine or intoxicating drinks were manufactured, sold, dispensed, or given away, or to manufacture, sell, dispense, or give away any such wine" etc., without first obtaining a license therefor. *Held*, that a complaint charging that defendant did "unlawfully keep a saloon, bar, etc., where liquors were then and there sold," and "did then and there sell, dispense, etc., malt beer, without first obtaining a license therefor," stated but a single offense, and was therefore not objectionable for duplicity, under the rule that where a statute enumerates a series of acts, either of which separately or all together may constitute an offense, all of such acts may be charged in a single count, because though each act may by itself constitute the offense, all of them together likewise constitute but one and the same offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 341.]

2. HABEAS CORPUS — SCOPE OF REMEDY — QUESTIONS INVOLVED.

While the inquiry on habeas corpus may extend to the question whether the complaint or information charges an offense known to the law, the objection that it is duplicitous will only be considered on appeal, and is not a ground for habeas corpus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 25.]

3. SAME.

Where the facts alleged in a criminal complaint state an offense, the writ of habeas corpus is unavailable regardless of how defectively or inartificially the facts are alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 25.]

4. SAME—CRIMINAL SENTENCE—FINE AND IMPRISONMENT—VOID PORTION OF JUDGMENT SEPARABLE.

A city ordinance prohibited the sale of liquors without a license, and provided a penalty of fine or imprisonment, or both. The minimum fine was \$25, and the maximum \$300. The maximum imprisonment was 150 days. A judgment directed that petitioner be imprisoned for 30 days in the county jail and pay a fine of \$240, and if the fine be not paid on or before the termination of the 30 days, defendant should be imprisoned in the city jail until the fine should be satisfied, at the rate of one day's imprisonment for every \$2 of fine, etc. *Held*, that the portion of the judgment imposing the imprisonment for nonpayment of the fine, if void, was separable, so that defendant was not entitled to his discharge on habeas corpus while the portion of the judgment prescribing imprisonment as a punishment was still in force.

5. CRIMINAL LAW—IMPRISONMENT—PLACE.

Where a judgment directed that petitioner be imprisoned for 30 days in the city jail, a return showing that by arrangement between the city and county, the latter had leased certain cells of the misdemeanor room of the county jail to be used as a city jail, and that the prisoner was confined in one of such cells, sufficiently showed that he was confined in accordance with the sentence.

6. MUNICIPAL CORPORATIONS — CLASSIFICATION ACT—APPLICATION.

The municipal corporations classification act (St. 1883, p. 24, c. 17, § 2) prescribes a general method for the classification of cities according to the United States census, and section 3 as amended (St. 1899, p. 141, c. 102) provides how municipalities may cause an enumeration of the inhabitants to be taken for the purpose of an immediate reorganization as a municipality of a higher or lower class, pursuant to an election to reorganize in such other class under the general municipal corporation act, declaring that thereupon such proceedings shall be had and an election held as provided in the general law for the reorganization, incorporation, and government of municipalities. *Held*, that the proceedings specified in section 3 were only to be employed in the particular instances therein specified, and that such classification act was not restricted in its application to cities and towns organized under the general law, but was applicable as well to those organized under freeholders' charters.

7. JUSTICES OF THE PEACE—JUSTICES IN CITIES—CONSTITUTIONAL PROVISIONS.

Const. art. 11, § 8½, providing that it shall be competent in all freeholders' charters to provide for the constitution, regulation, government, and jurisdiction of police courts, etc., did not indicate an intention to interfere with the legislative power to provide for a justice of the peace for cities and towns governed according to such charters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 2.]

8. SAME—CLASSIFICATION.

Justices' courts may be properly established in cities operating under freeholders' charters in accordance with the classification specified by Code Civ. Proc. § 103.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 2.]

Application of Peter Johnson for writ of habeas corpus. Writ denied.

L. E. Dadmun, for petitioner. J. W. Puterbaugh, for respondent.

TAGGART, J. This is an application for a writ of habeas corpus. Petitioner is detained in the county jail of San Diego county under a commitment issued in execution of a judgment of the city justice of the peace of the city of San Diego. Petitioner was found guilty of violating the liquor license ordinance of that city (No. 2,341), making it unlawful for any person "to keep a saloon, bar," etc., "where any wine * * * or any intoxicating drinks are manufactured, sold, dispensed, or given away, or to manufacture, sell, dispense, or give away any such wine," etc., "without first having obtained a license therefor, as provided in this ordinance," etc. The complaint upon which the conviction was had charges that the petitioner did "unlawfully, then and there, keep a saloon, bar," etc., "where * * * liquors were then and there sold," etc., "and did then and there sell, dispense," etc., "to wit, malt beer, without first obtaining a license therefor," etc. Petitioner contends that the complaint states two distinct offenses, and that a general verdict on such a complaint is void.

If the authorities from other jurisdictions cited by appellant to support his contention hold as claimed, they do not declare the rule in this state. Compare *State v. Pierce*, 136 Mo. 34, 37 S. W. 815, with *People v. Ellenwood*, 119 Cal. 166, 51 Pac. 553. The selling of malt beer was but incidental to the keeping of the saloon or bar; and the proof that petitioner did then and there sell, dispense, and give away liquors would be but one way of showing that liquors were then and there sold, dispensed, and given away. Section 1 of the ordinance, which is the section alleged to have been violated, makes it an offense to keep a saloon where liquors are sold. The showing that liquors were sold was necessary to establish the keeping of the saloon in the manner declared by that section to be unlawful. All the acts mentioned were charged in the conjunctive, and all preceded the charge that such acts were done without first obtaining a license therefor. But one offense, therefore, was charged, and the complaint was good even against a demurrer for duplicity or misjoinder. *People v. Dole*, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; *People v. Eagan*, 116 Cal. 287, 48 Pac. 120. Where a statute enumerates a series of acts, either of which separately or all together may constitute the offense, all of such acts may be charged in a single count; for the reason that, notwithstanding each act may, by itself, constitute the offense, all of them together do no more, and likewise constitute but one and the same offense. *People v. Gustl*, 113 Cal. 179, 45 Pac. 263; *People v. Leyshon*, 108 Cal. 440, 41 Pac. 490.

If the complaint were defective in the respect claimed, this would be a matter which could only be considered on appeal, and

no relief could be afforded on this ground by habeas corpus. *Ex parte Gibson*, 31 Cal. 620, 91 Am. Dec. 546; *Ex parte Long*, 114 Cal. 159, 45 Pac. 1057. While the inquiry on habeas corpus may extend to the question whether the complaint or information charges an offense known to the law, since this objection goes to the question of jurisdiction (*Ex parte Maier*, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129), the proceeding may not be made to subvert the office of a demurrer or appeal; and if the facts alleged state an offense, no matter how defectively or inartificially they may be stated, or however confused and beclouded they may be rendered through intermingling them with immaterial or unnecessary averments, the writ will not lie. *Ex parte Williams*, 121 Cal. 328, 53 Pac. 706; *Ex parte Harlan*, 1 Okl. 48, 27 Pac. 920. Misjoinder of offenses in a complaint or information will not warrant a discharge on habeas corpus. 15 Am. & Eng. Ency. of Law, p. 175 citing *In re Green*, 134 U. S. 377, 10 Sup. Ct. 586, 33 L. Ed. 951.

The ordinance violated provides a penalty of fine and imprisonment, or both. For the former a minimum of \$25 and a maximum of \$300 are prescribed, and the maximum imprisonment is fixed at 150 days. The judgment is that petitioner be imprisoned for thirty days in the "City Jail," and pay a fine of \$240, and if the fine be not paid on or before the termination of the 30 days' imprisonment, that he be imprisoned in the city jail "until the fine be duly satisfied, in the proportion of one day's imprisonment for every \$2 of fine, and on the payment of such portion of the fine that shall not have been satisfied by imprisonment, at the rate above prescribed, that the defendant be discharged from custody."

It is urged on the authority of *Ex parte Wadleigh*, 82 Cal. 520, 23 Pac. 190, and *People v. Hamberg*, 84 Cal. 475, 24 Pac. 298, that the judgment is void. The case at bar does not come within the reason or facts of either of those cases. If we were to hold that the portion of the judgment providing that petitioner be imprisoned for nonpayment of fine were void (which we do not), we could not release the prisoner on this ground, as that portion of the judgment is severable from the rest. The portion of the judgment prescribing imprisonment as a punishment is now in force, and the petitioner cannot now be discharged, whatever may hereafter be his rights regarding the portion relating to the fine. *Ex parte Mitchell*, 70 Cal. 1, 11 Pac. 488. The cases construing section 1205 of the Penal Code are to be distinguished from cases in which the law (whether statute or ordinance) violated provides for imprisonment in case of failure to pay the fine where both fine and imprisonment are imposed. The ordinance here in question provides that both fine and imprisonment may be imposed as a penalty for one violation, "and in the event that the fine imposed hereunder is not paid then (be punished) by imprisonment * * * at

the rate of one day for every two dollars of fine so imposed," etc. *Ex parte Green*, 94 Cal. 387, 29 Pac. 783; *Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. 372; *People v. Brown*, 113 Cal. 35, 45 Pac. 181. The commitment was to the city jail, while petitioner is imprisoned in the county jail. By the return to the writ made by the chief of police of the city of San Diego, it appears that by an arrangement between the city of San Diego and the county of San Diego the latter has leased to the former five cells of the "misdemeanor room" of the county jail, to be used as a city jail, and that petitioner was confined in one of these cells. This portion of the county jail, then, to all intents and purposes, is the city jail of the city of San Diego. There is nothing in the claim that petitioner is not imprisoned in accordance with the sentence of the court.

The principal reliance of petitioner, however, is upon the contention that the city justice court of the city of San Diego before which he was tried has no legal existence. The city of San Diego is organized under a freeholders' charter, ratified by the Legislature, March 2, 1889. St. 1889, p. 643, c. 20. It has never availed itself of the authority given it by the adoption of section 8½ of article 11 of the Constitution to create a police court. The city justice court under consideration depends upon section 103 of the Code of Civil Procedure for its existence, and the classification of cities used for the legislation in this section is that provided by the "Municipal Corporations Classification Act of 1883" (St. 1883, p. 24, c. 17), as amended in 1901 (St. 1901, p. 94, c. 80). Under this classification, if applicable to it, the city of San Diego is of the third class. Henning's General Laws, p. 743. This act, petitioner claims, has no application to cities organized under a freeholders' charter, but appertains only to those cities and towns organized and incorporated under the general municipal corporations act of 1883. Henning's Laws, p. 744. To sustain this view he relies chiefly upon the language of section 3 of the classification act, as amended in 1899 (St. 1899, p. 141, c. 102), which provides how municipalities may cause an enumeration of the inhabitants thereof to be taken for the purpose of an immediate reorganization as a municipality of a higher or lower class. By this section provision is made for an election to reorganize in such higher or lower class under the general municipal corporations act, "and thereupon such proceedings shall be had and election held as provided in the general law for the reorganization, incorporation, and government of municipal corporations," etc.

Section 3, however, does not contain the only method provided for ascertaining the number of inhabitants of a city or town for the purpose of determining the class to which such city or town belongs. Section 2 prescribes the general method, to wit, by United States census, and the proceeding under sec-

tion 3 is only employed in the particular instances therein specified. The proceeding under the latter section, then, was not necessary to the determination of the class to which the city of San Diego belonged. There is nothing in the title or the language of the classification act which confines the application to cities and towns organized under the general municipal corporations act. As amended in 1901, it contains a class which does not appear among those provided by the municipal corporations act, to wit, those having more than 100,000 and not exceeding 200,000 population which constitute the "first and one-half class." It is apparent, therefore, that the Legislature did not intend to restrict the use of the classification act to those cities and towns organized under the general law. All city justices' courts in the state, whether in cities with freeholder charters, or in those organized under the general law, are dependent upon section 103 of the Code of Civil Procedure, and therefore upon the classification act for a valid existence.

The legislation in this regard is based upon sections 1 and 11, article 6, of the Constitution. The latter section provides that the Legislature shall determine the number of justices of the peace to be elected in townships, incorporated cities and towns, and shall fix by law their powers, duties, etc. Under these provisions, the Legislature has created a state system of courts of which the court here under consideration is a member or branch. In doing this it has used the municipal classification act to avoid the objections urged in the cases cited by petitioner—*Miner v. Justice's Court*, 121 Cal. 284, 53 Pac. 795, and *Ex parte Giambonini*, 117 Cal. 573, 49 Pac. 732. In the former, an attempt was made to create a justice's court, and in the latter a police court, by special act. This it was held could not be done.

The classification act, made the basis of the legislation here in question, for that purpose is recognized as proper in a number of recent decisions of the Supreme Court. In *re Mitchell*, 120 Cal. 384, 52 Pac. 799. See, also, concurring opinion of Justice Henshaw (page 394 of 120 Cal., page 802 of 52 Pac.). It was frequently held before the adoption of section 8½ of article 11 of the Constitution, that such laws as section 103 of the Code of Civil Procedure constituted a valid exercise of the legislative power, and subdivision 1 of section 8½ shows no intention to interfere with the power of the Legislature in the matter of provision for justices of the peace for cities and towns. It is limited in terms to police courts. *Graham v. Mayor* (Cal.) 91 Pac. 147. No reason has been suggested why the classification in this act may not be made the basis of any necessary general legislation for all the municipal corporations in the state. Justices' courts being a part of the constitutional judiciary of the state, there appears to be some question whether it is necessary to classify them for the purpose

of creating and establishing them as distinguished from prescribing their duties and jurisdiction (In re Mitchell, 120 Cal. 390, 52 Pac. 802); but, assuming a classification to be necessary, a classification by population for this purpose is in accord with the whole spirit of the Constitution, and is the method prescribed by that instrument for the classification of cities and towns, as well as counties. There being nothing in the language of the classification act restricting its use to cities and towns organized under the general law, we see no objection to its use by the Legislature in creating city justices' courts for all cities and towns of the state, including those acting under a freeholders' charter. The court in question, therefore, is a valid court, properly established by a general law.

Writ denied, and prisoner remanded to the custody of the chief of police of the city of San Diego.

We concur: ALLEN, P. J.; SHAW, J.

6 Cal. App. 744

In re LANDER'S ESTATE. (Civ. 309.)

(Court of Appeal, Third District, California.
Nov. 7, 1907.)

**TAXATION—COLLATERAL INHERITANCE TAX—
REPEAL OF STATUTE—DISTRIBUTION OF ES-
TATE WITHOUT PAYMENT OF TAX.**

The right of the state to the tax, under the collateral inheritance tax act of March 23, 1893 (St. 1893, p. 193, c. 168), being, immediately on the death of a decedent, a vested right, which cannot be surrendered by the Legislature, the distribution of the estate which such act, as well as the repealing act of March 20, 1905 (St. 1905, p. 341, c. 314), the new collateral inheritance tax act, provides shall not be made till production of a receipt showing the tax has been paid, should be refused by the probate court, in the absence of such payment, whether or not a method for enforcing payment of the tax remains.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1676.]

Appeal from Superior Court, Plumas County; John E. Raker, Judge.

In the matter of the estate of H. J. Lander, deceased. From an order settling the final account and from the decree of distribution, appeal is taken. Reversed.

L. N. Peter and U. S. Webb, for appellant.
Garrouette & Goodwin, for respondent estate.

CHIPMAN, P. J. Deceased died intestate in the county of Plumas on June 19, 1904, leaving him surviving two sisters, who were his sole heirs. On July 21, 1905, the administrator of his estate filed in the superior court of said county his final account and petition for distribution of said estate. On July 31, 1905, and prior to the hearing of said matter, the district attorney was notified by the county treasurer that the tax on collateral inheritance due from said estate had not been paid, and on the same day the district attorney filed in said matter and presented to the court his protest against the settlement of

said account and the distribution of said estate until said tax was paid. No steps prior to said last-named date had been taken to collect said tax, and no part thereof had been paid. The court made its order settling the account and directing distribution of the whole estate without the payment of said tax. The appeal is from the order settling the final account, and also from the decree of distribution. The lower court held "that the act of March 23, 1893 (St. 1893, p. 193, c. 168), and the several acts amendatory thereof, had been repealed and there was no inheritance tax due or payable, and that there was no inheritance tax law in force by which any inheritance tax could be collected in said estate or ordered paid by the court." It would seem that the trial court held that the act of March 20, 1905 (St. 1905, p. 341, c. 314), which will be referred to as the repealing act, repealed the act of 1893 and destroyed the remedies provided in the latter act for the collection of taxes falling due thereunder prior to such repeal, applying the rule laid down in Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322. There is no brief filed by respondent, and we are without any assistance from him.

The facts here are substantially the same as in the recent case of Trippet v. State of California, 149 Cal. 521, 86 Pac. 1084, 8 L. R. A. (N. S.) 1210; i. e., the deceased died before the act of 1905 went into effect, and no steps had been taken by the state to collect the tax imposed by the law in force at the date of the death. It was held in the Trippet Case, supra, affirming the doctrine laid down in Estate of Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788, "that the right of the state to the tax under the law of 1893 is, immediately upon the death of the decedent, a vested right which cannot be surrendered by legislative act." The Trippet Case was an action to have determined that the property belonging to the estate of the decedent was not subject to any lien for taxes under the act of 1893, and acts amendatory thereof, imposing a tax on collateral inheritances. Such an action was authorized by the repealing act of March 20, 1905. In the Stanford Case it was held that to give retroactive effect to the amendatory act of 1897 (St. 1897, p. 77, c. 83) would be, in substance, if not in form, to turn over the fund in question belonging to the state to the appellants, and would be to make a gift or donation of the same which would conflict with the provisions of the Constitution prohibiting the Legislature from making any gift or donation of any public money or thing of value. The Attorney General makes the point that while the repealing act of 1905 purports to repeal the former act, it is but a re-enactment of the first, with certain amendments, and therefore only repeals so much of the original act as is inconsistent with it; that the provisions of the old act, which are carried into the later act without change, are to be considered,

not as repealed, but as continued in force and to have been the law all along—citing *Sutherland Stat. Con.* (2d Ed.) §§ 237, 238, 273; *Endlich on Int. of Stat.* § 490 (Ed. of 1888), and cases supporting the text. And it is pointed out that section 8 of the act of 1893, which provides that the estate shall not be distributed until the administrator produces a receipt showing that the tax has been paid, is also found in section 11 (p. 345) of the repealing act of 1905. In reply to the anticipated contention that the repealing act contained no saving clause and repealed absolutely the original act, and therefore the state cannot recover the tax, it is claimed that the Legislature passed another act on the same day on the same subject (*St. 1905*, p. 374, c. 325), which furnishes the same protection that would follow from the insertion of a saving clause in the repealing act itself; that the two acts are in pari materia, and must be construed together as one act—citing *People v. Jackson*, 30 Cal. 428; *Black on Int. of Laws*, § 86; *Smith v. People*, 47 N. Y. 338, and other cases. The New York case above cited discusses at much length the doctrine contended for.

It is further contended by the Attorney General that the rule announced in *Napa Hospital v. Flaherty*, supra, does not apply to taxes—citing *City of Oakland v. Whipple*, 44 Cal. 303, where it was held that where taxes are levied under a law which is repealed by a subsequent act, unless it be made apparent by clear and unequivocal language that the repealing act was intended to have a retrospective operation, it will be inferred that the intent of the Legislature was that the taxes should be collected in accordance with the law in force at the time they were levied. To like effect are cited *State v. Sloss*, 83 Ala. 94, 3 South. 745; *State v. Certain Lands*, 40 Ark. 38, and other cases. And finally it is contended that if the Legislature contemplated by the two acts of 1905 to give to the heirs of decedent the 5 per cent. of the estate which had previously vested in the state of California, such legislation would be obnoxious to section 31, article 4, of the Constitution. *Estate of Stanford*, supra; *Trippet v. State of Cal.*, supra.

There is much force in these contentions. We think, however, that it is not necessary to pass upon all of them. In the *Trippet* Case it was claimed, among other things, that the repealing act of 1905 left a bare right in the state without any constitutional means of enforcing it. The court said: "The plaintiff comes into court seeking, as against the state, a determination that it has no right to any tax. The state is not here seeking affirmative relief against the plaintiff. The judgment merely denies plaintiff the decree sought by him, declaring that the defendant has no right to any tax. Since, as we have seen, the defendant has a vested right to such tax, an adjudication that the estate is free from any claim for such tax would be manifestly im-

proper. Whether or not there remains a legal method of collecting the tax will be a question for decision when the state seeks to enforce its right." The court then shows that the plaintiff cannot, in the action, quiet his title without paying the claim of the state; that the case is analogous to that of a mortgagor who seeks to quiet his title against a mortgagee, where the right to foreclose is barred by the lapse of time, which he may not do without paying the amount due on the mortgage. It seems to us that the principle of that case should apply here, though the question arises in another form of action or proceeding. If, as was held in the *Trippet* Case, the right of the state vested at the death of the decedent, the state had a property interest in the estate which could no more be taken and given to an heir than could the interest of one heir be taken without his consent and given to another. The decree of distribution was entered August 2, 1905. The repealing act went into effect July 1, 1905, so that when the petition for distribution was filed (July 21, 1905), and when the decree was entered, the statute (section 11 of the repealing act) provided that the estate shall not be distributed until the administrator has produced a receipt showing payment of the tax. The court, then, by its decree not only deprived the state of a vested right, but in doing so proceeded in disregard of the plain provisions of the existing statute. The action of the court was doubtless based upon the erroneous assumption that the repealing act took away or was a renunciation of the right of the state, and hence it was unnecessary for the administrator to exhibit a receipt showing payment of a claim that had no legal existence. But we have seen that the right of the state to 5 per cent. of the estate vested at the death of the decedent, and that the Legislature had no power, if it had intended to do so (which is by no means conceded), to make a donation of this interest in the estate to the heirs of the decedent, by the indirect means of repealing the act under which the right vested. It seems to us quite clear that if the administrator in this case or the heirs of the decedent could not have the title to the estate quieted, without first paying the tax, as was decided in the *Trippet* Case, it would be a reproach to the law that would allow them to accomplish this result by proceedings in probate. But the decision of the *Trippet* Case rests, not alone upon the equitable form of the action, but also upon the principle that it would be inequitable to allow recovery against the state at all.

It is not within our province to suggest the steps necessary for the state to take should it seek affirmatively to enforce payment. But that the entire estate cannot be distributed to the heirs without payment of the collateral inheritance tax being first made we have no doubt. The final account sets forth that the balance of the estate on hand is money, except a mortgage note of \$200, and that the

estate is in condition to be closed. We do not understand that any objection is here made to the allowance and approval of the final account except as it may be affected by the question disposed of in this opinion. Before, however, the final account can be said to show that the estate is in condition to be closed, it should appear therefrom that the collateral inheritance tax has been paid.

The order settling and allowing the final account and the decree of distribution are reversed.

We concur: HART, J.; BURNETT, J.

6 Cal. App. 753

PEOPLE v. HO SING. (Cr. 101.)

(Court of Appeal, First District, California.
Nov. 11, 1907.)

1. ROBBERY—ELEMENTS OF OFFENSE—INFORMATION.

Under Pen. Code, § 211, providing that robbery is the felonious taking of personal property in the possession of another from his person or immediate presence and against his will, accompanied by force or fear, an information charging that the property was taken from prosecutor's presence, but failing to charge that it was taken from prosecutor's possession, was fatally defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Robbery, § 22.]

2. LARCENY—INFORMATION—ELEMENTS OF OFFENSE.

Under Pen. Code, § 484, defining larceny as the felonious stealing, taking, carrying away, of the property of another, an information charging that accused, from the immediate presence of prosecutor, by means of force and against prosecutor's will, did take, steal, and carry away certain property of the value of \$1,026 of the personal property of prosecutor, was sufficient as an information for larceny.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 94, 95.]

3. INDICTMENT—CONVICTION.

Where an information was sufficient to charge larceny, but was insufficient to charge robbery, and the court instructed exclusively on the theory that defendant was being prosecuted for robbery, for which offense he was convicted and sentenced, the judgment must be reversed.

4. SAME—FORMER JEOPARDY.

Accused was informed against for robbery. The information was insufficient to charge that offense, but did charge larceny. Defendant was tried, convicted, and sentenced for robbery. Held, that defendant having been once in jeopardy for the offense of larceny under such information could not be again tried therefor on reversal on the erroneous conviction of robbery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 396.]

Appeal from Superior Court, Contra Costa County; William S. Wells, Judge.

Ho Sing was convicted of robbery, and he appeals. Reversed. Defendant discharged.

Nathan C. Coghlan, for appellant. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. The defendant was informed against, tried and convicted of the crime of robbery, and was sentenced to im-

prisonment in the state prison for the term of 20 years.

The charging part of the information is as follows: "The said Ho Sing * * * did then and there, * * * from the immediate presence of one Chung Kee, * * * by means of fear and against the will of the said Chung Kee, take, steal and carry away" certain property of the value of \$1,026.00, "of the personal property of said Chung Kee." To this information a demurrer, general and special, was interposed, which was overruled. The argument by appellant on the demurrer is chiefly addressed to the point that the information does not state facts sufficient to charge the crime of robbery. We think the argument is sound. "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence and against his will, accomplished by means of force or fear." Pen. Code, § 211. It will be observed that the information fails to set forth one of the essential elements of the crime of robbery as defined in this section, in that it does not aver that the property was taken from the possession of Chung Kee. Had it been alleged in the information that the property was taken from his person, an allegation of possession, while expedient, would not be imperative, for, in that case, it would be apparent that the property was in his possession at the time it was taken. It does not necessarily follow, however, that because the property when taken was in the immediate presence of Chung Kee that it was in his possession. For example, it might have been in possession of lessee or pledgee. In the case of *People v. Walbridge*, 123 Cal. 274, 55 Pac. 902, the Supreme Court, speaking of an information for robbery, said: "The information alleges that the money was taken 'from the person and immediate presence of Victor Finster.' If it was taken from the person of Victor Finster, it must be assumed that it was in his possession at the time it was taken. It was so held in *People v. Shuler*, 28 Cal. 490. If the information had only alleged that the money was taken from the immediate presence of Victor Finster, then an additional allegation would have been necessary to the effect that it was at that time in the possession of Finster; but the allegation that it was taken from his person renders the allegation as to possession in him not absolutely necessary. It may be conceded that it would have been better pleading to have directly alleged the possession of the money to have been in Finster, but, under the circumstances here disclosed, we deem the information sufficient in the absence of such allegation."

While the information in the case at bar does not aver facts necessary to charge the crime of robbery, it does allege facts sufficient to charge the crime of larceny. "Larceny is the felonious stealing, taking, carrying away, * * * the property of an-

other." Pen. Code, § 484. Upon comparing the information with this section it at once appears that the information has every element necessary to charge the crime of larceny.

The respondent objects to the consideration by this court of the ruling on the demurrer by the trial court, because to that ruling there is no exception presented by a bill of exceptions. Disregarding this technical point, and passing on the merits of the demurrer, it is our opinion that the information in substance and form is good as charging larceny, and that the trial court committed no error in overruling the demurrer thereto.

On this information the defendant could have been tried and convicted of larceny, but he was tried on the theory that the information properly charged robbery. The court instructed the jury exclusively on that theory, the jury found him guilty of robbery, and he was sentenced for that crime. The result is that the defendant was charged with the crime of larceny, and was convicted of the higher crime of robbery. It follows that the judgment must be reversed. It is so ordered. And it appearing that the defendant has been once in jeopardy (*People v. Arnett*, 129 Cal. 306, 61 Pac. 930), and that a new trial would be a useless proceeding, it is further ordered that the defendant be discharged from custody.

We concur: HALL, J.; COOPER, P. J.

6 Cal. App. 741

In re CONROY'S ESTATE. (Civ. 332.)

(Court of Appeal, Third District, California.
Nov. 7, 1907.)

1. EXECUTORS AND ADMINISTRATORS — ACCOUNTING—PERSONS ENTITLED TO OBJECT.

A father who was administrator and sole heir of his daughter died after having conveyed his entire distributive share in his daughter's estate. On settlement of the account of the administrator de bonis non, a decree was entered directing distribution of the estate to the father's grantee. *Held*, that a brother of the daughter could not object to the decree on the ground that the father's deed was invalid, such a claim, if any, being as an heir of the father, and only enforceable in proceedings as to the father's estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 2157, 2158.]

2. DEEDS — EXECUTION — RELATION OF PARTIES.

A deed recited, "This indenture made the 21st day of April, 1903, between C. (administrator of the estate of L. C.) of D," etc., and acknowledged by C. individually, was C.'s deed as an individual and not as an administrator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 276, 277.]

3. DESCENT AND DISTRIBUTION—GRANTEE OF DISTRIBUTE.

Where a father, who was administrator and sole heir of his daughter's estate, conveyed certain property in controversy which descended to him as such heir to Q., and then died before having finally administered the estate, the father had no interest in the property which could pass to his heirs on his death, and the property was properly distributed to Q. under Code Civ. Proc.

§ 1678, authorizing distribution to a distributee's assigns.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, §§ 330-336.]

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Judicial settlement of the estate of Mary Elizabeth Conroy, deceased, by Frank M. O'Connell, administrator de bonis non. From a decree distributing the estate to John F. Quinn, Anthony Bernard Conroy appeals. Affirmed.

William Hoff Cook and Taylor & Tebbe, for appellant. James F. Farrahar, for respondent.

CHIPMAN, P. J. This is an appeal by Anthony Bernard Conroy from the decree of the superior court of Siskiyou county, made and entered November 10, 1906, making final distribution of said estate.

It appears that Frank M. O'Connell, respondent, as administrator of the estate of Mary Elizabeth Conroy, deceased, on October 20, 1906, filed his final account, together with a petition for the distribution of said estate. At the hearing it appeared, as shown by the decree of the court, that Bernard Conroy, to whom letters of administration were issued in said estate, died pending administration, and said Frank M. O'Connell was duly appointed administrator de bonis non; that the sole estate belonging to decedent consisted of a house and lot in the town of Dunsmuir, being lot 5 in block 10; that Bernard Conroy was the father of Mary Elizabeth Conroy, deceased; that the mother of Mary Elizabeth had died previous to the death of the latter; that Mary Elizabeth was a single woman and died intestate, and that Bernard Conroy was her sole heir; that due notice to creditors was given by said Bernard, as such administrator, before his death, and no claims were presented against the estate of Mary Elizabeth, and no property of any kind was received by said O'Connell, as administrator, other than \$202.50 advanced by John F. Quinn to pay the costs of administration; that all taxes, state, county, and municipal, together with all costs and charges against said estate of Mary Elizabeth, deceased, have been fully paid, and the estate is in condition to be closed; that Bernard Conroy, on April 21, 1905, by deed, granted said lot to said John F. Quinn, by virtue of which said Quinn "succeeded to the distributive right thereto of said Bernard Conroy, deceased"; that said final account "be and the same is hereby settled, allowed, and approved as submitted; that the said real estate so comprising the estate of Mary Elizabeth Conroy, deceased, be and the same is hereby distributed to said John F. Quinn, as successor in interest of said Bernard Conroy, deceased."

It does not appear from anything in the record that appellant is the son and heir of Bernard Conroy, or the brother of Mary Elizabeth; there is nothing but his notice of ap-

peal to show any relationship of appellant to either of the above-named persons. It appears from the petition for distribution that Mary Elizabeth was the daughter of Bernard Conroy; that she was a single woman and died intestate; whose mother had died before her death, which would make Mary Elizabeth's father her natural heir. Appellant's kinship, if any, would be to Bernard, whose estate, so far as appears, was not administered upon. The issue is not presented by the record. If there is any imperfection in the deed to Quinn, the rights of appellant, Anthony Bernard Conroy, must be first asserted in proceedings to administer the estate of Bernard Conroy, deceased.

Upon the merits of the matter, however, appellant's contention cannot be maintained. He relies on the claim that the deed of Bernard Conroy to Quinn was as administrator. The deed reads: "This indenture, made the 21st day of April, 1903, between Bernard Conroy (administrator of the estate of Lizzie Conroy) of Dunsmuir," etc. The deed is signed "Bernard Conroy," and is acknowledged: " * * * Personally appeared Bernard Conroy, known to me to be the person described in and whose name is subscribed to the within instrument, and acknowledged to me that he executed the same." There are no recitals in the deed showing that it was intended to be a deed by Bernard in his official capacity, as administrator, except as above appearing. The words in parenthesis are surplusage, and must be disregarded. They are repugnant to the terms of the deed, which in all other respects show it to be the deed of Bernard Conroy individually. *Wilcoxson v. Sprague*, 51 Cal. 640. As Bernard's grantee, Quinn was entitled to have distribution made to him. Code Civ. Proc. § 1678.

It is claimed that distribution should have been to the heirs of Bernard Conroy, inasmuch as he was then deceased; "that his heirs (this appellant, as a son, being one) were entitled to have the estate distributed to them, and their title became vested on the death of their father"—citing *Gutter v. Dalamore*, 144 Cal. 665, 79 Pac. 383. But if appellant be an heir of Bernard, we have no proof of it in the record, and, besides, the only way to establish heirship would be by proceedings in probate. Furthermore, Bernard Conroy in his lifetime conveyed to Quinn, and at his death he had no interest in the property, and hence his heirs, if he had any, took no interest.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

ULRICH et ux. v. STEPHENS.

(Supreme Court of Washington. Jan. 7, 1908.)

1. NEGLIGENCE—SETTING FIRES—EVIDENCE.

Evidence in an action for the burning of plaintiff's barn by fire, alleged to have been com-

municated to it from fires started by sparks from a fire set by defendant, during a dry season, to brush on a two or three acre tract, between which and plaintiff's property was a strip of green timber 750 feet wide, and a creek 40 feet from water's edge to water's edge and 80 feet from bank to bank, held to authorize a finding of negligence in setting the fire.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 267-273.]

2. SAME.

Where fire negligently set by one on his premises is carried to that of his neighbors, it is incumbent on him to do all that can reasonably be expected of a man in such situation to prevent injury coming from said fires to the property of the neighbors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 28-30.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

The finding that plaintiffs, whose barn was burned by fire communicated to it from fires started by sparks from the fire negligently set by defendant on his premises, were guilty of contributory negligence in putting personal property back in their barn, when they thought danger from the fires was passed, is not necessarily inconsistent with the allowance to them of damages from the burning of the barn and hay therein, neither of which could be readily removed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 92.]

4. APPEAL—REVIEW—FINDINGS BY COURT.

While a finding by a trial court is not binding to the same extent as a verdict, yet there being a conflict of evidence, its advantages, in seeing and hearing the witnesses, will be recognized, and the finding will not be disturbed, unless the appellate court is well satisfied of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

Mount, J., dissenting.

Appeal from Superior Court, Whatcom County; Jeremiah Neterer, Judge.

Action by William Ulrich and wife against Thomas H. Stephens. Judgment for plaintiffs. Defendant appeals. Affirmed.

Newman & Howard and Fred Llewellyn, for appellant. Crites & Romaine and Fairchild & Bruce, for respondents.

ROOT, J. This action was brought by respondents to recover damages for loss of a barn and personal property therein by fire alleged to have been negligently set and allowed to spread by appellant. The respondents own and occupy the S. E. $\frac{1}{4}$ of section 5, township 37 N., range 5 E. W. M. Appellant has the entire north half of the same quarter section, while the southwest $\frac{1}{4}$ thereof is owned by one William R. Stephens. Near their west line, and about 900 feet south of the appellant's south line, was situated respondents' barn above referred to. A little west of due north of respondents' barn, and just within his south line, appellant had a slashing consisting of fallen trees and brush piled in heaps covering an area of two or three acres. Between this slashing and respondents' barn was a strip of green timber about 750 feet in width and a creek measuring about 40 feet from water's edge to water's

edge and about 80 feet from bank to bank. Appellant set fire to his slashing shortly before 1 o'clock p. m. on August 21, 1906. There had been no rain for nearly two months, and everything in that vicinity was very dry. Appellant offered testimony to the effect that on the afternoon of August 20th and the forenoon of August 21st thunder was heard in the distance and there were appearances of rain. At the time the fire was started there was little, if any, wind. Later a north wind sprung up which increased in force to such an extent that sparks, embers, and particles of burning moss were carried southward across the creek and dropped upon respondents' premises, starting fires in many places where they happened to drop upon dry stubs, logs, brush, or other combustible material. Some of these particles, coming either from the original fire, or from small fires started therefrom, alighted on and around respondents' barn, and respondents, assisted by neighbors, fought against and extinguished many of these small fires that threatened the barn on this afternoon and evening. Respondents remained up a large part of that night watching and fighting the fire, but finally retired, believing that their premises were out of danger. On the next day the fire smouldered in logs and stubs on the lands west and north of respondents' place, and several small fires were claimed by respondents to have been extinguished by them near their barn on this day. There were a few dead snags and stubs, including one about 150 feet tall, to the northwest about 120 feet from respondents' barn, in which fires smouldered all day on the 22d. On the evening of that day respondents, believing that the barn was no longer in danger, replaced therein certain movable property which they had taken out when they regarded the barn in danger. Respondents retired about 11 o'clock that night, and were awakened about 4 in the morning by the burning of their barn. There was not very much wind at this time, and it could not be told with much certainty as to where the sparks came from that ignited the barn, if ignited thereby. The case was tried without a jury. The trial judge found that the appellant was negligent, and held him liable in damages for the value of the barn and the hay therein contained. He refused to allow a recovery for the personal property which the respondents had removed from the barn during the day and replaced on the evening before the barn burned, holding that they were guilty of contributory negligence in replacing this property in the barn under the circumstances. From the judgment entered, this appeal is prosecuted by the defendant.

The appellant claims that no negligence is established as against him, that he had a right to set the fire, and that his manner of managing it after it was set was not such as to charge him with negligence. The setting out of a fire is not in itself an act of

negligence. In a country like this, where it is necessary to clear land and burn brush and stumps thereupon, it is appropriate that fires should be employed at proper times and under suitable conditions; but when we remember that this appellant started this fire at a time when there had been no rain for nearly two months, and when much of the surrounding neighborhood contained combustible material that could be readily ignited by the sparks that would naturally fly from the burning of such a large amount of brush, we cannot say that the trial court was in error in adjudging the defendant guilty of negligence. The defendant may possibly have believed that it would soon rain, and he doubtless relied much upon the strip of green timber and the creek to prevent the fire spreading in the direction of respondents' premises. He, however, knew there was no certainty of rain, and he must have known that the burning of so much brush would tend to increase the wind and scatter sparks to a long distance from the location of the fire. This happened, and many fires were started upon the premises of respondents and their neighbor to the westward. These fires endangered respondents' premises on the 21st, and there were numerous places still burning or smouldering all day on the 22d. Appellant claims that the violence of the wind was unexpected, and could not reasonably have been anticipated; that he had no reason to suppose that the wind would blow hard enough to carry the sparks across the green timber and creek. There was evidence, however, to show that many of the sparks ignited the particles of moss, stumps, and other combustible material among the green timber and burned in numerous places therein. Having seen that the fire had been carried from his premises over to that of his neighbors, it was incumbent upon him to do all that could be reasonably expected of a man in such situation to prevent any injury coming from said fires to respondents' property. The evidence did not convince the trial court, and does not convince us, that he did so.

It is strenuously urged that the finding of the trial court that the respondents were guilty of contributory negligence in replacing in their barn on the evening of the 22d the personal property which they had theretofore removed when in fear of a fire is inconsistent with the allowance to the respondents of damages for loss of the barn and the hay therein contained. We do not think that it is necessarily inconsistent. Neither the barn nor the hay therein could be readily removed. As to the other property, it could be and was removed, but was replaced under conditions which the trial court did not believe justified its return, although the danger was not so imminent as to require respondents to stay up all night watching the barn. It therefore declined to allow them any recovery for that property which would not have been destroyed had it not been so returned to the barn.

There is considerable conflict in the evidence, especially upon matters of opinion as given by the various witnesses. While the finding of the trial court or judge in a case tried without a jury does not stand as a verdict, and is not to the same extent binding upon this court, yet, in the face of a conflict of evidence, this court will recognize the fact that the trial court, in being able to see and hear the witnesses personally, has advantages which this court does not have, and will not disturb the finding of the lower court unless well satisfied that it was in error. We are not so convinced in this case.

The judgment will therefore be affirmed.

FULLERTON, RUDKIN, and DUNBAR, JJ., concur. HADLEY, C. J., and CROW, J., took no part.

MOUNT, J. I think the evidence fails to show that the fire which destroyed respondents' barn originated from the fire set out by appellant, or from any negligence of appellant. I therefore dissent.

McLEAN v. LESTER et al.

(Supreme Court of Washington. Jan. 9, 1908.)

1. JUDGMENT—DEFAULT JUDGMENT—PROCESS TO SUSTAIN—SERVICE BY PUBLICATION—SUFFICIENCY.

Where a summons is attempted to be served by publication, but as published it notified defendants to appear within 60 days after date of first publication, to wit, within 60 days after December 23d, without showing the year, the summons was too indefinite and uncertain to support a judgment of default.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 25-33.]

2. SAME.

The summons in a proceeding to foreclose a delinquent tax certificate should state the time within which the defendants were required to appear, and if it fails to do so, it is insufficient. Hence, where a summons served by publication required defendants to appear within 60 days after the date of the first publication, and the day and month only of the first publication were stated, the date of the newspaper or of issuance of the certificate of delinquency would not be sufficient to make the summons definite, since the date of the newspaper is not a part of the summons, and the date of the certificate of delinquency does not indicate the time when the action is brought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 25-33.]

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by Christine McLean against Letsette E. Lester and others. From a judgment for plaintiff, defendants appeal. Affirmed.

William C. Keith, for appellants. Ira A. Campbell, for respondent.

MOUNT, J. This action was brought by the respondent to set aside a judgment foreclosing a delinquent tax certificate, and also a tax deed based thereon. Upon a trial a

judgment was entered as prayed for in the complaint. The defendants appeal.

It is necessary to notice but one of the questions presented, because upon that question alone the judgment appealed from must be affirmed. It appears that in the proceedings to foreclose the delinquent tax certificate service was attempted to be made upon the defendants by publication. No other service was made. The summons, as published in that case, notified the defendants "to appear within 60 days after the date of the first publication, to wit, within 60 days after the 23d day of December, in the above-named court, and defend this action, or pay the amount due, together with costs, and in case of your failure so to do the plaintiff will apply for a judgment foreclosing the lien of said taxes and costs against the real property above described. G. W. Tracie, plaintiff. Daniel Lamson, attorney for plaintiff. Room 9, Roxwell Block, City. First publication December 23, —7t." Upon this summons a judgment of default was entered, and the lot in question sold. The summons did not state the year when the defendants in that action were required to appear. Under repeated rulings of this court this summons was too indefinite and uncertain to base a judgment of default upon. *Owen v. Owen*, 41 Wash. 642, 84 Pac. 606, and cases there cited.

Appellants argue that the date of the newspaper and the fact that the certificate of delinquency was issued in the year 1904 are sufficient to make the summons definite. The date of the newspaper is no part of the summons, nor does the fact that the certificate of delinquency was issued in the year 1904 necessarily show that the case was brought in that year. The summons itself should state the time within which the defendants were required to appear. It did not do so, and was therefore insufficient.

The judgment appealed from must therefore be affirmed.

HADLEY, C. J., and FULLERTON and CROW, JJ., concur. DUNBAR and ROOT, JJ., took no part.

LANGE v. RESERVATION MINING & SMELTING CO. et al.

(Supreme Court of Washington. Jan. 6, 1908.)

CORPORATIONS — DISPOSAL OF CORPORATE PROPERTY — POWER OF CORPORATION TO CONVEY.

The trustees of a corporation formed to buy, sell, and deal in mines, with the ratification of the majority of the stockholders, may, as against the objection of the minority stockholders, sell mining property belonging to the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1774.]

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by H. Lange against the Reservation Mining & Smelting Company and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Wakefield & Witherspoon, for appellant.
A. D. McLaren, for respondents.

FULLERTON, J. The respondent the Reservation Mining & Smelting Company is a corporation, and the other respondents are the trustees thereof. The respondent corporation was incorporated September 1, 1898, one of the objects for which it was formed being to "buy, sell, * * * and deal in mines." Shortly after its organization the corporation purchased a group of claims, known as the "Lone Star & Washington Consolidated Lode Mining Claims," situated on what was then the Colville Indian Reservation, entered into possession of the same, and between that time and March 10, 1902, expended thereon some \$53,481.53 in development work, in an effort to make the mine a paying investment, the result being that there was extracted from the mines ore of the value of \$1,090.46. After March 10, 1902, no further effort was made to operate the mines. On June 1, 1906, the board of trustees entered into a contract for the sale of the mines, together with the machinery and tools used in operating the same, the same being all of the property owned by the corporation, for the sum of \$50,000. On July 30, 1907, at a special meeting of the stockholders, called for that purpose, the matter of the sale was submitted to such stockholders for ratification or rejection. At such meeting stockholders representing more than two-thirds of the outstanding stock voted to ratify the sale, while stockholders representing 6,500 shares, among whom was the appellant, voted against ratification. Immediately after the adjournment of the meeting this action was brought to restrain the corporation and the trustees thereof from carrying into effect the contract of sale. The trial judge, at the hearing of the case, ruled that the trustees, with the approval of stockholders owning more than two-thirds of the stock of the corporation, could make the sale, even against the dissent of minority stockholders, and dismissed the appellant's action. This appeal was taken therefrom.

It is the contention of the appellant that neither the trustees nor a majority of the stockholders of a corporation have power against the objection of minority stockholders to sell or otherwise dispose of the entire property of the corporation, where no necessity exists for such action, such as the payment of legitimate debts, the prevention of further losses from a losing business, or such like causes. Unquestionably this was the rule of the common law as applied to a corporation organized to carry on a particular business, when such sale would have the effect of thwarting the purposes for which it was organized, and destroying the corporation it-

self, and especially was it true where the purposes of the sale were to "freeze out," or otherwise deprive the minority stockholders from further participation in the profits of the business conducted by the corporation. *Theis v. Spokane Falls Gas L. Co.*, 34 Wash. 23, 74 Pac. 1004; *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 492, 65 Pac. 765.

But in the case before us the sale does not disrupt the corporation, nor is it contrary to the purposes for which the corporation was formed. On the contrary, the corporation will be in as good a condition to proceed with the objects it was formed to promote after this sale as it was before, and the sale will be but fulfilling one of its objects and purposes. Whether the sale is wise or not from a business point of view is not the question. It is a question of power in the board of trustees. And this power exists, we think, both by virtue of the articles of incorporation, and the general law conferring the management and control of the corporate business on the board of trustees. *Pitcher v. Lone Pine-Surprise, etc., M. Co.*, 39 Wash. 608, 81 Pac. 1047.

The judgment appealed from is affirmed.

HADLEY, C. J., and **MOUNT and ROOT, JJ.**, concur. **CROW, J.**, took no part.

STONE et al. v. SMITH-PREMIER TYPEWRITER CO. et al.

(Supreme Court of Washington. Jan. 7, 1908.)

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against the proprietor of a store for injuries to a customer who fell through an open trapdoor, the question of contributory negligence held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 286, 291, 296, 299.]

2. SAME—PERSONS LIABLE—EVIDENCE—SUFFICIENCY.

In an action against an individual and a corporation, who occupied a storeroom, for injuries sustained by a customer of the individual who fell through an open trapdoor, it appeared that the door was on the side of the store not used by the corporation, and that while the corporation had goods stored in the basement, which was reached by the door, and occasionally used the same, it had no control over it other than a mere license. It did not appear how long the door had been open, nor who left it open, and there was no evidence that any one connected with the corporation was in the store at the time of the accident. Held, that the evidence was insufficient to show liability on the part of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 267-273.]

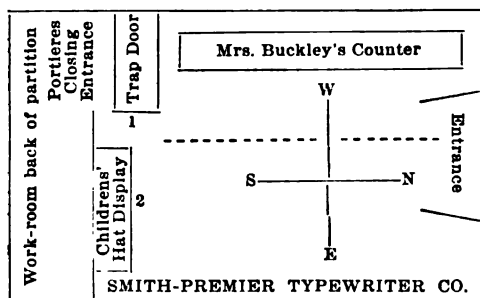
Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Emma F. Stone and another against the Smith-Premier Typewriter Company and another. From a judgment in favor of defendants, plaintiffs appeal. Affirmed as to the former defendant, and reversed and remanded as to the other.

Samuel R. Stern, for appellants, J. D. Campbell, for respondent Smith-Premier Typewriter Company. S. P. Domer, for respondent Ida M. Buckley.

ROOT, J. Appellants brought this action to recover damages for personal injuries received by Emma F. Stone in falling down a trapdoor stairway leading to a basement underneath a storeroom occupied by respondents, on the south side of Riverside avenue, in the city of Spokane. At the close of plaintiffs' evidence, the case was dismissed as to both the defendants. From the judgment of dismissal, this appeal is taken.

Respondent Buckley occupied the west side of the storeroom with millinery goods. The east side was occupied by the typewriter company, with desks and typewriting machines and material. At the rear of the store was a workroom used by Mrs. Buckley. This room was entered through a door on the west side covered by portieres. A counter extended along the west side of the store, and between the same and the portieres was a trapdoor which, when raised, left an opening 27 inches wide and 8 feet long. The south end of this opening extended beyond the outer line of Mrs. Buckley's counter about 14 inches. The following diagram will show substantially the situation at the time of Mrs. Stone's injury.



1—Where Mrs. Stone fell down stairway.
The distance from the trap-door to partition was 14 inches.

Dotted Line—Mrs. Stone's course down aisle.

2—Where clerk stood showing hats.

Mrs. Stone entered the store, and stopped at the counter to look at some hats. After standing there some time, she passed on to another counter at the rear of the store next to the workroom. In so doing she passed by the trapdoor. She did not see the trapdoor or opening, and testifies that she had never seen them and did not know of their existence, although she had traded in the store at various times during the past four years. While looking at hats at the rear of the store, she stepped back to make room for a clerk who was reaching over for a hat, and in doing so stepped into the opening and fell down the stairway, sustaining severe injuries. The trial court took the view that Mrs. Stone must have seen, or might have seen, the opening, and that she was therefore guilty of contributory negligence, which

defeated her right of action. We are unable to reach this conclusion as a matter of law. We think that, under the circumstances shown, it was for the jury to say whether or not she was guilty of negligence. The law requires a storekeeper to maintain his storeroom in such a condition as a reasonably careful and prudent storekeeper would deem sufficient to protect customers from danger while exercising ordinary care for their own safety. A customer entering a store of this character is required to use that degree of care and prudence which a person of ordinary intelligence, care, and prudence would exercise under the same circumstances. As to whether Mrs. Stone exercised that degree of care and prudence in this instance is a question upon which we think reasonable minds might differ. This being true, it became a question of fact for the jury. We think the facts herein shown clearly distinguish this case from that of *Dunn v. Kemp & Hebert*, 36 Wash. 183, 78 Pac. 782, which is relied upon by respondents.

It is urged, however, that the judgment should be affirmed as to the typewriter company, and we think this contention must be upheld. The trapdoor opening was upon the side of the store used by Mrs. Buckley. While both she and the typewriter company had goods stored in the basement, and occasionally used the trapdoor opening, yet it does not appear that the typewriter company had any control over the trapdoor other than a mere license to go down the opening when necessary. It does not appear how long the trapdoor had been open, nor who left it open at the time of this accident, which occurred between five and six in the afternoon. Mrs. Stone testified that she did not see any one in the part of the store occupied by the typewriter company, and there is no evidence that any one was there at that time. We do not think the evidence establishes any liability against the company.

The judgment of the honorable superior court will be affirmed in so far as it affects the typewriter company, and reversed and remanded for further proceedings in so far as it affects the respondent Buckley.

HADLEY, C. J., and CROW, MOUNT, and FULLERTON, JJ., concur. DUNBAR and RUDKIN, JJ., not sitting.

BLANGY v. SYLVESTER et al.

(Supreme Court of Washington. Jan. 8, 1908.)

APPEAL—DISMISSAL—GROUNDS FOR—SETTLEMENT OF CONTROVERSY.

Where the record on appeal shows a settlement and complete satisfaction of the whole controversy, the appeal will be dismissed.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Nellie Blangy against Clara E. Sylvester and the Charles E. Marvin & Sons

Company. From the judgment, Clara E. Sylvester appeals. Dismissed.

George Marvin Savage and May Sylvester, for appellant. Shepard & Flett, for respondents.

PER CURIAM. The record in this case shows a settlement and complete satisfaction of the whole controversy. The appeal will therefore be dismissed.

SHIPLEY et ux. v. GAFFNER et ux.

(Supreme Court of Washington. Jan. 6, 1908.)

1. TAXATION—TAX FORECLOSURE—NATURE OF PROCEEDINGS.

Proceedings for tax foreclosure are in rem, and not against the person of the owner; hence owners are bound to take notice of the property they own, pay taxes thereon, and defend against foreclosure for delinquent taxes, even though the property is assessed to unknown owners, or to other persons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 699.]

2. SAME—ASSESSMENT—UNKNOWN OWNER—EFFECT OF ASSESSOR'S STATEMENT—STATUTORY PROVISIONS.

Ballinger's Ann. Codes & St. § 1609, providing that the assessor shall make out in the detail and assessment list book a complete list of all lands subject to taxation, showing the names of the owners if to him known, and if unknown so state opposite each tract, does not require the assessor to use diligence in ascertaining the names of the true owners, and while if he knows he must show them, if unknown to him he may so state, and his statement is conclusive on the question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 699.]

3. SAME—CERTIFICATE OF DELINQUENCY—RECITAL OF OWNERSHIP—STATUTORY PROVISIONS—CONSTRUCTION.

Ballinger's Ann. Codes & St. § 1749, providing for issue by the treasurer of a certificate of delinquency, and requiring a stub which shall be a summary of the certificate and shall contain among other facts the name of the owner or reputed owner if known, refers to the name of the owner as stated on the assessment roll, and does not require the treasurer to draw upon his own knowledge or investigate to determine the actual or reputed ownership, and he is not negligent if he follows the record as it appears in his office.

4. SAME—WHICH ASSESSMENT ROLL GOVERNS.

The treasurer might under the statute state in a certificate either the name on the roll for the year when the taxes were delinquent, or that on the roll at the time of the certificate.

5. SAME—CONSTRUCTION OF ASSESSMENT ROLL—OWNERSHIP LEFT BLANK.

Where the place for the name of the owner of property is left blank in the assessment roll, it amounts to a statement that the owner is unknown.

6. SAME—EFFECT OF KNOWLEDGE OF TAXING OFFICER.

The fact that the taxing officer knew the real owner of property does not affect the validity of the tax or of tax foreclosure proceedings, where the property is assessed to unknown owners and so foreclosed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 699.]

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by F. K. Shipley and wife against W. T. Gaffner and wife. From a judgment for defendants, plaintiffs appeal. Affirmed.

Elias A. Wright and F. C. Kapp, for appellants. Eugene A. Childe, for respondents.

MOUNT, J. This action was brought by appellants against respondents to recover possession of certain real estate in King county, which respondents claim under a tax deed, and also to remove the cloud thereby created. The general demurrer interposed to the amended complaint by respondents was sustained. Appellants elected to stand on their complaint, and an order of dismissal was entered, from which this appeal was prosecuted.

The amended complaint alleged that appellants acquired the fee-simple title to said property in November, 1889; that they have continued to be the sole owners and entitled to the exclusive possession thereof ever since; that the tax rolls in the office of the county treasurer for the years 1891-92-93-94 show that appellant F. K. Shipley as owner had duly paid the taxes for those years before delinquency; that in the tax rolls for the years 1891, 1892, and 1896 to 1902, both inclusive, said property was assessed to appellant F. K. Shipley, he being designated therein as the owner thereof; that in preparing the tax rolls for the year 1895, the county officials carelessly and negligently failed to insert the names of appellants as owners of said property, and left the space provided therefor blank, although each of said officials well knew, or by the use of reasonable diligence could have ascertained, that the appellants were the owners thereof; that on January 31, 1898, at which time the rolls of all the prior years were in his office, the treasurer of said county issued to the county a certificate of delinquency against said property for the taxes of the year 1895, amounting to \$2.20; that he carelessly and negligently neglected to name appellants as the owners of said property in the certificate, the space provided therefor having been left blank, although he well knew, or by the use of reasonable diligence could have ascertained, that appellants were the owners of said property; that he thereafter filed such certificate as the complaint in an action to foreclose the same; that neither of the appellants was named as a party to said action, or attempted to be served with any process whatever; that in the published summons, which was the only process served or attempted to be served on the appellants in said action, appellants were not named at all, said property being designated therein as belonging to unknown owners, although the county treasurer well knew, or by the use of reasonable diligence could have ascertained that the appellants were the owners thereof; that thereupon a decree of sale was entered, and said property was ad-

vertised to be sold as belonging to unknown owners; that in November, 1902, a treasurer's deed was issued to respondent W. T. Gaffner, under which respondents claimed title to said property; that neither of appellants had any actual or constructive knowledge of said proceedings until August, 1906; that said property is worth \$1,000; that a proper tender of all taxes, penalties, interest, and costs had been made prior to the commencement of this action, which tender was refused; that by virtue of said matters the tax deed under which respondents claim title to said property was void and constituted a cloud upon the title of appellants.

The main question in the case is, may the county foreclose for delinquent taxes against property assessed to unknown owners, if the taxing officers knew, or by reasonable diligence could have ascertained, the names of the real owners? We have repeatedly held that these tax foreclosure proceedings are in rem, and not against the person of the owner, and that owners are bound to take notice of the property they own and pay the taxes thereon and defend against foreclosure for delinquent taxes, even though the property is assessed to unknown persons or to other persons. *Rowland v. Eskeland*, 40 Wash. 253, 82 Pac. 599, and cases there cited. In reference to the assessment of real estate, the statute in force at the time the assessment in this case was made provided: "The assessor shall make out in the detail and assessment list book, in numerical order, complete lists of all land or lots subject to taxation, showing the names of the owners, if to him known, and if unknown, so stated opposite each tract or lot." Section 1609, *Ballinger's Ann. Codes & St.* There is nothing in this language which requires the assessor to use diligence to ascertain the names of the true owners. If he knows, he must show them; but if unknown to him, he may so state. We think the officer's statement is conclusive upon the question. The statute providing for a certificate of delinquency requires a stub, "which shall be a summary of the certificate, and shall contain a statement—(1) description of the property assessed, (2) year or years for which assessed, (3) amount of tax and interest due, (4) name of owner or reputed owner, if known." Section 1749, *Ballinger's Ann. Codes & St.* This clearly refers to the name of the owner as stated on the assessment roll, and does not require the treasurer to draw upon his own knowledge or to examine other records to determine the actual ownership or the reputed ownership. The treasurer is simply a ministerial officer who exercises his duty in issuing these certificates, and no negligence can be charged against him when he follows the record as it appears in his office. It is true we said in *Rowland v. Eskeland*, supra: "We held in *Spokane Falls, etc., R. Co. v. Abitz*, 38 Wash. 8, 80 Pac. 192, that the notice is sufficient, where it is given to

the person appearing as owner on the treasurer's rolls when the certificate is issued." And to the same effect we quoted from the same case in *Carson v. Titlow*, 38 Wash. 196, 80 Pac. 299. We also said in *Rowland v. Eskeland*, at page 258 of 40 Wash., page 601 of 82 Pac.: "It follows that the actual ownership of the property is immaterial in these foreclosure proceedings, so long as the owner described in the certificate, and to whom the property was assessed, is given notice of such proceedings." The idea in these cases was that the treasurer was only required to state in the certificate the person to whom the property was assessed as the same appeared on the assessment rolls in the year when the taxes were delinquent. Some of the language used might upon careful analysis be construed as meaning that the treasurer was authorized or required to state the name of the owner which appeared on the rolls at the date of the certificate; that particular question was not under consideration in those cases, and we did not mean to decide questions which were not involved therein. We are of the opinion, however, that the treasurer might, under the statute, state the name at either time, and that a foreclosure based thereon would be sufficient. It is certainly sufficient where he states the name as it appears on the rolls as the property was assessed. In this case the fact that the name of the owner was left blank amounted to a statement that the owner was unknown. In view of the rule that these proceedings are in rem, and that owners are bound to take notice of the taxes against their property, the fact that the taxing officers knew, or by reasonable diligence could have learned, the true ownership, does not invalidate the tax or foreclosure proceedings, where the property is assessed to unknown owners.

The lower court therefore properly sustained the demurrer, and the judgment must be affirmed.

HADLEY, C. J., and CROW and ROOT, JJ., concur. RUDKIN and FULLERTON, JJ., did not sit.

NORTH PACIFIC LUMBER CO. v. CARROLL et al.

(Supreme Court of Washington. Jan. 7, 1908.)

SALE—DELIVERY—EVIDENCE.

The uncontradicted testimony of plaintiff's president that after the alleged delivery of lumber, the price of which is sued for, and after the rendering of an account therefor, he had a talk with one of the defendants, in which such defendant admitted that the lumber had been received, and that the account was correct and would be paid, and that subsequently a payment was made thereon, is sufficient evidence of delivery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 486-491.]

Appeal from Superior Court, King County; Mitchell Gillilan, Judge.

Action by the North Pacific Lumber Company against John D. Carroll and another. Judgment for plaintiff. Defendants appeal. Affirmed.

W. E. Crews and Wheeler & Skeel, for appellants. W. C. Bristol and Hastings & Stedman, for respondent.

PER CURIAM. The respondent brought this action in the court below to recover a balance alleged to be due for lumber sold and delivered to the appellants. The answer admitted the contract, but denied that the lumber had been delivered as alleged. Upon a trial the court found that the lumber had been delivered by the respondent to the appellants, and used by them to the amount of \$2,415.27, upon which there was paid \$500, leaving a balance of \$1,915.27. Judgment was entered for that amount. The defendants appeal.

The only claim made upon this appeal is that there is no evidence to sustain the finding that the lumber was delivered to appellants as alleged. The record shows that the president of the respondent company had a talk with one of the appellants after the lumber had been delivered, and after an account had been rendered therefor, and that the said appellant admitted in this conversation that the lumber had been received, and the account was correct and would be paid, and that subsequently \$500 was paid. There was other evidence; but this was enough to base the finding upon, especially since there was no evidence offered by appellants, and no effort made to contradict these statements.

The judgment must therefore be affirmed.

WIKSTROM v. PRESTON MILL CO.

(Supreme Court of Washington. Jan. 6, 1908.)

1. MASTER AND SERVANT—INJURIES TO SERVANT — DUTY TO INSTRUCT INEXPERIENCED SERVANT.

It is the duty of a master to instruct an inexperienced servant in the operation of a cut-off saw, and warn him of the dangers incident to its use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 314.]

2. TRIAL—INSTRUCTIONS—CHARGE CORRECT AS A WHOLE.

It is not essential that a single instruction should embody the entire law of the case, but it is sufficient if the charge as a whole fully covers it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-717.]

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Oscar Wikstrom against the Preston Mill Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Shank & Smith, for appellant. Higgins, Hall & Halverstadt, and Walter S. Fulton, for respondent.

RUDKIN, J. On the 2d day of February, 1906, the plaintiff was injured while operating a cut-off saw in the defendant's shingle mill at Preston, in King county. This action was instituted to recover damages for the injuries thus received, and from a judgment in favor of the plaintiff the defendant has appealed.

The negligence charged in the complaint is that the respondent was young and inexperienced, and was unfamiliar with the operation of cut-off saws; that the appellant, well knowing these facts, negligently ordered the respondent to operate a cut-off saw, without instructing him as to the proper use of the saw, or warning him against the dangers incident thereto; that the shingle bolts supplied were too large for the saw; that the saw was dull, rusty, unguarded, etc. The answer consisted of a denial of the negligence charged, and a plea of contributory negligence. The shingle bolts in question were approximately 4 feet in length, and it was the duty of the respondent to cut them into blocks 16 inches in length, by means of the cut-off saw. In the progress of this work the respondent had cut two blocks off a bolt, and was engaged in cutting the stub end off the third block, with his right hand on the stub, which was from 6 to 9 inches in length, when the saw kicked back, and his hand in some manner came in contact therewith, causing the loss of the greater part of the hand, including the thumb and first two fingers. There was a conflict of testimony on all material facts in issue, and we must assume that the jury found that the respondent was inexperienced and was not instructed as to the proper use of the saw or warned against the dangers incident to such use. The appellant meets the respondent on this broad ground, and contends that the dangers incident to the use and operation of the cut-off saw were open and apparent to any person of common understanding, and that neither experience, instruction, or warning was necessary. This in a measure is true. Every person who has attained years of discretion knows that a saw will cut and mangle, and that if the operator voluntarily comes in contact therewith injury will of necessity result. But this is largely true of all circular saws, and yet it is a matter of common knowledge that the dangers incident to their use and operation are manifold and great. The danger from voluntary contact with the saw is not the only danger to guard against. There is also the danger from involuntary contact, brought about from improper use of the saw. We think it clearly appears from all the testimony in this case that some instruction, at least, is requisite to qualify one to operate even a cut-off saw, and that there are dangers from involuntary contact that experience and instruction will in a measure ward against. The trial judge and jury saw the respondent, and heard his testimony. They were in a better position to judge of his ca-

pany and the necessity for the instruction and warning than we are, and we think their conclusion on the facts should not be disturbed.

Exception was taken to one of the instructions given by the court, because it left out of consideration the questions of contributory negligence and assumption of risk. The court could not well embody the entire law of the case in a single charge, and other instructions fully covered these questions. Taken as a whole, the charge was eminently fair to both parties; and, finding no error in the record, the judgment is affirmed.

FULLERTON, CROW, and MOUNT, JJ., concur.

VICTOR SAFE & LOCK CO. v. O'NEIL et al.
(Supreme Court of Washington. Jan. 6, 1908.)

1. EVIDENCE—COMPLETE WRITTEN CONTRACT—EVIDENCE OF COLLATERAL AGREEMENT.

Where a written order addressed to the seller's home office in Cincinnati, and subject to the approval of that office, recited that it contained all the agreements between the parties, and that any verbal agreements not embodied therein were waived, evidence of a verbal agreement that shipment was to be made from Portland, Or., immediately upon receipt of the order at that place by the seller's agents, who had taken the order, is incompetent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2035, 2036.]

2. SALES—CONTRACTS—DELAY IN PERFORMANCE—"AS SOON AS POSSIBLE."

Defendants ordered a safe from plaintiff to be shipped "as soon as possible." Upon receipt of the order plaintiff had no finished safes on hand, but rushed to completion one in process of manufacture, using all proper diligence, and shipping it 19 days after receipt of the order. It appeared that the customary time for filling an order by the manufacture of a new safe was 30 days. *Held*, that the shipment was a substantial compliance with the order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 219.

For other definitions, see Words and Phrases, vol. 1, pp. 528-529.]

3. SAME—WITHDRAWAL OF OFFER—ACTS CONSTITUTING WITHDRAWAL.

After a firm had ordered a safe, they wrote the seller that unless the safe was the equal or superior of any safe made they would not accept it, and again that they had made an investigation and found that they could not accept the safe unless the seller would submit it to a test as to its burglar-proof qualities. *Held*, that the letters were mere conditional threats to withdraw the order, and not a withdrawal in law; since there was voluntarily left for further investigation ground for dispute as to facts that might have required a judicial determination to settle before it could be definitely known whether defendants would or would not withdraw.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 45.]

4. SAME.

A withdrawal of an offer to contract must be a distinct, unequivocal, and unconditional statement of the party's withdrawal, such as to leave no doubt that further relations between the parties on the subject are at an end.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 45.]

5. SAME—REMEDIES OF SELLER—ACTION FOR PRICE.

An order for a safe, to be paid for partly in cash, and partly by exchange of an old safe, was accepted and filled, but the purchaser did not accept the safe, and did not pay the cash price nor deliver the old safe in exchange, and the new safe was held subject to the purchasers' orders. *Held*, that the seller could recover the full purchase price.

Appeal from Superior Court, Spokane County; Wm. A. Humeke, Judge.

Action by the Victor Safe & Lock Company against B. F. O'Neil and another, copartners. Judgment for plaintiff, and defendants appeal. Affirmed.

Gallagher & Thayer, for appellants. Hap-
py & Hindman, for respondent.

HADLEY, C. J. This is an action to recover the purchase price of a bank safe. Plaintiff is a corporation with its home office at Cincinnati, Ohio, and the defendants are copartners, under the firm name of the "Bank of Latah," doing business at Latah, Wash. The complaint alleges that in consideration of the sum of \$1,400, to be paid in the manner hereinafter specified, the plaintiff agreed to sell and deliver to the defendants f. o. b. car at Latah, Wash., one Victor manganese steel screw door bank safe; that the defendants agreed to purchase and receive the safe, and to pay the plaintiff the said sum of \$1,400, as follows: To deliver to plaintiff, upon compliance of the latter with said contract, one double-door Hall safe, with burglar-proof chest, f. o. b. car at Latah, Wash., and to pay the plaintiff the sum of \$950 cash. It is further alleged that the plaintiff fully performed all conditions imposed upon it by said contract, and delivered to defendants at Latah the Victor safe mentioned in the contract, but that the defendants have refused to deliver to plaintiff the Hall safe mentioned, or to pay said sum of \$950, or any other sum. Based upon the above allegations, the plaintiff brought this suit to recover the full sum of \$1,400, the purchase price of the safe. The defendants answered that about September 18, 1905, one Marcellus, the representative of Glass & Prudhomme, the agents of plaintiff at Portland, Or., visited the defendants at Latah, and solicited them to purchase a safe from the plaintiff through said agents; that in order to induce the defendants to make the purchase, said Marcellus represented that Glass & Prudhomme had a safe then at Portland, which they could ship immediately from Portland to the defendants; that the defendants were anxious to obtain the immediate delivery of any safe they might purchase, and made such fact known to said Marcellus and to said agents, and that they would not purchase any safe that could not be delivered immediately; that relying upon said representations, and believing that the plaintiff had a safe in Portland which it could and would ship to the defendants im-

mediately, they placed the order for the purchase of the safe from plaintiff. It is alleged that the plaintiff did not deliver said safe within a reasonable time or at all, and that defendants never accepted the safe mentioned in the complaint. The cause was tried by the court without a jury, and resulted in a judgment against the defendants for the full purchase price of the safe with interest. The defendants have appealed.

Appellants have assigned a number of specified errors; but the appeal involves the one question, whether the judgment is justifiable under the facts. The order from appellants for a safe is shown by the evidence as follows: By a partly printed and partly written instrument, which is designated as "Specifications Victor Manganese Steel Screw Door Bank Safes," upon the same page of which heading follow detail specifications of a safe as to size, materials, and workmanship. On the next page, or reverse side of the sheet containing such specifications, appears a written order for a safe of which the following is a copy: "The Victor Safe and Lock Company, Cincinnati, Ohio—Gentlemen: Please furnish us in accordance with the foregoing specifications one No. 49 Victor Manganese Steel Screw Door Bank Safe, carefully packed and delivered f. o. b. cars at Latah, Wash. Bill to the Bank of Latah, Latah, Wash. Ship as soon as possible via freight. On receipt of same in good condition will pay to your order the sum of fourteen hundred dollars as follows: Nine hundred & fifty dollars (\$950) in current funds & one (1) double door Hall safe with burglar proof chest f. o. b. Latah, Wash. This contract covers all of the agreements between the parties hereto, and all claims for verbal agreements of any nature not embodied herein are waived, and order is taken subject to the approval of the Cincinnati office of the Victor Safe & Lock Company. All orders must be on this blank. Witness my hand and seal this 25th day of Sept. 1905. Bank of Latah. [L. S.] Wm. A. McEachern. [L. S.]" It will be seen that the order refers particularly to the said specifications, was made by the appellants, and was addressed to the plaintiff at its home office in Cincinnati. It expressly declares that it contains all the agreements between the parties, that all claims for verbal agreements of any nature not embodied in the writing are waived, and that the order was subject to the approval of the Cincinnati office of the plaintiff. Thus the appellants solemnly said, over their own signatures, that the writing contains the whole contract between the parties, and that any further verbal agreements were waived. By their answer, and by evidence received at the trial, they, however, sought to show a verbal agreement that the safe was to be shipped from Portland, Or., immediately upon the receipt of the order by Glass & Prudhomme. By the terms of the written order such evidence became incompetent, it being

evidence entirely inconsistent with the written order. The order not only made no mention of such agreement as to immediate shipment from Portland, but in effect negated the existence of such agreement, for the reason that it was addressed to the respondent at its Cincinnati office, and was expressly made subject to the approval of that office. The evidence shows that, in the regular course of transmitting mail from Portland to Cincinnati, at least four days are required, a fact which the appellants must be held to have had in view at the time they made the order.

The evidence shows that the order was forwarded at once by Glass & Prudhomme to the Cincinnati office of respondent; that there were no finished safes in stock at the time; that the customary time for filling the order by the manufacture of a new safe was about 30 days; that respondent immediately directed that a safe which was then in process of manufacture should be rushed to completion for the purpose of filling this order; that this was done, and the safe was finished and shipped to appellants 19 days after receipt of the order. The evidence clearly shows that all possible diligence was exercised by respondent to fill the order under the circumstances as they existed at the time the order was received. Appellants urge that they were not required to wait until a safe could be manufactured, and that they were entitled to immediate shipment when the order was received. Their order did not call for immediate shipment, but said, "ship as soon as possible." We have seen that the shipment was made as soon as possible under the existing circumstances, and under such general directions as to shipment, in the absence of more definite specifications as to time, we think the shipment which was made was a substantial compliance with the order. To be sure an unreasonable lapse of time could not be held to have been within the spirit of the order, but the time here was not unreasonable, considering the circumstances. Pending the manufacture and shipment of this safe as aforesaid, no correspondence was had directly between respondent's home office and appellants, and the latter contend that they were not advised that respondent had accepted the order, for which reason they say it was not in law accepted so as to make a contract before the time when appellants claim that they withdrew their order. The answer does not allege any withdrawal of the order before acceptance, and that subject was not introduced by the pleadings; but, in view of the evidence, we will examine that subject. The order was in fact immediately acted upon by respondent, as we have seen, and it at once set about filling it. This was followed by actual shipment and the arrival of the safe at Latah as requested in the order. Whatever may be said as to whether there was such an acceptance as made a completed contract prior to the arrival of the safe at

Latah, it must in any event be held that there was a complete acceptance when the safe reached Latah, and, unless appellants had in legal contemplation theretofore withdrawn their order, the contract became complete, and they were bound by the terms of their written order. Was there such a withdrawal? Before the shipment was made the appellants addressed to Glass & Prudhomme, at Portland, the following communication: "It has been brought to our notice that the safe we ordered from you through Mr. Marcellus is not the article we understood we were getting, and that was represented to us at the time the proposition was made us which led up to the order. Our order was given on the representation that the Victor Safe was the best in the world, in the sense that it was the most burglar proof and would stand the most severe attack that could be made on it, and to be the equal or superior of any safe made, the manganese steel safe and all the rest of them included. We will look into this matter a little further, but now write to advise that if we are not getting the strongest and best safe made we are not getting what we ordered and what was represented to us in the sale, and will not receive it if such be the case." Later the following was also addressed by appellants to the same persons: "We addressed you on October 6th a letter in regard to safe ordered from you and advising you that if we found upon investigation that this safe has been misrepresented to us that we would refuse to accept it. We have had no reply to this letter, and now write to advise you that we have made a thorough investigation into the matter and find that we cannot accept your Victor manganese safe, unless you will submit it to an honest test as to its burglar-proof qualities." The matters urged in the above letters as representations made by respondent's agents were not mentioned in the specifications of appellants' written order. They, therefore, became a part of the verbal representations, which, as we have seen, were all expressly waived. The existence of such representations was the only ground stated for a possible future refusal to accept the safe, facts which appellants are not entitled to urge as against a completed contract, because they have expressly waived them. Assuming, however, that they had the absolute right of withdrawal before the acceptance of the order by respondent, without any regard to the reasons given therefor, the fact remains that there was no absolute withdrawal. The claim that there was a withdrawal is based entirely upon the above letters, and an inspection of them clearly shows that there was a mere conditional threat to withdraw. The matter was still left open for respondent to establish the burglar-proof qualities of the safe. Thus there was voluntarily left open for further investigation ground for dispute as to facts that might have required a judicial determination to settle before it could be definitely

known whether appellants would or would not withdraw. Such cannot be a withdrawal in law. To amount to a withdrawal there must be communicated a distinct, unequivocal, and unconditional statement to that effect, so definite as to leave no doubt that further relations between the parties on the subject are at an end. The renunciation of an offer to contract should in substance be as explicit and definite as a renunciation of the contract after its acceptance. With reference to the renunciation of a contract, the rule is stated in vol. 2, Mechem on Sales, § 1087, as follows: "Where, before the time arrives for the performance of the contract by one party, the other absolutely and unqualifiedly announces that he will neither receive such performance by the former nor perform on his part, the former may, if he desires, consider himself as absolved from his duty to perform. This renunciation by the other, however, must be more than a mere threat of nonperformance, and, a fortiori, more than mere idle talk of not performing. It must be a distinct, unequivocal, and absolute refusal to receive performance or to perform on his own part." See, also, Benjamin on Sales (Bennett's Ed.) § 568; 9 Cyc. 637; *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; *Smoot's Case*, 15 Wall. (U. S.) 36, 21 L. Ed. 107; *Kilgore v. Northwest Texas Baptist Educational Society*, 90 Tex. 139, 37 S. W. 598; *Vittum v. Estey*, 67 Vt. 158, 31 Atl. 144. There was therefore no effectual withdrawal of the order prior to the arrival of the safe at Latah, and the acceptance of the order became complete at that time, making a completed contract between the parties. Appellants wholly refused to perform either in kind or otherwise, and the right of action thereupon accrued to respondent for the recovery of the full purchase amount, the safe being held subject to appellants' order. *Schott Company v. Stone, Fisher & Lane*, 35 Wash. 252, 259, 77 Pac. 192.

For the foregoing reasons, the judgment is affirmed.

FULLERTON, CROW, MOUNT, and ROOT, JJ., concur.

CHICAGO LUMBER & COAL CO. v. McCANN et al.

(Supreme Court of Washington. Jan. 6, 1908.)
SALES — ACTS CONSTITUTING DELIVERY — DELIVERY TO CARRIER.

Vendor of shingles and vendee agreed that 1,000 shingles should have a fixed weight; that, if the actual weight were more than the fixed weight, vendor would deduct from the price the freight on excess weight to the point where vendee destined the shingles; and that, if the actual weight were less, vendee would pay vendor the amount saved thereby on freight. *Held*, that the place of delivery to vendee was not thereby fixed at the destination of the shingles rather than where the shingles were delivered to the carrier.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 377-380.]

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by the Chicago Lumber & Coal Company against Andrew McCann and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Shorett & Shorett, for appellant. Smith & Cole, for respondents.

MOUNT, J. Appellant brought this action to recover from respondents \$206.70, alleges to have been paid to respondents for a car load of shingles which were not delivered to appellant. The respondents admitted the receipt of the money, but denied that the shingles were not delivered to appellant. The case was tried to a court without a jury. The only question in the case was whether the shingles were delivered to appellant. The trial court found that they were delivered, and entered a judgment of dismissal.

It appears that respondents had been selling shingles to appellant for some time, and delivering the same on cars of the Northern Pacific Railway Company at Falls City, Wash.; that when a car was loaded at that place, an invoice thereof would be mailed to appellant's agent at Seattle. By reason of the fact that the railway company had no agent at Falls City, a bill of lading was issued by the railway agent at Preston, about five miles distant from Falls City, and a copy of the bill of lading was usually mailed by the railway agent to the appellant at Seattle, as consignor. Upon receipt of the invoice the appellant would pay the purchase price of the shingles to respondents. There was an understanding between the appellant and respondents that 1,000 shingles should have a fixed weight. If the actual weight were more than the fixed weight, the respondents would deduct from the price of the shingles the freight on the excess weight to the points where appellant destined the shingles. If the actual weight were less, the appellant would pay respondents the amount saved thereby on freight. On March 24, 1905, at appellant's order, respondents loaded Northern Pacific car No. 2,268 at Falls City, and directed the same by order of appellant to be shipped to Alliance, Neb., and requested the railway agent at Preston to send a copy of the bill of lading to appellant at Seattle. Respondents at the same time sent an invoice to the appellant at Seattle, whereupon appellant paid to respondents \$206.70, the purchase price of the shingles. The railway agent at Preston by some mistake did not send the bill of lading to appellant. Appellant, however, assumed control of the car, and while the same was en route to Alliance, Neb., diverted the shipment to Endarka, Okl. For some reason which does not clearly appear, the car load of shingles was lost to appellant. This action was brought to recover back from respondents the \$206.70 paid for the shingles.

There is a direct conflict in the evidence

as to whether the contract was for delivery on board the cars at Falls City, or at the point of destination of the car. Appellant argues, because the freight was subject to adjustment after the arrival of the car at its destination, that this fact shows that delivery was to be made at the point of destination of the car; but we think this fact does not have the effect claimed for it. It is not claimed that respondents agreed to pay any part of the freight if the shingles weighed the fixed weight. If they weighed more than the fixed weight, respondents were to pay freight for the excess weight only. If the shingles weighed less, appellant was to pay to respondents the difference in the freight charges. This amounted simply to a guaranty of weight, nothing more, and did not, and was not intended to, fix the place of delivery. It is not claimed that this particular car weighed more or less than the guaranteed weight, or that the respondents had any control of the car or the shipment after the shingles were loaded on the car of the railway company. We are satisfied from an examination of all the evidence, which need not be stated here, that the contract was for delivery at Falls City, and that the trial court properly found that fact.

The judgment should therefore be affirmed.

HADLEY, C. J., and CROW and ROOT, JJ., concur. RUDKIN and FULLERTON, JJ., did not sit.

HOUSEKEEPER v. LIVINGSTONE.

(Supreme Court of Washington. Jan. 9, 1908.)

1. MECHANICS' LIENS—ENFORCEMENT—LIMITATION OF LIABILITY BY AGREEMENT—EVIDENCE—SUFFICIENCY.

In an action to enforce a mechanic's lien against the owner of the property and his lessees, evidence held to sustain a finding that the owner's liability was not limited to a certain amount by agreement.

2. APPEAL—RIGHT OF REVIEW—EFFECT OF STIPULATION—ATTORNEY'S FEES.

Where all the parties at a trial stipulated that the court should fix the amount of attorney's fees without introduction of evidence thereon, in the absence of a showing of abuse of discretion, the determination cannot be reviewed; hence in case of such an agreement an allowance of \$150 attorney's fees on the trial of a sharply contested action to enforce a mechanic's lien, which resulted in judgment for \$340.37, will not be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3881-3889.]

3. MECHANIC'S LIENS—ENFORCEMENT—AGREEMENT OF TENANT—EVIDENCE—SUFFICIENCY.

In an action to enforce a mechanic's lien against lessees of the property, evidence held to sustain a finding that they had not agreed to assume any liability.

Fullerton, J., dissenting in part.

Appeal from Superior Court, Whitman County; C. F. Miller, Judge.

Action by J. O. Housekeeper against H. W. Livingstone, owner of a hotel, and M. J. Maloney and wife, lessees thereof, to enforce a

mechanic's lien. From a judgment against Livingstone and in favor of Maloney and wife, Livingstone and plaintiff appeal. Affirmed on both appeals.

McCroskey & Canfield, for appellant J. O. Housekeeper. John Pattison, for appellant H. W. Livingstone. J. N. Pickrell, for respondents.

HADLEY, C. J. This is an action to foreclose a mechanic's lien against a hotel in Colfax, Whitman county. The action was brought by J. O. Housekeeper against H. W. Livingstone and M. J. Maloney and wife. Livingstone was the owner of the real estate, and Maloney occupied it as a tenant under a lease. A fire had seriously damaged the building, and somewhat extensive repairs were made thereon by Housekeeper, at the request of Livingstone, the owner of the fee. As a part of the repairs made by Housekeeper certain materials and labor were furnished by him in the way of kalsomining and glazing in parts of the building. The controversy in this case arises over the last-named items. Housekeeper claims that he made the repairs at the request of both Livingstone and Maloney, and that both the fee and the leasehold estate are chargeable with the cost thereof. Livingstone claims that he expressly limited his liability for these particular repairs to \$75, that he told Housekeeper if the cost exceeded said sum he must look exclusively to Maloney for the excess. Maloney denies that he directed any part of the work to be done on account of his liability, and maintains that the entire repairs were authorized and directed by Livingstone. As lessee Maloney therefore contends that Livingstone's estate in fee is alone subject to a lien for the whole amount, and that the leasehold estate cannot be subjected to the lien for any part of the expense. The decree of the court was that the lien for the whole amount shall be enforced against the interest of Livingstone, but not against that of Maloney, and Maloney and wife were dismissed from the action. It was provided that, in the event of a sale under the decree, the purchaser shall be let into possession, subject to the possession of Maloney and wife as lessees. From the decree the defendant Livingstone and the plaintiff Housekeeper have both appealed.

Appellant Livingstone contends that the court erred in finding that the labor and material in excess of the value of \$75 were furnished at his request. There was no writing between Livingstone and Housekeeper concerning the work, and it is somewhat difficult to determine from the evidence of the conversations between them the full legal effect thereof. Housekeeper testified that Livingstone told him to go to Maloney and tell him that Livingstone would pay \$75 upon the kalsomining and glazing, and that, if Maloney desired more work done than that amount in value, he must pay for it himself. House-

keeper, however, says that Livingstone at no time said that he would in no event pay the excess of \$75, but that he merely asked Housekeeper to so tell Maloney. Livingstone's purpose appeared to be to get an agreement from his tenant Maloney to pay for part of the repairs, and this he sought to do by sending Housekeeper to Maloney. But we believe the testimony as a whole does not establish that Livingstone limited his own liability as between himself and Housekeeper. Whatever may have been his intention as between himself and Maloney, he nevertheless permitted Housekeeper to go ahead and do the work to the betterment of his property, without expressly telling Housekeeper that the liability was limited to less than the full value. Under such circumstances, we think Livingstone's liability was not limited to \$75. The property belonged to Livingstone, and the primary liability to pay for all the permanent improvements made with his knowledge and without his objection was upon him, unless he so distinctly and clearly limited his liability that Housekeeper could not have reasonably understood it otherwise. After a careful examination of the evidence, we think we would not be warranted in disturbing the court's finding that the material and labor were furnished at Livingstone's request. The same is also true as to the finding concerning the value of the labor and material.

It is next assigned that the court erred in allowing the sum of \$150 as attorney's fees. The reasonable value of the labor and materials was found to be \$340.37, and the decree is for the enforcement of the lien for that amount and for costs. Considering the amount involved, it is contended that the fee allowed was too large. We think the record is such that the question of excessive attorney's fees is not reviewable here. All parties stipulated at the trial that the court should fix the amount of attorney's fees without the introduction of any evidence upon the subject, and the amount was so fixed without evidence. Under such circumstances there is nothing for the appellate court to review. To be sure, if it manifestly appeared that the trial court abused its powers in the premises, this court might be warranted in so holding. Such a case is not presented here, however. In the absence of any evidence upon the subject, and in view of the stipulation to abide the court's decision, together with the evident sharply contested litigation and necessity for somewhat extensive legal services as shown by the record, the case before us does not present a manifest abuse of power. So far as the appellant Livingstone is concerned, we think the judgment should be affirmed.

Referring now to the appeal of Housekeeper, we find that the assignments of error relate to the failure of the court to find that the respondents Maloney and their leasehold estate are liable. It is contended that Malon-

ey requested the improvements as well as Livingstone. The evidence, however, shows that Livingstone repeatedly said to Maloney and others after the fire that he would fully repair the building as rapidly as it could be done. When Housekeeper delivered Livingstone's message to Maloney about the proposed \$75 limitation, Maloney replied in substance that Livingstone had always said he would repair as rapidly as possible, and that Housekeeper would make the repairs in question as well as others he had already made; that he (Maloney) was greatly inconvenienced by reason of the delay, and he demanded that Housekeeper should go ahead and complete the repairs or he would get some one else to make them. The entire conversation and the whole evidence together convinces us that Maloney simply demanded that Housekeeper should proceed on the authority of Livingstone, as had been all the time contemplated, or he (Maloney) would see that some one else did the work. The court heard the testimony of all these persons, and we think under the evidence that we should not say it was error to refuse to find that Maloney requested the work done on his own responsibility. The dismissal of the Maloneys from the case followed as a result, and was therefore not erroneous.

The contentions upon both appeals are denied, and the judgment is affirmed. Housekeeper shall recover his costs on the Livingstone appeal, and the Maloneys shall recover their costs on the Housekeeper appeal.

MOUNT, CROW, and ROOT, JJ., concur.
DUNBAR and RUDKIN, JJ., not sitting.

FULLERTON, J. (dissenting in part). I think there was no obligation on the part of the appellant Livingstone to pay a larger sum than \$75, and that the decree, in so far as it requires him to pay in excess of this amount, is erroneous.

(48 Wash. 196)

STATE ex rel. CONLAN v. OUDIN & BERGMAN FIRE CLAY MINING & MFG. CO.

(Supreme Court of Washington. Jan. 7, 1908.)

1. APPEAL—RECORD—NECESSITY FOR BILL OF EXCEPTIONS OR STATEMENT OF FACTS.

The findings of the trial court are not subject to review, in the absence of a statement of facts and bill of exceptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2424.]

2. CORPORATIONS — DISSOLUTION — GROUNDS — DISSOLUTIONS AS TO MANAGEMENT.

Ballinger's Ann. Codes & St. § 5780, subd. 5, provides that an information may be filed against a corporation which does or omits acts which amount to a surrender or a forfeiture of its rights and privileges as a corporation, or where it exercises powers not conferred by law. Section 5789 provides that when a corporation shall be found guilty of unlawfully exercising any office or franchise it shall be dissolved. Section 5790 provides for the disposition of the estate of a corporation offending against the

state laws. *Held*, that the court has power to dissolve a corporation in which there are only three stockholders, two of whom are husband and wife, who own one-half the stock, where, because of ill feeling between them and the third stockholder, they are unable to agree as to the management of the corporate affairs, and no board of directors has been elected for over four years, the husband having represented the corporation without authority during that time.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by the state, on the relation of Thomas F. Conlan, against the Oudin & Bergman Fire Clay Mining & Manufacturing Company for a dissolution. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Gallagher & Thayer, for appellant. R. L. Edmiston and R. J. Danson, for respondent.

ROOT, J. This action was instituted for the purpose of dissolving the defendant corporation. From a decree of dissolution this appeal is prosecuted.

The defendant was incorporated under the laws of Washington, in April, 1893, with a capital stock of \$150,000, divided into 1,500 shares of the part value of \$100 each. No by-laws appear to have been adopted by the corporation. The trial court finds that on the 17th of April, 1903, the relator herein became the owner of 750 shares of the stock, and that Eva M. Oudin and Charles P. Oudin were the owners of the other 750 shares; that the stock is still owned by them in the respective amounts mentioned. At that time the relator obtained his stock from one Bergman, who was one of the trustees. The said Charles P. Oudin was the other trustee, the articles providing for only two. Shortly after the date above mentioned, a meeting of the stockholders was called to elect a trustee to fill the vacancy caused by the withdrawal of Bergman from the company. At the meeting all of the stockholders were present. Seven hundred and fifty shares were voted for this relator, and 750 shares for Eva M. Oudin, wife of Charles P. Oudin. As neither received a majority, no election was had. Since said date no election has taken place, and the corporation has had but one trustee, and consequently been unable to legally transact any corporate business. The court finds that said Oudin and wife refuse to elect, or to help elect, or to consent to the election of, said relator as a trustee, and declare that they will never consent to relator occupying any official position or exercising any official authority or control with or over the corporation. The court finds that said Charles P. Oudin has assumed to act on behalf of and to represent said corporation without authority, and that under his management and control the corporation has suffered great financial reverses and loss, and that by reason of his great carelessness the factory and manufacturing plant of the corporation was destroyed by fire and the business destroyed, and that said Oudin has ever since April,

1903, been engaged in organizing and building up a rival fire-brick, sewer-pipe, and clay manufacturing plant, exercising the management and control thereof, and wholly absorbing the business patronage of the defendant corporation. No statement of facts or bill of exceptions is brought up. Hence the findings cannot be questioned. Appellant urges that the facts as found do not justify the conclusions of law or the decree.

Section 5780, Ballinger's Ann. Codes & St., reads as follows: "An information may be filed against any person or corporation in the following cases: * * * (5) Or where any corporation do or omit acts which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or where they exercise powers not conferred by law." Section 5789 provides that, when a defendant shall be found guilty of unlawfully exercising any office or franchise, the court shall give judgment of ouster, and in case of corporations the same shall be dissolved. Section 5790 makes further provision for the disposition of the estate of the corporation offending against the laws of the state. While the provisions of the statute may not be entirely clear and specific, we think they justify a dissolution of a corporation under such circumstances as we find in this case. The rival stockholders herein seem unable to agree as to the management and control of the corporate affairs. This is the eighth appeal to this court by these parties, or those interested in this matter, and we are informed that another appeal is now on the way. As the stock is held entirely by three stockholders, two of whom are husband and wife, considerations do not obtain which might, if there were numerous stockholders not directly responsible for the controversy and the present condition of the corporation. We see no reason for not dissolving this corporation, which for over four years has been impotent and unable to legally transact any business on account of the controversy and ill feeling existing between the parties who own, each, half of the stock.

We think the judgment and decree of the trial court was justified, and the same is therefore affirmed.

HADLEY, C. J., and CROW, MOUNT, and FULLERTON, JJ., concur. DUNBAR and RUDKIN, JJ., not sitting.

DUTEAU v. BARTO et al.

(Supreme Court of Washington. Jan. 8, 1908.)
APPEAL—REVIEW—FINDINGS OF FACT ON
CONFLICTING EVIDENCE.

The findings of fact by a trial judge upon conflicting evidence will not be disturbed on appeal, unless clearly unsupported by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Joseph Duteau against R. W. Barto, administrator of the estate of George M. Godfrey, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Walter B. Beals and Blaine, Tucker & Hyland, for appellants. Arthur C. Dresbach and F. A. Gilman, for respondent.

PER CURIAM. This action was commenced by Joseph Duteau against George M. Godfrey and Lee Melleur, to recover \$1,283, less \$185.20, paid for services rendered by the plaintiff to the defendants from May, 1904, to July 11, 1905, as their housekeeper and cook, and also in caring for and nursing the defendant Godfrey at times when he was not in a condition to care for himself. The defendants, after denying the allegations of the complaint, alleged that in May, 1904, the plaintiff, being unable to do hard manual labor, offered to do the housework and cooking for the defendant Godfrey for his lodging and board; that his offer was accepted; that in July, 1904, the defendant Melleur went to live with plaintiff and Godfrey under this arrangement; and that the defendants were not indebted to the plaintiff in any sum whatever. Prior to trial the defendant Godfrey died, and his administrator having been substituted as a party defendant, amended pleadings were filed, raising the same issues, with the additional allegation made by the administrator that Godfrey during his lifetime had loaned \$185.20 to the plaintiff, no part of which had been paid, and for which he asked judgment. The trial judge made findings upon which judgment was entered in favor of the plaintiff against both defendants for \$397.57 and costs. The defendants have appealed.

No question of law is raised on this appeal, appellants' controlling contention being that the findings and judgment are not supported by the evidence. We have repeatedly said that, when a trial judge has tried an issue of fact, has seen the witnesses, heard them testify, has been in a position to pass upon their credibility, and has on conflicting evidence made findings of fact, this court will not, on a trial de novo, disturb such findings, unless they are clearly unsupported by the weight of competent evidence. Having carefully read the entire record, we have concluded that the evidence, although conflicting, is amply sufficient to sustain each and all of the findings made, and the judgment entered thereon.

The judgment is affirmed.

COLLINS et al. v. HUFFMAN et al.

(Supreme Court of Washington. Jan. 7, 1908.)

1. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action on bonds given on an injunction pendente lite, restraining plaintiffs from interfering with a stock of merchandise or with defendants' possession, the court permitted one

of the plaintiffs to be asked, on cross-examination, whether it was true that he had made a contract with defendants because he could not agree with them and wanted to get them out of a certain company, over objection that in the injunction suit the court had found that there was no contract. The answer was "No." *Held*, that it appearing from the context that the thought involved in the question was merely the reason that defendants sought to withdraw, no prejudice could have resulted from the answer, as it was sufficiently to the effect that there was no contract, which was consistent with the court's finding, and met the objection specified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

2. INJUNCTION—LIABILITIES ON BONDS—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action on bonds given on an injunction pendente lite, restraining plaintiffs from interfering with a stock of merchandise or with defendants' possession, it was sought to introduce evidence as to the collectibility of a certain account owing plaintiffs, the purpose being to found damages against defendants for failure to collect it, when it was claimed plaintiffs were prevented by the injunction from so doing. Witness had already testified that the account was not taken in charge by defendants, and that he knew during the injunction suit that defendants did not claim control of the account. *Held*, that the collection of the account not having been taken from plaintiffs by the injunction, the evidence as to its collectibility was immaterial and properly excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 584.]

3. SAME.

In an action on bonds given on an injunction pendente lite, restraining plaintiffs from interfering with a stock of merchandise or with defendants' possession, it appeared that after the injunction was dissolved a stipulation was made between the parties for joint possession, and that later the store was turned over to plaintiffs, who placed it in the hands of a jobbers' association. In estimating the amount of property, plaintiffs charged defendants with the full invoice price of all goods turned over at the time of the injunction. *Held*, that objection was properly sustained to the question as to what the stock of goods brought when sold by the jobbers' association, defendants being entitled to credit for the invoice value on all that was turned back to plaintiffs, and the goods having been turned over to the jobbers' association by plaintiffs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 584.]

4. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Whatever may be said as to the materiality of a question, no prejudice could have resulted therefrom where the answer was "It would be hard for me to say. I could not swear to that."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

5. SAME—PREJUDICE.

Errors assigned but not discussed in appellant's brief will not be considered, though counsel state that they are not waived, the burden being on appellant to show injury therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4250-4261.]

6. TRIAL—INSTRUCTIONS—WRITTEN INSTRUCTIONS.

A stenographer employed by both parties to report a trial is virtually under the direction of the court, and hence the court's charge having been reported by such stenographer, the same was in writing within Laws 1903, p. 120,

c. 81, § 1, subd. 4, providing that on request of either party the charge must be in writing, but that a stenographic report thereof shall be considered a charge in writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 522.]

7. DAMAGES—INSTRUCTIONS—CONFLICTING INSTRUCTIONS.

In an action on injunction bonds, the court charged that damages must be found in some amount, either nominal or actual, and a later instruction contained the expression, "so that you will bear in mind in finding your damages in this case, if you find any at all," etc. *Held*, that the jury must have understood the court to refer to actual damages when it used the words "if you find any at all," the whole case having been tried on the theory that nominal damages were recoverable, and as so understood, that the instructions were not conflicting, in that the later instruction permitted a finding of no damages whatever.

8. APPEAL—REVIEW—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

In an action on injunction bonds, an instruction that damages must be confined to matters occurring subsequently to the date of the bond was not prejudicial error, though the injunction order was dated two days before the bond, and the instruction failed to permit any recovery of damages for the intervening day, where it was not shown that there was any change of conditions between the date of the injunction and the bond from which any damages accrued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4220.]

9. INJUNCTION—LIABILITIES ON BONDS—ACTIONS—DAMAGES—ATTORNEYS' FEES.

A restraining order was issued which contained an order to show cause why a temporary injunction should not issue. No motion was made to dissolve the restraining order, but on the return day of the order to show cause it was simply sought to prevent the issuance of a temporary injunction. No motion was made to dissolve the latter order, and the attorney's services thereafter rendered were on the trial of the issues of the main case, which resulted incidentally in the dissolution of the injunction. *Held*, in an action on the bonds given, that under the rule that attorney's fees, to be recoverable, must have been for services rendered in securing a dissolution of the injunction distinct from any services rendered in connection with the main case, no services were rendered for which fees were recoverable as damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 597.]

10. SAME—INSTRUCTIONS.

Where, in an action on bonds given on an injunction, restraining plaintiffs from interfering with a stock of merchandise or with defendants' possession, it appeared that after dissolution of the injunction a stipulation was made between the parties for joint possession of the store, and that later it was turned over to plaintiffs, who placed it in the hands of a jobbers' association, which disposed of the whole without any segregation of the old stock from the new, the court did not proceed on a wrong theory of the case in considering the business of plaintiffs and that conducted by defendants as one continuous business, and in instructing that the business, stock, and accounts should be considered as they were at the date defendants took possession, and also at the date they returned possession, instead of instructing that plaintiffs' business as it was when defendants took possession should be considered alone, and that plaintiffs had nothing to do with stock and accounts added during defendants' possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 589-593.]

11. SAME.

An order for an injunction *pendente lite* recited that the court, being fully advised, ordered that the injunction as prayed be granted, and that the same be continued until the hearing of the cause, and it was further ordered that on giving a bond "an injunction forthwith issue." *Held*, that the point that under the terms of the order it became necessary after the bond was filed and approved to issue a formal injunction order, and that inasmuch as this was not done there was in fact no injunction, and therefore no liability on the bond, was not well taken, the words "granting the injunction" being manifestly intended to operate as the injunction order itself on the filing and approval of the necessary bond.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 340.]

Appeal from Superior Court, Spokane County; Miles Poindexter, Judge.

Action by T. E. Collins and others against Fred B. Huffman and the Fidelity & Deposit Company of Maryland. From a judgment for plaintiffs, both plaintiffs and the Fidelity & Deposit Company appeal. Affirmed on both appeals.

Cullen & Dudley, for appellants. Danson & Williams, for respondent.

HADLEY, C. J. This is a suit for damages based upon two injunction bonds. The bonds were executed by the defendant Fred B. Huffman and another, with defendant Fidelity & Deposit Company of Maryland as surety. The facts stated in the complaint are substantially as follows: On the 23d day of December, 1903, in an action then pending in the district court of the First judicial district of the state of Idaho, wherein one George W. Huffman and the defendant Fred B. Huffman were plaintiffs and the plaintiffs herein were defendants, a restraining order was issued whereby these plaintiffs, the defendants in the former action, were restrained from in any manner interfering with the stock of merchandise, books of account, accounts, and personal property belonging to the Collins Mercantile Company located at King's Spur, Kootenai county, Idaho, and from in any way interfering with the possession thereof by the said Huffmans until the further order of court. Upon the issuance of the restraining order an injunction bond in the sum of \$1,500 as required by the court was executed by the persons aforesaid, as plaintiffs in said action, and by said surety company. It is alleged that thereafter, on or about December 31, 1903, upon the hearing of the order to show cause why the restraining order should not be continued in force pending the suit, the court duly made an order continuing the injunction in force upon the condition that the plaintiffs in the action should file an additional bond in the sum of \$5,000. A bond in said sum, executed by the same obligors who made the first one, was thereupon duly executed and filed. It is further alleged that such proceedings were thereafter had in said action that on or about May 5, 1905, the said Idaho court finally decided that the

plaintiffs in the action were not entitled to the injunction, and that a judgment was entered therein in favor of these plaintiffs. The claim for damages herein is based upon an alleged dissipation of the stock of goods and accounts, and destruction of the business of these plaintiffs during the time the said Huffmans were in possession thereof by authority of said injunction orders. The complaint fixes the damages at more than \$12,000. The answers of the defendants admit the issuance of the injunction orders and the execution of the bonds, but they deny that plaintiffs were damaged in any sum. A trial was had before a jury, a verdict was returned in favor of the plaintiffs for the sum of \$750, and judgment was entered in accordance with the verdict. The plaintiffs and also the defendant Fidelity & Deposit Company of Maryland have appealed.

The appeal of the plaintiff appellants is prosecuted upon the contention that the trial court proceeded upon an entirely erroneous theory, or the result which was effected in the case could not have been reached. It is contended that the evidence shows an investment by appellants of \$7,000 in a profitable business; that the business was taken away from the owner by a voluntary wrongdoer through the means of a writ of injunction, and was run and controlled by such wrongdoer for nearly a year and a half, at the end of which time the whole investment of \$7,000 was lost; that for such loss directly caused by the wrongdoer damages in the sum of \$750 only have been awarded. The appellants have assigned many errors, and an examination of them becomes necessary to determine whether the cause was tried upon an erroneous theory.

It is first assigned that the court erred in permitting the witness Severance to answer the question as to whether it was true that he had made a contract with the Huffmans because he could not agree with them and wanted to get them out of the Severance-Huffman Company. Severance was interested in the profits of the Collins Mercantile Company, the latter being really the appellant Collins. Severance had also sustained business relations with the Huffmans, the same being referred to as the Severance-Huffman Company. When the question to which objection was made was asked Severance, he was being interrogated about an account which was owing from the Severance-Huffman Company to the Collins Mercantile Company, or really to the appellants. The objection was made upon the single ground that the Idaho court had found that there was no contract. An examination, we think, shows that the question refers to a proposed agreement or mere negotiations as descriptive of the reason why it was sought to sever the Huffmans from the company. The contention now is that permitting the witness to answer must have created a prejudice in the minds of the jury. The answer

was "No," which was equivalent to saying that the witness did not enter into such a contract. Since it appears from the context of the record that the thought involved in the question was merely the reason that the Huffmans sought to withdraw, no prejudice could have resulted from the answer of the witness, for the reason that the answer was sufficiently to the effect that there was no contract, which was consistent with the findings of the Idaho court, and met the ground specified in the objection.

It is next assigned that the court erred in sustaining an objection to a question asked the witness Severance on re-examination as to the collectibility of the Severance-Huffman Company account, which was an account of something more than \$2,000 owing to appellants. The purpose of attempting to show the collectibility of the account was to found damages against the Huffmans for failure to collect it, when it is claimed appellants were prevented by the injunction from so doing. The same witness had testified already that this account was not taken into the charge of the Huffmans, and that he knew during all the time of the Idaho litigation that the Huffmans did not in any way claim the control of this account. This showed that the collection of the account was not taken from appellants by the injunction, and the Huffmans cannot therefore be held responsible for failure to collect it. In view of the witness' previous testimony, the matter of the collectibility of the account became immaterial to the issues in the case, and it was not error to sustain the objection.

It is next urged that it was error to sustain an objection to a question asking what the stock of goods brought when sold by the Spokane Jobbers' Association. After the injunction was dissolved, a stipulation was made between the parties for joint possession of the store for a time, and later it was turned over to the control of appellants, who placed it in the hands of the Spokane Jobbers' Association. In estimating the amount of property, appellants had charged the respondents with the full invoice price of all goods which were turned over at the time of the injunction. Respondents were therefore entitled to credit in the same way for the invoice amount of all that were turned back to appellants. These having been turned over to the Spokane Jobbers' Association by appellants themselves, it became immaterial so far as respondents were concerned what prices the goods brought.

It is also contended that it was error to overrule appellants' objection to a question asked a witness as to whether, with a few goods added, the store could have been run longer and all the outstanding accounts collected. This witness was in charge of the stock for the Spokane Jobbers' Association, which, as we have seen, held it under the direction of appellants. Whatever may be said as to the materiality of the question, no prej-

udice could have resulted therefrom in view of the answer of the witness. The answer was, "It would be hard for me to say. I could not swear to that."

A number of other errors are assigned upon the admission and rejection of testimony; but while counsel say they do not waive them, they have not discussed them in their brief. The burden is upon appellants to show wherein they have been prejudiced. Errors to be available for reversal must operate to the injury of the complaining party. *Brown Bros. v. Forest*, 1 Wash. T. 202; *Jose v. Stetson*, 20 Wash. 648, 56 Pac. 397. We find no prejudicial error in the particulars mentioned.

It is next contended that the court instructed the jury orally, and that this was error in view of the fact that appellants had seasonably requested written instructions. The record shows that one stenographer was employed by both parties to report the case at the trial, and that she did report it, including the taking of the court's instructions. She was therefore under the control of both parties. The pertinent part of the statute upon this subject is found in subdivision 4, § 1, Laws 1903, p. 120, c. 81, as follows: "When the evidence is concluded, either party may request the judge to charge the jury in writing, in which event no other charge or instruction shall be given, except the same be contained in the said written charge; * * * Provided, further, that whenever in the trial of any cause, a stenographic report of the evidence and the charge and instructions of the court is taken, the taking of such charge or instructions by the stenographic reporter, shall be considered as a charge or instruction in writing within the meaning of this section." Appellants contend that, on the authority of *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, the instructions as given by the court in the case at bar were not in conformity with the above statute. In the case cited it was said that there were two stenographers present at the trial taking a report of the case, one employed on behalf of the prosecuting attorney and the other by the defendant. Under such circumstances it was held that the court was not relieved from the obligation to charge the jury in writing, the request therefor having been made. It was stated in effect that, in order to relieve the court of this obligation, the stenographer present must be an official stenographer, or one under the direction and control of the court, "so that a copy of the charge could be had if application to the court should be made therefor." It was held that a stenographer employed by one of the parties only is not so under the control of the court that he can be required to furnish a copy of any part of the proceedings either to the court or to the opposing party. The holding was based upon the ground that the report of a stenographer employed by one party only becomes the private property of that party, which is no doubt

correct. Appellants contend here that the stenographer employed in this case was not under the control of the court, and was not an official stenographer. Strictly speaking, there is under our statutes no such person as an official court stenographer, but a stenographer may be so related to both the parties in a cause as virtually places him under the direction of the court. We think this is true where one stenographer is employed by both parties to report a trial. Such a reporter is under the direction of either party, and if the interest or advantage of either party requires that copies of instructions which the reporter has taken shall be furnished to the court, or to such party, the copies must be forthcoming. If the statute quoted is to be given any force at all, it would seem that the court complied with its provisions in this case. The statute was passed with knowledge that we have no official stenographers, and in view of that fact we think it was intended to meet just such cases as the one at bar. This holding in no way conflicts with *State v. Mayo*, supra, the facts of which were materially different from those now before us.

It is contended that the court gave contradictory instructions in that the jury were first told that they must find damages in some amount, either nominal or actual, and a later instruction contained the expression, "so that you will bear in mind in finding your damages in this case, if you find any at all," etc. Appellants argue that the above expression conflicts with the first instruction, for the reason that it gave the jury liberty to find no damages whatever. The jury must have understood the court to refer to actual damages when it used the words "if you find any at all," for the whole case had been tried upon the theory that nominal damages were recoverable. That the jury were not misled is evidenced by the fact that the verdict which was returned was for substantial actual damages.

It is next urged that the court erred in instructing that damages under the second or \$5,000 bond must be confined to the matters occurring subsequently to December 31, 1903, the date of that bond. The injunction order upon which that bond was based was dated December 29, 1903, and the instruction also limited the recovery of damages under the first or \$1,500 bond to the period between the dates of December 23d and 29th, inclusive. It is therefore argued that the instruction failed to permit any recovery of damages for December 30th. Appellants' assignment of error is, however, directed to the point that the instruction erroneously directed that no recovery could be had upon the \$5,000 bond between the dates of December 23d and 29th, and no reference is made to failure to cover the date of December 30th. The exceptions to the instruction also fail to call specific attention to this point, and we think appellants are not in position to urge it. But, in any event, if the question were properly be-

fore us, appellants have not shown from anything in the record that there was any change of conditions as between the 29th and 31st of December from which any particular damages were recoverable for December 30th, the omitted day, and no prejudice therefore appears.

It is next assigned that the court erred in instructing that the jury should not allow any damages by way of attorney's fees, for the reason that there was no evidence showing that attorney's fees were incurred or paid by reason of the injunctions, separate and distinct from the other issues involved in the case. We believe the instruction was not erroneous in view of the evidence and history of the injunction case. It is well established that the recoverable fees must be for attorney's services rendered in securing a dissolution of the injunction, distinct from any services rendered in connection with the main case. A restraining order was issued, which contained an order to show cause why a temporary or interlocutory injunction should not issue pending the litigation. No motion was made to dissolve the restraining order, but on the return day of the order to show cause appellants simply sought to prevent the issuance of a temporary injunction. No motion was made to dissolve the latter order, and the attorney's services thereafter rendered were upon the trial of the issues of the main case, which resulted merely incidentally in the dissolution of the injunction. Under the rule of law upon this subject, we therefore think no services were rendered by attorneys for which fees are recoverable as damages. *Donahue v. Johnson*, 9 Wash. 187, 37 Pac. 322; *White Pine Lumber Company v. Aetna Indemnity Co.*, 42 Wash. 569, 85 Pac. 52.

Several errors are assigned upon certain instructions, to the effect that the court proceeded upon a wrong theory of the case in considering the business of appellants and that conducted by the Huffmans as one continual business, and instructed that the business, stock, and accounts should be considered as they were at the date the Huffmans took possession, and also as they were at the date they returned possession. Appellants contend that their business as it was when the Huffmans took possession should be considered alone, and that they have nothing to do with stock and accounts added during the Huffmans' possession. The evidence shows, however, as already stated, that on the return of the stock appellants took possession of everything and turned all over to the Spokane Jobbers' Association, which disposed of the whole without any segregation of the old from the new. We therefore, think the court did not err in its theory of the instructions, and we find no prejudicial error as to any other instructions given or refused to appellants. We believe the cause was fairly submitted to the jury, and that, inasmuch as the jury

were the triers of the facts, their verdict should stand so far as plaintiff appellants are concerned.

Referring now to the cross-appeal of the defendant appellant, Fidelity & Deposit Company of Maryland, we find 10 distinct assignments of error, all relating to the instructions given or refused. This opinion has already been extended to such an inordinate length by reason of the many questions raised by the plaintiff appellants, we find it necessary to abbreviate the discussion of the cross-appellant's appeal. A specific discussion of each assignment is unnecessary, since the points involved may be more generally stated. It is urged that the court erroneously assumed in its instructions that specific damages were shown as resulting from the temporary restraining order. That order it will be remembered continued from December 23d until December 29th, inclusive, when the order for an injunction pendente lite was issued. It is contended that no specific damages were shown as resulting from the first order, and that only nominal damages were recoverable upon the \$1,500 bond. The jury were specifically told that they should allow no actual damages upon that bond, except such as accrued between December 23d and 29th. Under the evidence we think it was for the jury and not for the court to say whether any actual damages did accrue. The court did not assume to say that actual damages had been in fact proven, but said in reference to actual damages that, if the jury found "any at all," they could allow no damages on the \$1,500 bond, except such as accrued on and between the dates aforesaid. We think there was no error in this particular.

It is further urged that the cross-appellant is not liable upon the second or \$5,000 bond, for the reason that no injunction was issued and served. The order for the injunction pendente lite contained the following: "The cause was argued to the court by respective counsel, and the court being fully advised in the premises orders that the injunction as prayed for by the plaintiffs in their verified amended complaint on file herein be granted, and that the said injunction be continued until the hearing of this cause upon the merits." It was further ordered that upon giving a bond for \$5,000, "an injunction forthwith issue." It is argued that, under the terms of the order, it became necessary, after the bond was filed and approved, to issue a formal injunction order, and that, inasmuch as this was not done, there was in fact no injunction and therefore no liability upon the bond. We think the point is not well taken. The order shows that the court granted by injunction the specific relief asked in the amended complaint. This was definite and certain, and could not have been misunderstood. The words "granting the injunction" were in the present tense, and were manifestly in-

tended to operate as the injunction order itself upon the filing and approval of the necessary bond. It is true the order afterwards further says that upon the filing and approval of a bond in the sum specified, "an injunction forthwith issue"; but in the light of the whole context and the circumstances the words were manifestly intended in the sense that the injunction which had been previously granted in the order should forthwith be in effect upon the filing and approval of the bond. The court, therefore, did not err when it instructed the jury that damages were recoverable under the \$5,000 bond, if any were shown to have accrued during the period covered by it.

For the foregoing reasons, we conclude that the contentions upon both appeals should be denied, and the judgment is affirmed. No costs shall be recovered by either appellant.

CROW, ROOT, MOUNT, and FULLERTON, JJ., concur.

(30 Nev. 106)

LINVILLE v. SCHEELINE et al. (No. 1,708.)

(Supreme Court of Nevada. Jan. 3, 1908.)

1. APPEAL — PROCEDURE — STRIKING COST BILLS.

An order striking a cost bill is an order made after final judgment, and, if appealed from, should be taken up in a statement on appeal containing only so much of the record as is necessary to present the facts, no statement on motion for a new trial being necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2398.]

2. COSTS—RECOVERY—REQUISITES.

Under Civ. Prac. Act, § 486 (Comp. Laws, § 3581), requiring the party in whose favor judgment is rendered, and who claims his costs, to deliver a cost bill to the clerk within two days after the verdict or decision, or such further time as the court may grant, if a party fails to file a cost bill within the time prescribed, he waives his rights to costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 768-771.]

3. SAME—"DECISION OF COURT."

Under Prac. Act, § 486 (Comp. Laws, § 3581), requiring a party in whose favor judgment is rendered, and who claims his costs, to deliver a cost bill to the clerk within two days after the verdict or "decision of the court," the decision is the announcement by it of its judgment, and is distinct from the findings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 771.]

For other definitions, see Words and Phrases, vol. 2, p. 1808.]

4. APPEAL—RECORD—SUFFICIENCY.

Where, on appeal from an order striking plaintiff's cost bill, the record shows only that motion to strike because the bill was not filed in time was made and allowed, and the order excepted to on the ground the clerk failed to notify plaintiff of the court's decision as directed, the record is insufficient to show the clerk did not so notify plaintiff, and to overcome the presumption in favor of the correctness of the trial court's rulings and the presumption that the clerk performed his duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2398.]

5. TRIAL—DECISION IN ABSENCE OF COUNSEL—NOTICE.

Where courts render decisions in the absence of counsel, they should direct notice to be given to the parties' attorneys.

Appeal from District Court, Washoe County.

Action by R. W. Linville against Agnes Scheeline and others. Plaintiff was awarded a decree, but it was modified by allowing costs. From an order denying a new trial, striking out cost bills and denying an amendment to the findings, plaintiff appeals. Affirmed.

O. H. Mack, for appellant. Jas. T. Boyd and A. N. Salisbury, for respondents.

SWEDNEY, J. This action was for specific performance of a written contract to convey real estate. The case was tried before the court with the aid of a jury on the 4th day of May, 1905. Special issues were submitted to the jury, which were answered in favor of the plaintiff. Thereafter the case was continued for oral argument before the court. On the 28th day of July, 1905, the case was argued and submitted to the court. The minutes of the court for the 30th day of October, 1905, show the following order made in this cause on said day: "The court adopts the findings of the jury on the matters of fact submitted to them and finds for the plaintiff, and decrees that findings of fact and conclusions of law and decree be entered for the plaintiff as prayed for. Ordered that the clerk of this court notify Mack & Farrington and O. H. Mack, and Boyd and Salisbury. Whereupon a recess was taken until the further order of the court." On the 9th day of November, 1905, counsel for plaintiff filed and served his cost bill. On the 11th day of November, 1905, counsel for defendant filed a motion to strike out the cost bill filed November 9th, upon the ground that said cost bill was not filed within the time allowed by law, which motion coming on to be heard was allowed upon the said ground that the same was not filed in time. On the 4th day of January, 1906, the court signed findings and a decree prepared by counsel for plaintiff, the decree, however, being modified before signing and filing by striking out the costs of the action inserted therein. On the said 4th day of January, following the filing of the decree, counsel for plaintiff filed another cost bill. On the 6th day of January following counsel for defendants moved to strike out this last cost bill upon the ground that the same was not filed within the time allowed by law. The motion coming on to be heard was allowed by the court. On the 6th day of January, 1906, counsel for plaintiff moved for a new trial upon the following grounds: "Insufficiency of the evidence to justify the findings and the decision of the court, and that the decision is against law. Errors in law occurring at the trial, excepted to by the plaintiff. Fail-

ure to give plaintiff proper relief, appearing to have been refused under the influence of passion or prejudice." The motion for a new trial was denied. On the 13th day of January, 1906, the court made an order denying plaintiff's request for an additional finding, reading as follows: "The judge of the above-entitled court, on the 4th day of January, 1906, signed and filed a judgment in said cause and in said court in favor of the plaintiff, according to the prayer of the complaint therein. (1) The court now finds that the plaintiff is entitled to a judgment against defendants, and each of them, for all of his costs and disbursements therefor incurred in this action, according to the prayer of the complaint therein." This appeal is taken from the order of the trial court denying plaintiff's motion for a new trial, from the orders striking out plaintiff's cost bills, and from the order denying plaintiff's request for an amendment to the findings made on the 13th day of January, 1906.

The record in this case presents the novel situation of a statement on and motion for a new trial upon the part of the plaintiff, where the judgment and decree are in plaintiff's favor and in accordance with the prayer of his complaint, except that costs were not included for the reason that the court struck out the cost bill upon the ground that the bill was not filed in time. The third ground stated in the motion is not a ground for new trial specified in the statute. The first two grounds of the motion the plaintiff was in no position to make, as he could not be prejudiced by error in either particular specified. It is evident from the record that the only alleged error which counsel for appellant is seeking to correct on this appeal is in reference to the order or orders striking out the cost bill or bills. To correct this error, if such existed, manifestly did not require a statement on motion for a new trial. An order striking out a cost bill is an order made after final judgment, and, if appealed from, should be brought to this court in a statement on appeal containing only so much of the record as is necessary to present the facts. The record in this case, as presented, is in two volumes, containing all the testimony and rulings upon the trial, as well as all the original papers and documents filed in the case for any purpose whatever, most all of which have no place in the record. The questions presented in this case could and should have been presented in a statement of one-twentieth the size of the present one, at a great saving in cost to the client appealing, and of labor upon the part of this court in sorting out from the mass of foreign and irrelevant matter such portions of the record as present the real questions for consideration. It is a serious question whether appeals presenting transcripts of this character ought not to be dismissed without consideration, or else the appellant be required to reform his record before it would

be considered. No motion for diminution of the record was made by counsel for respondent. Without making this case a precedent for the action of this court in future cases, where similar records are presented, we will, in this instance, under the circumstances, determine the only question presented—whether or not a cost bill was filed in time. Section 486 of the Civil Practice Act (Comp. Laws, § 3581) reads as follows: "The party in whose favor judgment is rendered and who claims his costs, shall deliver to the clerk of the court, within two days after the verdict or decision of the court, or such further time as the court or judge may grant, a memorandum of the items of his cost and necessary disbursements in the action or proceeding, which memorandum shall be verified by the oath of the party, or his attorney, stating that the items are correct, and that the disbursements and costs therein named have been necessarily incurred in the action or proceeding. He shall be entitled to recover the witness fees, although at the time he may not have actually paid them." In order for a party to recover costs, he must come within the provisions of the statute, and if he fails to file his cost bill within the time prescribed, he is deemed to have waived his right to costs. *State v. District Court*, 26 Nev. 258, 66 Pac. 743. This court has repeatedly held that the decision of the court is the announcement by the court of its judgment, and is distinct from the findings. *Elder v. Frevert*, 18 Nev. 278, 3 Pac. 237; *Robinson v. Benson*, 19 Nev. 331, 10 Pac. 441; *State ex rel. Hopplin v. Cheney*, 24 Nev. 222, 52 Pac. 12; *Robinson v. Kind*, 25 Nev. 261, 59 Pac. 863, 62 Pac. 705; *Sholes v. Stead*, 2 Nev. 108; *Howard v. Richards*, 2 Nev. 128, 90 Am. Dec. 520; *Telegraph Co. v. Paterson*, 1 Nev. 150. Were this question a new one, it might be open to serious question, as many authorities, under similar statutes, take a contrary view. The practice in this state, however, of regarding the oral announcement by the court of its judgment as the decision, has been so thoroughly recognized by the bench and bar that it would not now be proper to announce a different rule.

It is not contended that counsel, prior to November 9th, either by order of court or by stipulation, was allowed any extension of time to file his cost bill. Counsel for appellant argues, however, that because of the fact that the decision was rendered in the absence of counsel on either side, and the clerk was directed to notify respective counsel that he was entitled to two days from the time of receiving such notice in which to file his cost bill, the clerk never did give such notice, and that he filed his cost bill the day he obtained knowledge of the decision. If this state of facts was established by the record, we would be called upon to determine whether such neglect upon the part of the clerk would relieve plaintiff from an enforcement of the strict provisions of the statute. All

that the record shows, however, is that the motion to strike out the cost bill was made, that the motion was allowed by the court, and the order of the court excepted to upon the ground that the clerk failed to notify counsel as directed. What showing, if any, was made upon the hearing of the motions that counsel was not served with notice of the decision, and had no such notice, does not appear of record. All presumptions are in favor of the correctness of the rulings of the trial court, and where such rulings are questioned the record must show wherein they are erroneous. It is also a presumption of law, in the absence of a showing to the contrary, that officers perform their duties. *Jones on Evidence*, vol. 1, § 38. Neither of these presumptions are shown in the record to have been overcome, and we cannot take statements contained in counsel's exceptions or assertions contained in his brief as an equivalent of facts which should be established of record. So far as the record shows, plaintiff's counsel may have had notice of the decision the day the same was rendered. At least there is no showing, and we cannot presume to the contrary. If the facts are as counsel contends in his brief, the situation is unfortunate. The plaintiff was clearly entitled to his costs, unless he waived them by neglecting to file his bill in time. The costs in this case are a very material item. For the plaintiff to have to pay them, under the circumstances of this case, imposes a heavy burden upon him, and takes from him, in a large measure, the benefits of the court's decision; for the costs represent a considerable portion of the value of the property involved. Where courts render decisions in the absence of counsel, they should be particularly careful to direct that notice be promptly given to the attorneys of the parties. The court made such an order in this case. The clerk should have promptly notified counsel, and the presumption is that he did so. The statutes of many of the states allow counsel for the prevailing party a certain time after notice of the decision in which to file the cost bill. An amendment of our statute in this particular would, we think, be advantageous to litigants.

The several orders of the trial court appealed from are affirmed.

TALBOT, C. J., and NORCROSS, J., concur.

(30 Nev. 93.)

In re ABEL'S ESTATE.

ABEL v. HITT. (No. 1,694.)

(Supreme Court of Nevada. Jan. 3, 1908.)

1. WILLS—TESTAMENTARY CAPACITY—EVIDENCE.

Evidence held to show that a testatrix was mentally incompetent to execute a will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 137-161.]

2. SAME—VALIDITY—UNDUE INFLUENCE—EVIDENCE.

Evidence held to show that a testatrix in making her will acted under undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 421-437.]

3. APPEAL—REVIEW—JUDGMENT ON CONFLICTING EVIDENCE.

A judgment rendered on conflicting evidence will not be disturbed on appeal, where there is substantial evidence to support it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

4. TRIAL—CONDUCT OF JURY—SEPARATION.

The fact that some of the jury in a civil case, during the trial, but before they were instructed and placed in the custody of an officer to consider the verdict, became separated and were not in the custody of the officer, is not ground for reversal, where it does not appear that any juror was improperly influenced, nor that any effort was made to prejudice the rights of the complaining party, nor that any of his rights were prejudiced by the separation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 724.]

Appeal from District Court, Elko County.

Proceeding by W. T. Hitt to probate the will of Mary Abel. From a judgment for J. D. Abel, contestant, denying the probate, proponent appeals. Affirmed.

Mack & Farrington, E. J. L. Taber, and C. B. Henderson, for appellant. Cheney, Massey & Price and M. S. Wilson, for respondent.

SWEENEY, J. This is an appeal from a judgment and order denying a motion for a new trial rendered in the district court of the Fourth judicial district of the state of Nevada in and for the county of Elko in a will contest wherein W. T. Hitt, proponent and executor of the estate of Mary Abel, deceased, was successfully sued by J. D. Abel, contestant and respondent in this action. It appears from the record that Mary Abel died on or about the 13th day of March, 1904, at Elko, Nev., leaving an estate in said county consisting of real and personal property. At the time of her death she was 67 years of age, and had been married to her husband, now 83 years of age, since 1873. There were no children born to them. The appellant, W. T. Hitt, four days after the death of the deceased, filed in the said district court of Elko county what purported to be the last will and testament of Mary Abel, and duly petitioned the court to probate the same. Within due time the husband, respondent in this action, filed a contest against the probate of said will, in which it was alleged that the purported will was not the last will and testament of the deceased, because as alleged at the date said will was signed the deceased was mentally incompetent to make a will, that the execution of said will was procured by undue influence of E. C. McClellan and his wife, witnesses thereto, and of Margaret Sheldon, a sister of the deceased. Upon the issues made by the petition for probate and the objections filed by the contestant, the cause came on regularly for trial on the 12th

day of January, 1905, before the court, with the aid of a jury. Numerous witnesses were called and sworn, the cause was argued, the jury instructed, and under instructions given by the court returned a general verdict in favor of the contestant. Nine special issues were submitted to the jury, with instructions to return answers to the same. They were as follows: "(1) Did Mary Abel sign the instrument which has been offered in evidence as her last will and testament? A. Yes. (2) Did Mary Abel sign said instrument in the presence of E. C. McClellan and Eleanor A. McClellan? A. Yes. (3) Did Mary Abel, at the time she signed said instrument, if she did sign it, say it was her will? A. Yes. (4) Did E. C. McClellan and Eleanor A. McClellan sign said instrument in the presence of Mary Abel, as witness thereto? A. Yes. (5) Was Mary Abel of sound mind and disposing memory at the time the proposed will was signed? A. No. (6) Was Mary Abel acting under undue influence at the time the proposed will was made? A. Yes. (7) Did Mary Abel, at the time of signing the alleged will, if she did sign it, have sufficient mental [G. S. B.] capacity to recollect the property she intended to dispose of? A. No. (8) Did Mary Abel, at the time of the signing the alleged will, if she did sign it, have sufficient mental capacity to recollect the people who were the natural objects of her bounty? A. No. (9) Was any of the property mentioned in the proposed will the separate property of Mary Abel at the time of her death? A. Yes." Upon the rendition of the verdict by the jury, judgment was entered by the court decreeing that the instrument was not the last will and testament of Mary Abel, deceased, and refusing to admit the same to probate.

Appellant urges that a new trial should be granted, assigning many alleged errors, a number of which we deem harmless, even though conceded to be errors, but which apparently counsel have abandoned, and for these reasons we will not refer to them in this opinion, confining our attention solely to the main alleged errors urged. Appellant contends that the testimony was insufficient to support the verdict as to undue influence, and contends that there is no testimony tending to support the special finding that Mary Abel was acting under undue influence when she executed the will. A careful review of the testimony in this case leads us to conclude that the court and jury had ample evidence, though conflicting in certain respects, upon which to base their verdict. It appears from the testimony that the deceased was under the constant care and attention of physicians, and confined to her home for more than six months prior to the execution of the will; that her condition was so precarious as to require the care of a number of nurses; that the deceased was an elderly woman 67 years of age, weighing over 200 pounds, and during the latter months of

her sickness was almost constantly under the influence of opiates for the purpose of allaying the intense pain to which she was subjected; that the disease with which she was afflicted had caused her limbs to become so swollen that it became necessary to split them open with a surgeon's knife. Her husband, the contestant, who was assisting in her care during her last sickness, and was almost constantly in attendance upon her, and who had lived with her for nearly 40 years, testified that her mind was apparently blank at times, and that she was unable to recognize him, and during the latter months of her life her mental condition was failing and very bad all the time; that the expression on her face was very simple, at times idiotic, and that her mind seemed a blank. Another witness who rented a small house from the deceased adjoining her house and who during January, the month the alleged will was executed, saw the deceased two or three times a day, testified that deceased was insane on the 15th of January, and that on the date the will was executed she was no better mentally or physically; that at the time the will was executed and for some time prior thereto she was always in a stupor, and used language which indicated she was mentally unbalanced. This evidence is supported by the testimony of Mrs. Keith, Mrs. Haywood, and Mrs. Watkins, and contradicted to a limited extent by a few reputable witnesses for the appellant. Other witnesses in behalf of the proponent testified in effect that while she was ailing physically and mentally, yet she had a clear mind and disposing memory; but from all the testimony on both sides it appears plain that the mental condition of deceased was very weak at the time she executed the will, and that the jury and judge who passed judgment in this case were thoroughly warranted in finding that at the time of the execution of the alleged will Mary Abel was not of sound mind and of disposing memory.

It appears from the testimony that the purported will was prepared by E. C. McClellan, a notary public, some three or four days before the date of the execution of the same; that Mr. McClellan and his wife were the only persons present at the time of the execution of the will, and that Mrs. McClellan had urged the deceased to make a will; that the McClellans were intimate friends of Mrs. Sheldon, who is charged in part with the procurement of this will in her favor; that the McClellans lived about 90 feet from the home of Mrs. Abel, and were social and intimate friends and called daily on the deceased; that on the day when the will was executed Mrs. McClellan waited with Mrs. Sheldon until the nurse and Mr. Abel had left the house, and there was no one present at the home save Mrs. Sheldon, who, during the time the will was being executed, was out on the porch and had Mr. McClellan bring over the typewritten will which he had pre-

pared for execution; that there was no one present at the time of the execution of the will save Mr. McClellan and his wife, who signed as witnesses to said will; that there was not a word changed in the typewritten will by Mrs. Abel, and the signature to said will discloses a signature which, if not connected with the will itself, would be impossible to recognize as the signature of Mary Abel; that the deceased was either so weak mentally or physically that she did not know how to spell her own name correctly.

Many exhibits were introduced showing the signature of Mary Abel to checks and letters which were submitted to the jury for comparison with that of the signature attached to the purported will. These checks and signatures were written at different periods just prior to the execution of the will. It appears from the evidence that it was her custom to sign in a plain, firm hand, and all her signatures prior to a couple of months before the execution of the will were in a firm, plain hand; that her signatures to different exhibits written after January 7, 1904, evidenced physical, if not mental, decay, and that the jury assumed from the signature to the will, which did not even spell her name properly, omitting one of the letters in the last name, that physically and mentally she was in such a condition that she did not know what she was doing and did not possess the requisite ingredients of mind necessary to dispose of her property. The evidence submitted to the court and jury upon the mental weakness of the deceased was sufficient for them to have found, notwithstanding the conflicting testimony, that the deceased was incompetent and of unsound mind at the time of the execution of the will.

On the day the will was executed, Mr. McClellan testified that he was home all day, and that his wife had informed him that the respondent and the nurse had left the Abel house; that he knew that Mrs. Abel had been sick for six months before she signed the will, and that he had prepared the will upon the information of and solicitation by his wife, Mrs. McClellan, who the evidence discloses was the intimate friend of Mrs. Sheldon, the beneficiary under the will; that he had this typewritten will prepared for several days before it was signed; that he was intimately acquainted with Mrs. Sheldon, who often visited his home, and nearly always talked about the proposed will; that Mrs. Sheldon was at the Abel house when he went there, and on the front porch of said house when he left after the alleged execution of the will; that he never told Mr. Abel, the contestant, anything about the will; that Mrs. Abel never gave him any instructions about the contents of the will, and that after it was executed he delivered it to Mrs. Sheldon; that at the time of the execution of the alleged will Mrs. Abel said nothing about any of her other relatives.

This condition of affairs existing, and the

circumstances under which the will was prepared, and the execution of the same, were facts which also warranted the court and jury in finding that Mary Abel at the time the alleged will was executed was acting under undue influence, and that she did not have sufficient mental capacity to recollect the property she intended to dispose of, nor to recollect the people who were the natural objects of her bounty, and was otherwise mentally incompetent to execute a will. There are many respectable authorities holding that in will contest cases, when the question as to the correctness of the verdict in view of the evidence is raised in the appellate court, the verdict will not be set aside unless there is clearly a legal insufficiency in the evidence to sustain the verdict. *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *White v. Cole* (Ky.) 47 S. W. 759; *Coates v. Semper*, 82 Minn. 460, 85 N. W. 217; *Crossan v. Crossan*, 169 Mo. 631, 70 S. W. 136; *In re Watson*, 131 N. Y. 587, 30 N. E. 56; *In re Voorhis' Will*, 125 N. Y. 765, 26 N. E. 935; *In re Elmer's Will*, 88 Hun (N. Y.) 290, 34 N. Y. Supp. 406; *Robinson v. Robinson*, 203 Pa. 400, 53 Atl. 253. And particularly has this been held to be the rule when the trial court has declined to interfere. *Peteñish v. Becker*, 176 Ill. 448, 52 N. E. 71; *In re Allison's Estate*, 104 Iowa, 130, 73 N. W. 489; *Gardner on Wills*, p. 332. However in this case the record discloses no such showing for appellant. But this court has repeatedly held that, where there is substantial evidence to support a judgment or verdict, even though the evidence to a degree be conflicting, it will not disturb such verdict or judgment, and in the present case we believe the transcript discloses that such substantial evidence exists, and hold accordingly.

Appellant further urges as reversible error misconduct of the jury. It appears from the affidavits of three of counsel for appellant that during the progress of the trial, but not after the jury were instructed and placed in the custody of an officer to consider the verdict, some of the jury became separated, and were not in the custody of the officer. It is not claimed by the appellant that the jury was allowed to separate after the instructions of the court had been given and while they were considering their verdict, nor is it shown or claimed by said affidavits that at the times said jurymen were separated or out of the custody of the officer that any jurymen had been tampered with or improperly influenced, or at all, or that any effort had been made to prejudice the rights of appellant, nor is it claimed or maintained that because of such separation any of the rights of appellant were prejudiced, nor because of this separation that they were damaged in any way. While there are some authorities, in criminal cases, which hold that this would be proper ground for reversal, we are unable to find any which would make

this reversible error in a civil case, under the circumstances of the present case, where it is not claimed that because of a mere separation of the jury any injury or damage was suffered by appellant. When, during the trial of a case in the lower court, the court enters an order that the jury remain together, they should do so, and the jurymen should not be allowed to become separated, even before the instructions are given by the court and the case put into their hands to consider their verdict; but, under the circumstances of the present case, where no damage is alleged to have arisen from such separation, nor where it is not shown that the jurors were tampered with or improperly influenced, or at all, and none of the circumstances indicate any rights were violated or damage suffered, we do not believe it to be reversible error. 17 Encyc. of Law (2d Ed.) pp. 1227, 1228. The authorities cited by appellant are not in point, for the reason that those cases wherein judgment had been reversed, because of the separation of the jury, applied to cases where the jury had retired after being instructed by the court to consider their verdict. In another case cited by appellant a judgment was reversed because of an improper separation during the trial of a criminal action, wherein, during the progress of the trial, a jurymen became separated from the jury, and without the custody of the sheriff; the court holding that the mere fact of his separation in such a case, as distinguished from a civil case, was ground for reversal, unless the presumption is sufficiently rebutted that the juror was not improperly influenced or tampered with, or that the appellant's rights were prejudiced or suffered harm. 17 Encyc. of Law (2d Ed.) 1227. At any rate, in the present case, it being an action wherein a verdict of a jury is merely advisory, the court was not bound by the verdict. The court in the present case could either have accepted the findings of the jury, and accepted its verdict, or set them aside and acted on its own judgment, as it saw fit. In the present case the court saw fit to accept the verdict and findings of the jury and entered judgment against the proponent. Nev. Comp. Laws, §§ 2803, 2805, 3038, 3067; 16 Ency. P. & P. 1042-1043.

This same observation with reference to the jury being improperly influenced or prejudiced is equally applicable to the error assigned by appellant's counsel of certain improper language and argument alleged to have been used by Attorney Massey, one of the chief counsel for contestant, in his argument before the jury. The court evidently, in passing its own judgment, did not consider the language complained of sufficiently harmful or injurious to warrant a judgment otherwise than he rendered. *Lake v. Tolles*, 8 Nev. 285; *Duffy v. Moran*, 12 Nev. 97; *Van Fleet v. Olin*, 4 Nev. 95, 97 Am. Dec. 513. In other jurisdictions where the ver-

dict of a jury is merely advisory in a will contest, as it is in the present case under consideration, the rule prevails, as in this state, that the verdicts of juries are merely advisory, and can be totally disregarded or accepted as a trial court decides. *Bryant v. Pierce*, 95 Wis. 331, 70 N. W. 297; *In re Jackman's Will*, 28 Wis. 104; *Chaffin Will Case*, 32 Wis. 569; *Wright v. Jackson*, 59 Wis. 584, 18 N. W. 486; *Loughney v. Loughney*, 87 Wis. 101, 58 N. W. 250; *Fay v. Vanderford*, 154 Mass. 498, 28 N. E. 681; *Newell v. Homer*, 120 Mass. 277; *Hudson v. Hughan*, 58 Kan. 152, 42 Pac. 701.

After a careful review of the transcript on appeal, the bill of exceptions, and authorities presented, we are of the opinion that the judgment should be affirmed, and it is so ordered.

TALBOT, O. J., and NORCROSS, J. We concur in the judgment and in the opinion of **SWEENEY, J.**, except in so far as it holds that the verdict of the jury is simply advisory, and as to that portion of the opinion which may bear on the provisions of Comp. Laws, §§ 2803, 2905, 3038, and 3067, we express no views, as we do not consider the question necessarily involved.

(30 Nev. 113)

LINVILLE v. CLARK. (No. 1,725.)

(Supreme Court of Nevada. Jan. 3, 1907.)

APPEAL—FAILURE TO PROSECUTE—AFFIRMANCE.

Where appellant did not appear at the hearing, and no brief was filed on his behalf until a month thereafter, when, without any stipulation or order authorizing it, one was filed setting up a question to which no exception was taken in the trial court, and regarding which no assignment of error had been made, the judgment will be affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3109, 4430.]

Appeal from District Court, Washoe County.

Action by R. W. Linville against A. J. Clark. From the judgment, defendant appeals. Affirmed.

Jas. T. Boyd and A. N. Sallsbury, for appellant. O. H. Mack, for respondent.

TALBOT, O. J. About 2½ months before the day set for the hearing a stipulation was filed allowing the appellant 30 days additional in which to file his opening brief, if his time for that purpose had not already expired. No one appeared on the part of the appellant at the hearing, and no brief was filed on his behalf until more than a month after the hearing, when, without any stipulation or order authorizing it, one was filed setting up a question to which no exception had been taken in the trial court, and regarding which no assignment of error had been made. Under these circumstances, and as often held by this court in *Matthewson v.*

Boyle, 20 Nev. 88, 16 Pac. 434, *Goodhue v. Shedd*, 17 Nev. 141, 30 Pac. 695, *State v. Myatt*, 10 Nev. 166, *Gardner v. Gardner*, 23 Nev. 214, 45 Pac. 139, and other cases, the judgment of the district court is affirmed by reason of appellant's failure to prosecute the appeal.

NORCROSS and SWEENEY, JJ., concur

(50 Or. 411)

ST. BENEDICT'S ABBEY v. MARION COUNTY et al.

(Supreme Court of Oregon. Jan. 7, 1908.)

1. CONSTITUTIONAL LAW — DUE PROCESS OF LAW—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS.

The Legislature may authorize a municipality to assess the expenses of street improvements on property benefited thereby, and such assessment is not a taking of property without due process of law, where the property owner is given an opportunity to be heard before the assessment is made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 870-875.]

2. MUNICIPAL CORPORATIONS — TAXATION — EQUALITY—STREET ASSESSMENTS.

A statute authorizing a municipality to assess the expenses of street improvements on property benefited thereby does not violate the constitutional provision that taxation shall be equal and uniform.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Municipal Corporations, § 1004.]

3. STATUTES—"LOCAL STATUTE."

Within Const. art. 4, § 23, subd. 10, forbidding the enactment of special or local laws for the assessment and collection of taxes for state, county, township, or road purposes, Act Nov. 22, 1905 (Laws 1905, p. 410), providing for the improvement of roads at the expense of the lands benefited thereby on petition of a majority of the resident landowners, etc., is general and applicable throughout the state, and is not a local statute applicable only to a particular locality or limited part of the state and the inhabitants of that part, though its operation is contingent, depending on the wish of the landowners in the vicinity of a proposed improvement and the existence of certain conditions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 108, 109.]

For other definitions, see Words and Phrases, vol. 5, pp. 4208-4213.]

4. HIGHWAYS—ROAD IMPROVEMENTS—ASSESSMENTS—BENEFITS.

The expenses of road improvements can be assessed against lands benefited only in proportion to benefits, and an act authorizing the assessment of a portion of the expense without reference to benefits is invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 390.]

5. SAME.

Act Nov. 22, 1905 (Laws 1905, p. 410), providing for the improvement of roads, the expenses of which are to be assessed on real estate adjacent thereto and benefited thereby, according to the benefits, etc., limits the assessment to lands benefited by the improvement, and in proportion to such benefits and is valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 390-393.]

6. SAME—BENEFIT DISTRICTS.

The Legislature, in providing for the payment of road improvements by assessment on

property benefited, may fix the sum to be raised, and prescribe the benefit district, or it may delegate one or both of the questions to a local body.

7. SAME.

The Legislature has a wide discretion in providing for road improvements at the cost of property benefited and prescribing the taxing district and delegating to local boards of viewers power to determine the extent of the benefits and the manner of apportioning the expense, and its action will not be disturbed, unless it clearly appears that it has exceeded its constitutional authority, its taxing power being unlimited except as restricted by the federal Constitution.

8. SAME—"ROAD."

The word "road" in Act Nov. 22, 1905 (Laws 1905, p. 414) § 7, providing that where any "road" has been constructed under the act providing for the improvement of roads at the expense of the property benefited thereby, and another "road" shall be thereafter constructed within four miles thereof, the amount to be assessed against all lands included within the overlapping two-mile lines of each road shall be equitably determined by the county court, on the report of the viewers and appraisers, means the portion improved, and the improvement of any other portion of the same road is another road, and lands within the overlap are protected from unequal burdens.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6250-6254.]

9. SAME.

Since Act Nov. 22, 1905 (Laws 1905, p. 410), providing for the improvement of roads at the cost of lands benefited thereby, gives a landowner within the taxing district opportunity to question the action of viewers as to whether his land is benefited, or as to how much it may be benefited, and as to whether the assessment on his land is proportionate to the benefits, and gives him a right to appeal to the circuit court, equity will not interfere, unless the method adopted in estimating the benefits and assessing the expenses amounts to a fraud on him, the remedy provided by the statute being otherwise exclusive.

Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit by St. Benedict's Abbey against Marion county and others. From a decree for plaintiff, defendants appeals. Reversed and rendered.

This is a suit in equity to enjoin the improvement of a county road and to prevent the assessment of any portion of the expense thereof upon plaintiff's lands. A demurrer to the complaint was sustained by the lower court, and decree rendered granting a perpetual injunction against defendant, and it appeals. Based upon the petition of landowners along the line of what is known as the "Silverton-Marquam Road" asking for the improvement of a portion of said road, the county court of Marion county, on about March 9, 1906, commenced proceedings to improve said road, under the provisions of an act of the legislative assembly of the state of Oregon, of date November 22, 1905 (Laws 1905, p. 410), providing for the improvement of roads at the expense of the lands benefited thereby. Viewers were appointed under the provisions of the said act, who proceeded to and did estimate the cost of

said improvement to be \$23,746.10, and also estimated the value of benefits to all lands within the two-mile limit to be \$47,492.20, and in their report to the court itemized such benefits and the apportionment of such expenses by setting opposite the name of each person the description of his land subject thereto, the classification thereof, according to benefits thereby to be derived, the number of acres in each classification, and the estimated benefits and apportionment of expenses thereto. In estimating the benefits, they classified the land as to its relative location to the road and as to its quality, and attempted to make such apportionment of expense according to benefits, which resulted in the assessment of \$479 against the lands of plaintiff; and on July 25, 1907, the county court, after disallowing the remonstrances that had been filed to the action of the viewers, approved their report, and ordered the improvement made, the enforcement of which decree of the county court is the proceedings sought to be enjoined.

C. L. McNary, for appellants. A. M. Cannon, for respondent.

EAKIN, J. (after stating the facts as above). The road act in question authorizes county courts to improve any county road by grading, graveling, macadamizing, etc., the same; and to appoint viewers to estimate the cost and expense of the proposed improvement and the benefits to the land within the taxing district; and that the costs and expenses thereof be paid by assessment on the real estate adjacent thereto and benefited thereby within two miles on either side and one mile beyond the terminus of such improvement, in proportion to the benefits to be derived therefrom; and to apportion the estimated costs and expenses of the improvement upon said lands according to the benefits derived therefrom, including the lots in any incorporated city or town.

It is also provided by section 6 that the owner of any lands affected by the work proposed may remonstrate against the report of the viewers for the following causes: "(1) That the report of the viewers is not according to law; (2) that the lands of the party filing the remonstrance are not benefited, or are assessed too much as compared with other lands assessed as benefited, specifying such lands; (3) that the lands of the party filing the remonstrance are damaged, or that the damages assessed are inadequate; (4) that it is not practical to accomplish the proposed work without an expense exceeding the aggregate benefits; (5) that the proposed work will not be of public utility or convenience." Also section 6 further provides that the issues raised by such remonstrance shall be tried by the county court, and, if it finds for the remonstrants upon the fourth or fifth cause thereof, the proceeding shall be dismissed at the cost of

petitioners, and if resident owners of lands affected by such proposed improvements, upon which more than two-thirds of the aggregate assessment for benefits has been made, shall remonstrate against said petition for the fifth cause of remonstrance, the said petition shall be dismissed, and if the court finds for the remonstrants for the first, second, or third cause, it shall modify the report accordingly. By section 14 appeal to the circuit court may be taken by remonstrants from the decision of the county court upon any of the first three causes of remonstrance, and the issues therein tried by a jury. That the Legislature may authorize a municipality to assess the expense of the improvement of streets upon the property benefited thereby, and that such assessment is not a taking of property without due process of law, if the property owner has had an opportunity to be heard before the assessment is made, has been frequently held by this court. Nor is such an act a violation of the constitutional provision that taxation shall be equal and uniform. *King v. City of Portland*, 2 Or. 146; *Masters v. City of Portland*, 24 Or. 161, 33 Pac. 540; *Wilson v. City of Salem*, 24 Or. 504, 34 Pac. 9, 691; *Elliott, Roads & Streets* (2d Ed.) § 543; *Cooley, Taxation* (2d Ed.) pp. 634-636. This principle is recognized in many other Oregon cases; but, as applied to rural highways, it is contended that the act violates the provision of subdivision 10 of section 23 of article 4 of the Constitution, which provides that the Legislature shall not pass special or local laws "for the assessment and collection of taxes for state, county, township, or road purposes." It cannot be seriously contended that this law is local. It is, by its terms, general and applicable throughout the state, and may be invoked for any road, for the improvement of which a majority of the resident landowners of the county, whose lands are within the taxing district, may petition. A local statute is one which applies only to a particular locality or limited part of the state, and the inhabitants of that part. An act relating to a particular road in Tillamook county was held to be void in *Maxwell v. Tillamook County*, 20 Or. 495, 26 Pac. 803, because it was applicable only to the one road and was clearly local. In *Ellis v. Frazier*, 38 Or. 462, 63 Pac. 642, 53 L. R. A. 454, the bicycle tax law was held to be local and special, for the reason that it applied only to a few counties. But a law is not local or special that is applicable throughout the state, even though its operation in any locality is made to depend upon a local contingency, or a particular expediency to be ascertained or determined by a public vote in the locality or by petition, or adjudication of a court or other authority authorized by the act. It is, nevertheless, open to every locality when brought within its terms. This is the holding in *Fouts v. Hood River*, 46 Or. 492, 81 Pac. 370, 1 L. R. A. (N. S.) 483, *Baxter v.*

State (Or.) 88 Pac. 677, *Goodrich v. Winchester & Deerfield Turnpike Co.*, 26 Ind. 119, *Palmer v. Stumph*, 29 Ind. 329, and *Paul v. Gloucester County*, 50 N. J. Law, 585, 15 Atl. 272, 1 L. R. A. 86. The Indiana "act concerning gravel and macadamized roads" (Laws of 1903, p. 255, c. 145) is almost identical with the one under consideration, and the Constitution of that state prohibits local laws for the assessment and collection of taxes for road purposes. There it was held that an earlier law of like import is general in its provisions and open to all the citizens of the state to avail themselves of its benefits. *Goodrich v. Winchester & Deerfield Turnpike Co.*, supra; *Bowlin v. Cochran et al.*, 161 Ind. 486, 69 N. E. 153. Statutes in other states authorizing special assessments upon the property benefited for the expense of the improvement of rural highways or drainage districts are upheld. 25 Am. & Eng. Ency. Law, 1183; *Lewis et al. v. Laylin et al.*, 46 Ohio St. 663, 23 N. E. 288; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508; *Graham, etc., v. Conger, etc.*, 85 Ky. 582, 4 S. W. 327; *Malchus v. District of Highlands*, 4 Bush (Ky.) 547. The operation of this statute is contingent, depending upon the wish of a majority of the landowners in the vicinity of any proposed improvement and upon the existence of certain conditions, but it is applicable in every portion of the state alike when the contingencies are met.

It is also contended that the act authorizes the assessment of a portion of the expense of the improvement against plaintiff's property without reference to benefits. It is certain that the expense of such improvements can be assessed only against lands benefited, and it must be apportioned according to such benefits. *O. & C. R. Co. v. Portland*, 25 Or. 229, 35 Pac. 452, 22 L. R. A. 713; *King v. Portland*, 38 Or. 402, 63 Pac. 2, 55 L. R. A. 812; *Elliott, Roads & Streets* (2d Ed.) 542. But this statute is not subject to the criticism that it authorizes such assessment in excess of benefits. The act relates to improvements, the expenses for which are to be assessed "upon real estate adjacent thereto and benefited thereby." This is expressed in section 2 of the act, as well as in the title. In section 2 the viewers are directed to "make an estimate of the value of the benefits to all lands within two miles of such improvements, and if the said viewers and appraisers find that such improvement will be of public utility and convenience, and that the costs or expenses thereof, including damages caused landowners thereby, will be less than the benefit to the lands within two miles on either side and one mile beyond the terminus of such improvement, they shall apportion the estimated costs, expenses, and damages upon all the said lands within two miles on either side, and one mile beyond the terminus, that are benefited, according to the benefits to be derived therefrom." Thus the act clearly contemplates

limiting the assessment to lands benefited and in proportion to such benefits.

It is also objected that the limits of the taxing district are fixed arbitrarily by the Legislature, and do not include all lands benefited. It is within the power of the Legislature to fix the sum to be raised, and also to prescribe the benefited district, or they may delegate one or both of these questions to a local board or body. *King v. Portland*, supra; *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; *Id.*, 100 N. Y. 585, 3 N. E. 682; *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047. The Legislature has prescribed the taxing district and delegated to a local board of viewers power to determine the extent of the benefits and the manner of apportioning the expense, and it has a wide discretion in describing the taxing district, and its action will not be disturbed, except where it clearly appears that it has exceeded its constitutional authority. Its taxing power is unlimited, except as restricted by the federal Constitution, and it may authorize local improvements to be made at the expense of the lands benefited. As said in *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682, "The Legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so, and may settle both questions for itself; and when it does so its action is necessarily conclusive and beyond review." This question is exhaustively treated by Mr. Justice Wolverton, in *King v. Portland*, 38 Or. 402, 63 Pac. 2, 55 L. R. A. 812, and he concludes: "The authority of the Legislature in these respects is almost without limit. Yet that there is a limit beyond which it cannot go all will concede. When, however, it has exercised its legislative discretion, and prescribed a district and adopted a method, it ought to be plain and indisputable that it has exceeded its constitutional authority before the court should undertake to set at naught its declared will." There is nothing suggested in the case before us that indicates that the Legislature has exceeded its authority in fixing the taxing district.

It is also urged that lands assessed for one improvement are unequally burdened in case of a further improvement overlapping the first taxing district. By section 7 of the act (page 414) it is provided: "And in all cases where any road has been constructed under this act, and another road shall be thereafter, under the provisions of this act, constructed within four miles thereof, the amount to be assessed against all lands included within the overlapping two-mile lines of each road shall be equitably determined by the county court, upon the report of said viewers and appraisers, to the end that such lands shall pay only a just and equitable proportion of the cost of constructing each road com-

pared with other lands not within such overlap." The term "road," as used here, undoubtedly means the portion improved, and the improvement of any other portion of the same road would be another road within the meaning of this act, and therefore lands within such overlap are protected from unequal burdens. If the portion of the viewers' report that is in the transcript correctly states the method of computing the assessment against the lands benefited, it would seem to be erroneous in so computing a certain proportion of the total expense against each class regardless of the acreage in such class; but it does not appear how plaintiff's lands are classified, or that they are injuriously affected, and such errors are not for correction in this court. Ample opportunity is afforded a landowner within the taxing district to question the action of the viewers as to whether his land is benefited at all, or as to how much it may be benefited, and as to whether the assessment on his land is proportionate to its benefits, and he has a right to appeal to the circuit court from the action of the county court as to these questions, and that remedy is exclusive, unless it is obvious from the circumstances of the case that the plan or method adopted in estimating the benefits and assessing the expenses amounts to a fraud upon him. Equity will not review the action of the Legislature in fixing the taxing district, or of the viewers in estimating the value of benefits to lands within the taxing district or in apportioning the expense of the improvement, except where it is plain that the constitutional authority of the Legislature has been exceeded. The one is the act of the Legislature itself, and the other the exercise of a delegated power, and hence the power and discretion of the viewers are coextensive with that of the Legislature while acting within the terms of the act, and, as said by Mr. Justice Moore in *O. & C. R. Co. v. Portland*, 25 Or. 229, 35 Pac. 452, 22 L. R. A. 713, "these are questions of policy with which the Legislature and its creature, the municipal corporation, deals, and the courts have no right to interfere, except in case of fraud or oppression, or some wrong constituting a plain abuse of such discretion."

Therefore the court erred in overruling the demurrer to the complaint, and the decree will be reversed, and decree rendered here dismissing the suit.

CUSITER v. CITY OF SILVERTON et al.
(Supreme Court of Oregon. Jan. 16, 1908.)

1. CERTIORARI—RETURN—CONCLUSIVENESS.

The return on a writ of review to review judicial proceedings is conclusive as to the facts.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, §§ 143-144.]

2. SAME.

The return on a writ of review to review proceedings of the recorder's court of a city on

a trial for the violation of a municipal ordinance showed that accused demanded a jury, and that, the court having no list of jurors in accordance with B. & C. Comp. § 2251 et seq., ordered an officer to select jurors, and that accused objected to the manner of selecting a jury, and filed a motion that a jury be selected from the jury list. *Held* to show that accused, at the time of his demand for a jury, demanded, as expressly authorized by section 2257, a jury from the jury list, and the court could not direct an officer to select a jury.

8. JURY—SELECTION—JUSTICES' COURTS.

Where a party, as authorized by B. & C. Comp. § 2257, demands a jury selected from the jury list, provided for by section 2251 et seq., the court cannot, over the objections of such party, direct an officer to summon a jury as authorized by sections 2221, 2222, though the court has no jury list.

4. MUNICIPAL CORPORATIONS—VIOLATION OF ORDINANCE—APPEAL.

Where the error of the court on a prosecution for the violation of a municipal ordinance resulted from exceeding its jurisdiction in directing an officer to summon a jury, notwithstanding the demand of accused for a jury from the jury list, the error amounted to a mistrial only, and the cause, after conviction, must be remanded for new trial.

Appeal from Circuit Court, Marion County; William Galloway, Judge.

Writ of review by George A. Cusiter against the city of Silverton and another to review proceedings of the city recorder's court. From a judgment for petitioner, defendants appeal. Modified and remanded.

This action was brought to review the proceedings of the recorder's court of the city of Silverton, wherein the petitioner was charged with the violation of an ordinance to prevent the obstruction of streets and to prohibit throwing rubbish into streets, and imposing a fine for a violation thereof. It is averred in the petition that the complaint was made and filed on November 21, 1906; that on that date plaintiff was arrested and entered a plea of not guilty, whereupon the trial was set for December 10, 1906; that it was then continued until December 15, 1906, at the hour of 10 o'clock a. m., at which time plaintiff demanded a trial by jury and deposited the required jury fee, and also demanded that a jury be selected from the regular jury list, and be drawn from the jury box of said court; that the court denied plaintiff's demand for a selected jury, but issued an order to the city marshal to summon six citizens of the city of Silverton as jurors in said cause, which he did. Whereupon plaintiff filed written objections to the trial of the cause by the jury so drawn, and objected to each and every member of the jury for reasons particularly specified and set forth. Notwithstanding his objections, plaintiff was tried before the jury thus drawn, convicted of the charge, and sentenced by the court to pay a fine of \$10 and the costs of the action. Upon the return to the writ being filed, defendants herein filed a motion to dismiss the writ and affirm the proceedings of the trial court, but also asked that, in the event the court should be of the opinion that the recorder's court exceeded its jurisdiction in refusing plaintiff's

request for a selected jury, the cause be remanded to the lower court, with directions to allow plaintiff's request. Upon the hearing the circuit court denied defendant's motion, sustained the petition, and set aside the judgment, but made no order remanding the cause for further proceedings. From this judgment, defendants appeal.

Geo. G. Bingham, for appellants. L. H. McMahon, for respondent.

SLATER, C. (after stating the facts as above). The invalidity of the judgment is based upon the charge that plaintiff was tried over his objection before a jury summoned by the officer of the court, instead of being drawn and selected from the regular jury list, as demanded by him. The charter of the city of Silverton provides, in substance, that the city recorder shall be ex officio police judge, and the judicial officer of the corporation, and shall hold court, which shall be known as "police court"; that he shall have jurisdiction of all crimes defined by ordinance, and the jurisdiction and authority of a justice of the peace, and he shall be subject to the general laws prescribing the duties of justices of the peace; that in all criminal cases before him, including all violation of city ordinances, he shall be governed by the general laws of the state governing justices of the peace in similar cases, but in the proceedings for violation of city ordinances the trial shall be without a jury, unless the defendant, on demanding a jury, shall deposit a sum sufficient to pay the per diem for the jury for one day. The general laws governing trials and proceedings in criminal actions in justices' courts provide that upon a plea other than a plea of guilty, if the defendant does not then demand a trial by jury, the justice must proceed to try the issue (section 2270, B. & C. Comp.), and, if a trial by jury be demanded, a jury must be selected and summoned as in a civil action in a justice's court (section 2271, B. & C. Comp.). In chapter 5, B. & C. Comp., relating to actions and proceedings in justices' courts in civil actions, it is found that each justice is required to have a jury list to be made by him on the first Monday in each year in the particular manner therein stated, from which juries are to be drawn for one year and until another list is selected; but, if for any reason the making of the jury list is omitted and neglected at the time designated, the same may be done on the first Monday of any month following to serve until the close of the year and until another is made. The justice is also required to keep a jury box, in which is to be placed separate ballots containing the name of each person on the jury list. When a right to a selected jury is established, it is to be drawn from this jury box; but section 2257, B. & C. Comp., provides that "when a jury is demanded in a justice's court instead of being selected by the officer as provided in chapter 6 of this

act, such jury must be drawn and selected from the jury list of the precinct if either party require it." That section is a part of the original justice's act of 1884, and chapter 6 thereof, referred to in this section, provides another and different mode of obtaining a jury by it being selected by an officer on the order of the court, as was done in the case now under review. That chapter, however, was repealed by act of February 17, 1899 (Laws 1899, p. 119); but those provisions relating to the summoning of a jury by an officer were re-enacted by the repealing act and now appear as sections 2221-2222, in chapter 3 of the Justice's Code (B. & C. Comp. §§ 2221-2222).

It is contended by appellants that, to entitle a party to a selected jury, he must not only demand a jury, but, by the provisions of section 2257, *supra*, must also at the same time demand that it be drawn and selected from the jury list of the precinct; and the respondent seems to concede that to be the law. Appellants also contend that the demand of defendant, in the action for a selected jury was not in time, because it is claimed it was not made by him when he demanded a jury, but after the jury chosen and summoned by the officer had appeared. This claim is resisted by the plaintiff in the writ, who asserts that his demand for a selected jury was made at the time he demanded the jury. This issue must be determined by the return on the writ, which is conclusive. It contains a transcript of the orders of the court and minutes of the trial, which substantially confirm the averments of the petition. It appears therefrom that on December 15, 1906, at the hour of 7 p. m., the time set for the trial, defendant demanded a jury trial and deposited with the court the required amount as jury fee. Immediately succeeding the entry of this fact is the following: "The court had no selected list of jurors in a jury box in accordance with sections 2251, 2252, 2253, 2254, 2255, or 2256 of said Code, or otherwise, or at all. Whereupon the court issued an order to the chief of police of the city of Silverton, directing him to select six men, or a greater number, if any of those already selected should be rejected." Then follows a full copy of the order of the court, by the terms of which the jurors were to appear "at the hour of 7 p. m. of this day," which order was dated December 15, 1906. After this entry there is recorded the return of the officer, which is without date. Then follows this entry: "The defendant objected and protested against the above manner of selecting a jury, and filed his motion that a jury be drawn from a selected list of jurors and from a jury box, as required by sections 2251, 2252, 2253, 2254, 2255, or 2256 of the statutes of the state of Oregon." After overruling of defendant's motion, it is stated in the record that defendant filed his written objections, which are of the same import and are set out in full.

The record shows conclusively both a demand for a jury and for one selected from a jury list; but, because the entry of the order to the officer and his return thereon intervene between the record of the defendant's demand for a jury and for a selected jury, the conclusion is sought to be drawn that such demands were made at different times, and the latter one after the jury summoned by the officer had appeared. But the order in which these entries have been made is not conclusive that the facts evidenced by them occurred in that order, unless it were so stated in the record. A justice's record is not made in the precise and formal way and with such accuracy as that of a court of record. There is nothing affirmatively stated in this record to indicate at what precise relative time of the proceedings of that session of the court the above objections and protests of defendant and his demand for a selected jury were in fact made with reference to the other noted or recorded events of that evening. But the subject-matter of the entry would indicate that his demand for a selected jury must have preceded in time the order of the court to its officer to bring in a jury, and was coincident with his demand for a jury. If this is not the fact, why is it that the court thought it necessary to state in the record, as it did, that the reason for directing the officer to bring in a jury was that the court had no selected list of jurors in a jury box in accordance with certain sections of the Code? Is the court not there arguing against the right of a selected jury? The sections of the Code there enumerated, being the same sections enumerated by defendant in his demand for a selected jury and recorded later on, is also of some significance. The reason for this entry and its contents can be explained only upon the theory that a previous demand had been made by the defendant for a selected jury, as well as for a jury, but for want of a proper list that part of defendant's demand could not, in the opinion of the court, be allowed, whereupon, it is recorded, he issued the order to the officer. The fact that the trial court had no precinct jury list from which a jury may be drawn is not a valid reason for denying a proper demand by a party to the action for a selected jury. The statute gives that right to a defendant when he makes a proper demand, and the neglect of the court to have a precinct jury list or the convenience of the court in summoning a jury by its officer cannot serve to take away that right. It seems to have been conceded by the court that the defendant in the action was at least entitled to trial by a jury; and, if he were entitled to a jury at all and made the proper demand for a selected jury, which we think the record shows, he was entitled to have it selected as the law provided, and he could not be legally compelled, over his objections, to go to trial before a jury selected by the officer. The trial court, therefore, exceeded its jurisdiction in

that respect, and the circuit court committed no error in setting the judgment aside.

The error of the trial court, however, was to the extent only of exceeding its jurisdiction in a particular matter of its procedure in the course of the trial of a cause of which it had jurisdiction as to the subject-matter as well as of the person of the defendant therein, and amounts to a mistrial. For this reason the judgment appealed from should be modified, and the cause remanded to the lower court, with instructions to remand to the trial court, with directions to set aside the judgment and take such other and further proceedings therein as may be proper. The petitioner should recover costs in this court.

BROWN v. CITY OF SILVERTON et al.

(Supreme Court of Oregon. Dec. 31, 1907.)

Appeal from Circuit Court, Marion County; William Galloway, Judge.

Action by J. M. Brown against the city of Silverton and another to review the proceedings of the recorder's court. From a judgment for petitioner, defendants appeal. Modified and remanded.

Geo. G. Bingham, for appellants. L. H. McMahon, for respondent.

SLATER, C. The material facts being identical with the case of *Cusiter v. City of Silverton*, 93 Pac. 234, that case is controlling. Therefore the judgment appealed from should be modified, and the cause remanded to the lower court, with instructions to remand to the trial court, with directions to set aside the judgment and take such further proceedings therein as may be proper not inconsistent with this opinion. The petitioner should recover costs in this court.

STATE v. KLINE et al.

(Supreme Court of Oregon. Dec. 17, 1907.)

1. CRIMINAL LAW—CHANGE OF VENUE—AFFIDAVITS—NECESSITY—STATUTORY PROVISIONS.

Under B. & C. Comp. § 1250, providing that in an action for a felony, where the cause is at issue upon a question of fact, the court may order the place of trial to be changed, when it appears by affidavit, to the satisfaction of the court, that a fair and impartial trial cannot be had in the county, etc., a motion for a change of venue in an action for a felony, when a transfer of the cause is objected to, raises an issue which must be determined by the court from an inspection of affidavits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 251-253.]

2. SAME—APPEAL—RECORD—BILL OF EXCEPTIONS—CONTENTS—AFFIDAVITS.

Affidavits for a change of venue must be incorporated in a bill of exceptions and transmitted to the Supreme Court in order to have the action of the trial court reviewed on appeal, if such action is assigned as error, and where such affidavits are merely certified by the clerk, it does not make them a part of the bill of ex-

ceptions, and alleged error in refusing to grant a change cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2925.]

3. SAME—SEPARATE TRIAL OF DEFENDANTS—MISDEMEANOR—STATUTORY PROVISIONS—REVIEW OF COURT'S DISCRETION.

Under B. & C. Comp. § 1396, providing that when two or more defendants are jointly indicted for a felony, any defendant requiring it must be tried separately, but that in other cases defendants jointly indicted may be tried separately or jointly, in the discretion of the court, refusal on appeal from justice's court to grant separate trials to persons charged with a misdemeanor, will not be held error, when the bill of exceptions does not show that the court abused its discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3050.]

4. STATUTES—VETO POWER—ABSENCE OF CONSTITUTIONAL PROVISIONS.

In a democratic form of government, the authority of an executive, to veto an enactment of the legislative department, is not an inherent power, and can be exercised only when sanctioned by a constitutional provision.

5. SAME—ENACTMENT—APPROVAL—CONSTITUTIONAL PROVISIONS.

The amendment of Const. art. 4, § 1 (B. & C. Comp. p. 72), reserves to the people the initiative, the right to propose laws and amendments to the Constitution, and to enact or reject them at the polls, and the referendum, the right to approve or reject at the polls any act of the legislative assembly, and provides that the referendum may be ordered by petition or by the legislative assembly; also that the veto power of the Governor shall not extend to measures referred to the people. Const. art. 5, § 15, provides that every bill which shall have passed the legislative assembly shall be presented to the Governor for his approval before it becomes a law. *Held*, that a law proposed by petition and enacted by the people under the initiative need not be approved by the Governor.

6. CRIMINAL LAW—EVIDENCE—"PRIMA FACIE EVIDENCE."

"Prima facie evidence" is that degree of proof which, unexplained or uncontradicted, is by itself sufficient to establish the truth of a legal principle asserted by a party.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5549, 5550.]

7. INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—ADMISSIBILITY OF EVIDENCE.

Under the local option law (Laws 1905, p. 47, § 10), providing that the order of the county court declaring the result of a local option election shall be held to be prima facie evidence that all the provisions of the law have been complied with in giving notice, etc., the order of the county court is admissible in a criminal prosecution for violating that law, without introducing the petition, notices, etc., but the burden is on the accused to overcome such prima facie proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 276.]

8. CONSTITUTIONAL LAW—IMPAIRMENT OF VESTED RIGHTS—BURDEN OF PROOF—STATUTORY CRIMES.

The rule which imposes upon the defendant the burden of proof in a prosecution for a statutory crime does not violate any vested right which he possesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 261.]

9. CRIMINAL LAW—APPEAL—RECORD—BILL OF EXCEPTIONS—MATTERS NOT INCLUDED.

Documentary evidence which is not made a part of the bill of exceptions cannot be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2936.]

10. SAME—REVIEW—NECESSITY FOR PRESENTATION OF QUESTIONS IN TRIAL COURT.

The only questions brought up for review on appeal in a law action are such as have been properly submitted to and considered by the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2619.]

11. SAME—PRESUMPTIONS—NOTICE TO PRODUCE ORIGINAL DOCUMENT.

B. & C. Comp. § 703, subd. 1. provides that secondary evidence of the contents of a writing may be given when the original is in the possession of the party against whom it is offered, and he withholds it after receiving reasonable notice to produce it, as required by section 771. A bill of exceptions on appeal in a prosecution for violating the local option law showed that an internal revenue license was issued to defendants, and was in their possession, but it was not made to appear that any notice to produce it had been given to them. The only objection to parol proof of the contents of the license was that it was incompetent, immaterial, irrelevant, and not the best evidence. *Held* that, as want of notice was not suggested, it must be presumed in favor of the judgment rendered that testimony as to the demand to produce the license was duly given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3029.]

12. SAME—ADMISSION OF MANUSCRIPT—ABSENCE FROM RECORD.

Where a manuscript sent up with a package of papers on appeal is not made a part of the bill of exceptions nor properly identified, it must be presumed that no error was committed in admitting it in evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2936.]

13. SAME—MATTERS NOT OF RECORD.

Where the bill of exceptions on an appeal from a conviction for violation of the local option law referred to a writing in the following terms: "Defendants offered in evidence articles of incorporation of the Corvallis Social & Athletic Club (marked 'Defendants' Exhibit D'), as follows: (Clerk print)"—and that was the only reference to the document, and the direction to print was not obeyed, though the articles of incorporation may have been included in a package of papers certified to by the clerk, it was not a part of the bill of exceptions, and when not identified by the trial judge it cannot be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2936.]

14. INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—SALE—INCORPORATED CLUB.

Under the local option law (Laws 1905, p. 48, § 15), forbidding under penalty any person in prohibition territory to sell, exchange, or give away, with intent to evade the provisions of the law, any intoxicating liquors whatsoever where intoxicating liquors are purchased by an incorporated society, and sold or distributed to the members at approximate cost, the act constituted a sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 186.]

15. INFORMATION—WAIVER OF DEFECTS—DUPPLICITY.

Where a complaint charged defendants with selling "and" giving away intoxicating liquors with intent to evade the law, a failure to demur on the ground of duplicity in the specification of the charge was a waiver of any defect on that account.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 635.]

16. INTOXICATING LIQUORS—OFFENSES—SALES—STATUTORY PROVISIONS—EXCEPTIONS—SOCIAL CLUBS.

Local Option Law, § 2 (Laws 1905, p. 42), provides that the inhibition of the sale of intoxicating liquors, when effectuated, shall not prohibit the sale of certain liquors for certain excepted purposes, but no reference is made therein to clubs. *Held* that, when the prohibition law became operative in a certain county, it *ex proprio vigore* inhibited all social clubs within the county from selling or giving to members thereof intoxicating liquors with a purpose of evading the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 186.]

17. CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—LOCAL OPTION LAW.

The local option law (Laws 1905, p. 41) is not unconstitutional as a delegation of legislative power, since the power to enact a law is not delegated, but authority was merely conferred upon the people of the counties to determine by a majority vote whether a law already passed for the entire state shall be applicable to such county, since it is the majority vote of the electors, and not the order of the county court, that effects the result, and the sale is forbidden by operation of the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 116; vol. 29, Intoxicating Liquors, § 16.]

18. INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—INSTRUCTIONS.

In a prosecution for violation of the local option law, where B., a witness, testified that at about the time stated in the complaint he went into a building formerly operated as a saloon, and there talked with one of the defendants; that at the time he obtained a half pint of brandy, for which he offered to pay, but that the accused told him that an assessment would subsequently be made for the expense of the Corvallis Social & Athletic Club; that he thereafter paid an assessment of forty cents; that he had not in the meantime procured any other goods at that place; that the sum paid was more than the ordinary price of such liquor, and that he thought the assessment imposed upon him included his right to visit the clubrooms—it was not error to instruct that if the club was the owner of, or kept intoxicating liquor, which was sold or given to B., for the purpose of evading the local option law, and that defendants or either of them aided or authorized such sale or gift with such intent, the averments in the complaint were sufficiently established, for the use of the expression "sale or gift" was proper to dispel any doubt as to the nature of the disposal of the liquor under the circumstances mentioned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 343.]

19. SAME—EVIDENCE—INTERNAL REVENUE LICENSE—STATUTORY PROVISIONS—"PERSON."

Local Option Law, § 18 (Laws 1905, p. 50), provides that the issuing of a license or internal revenue special tax stamp by the federal government to any person for the sale of intoxicating liquors shall be prima facie evidence that such person is selling, exchanging, or giving away intoxicating liquors. *Held* that the term "person," as used, includes the word "corporation"; hence it was not error to instruct that if an internal revenue license had been issued to a certain club, authorizing the sale of intoxicating liquor, such license was prima facie evidence that the club was engaged in selling, exchanging, or giving away intoxicating liquors, but that such finding alone would not be applicable to the defendants or either of them.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

Appeal from Circuit Court, Benton County: L. T. Harris, Judge.

Charles M. Kline, jointly accused with another, was convicted of violating the local option law, and appeals. Affirmed.

J. R. Wyatt, for appellant. E. R. Bryson, for the State.

MOORE, J. The defendants, Charles M. Kline and Merwin McMaines, were jointly convicted in a justice's court of Benton county, of the crime of selling and giving away intoxicating liquor with a purpose of evading the provisions of the local option law of Oregon, alleged to have been committed in that county, August 18, 1905, by then and there unlawfully selling and giving away, with such intent, intoxicating liquor to one Thomas Bell, at which time the sale of that kind of drink had been prohibited in the entire municipality, stating when and how the interdiction was effected, and further averring that the law was then and there in full force and effect. The defendants appealed from the sentences imposed upon them to the circuit court for that county, where the cause was tried anew, and McMaines acquitted; but Kline was convicted, and, from the judgment which followed, he appeals to this court.

It is contended by his counsel that an error was committed in refusing to grant a change of venue. To secure a transfer of the cause to another county for trial, the defendant interposed a motion which states that it was based on affidavits filed therewith. A number of affidavits, newspaper clippings, and other papers were fastened together and sent up to this court, but they are not made a part of the bill of exceptions or identified in any manner by the trial judge. A motion to secure a change of venue in an action for a felony, when a transfer of the cause is objected to, raises an issue which must be determined by the court from an inspection of affidavits. B. & C. Comp. § 1250. These written declarations under oath constitute the proof, which, like all other evidence, must be incorporated in a bill of exceptions and transmitted to this court, in order that the action of the trial court may be reviewed on appeal, if assigned as error. The affidavits referred to, though certified by the clerk, do not make them a part of the bill of exceptions, and hence the question suggested, even if the crime charged were a felony, is not before us for consideration. *State v. Clements*, 15 Or. 237, 14 Pac. 410; *Roberts v. Parrish*, 17 Or. 583, 22 Pac. 136; *Craft v. Dalles City*, 21 Or. 53, 27 Pac. 163; *Fisher v. Kelly*, 26 Or. 249, 38 Pac. 67; *Farrell v. Oregon Gold Co.*, 31 Or. 463, 49 Pac. 876; *Nosler v. Coos Bay Navigation Co.*, 40 Or. 305, 63 Pac. 1050, 64 Pac. 855; *Multnomah County v. Willamette Towing Co. (Or.)* 89 Pac. 389. It is also maintained that the court erred in denying the defend-

ants' motion to grant separate trials. When two or more persons are jointly charged with the commission of a felony, any defendant requiring it must be tried separately, but in all other cases the granting of a separate trial is a matter of discretion. B. & C. Comp. § 1395. The crime charged in the case at bar is only a misdemeanor, and as the bill of exceptions does not show that the discretion reposed in the trial court was abused, its action in refusing to grant separate trials was not erroneous.

It is insisted that the local option liquor law, the provisions of which Kline is charged with having violated, was initiated by a petition and ratified by a vote of the electors of Oregon, but the enactment was not submitted to the Governor for his approval or rejection, and for that reason it never became operative. The amendment of section 1 of article 4 of the Constitution of Oregon (B. & C. Comp. p. 72) contains the following clause: "The veto power of the Governor shall not extend to measures referred to the people." As this amendment provides that the referendum may be ordered either by petition of the electors or by the legislative assembly, it might seem reasonably to be inferred from the limitation of the Governor's authority that he could annul any measure initiated by petition. In a democratic form of government, the authority of an executive to set aside an enactment of the legislative department is not an inherent power, and can be exercised only when sanctioned by a constitutional provision. The fundamental laws of Delaware, North Carolina, Ohio, and Rhode Island do not confer the veto power on the Governors of those states. In this state, prior to the amendment referred to of the Constitution, every bill which passed the legislative assembly was required to be presented to the Governor before it became a law. Const. Or. art. 5, § 15. This provision of the organic act was impliedly changed by the amendment under consideration, so as practically to insert in the original the following parenthetic clause, to wit: "Every bill which shall have passed the legislative assembly (except such as may, by order of that body, be referred to the people for their sanction or rejection) shall, before it becomes a law, be presented to the Governor," etc. The amendment of section 1 of article 4 of our Constitution does not direct that a proposed law, when enacted by the people, pursuant to an exercise of the initiative power reserved, shall, before it becomes operative, be presented to the Governor; and hence the chief executive of this state is powerless either to approve or repudiate a measure passed in the manner indicated. The local option law of Oregon was proposed by initiative petitions, and approved by a majority vote of the electors, June 6, 1904, and took effect 18 days thereafter, conformable to the Governor's proclamation and without his approval.

It is urged that an error was committed in admitting the evidence, over objection and exception, a certified copy of the order of the county court of Benton county, declaring the result of the election, held under the local option law, and absolutely prohibiting the sale of intoxicating liquors within that municipality, without first having introduced in evidence, as a foundation for such prescription, the petition initiating the right to call the election, the notices issued in pursuance of such call, and the proof of posting the notices. A clause of the local option law relating to the action of a county court in declaring the result of an election, held to determine whether or not the sale of intoxicating liquor should be prohibited, is as follows: "The order thus made shall be held to be prima facie evidence that all the provisions of the law have been complied with in giving notice of and holding said election, and in counting and returning the votes and declaring the result thereof." Laws Or. 1905, p. 47, § 10. Prima facie evidence is that degree of proof which, unexplained or uncontradicted, is alone sufficient to establish the truth of a legal principle asserted by a party. 1 Jones, Ev. § 7. The provision of the law quoted casts upon a party to a criminal action, who is charged with violating the terms of the local option enactment, the burden of overthrowing such prima facie proof, by introducing in evidence the writings which constitute the alleged irregularity of the proceedings, upon which the order of prohibition is primarily based, without which statutory declaration of the character of proof it would have been incumbent upon the state to establish the validity of the several initiatory steps necessary to the making of an efficacious order declaring the result of the election, and prohibiting the sale of intoxicating liquors in the territory specified. *Strode v. Washer*, 17 Or. 50, 16 Pac. 926; *Harris v. Harsch*, 29 Or. 562, 46 Pac. 141; *Brentano v. Brentano*, 41 Or. 15, 67 Pac. 922. The rule which imposes upon a defendant the burden of proof in a prosecution for a statutory crime does not violate any vested right which he possesses. 12 Cyc. 380. The order of the county court was admissible in evidence without introducing the petition, notices, or proof of posting such notices. *State v. Carmody* (Or.) 91 Pac. 446.

It is argued, however, that the prima facie proof mentioned was overcome by introducing in evidence the sheriff's certificate of the posting of the election notices. In the package of papers referred to upon the question of a change of venue, appears a memorandum, which has noted in the margin in lead pencil, "Defendant's Exhibit C." This exhibit purports to be the sheriff's return upon the notice mentioned, but it is not made a part of the bill of exceptions or certified to in any manner by the trial judge, and for that reason it will not be considered.

It is contended that the court erred in ad-

mitting, over objection and exception, testimony tending to prove the contents of an internal revenue license, without calling for, or producing, the original or attempting to account for its absence. Secondary evidence of the contents of a writing may be given when the original is in the possession of the party against whom it is offered, and he withholds it (B. & C. Comp. § 703, subd. 1) after having received reasonable notice to produce it. Ib. § 771. The bill of exceptions shows that the license mentioned was issued by the collector of internal revenue, and having been displayed in the defendants' place of business, it was in their possession, but it does not appear that any notice to produce it had been given to them. The contents of the revenue stamp was attempted to be given by three witnesses, whose testimony was challenged by defendants' counsel on the ground that it was incompetent, immaterial, and irrelevant, and not the best evidence. It will thus be seen that the objections interposed to such testimony do not negative the implication that the defendants had received reasonable notice to produce the license. The only questions brought up for review in a law action are such as have been properly submitted to, and considered by, the trial court; and, as the want of notice was not suggested, it must be presumed, in favor of the judgment rendered, that testimony in relation to the demand to produce the license was duly given.

R. Turney, as a witness for the state, testified that in August, 1905, as manager of the *Corvallis Gazette*, he printed in that newspaper office a letter head, the manuscript for which, he believed, was prepared by the defendant McMaignes; and, producing the writing, it was received in evidence as "State's Exhibit B," over an objection that it was incompetent, immaterial, and irrelevant; that the witness had not shown himself competent to testify; and that the writing had not been identified as that of McMaignes. This witness, on cross-examination, having testified that he did not remember having ever seen McMaignes write, the testimony in relation to the manuscript was sought to be stricken out, for the reasons hereinbefore suggested, as to the declarations under oath of this witness, but the motion was denied and an exception saved.

In the package of papers adverted to appears what is marked, "State's Exhibit B," but as the manuscript thus indicated is not made a part of the bill of exceptions, or properly identified, it must be presumed that no error was committed in admitting it.

The following excerpt is taken from the bill of exceptions, and contains the entire reference to the writing mentioned, to wit: "Defendants offered in evidence articles of incorporation of the *Corvallis Social & Athletic Club* (marked, 'Defendants' Exhibit D'), as follows: (Clerk print.)" This direction was not obeyed, and the articles of incor-

poration, though probably included in the package of papers mentioned, are not made a part of the bill of exceptions or identified by the trial judge; and, for the reasons hereinbefore given, the charter is not properly before us. Though the manner of conducting the business of the Corvallis Social & Athletic Club is not particularly disclosed by the testimony of any witness, we shall assume, without deciding the question, that the corporation was organized for a bona fide purpose, and not with intent to evade the provisions of the local option law, and that disposition of intoxicating liquors kept by it was made to the members of the organization; and, based on such supposition, we will consider whether a transfer of the possession of alcoholic drink by an agent of a corporation to a member thereof is lawful in territory where the local option law is in effect. Though the bill of exceptions, in the case at bar, is silent as to the manner in which the business of the Corvallis Social & Athletic Club was conducted by the defendant, who, at the time stated in the complaint, was an officer of the corporation, the mode pursued is so nearly uniform to that revealed in *Barden v. Montana Club*, 10 Mont. 330, 25 Pac. 1042, 11 L. R. A. 593, 24 Am. St. Rep. 27, that a description is taken from a note thereto, as follows: "In nearly every state in the Union social clubs exist, some of which are incorporated, and others are not, and which are conducted for the use of the members only, to provide for their rational entertainment and amusement, both intellectual and social. They generally transact no business whatsoever for the purpose of making any profit, directly or indirectly, for themselves or their members, and the income derived from various sources is applied solely to defraying the expenses of the organization or incorporation. Their sources of income generally consist of an entrance or membership fee, collected from each new member, and such monthly dues as shall be assessed by the management or board of directors each month, together with money paid by members for what refreshments, liquors, and cigars they obtain for their personal use, or that of their especially invited friends, at the clubhouse, and such additional assessments, fines, and penalties as may be, from time to time, imposed upon the members. The money thus received is expended in paying the current expenses of the club, and the other enumerated sources of income are seldom sufficient to meet such expenses without the imposition of additional assessments. The spirituous and fermented liquors consumed by the members are bought by the club, and kept therein under charge of a steward or manager, an employé of the club, under the supervision and control of the board of directors. The members of the club, and no other persons, except especially invited guests, can get what liquors they want, by a member calling for them upon the steward

and paying a price fixed by the regulation of the club, either at the time, or at the end of each month, or at such other time as such regulations may require. This price for the liquor is fixed and paid, not for the purpose of making any profit, either directly or indirectly, but merely for the purpose of covering the outlay in the purchase thereof by the corporation or organization. The moneys received are used to replenish the stock of liquors so kept for the use of the members, and the expense attendant upon the keeping and serving thereof at the clubhouse, and other expenses of the club." When intoxicating liquors are purchased by an unincorporated social club, to be used in the manner indicated, it is generally conceded that the members of the organization are the joint owners of the general property in all the alcoholic drinks thus kept; that the officer who, upon a request therefore, dispenses such liquor to members of the club, is their agent, and that the delivery of a quantity of such goods to a member, though for a consideration, whereby a special property is transferred, is not, in the strict sense of the term, a sale, because the element of a bargain is lacking. The people of this state, evidently having knowledge of the manner in which the business of social clubs was usually conducted, and also understanding that the disposal of intoxicating liquor to the members of such organizations might not be construed a sale, apparently intending to prevent such transfers of the special property in alcoholic drinks, as a beverage, adopted section 15 of the local option law, which so far as important herein, is as follows: "When any such election has been held and has resulted in favor of prohibition, and the county court has made the order declaring the result, and the order of prohibition, any person who shall thereafter, within the prescribed bounds of prohibition, sell, exchange, or give away, with a purpose of evading the provisions of this law, any intoxicating liquors whatsoever, or in any way violate the provisions of this law, shall be subject to prosecution," etc.

It would thus seem, from an inspection of the language last quoted, that the section was framed with an intent to prevent the disposal of intoxicating liquors by an unincorporated social club to its members within prohibited territory, even if it were determined that the transfer of the special property in the liquor, by an agent of the organization to a member thereof, constituted only a gift. Where, however, as is assumed in the case at bar, intoxicating liquors are purchased by an incorporated society, to be used, as hereinbefore detailed, it would appear that the corporation is the owner of the liquors, and when they are dispensed to a member, with intent to pass the title in the goods, the act constitutes a sale.

It will be remembered that the complaint charges the defendants with selling and giv-

ing away intoxicating liquor with a purpose of evading the provisions of the local option law. No demurrer having been interposed by the defendants on the ground of duplicity in the specification of the charge, any defect in the pleading on that account was thereby waived. *State v. Lee*, 33 Or. 506, 56 Pac. 415; *State v. Carlson*, 39 Or. 19, 62 Pac. 1116, 1119.

These preliminary matters having been disposed of, a consideration of the principal inquiry on this branch of the case will be resumed. In the note to the case of *Barden v. Montana Club*, 24 Am. St. Rep. 27, immediately following the excerpt hereinbefore quoted, the editors of that valuable series of case-law make the following observation, as deducible from an examination of adjudications applicable to the inquiry, to wit: "The question whether or not the furnishing of intoxicating or fermented liquor by a club to its members in the manner above stated constitutes a sale in violation of laws prohibiting sales, or whether or not it constitutes a sale within the meaning of a law requiring a license before one can engage in retailing such liquor, has been the subject of various and conflicting decisions by a number of the appellate courts of the country. While the cases cannot be reconciled, the current as well as the weight of authority is undoubtedly in favor of the rule that the distribution and consumption of liquors in a club by its members in the manner above stated is a sale, and a violation of laws of the nature stated." Several cases are cited, and quotations therefrom are contained in the note that fully sustain the conclusion thus reached, and we adopt that part of such deduction as relates to the disposal of intoxicating liquor by a club to its members in violation of the provisions of a local option law, without further calling attention to the cases relied upon.

Section 2 of the local option law provides that the inhibition of the sale of intoxicating liquors, when effectuated, shall not prohibit the sale of pure alcohol for scientific and manufacturing purposes, or wines to church officials for sacramental purposes, nor alcoholic stimulants as medicine in case of actual sickness. The expression of these exceptions necessarily leaves no room for the consideration of any other exclusion; and hence, we conclude, that when the prohibition law became operative in Benton county, it, *ex proprio vigore*, inhibited all social clubs within that territory from selling or giving to the members of such organizations intoxicating liquors with a purpose of evading the provisions of the enactment.

Exceptions having been taken to parts of the court's instructions, it is contended that errors were committed in giving them, to wit: The court said to the jury, in effect: (1) That if they should find, beyond a reasonable doubt, that the county court of Benton county made an order, at a specified time, declaring the result of an election, and abso-

lutely prohibiting the sale of intoxicating liquors within that territory, such declaration was *prima facie* evidence that all the provisions of the law, relating to giving notice, holding an election, counting and returning the votes cast, and declaring the result thereof had been complied with; (2) that if they should find that the Corvallis Social & Athletic Club was the owner of or kept intoxicating liquor which was by some person, other than the defendants, sold or given to Thomas Bell, with a purpose of evading the provisions of the local option law, and that the defendants, or either of them aided or authorized such sale or gift, with such intent, then the averments of the complaint were sufficiently established; (3) that if they should find that intoxicating liquor was owned by the Corvallis Social & Athletic Club, that such organization was duly incorporated, that the defendants were its agents, and that Thomas Bell was a member of the club, then a sale or gift by them, as such agents, to him, with intent to evade the provisions of the local option law, would not exonerate them from liability; (4) that if they should find that an internal revenue license had been issued to the Corvallis Social & Athletic Club, authorizing the sale of intoxicating liquor, such permission afforded *prima facie* evidence that the club was, during the time specified in the tax stamp, engaged in selling, exchanging, or giving away intoxicating liquors, but that such finding alone would not be applicable to the defendants or either of them.

Considering these instructions in the order specified, it is argued that the local option law being dependent upon a vote of the people, to determine whether or not it should be operative within a specified territory, contravenes the organic law of the state by delegating legislative power, which fact is evidenced by the order of a county court whereby its mandate, and not the enactment, becomes the rule of prohibition. The power to enact a law was not delegated, but authority was conferred upon the people of Benton county to determine by a majority vote, whether or not a law, which had already passed for the entire state, should be applicable to such county. *Fouts v. Hood River*, 46 Or. 492, 81 Pac. 370, 1 L. R. A. (N. S.) 483.

The local option law (section 10) provides that, if a majority of the votes cast at an election be in favor of inhibition, the county court shall make an order declaring the result of the vote, and absolutely prohibiting the sale of intoxicating liquor within the prescribed limits. It is the majority vote of the electors in favor of prohibition that effectuates such result, and though the county court is required to make an order absolutely prohibiting the sale of intoxicating liquor, such declaration is only tantamount to a proclamation of the consequences which follow a canvass of the votes, and thus the sale is forbidden by operation of law and not by the county court.

The bill of exceptions shows that Thomas Bell, as a witness for the state, testified that, about the time stated in the complaint, he went into a building at Corvallis, formerly used as a saloon, and there talked with the defendant Kline; that at that time he obtained a half pint of brandy which was set out for him, for which he offered to pay, but Kline told him that an assessment would subsequently be made for the expense of the Corvallis Social & Athletic Club; that he thereafter paid an assessment of 40 cents; that he had not in the meantime procured any other goods at that place; that the sum so paid was more than the ordinary price of such liquor; and that he thought the assessment imposed upon him included his right to visit the clubrooms.

The "sale or gift" to which the court referred in the second instruction excepted to was evidently based on the testimony of Bell, in relation to the method pursued whereby he obtained the brandy and paid money, not for the intoxicating liquor, possibly, but on account of an assessment to defray the expenses of the club. To dispel any doubt that might possibly arise in the minds of the jurors as to the nature of the disposal of the alcoholic drink, under the circumstances mentioned, the court spoke of the transfer of the property in the brandy as a "sale or a gift," and, in doing so, committed no error. The disposal of intoxicating liquor by a social organization to a member thereof, as indicated in the third exception to the instruction, has heretofore been discussed under the question of the incorporation of the Corvallis Social & Athletic Club, and needs no further elucidation at this time.

Section 18 of the local option law contains, *inter alia*, the following clause: "The issue of a license or internal revenue special tax stamp by the federal government to any person for the sale of intoxicating liquors shall be prima facie evidence that such person is selling, exchanging, or giving away intoxicating liquors." The term "person," as used in this provision, is undoubtedly broad enough to include the word "corporation"; and, this being so, the fourth instruction, to the giving of which an exception was reserved, correctly stated the law applicable to the facts involved.

Other exceptions are noted, but believing them immaterial, the judgment is affirmed.

STATE v. BARTLETT.

(Supreme Court of Oregon. Jan. 7, 1908.)

CRIMINAL LAW—INSTRUCTIONS—CREDIBILITY OF TESTIMONY OF ACCUSED.

The court instructed that an accused is deemed a competent witness, and that while the jury should give his testimony such weight and credibility as they might consider it entitled to, yet they were to consider in connection therewith that accused was testifying in his own behalf; that they were not bound to consider his

testimony as absolutely true, nor as equal to the testimony of a disinterested witness, but to bear in mind that defendant spoke in his own behalf, and that the jury should consider the great temptation which one so situated was under to speak so as to procure his acquittal. *Held*, that the instruction was erroneous, as seeming to leave an implication that it was incumbent on the jury to consider defendant's testimony as false.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1896.]

Appeal from Circuit Court, Union County; William Smith, Judge.

E. W. Bartlett was convicted of attempting to extort money, and he appeals. Reversed, and new trial ordered.

Samuel White, for appellant. F. S. Ivanhoe, Dist. Atty., and C. H. Flinn, for the State.

MOORE, J. The defendant E. W. Bartlett was jointly convicted with one S. A. Gardinier of the crime of attempting to extort money, alleged in the information to have been committed, by unlawfully threatening to accuse certain persons of the offense of gambling and to prosecute them therefor. Bartlett appeals from the judgment which followed, and his counsel contend, *inter alia*, that the trial court erred in charging the jury. The instruction particularly complained of, and to the giving of which an exception was taken, is as follows: "In this case the defendants went upon the witness stand as witnesses in their own behalf. I instruct you that under the statutes of this state a person accused or charged with the commission of a crime is, at his own request, deemed a competent witness, and while you are to give his testimony such weight and credibility as you consider it entitled to, yet you are to consider the fact in connection therewith that he is the accused person testifying in his own behalf. You are not bound to consider the testimony of the defendants as absolutely true, nor any part of it as absolutely true, nor as equal to the testimony of disinterested witnesses. You are to bear in mind that the defendants speak in their own behalf to discharge themselves of a criminal accusation, and you are to consider the great temptation which one so situated is under, so to speak, as to procure his acquittal." That part of the foregoing charge, commencing with the words, "You are not bound," etc., was evidently patterned after a quotation found in the works of a distinguished author (2 Thompson, Trials, § 2447), in a note to which it is said, "Approved in *Solander v. People*, 2 Colo. 48, 56." In the case to which attention is called in the note, the plaintiff in error, a woman, was indicted for manslaughter, and, at her trial, one Knauss, a witness for the prosecution, detailed certain declarations against interest which were imputed to her. Upon argument the counsel for the people insisted that the sworn state-

ments of Knauss were entitled to credit, from the circumstance that the accused, though examined in her own behalf, had not contradicted his testimony, and that her counsel had not interrogated her in relation thereto, whereupon her attorney requested the court to give the following instruction: "That, in the examination of the prisoner provided for by the statute, which examination extends only to the facts and circumstances of the cause on trial, and does not confer on the prisoner the right to testify to facts or circumstances tending to impeach any of the witnesses in the cause. Therefore, the fact that defendant did not testify to facts or circumstances calculated to impeach any of the witnesses sworn in the case is not to be taken as properly commented upon, or as a circumstance against her." The report of the case states, "but the court refused to so charge, and the prisoner excepted." The jury were charged in relation to the law involved in the issue, and the court gave, *inter alia*, the instruction quoted in the latter part of section 2447, as indicated in 2 Thompson, Trials, but no exception thereto appears to have been reserved. The accused, having been convicted, appealed, and, in affirming the judgment, Mr. Chief Justice Hallett refers to the requests made by the appellants' counsel for certain instructions, relating to the corroboration of the testimony of an accomplice, and says: "The prisoner having elected to testify under the act of 1872 (9 Sess. Assem. p. 95), her testimony became a fair subject of criticism before the jury, and the counsel for the people was at liberty to analyze her testimony, to compare it with the other testimony in the cause, and comment upon the omissions and contradictions, if any, therein. The prisoner was at liberty to contradict Knauss, and to give her own account of the matters related by him, and the fact that she did not do so might well be considered by the jury in determining the credibility of Knauss. *People v. Dyle*, 21 N. Y. 578. The prisoner was not required to testify, and, by the terms of the statute, if she had chosen to remain silent, no inference of guilt could be drawn from her conduct. By taking the witness stand she opened the door to criticism, and cannot now complain that an effort was made to measure her testimony by the ordinary rules which govern human conduct." The foregoing observation, relating to the declarations upon oath of the accused as a witness in her own behalf, constitutes the only reference made by the court to any instruction requested by her counsel or to any charge given to the jury as to her testimony. How then can it be said, as indicated in the note adverted to, that the language quoted in the text by the noted author, and as given by the court in the case cited, was approved, when the instruction does not appear even to have been challenged by counsel for the

accused or commented upon in any manner by the justice who wrote the opinion? The only references to the case of *Solander v. People*, *supra*, that we have been able to find in the Colorado reports relate to other questions. See, upon this subject, *Jones v. People*, 2 Colo. 355; *Union Gold Mining Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 576; *Jones v. People*, 6 Colo. 456, 45 Am. Rep. 526; *Minich v. People*, 8 Colo. 449, 9 Pac. 4; *Wisdom v. People*, 11 Colo. 174, 17 Pac. 519; *Babcock v. People*, 18 Colo. 518, 22 Pac. 817; *Thompson v. People*, 26 Colo. 505, 59 Pac. 51; *Johnson v. People*, 33 Colo. 237, 80 Pac. 133, 108 Am. St. Rep. 85.

In *People v. Cronin*, 34 Cal. 191, an instruction of similar import to that contained in the latter part of the charge complained of in the case at bar was approved. In *People v. Murray*, 86 Cal. 31, 24 Pac. 802, Mr. Justice McFarland, referring to the rule announced in the preceding case, says: "That instruction has been approved in subsequent cases, and it is now too late to question its correctness; but if courts and prosecuting attorneys think it their duty to have an instruction on that subject in every case, they should be careful not to go further in that direction than courts have already gone. An instruction giving the general rule can do no harm, and is not of much importance, for every intelligent juror knows, without any instruction on the subject, that a defendant, whether innocent or guilty, is deeply interested in being acquitted. But when such an instruction is reiterated, and put into exceedingly strong language, so as to give it peculiar emphasis, it is too apt to lead the jury to believe that the court thinks the defendant in the particular case on trial to be unworthy of belief."

In *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520, the trial court, in referring to the declarations under oath made by the defendant as a witness in his own behalf, charged the jury as follows: "In weighing his testimony you are to consider what he has at stake. You are to consider the temptations that may be brought to bear upon a man in his situation to tell a falsehood for the purpose of inducing you to acquit him, or to disagree." The defendant, having been convicted, appealed, and in reversing the judgment, the court say: "If the question were entirely an open one we would feel constrained to hold, upon principle, that any instruction at all as to the credibility of any witness, or the weight to be given to his testimony, is violative of section 19 of article 6 of the Constitution, which provides that 'judges shall not charge jurors with respect to matters of fact,' and section 1887 of the Code of Civil Procedure, which, referring to a witness, provides that 'the jury are the exclusive judges of his credibility.'" It is further intimated that the instruction last above quoted was more restrictive than the charge approved in *People v. Cronin*, 34 Cal.

191. It will thus be seen that the Supreme Court of California practically condemned the instruction given in *People v. Cronin*, supra, but felt impelled to follow the rule thus announced, because of its repeated approvals for nearly a generation.

In *Johnson v. United States*, 157 U. S. 320, 15 Sup. Ct. 614, 39 L. Ed. 71, cited by counsel for the state in the case at bar, the jury were charged as follows: "The defendant goes upon the stand before you, and he makes his statement—tells his story. Above all things in a case of this kind you are to see whether that statement is corroborated substantially and reliably by the proven facts; if so, it is strengthened to the extent of its corroboration. If it is not strengthened in that way, you are to weigh it by its own inherent truthfulness—its own inherent proving power that may belong to it." This instruction was approved by the Supreme Court of the United States, but as the cause was originally tried in a federal court, where the rules of the common law prevail, thereby permitting the judge to comment upon the weight of the testimony, no other deduction could well have been made. *Carver v. Astor*, 4 Pet. 1, 79, 7 L. Ed. 761; *Magniac v. Thompson*, 7 Pet. 348, 389, 8 L. Ed. 709. The conclusion there reached, however, is not controlling in the case at bar, in consequence of our statute prohibiting such method of charging the jury.

In *Territory v. Romine*, 2 N. M. 114, a similar charge was upheld on the assumption that such an instruction was permissible under the rules of the common law, which at the time of that trial had not been changed, but subsequent thereto, and prior to the hearing of the cause in the Supreme Court a statute had been adopted by the legislative assembly of New Mexico, which precluded a court from commenting upon the weight of the evidence. In that case it is intimated that, after the passage of the statute, the giving of such an instruction would have been erroneous. Our statute, regulating the giving of instructions, was adopted in its present form, December 20, 1865 (Laws Or. 1865, p. 37), and is as follows: "In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact." B. & C. Comp. § 139. This section practically prohibits the giving of an instruction as to the weight of the evidence, for if a court cannot present the facts of a case it is necessarily precluded from charging the jury in respect to any particular conclusion which might be deduced from a consideration of the testimony.

An early statute of this state prevented a defendant in a criminal action from becoming a witness for or against himself. Section

166, tit. 1 of chapter 16 of the Criminal Code, as compiled by Matthew P. Deady and Lafayette Lane. This section was amended October 25, 1880 (Laws Or. 1880, p. 28), so as to read, as far as deemed involved herein, as follows: "In the trial of or examination upon all indictments, complaints, information, and other proceedings before any court, * * * against persons accused or charged with the commission of crimes or offenses, the person so charged or accused shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court." B. & C. Comp. § 1400. As this alteration was made after the passage of section 139, supra, it would seem, from a construction of such amendment in pari materia with that section, that it had been impliedly amended, so as to permit the court to call the attention of the jury to the credibility of a defendant in a criminal action when he appeared as a witness in his own behalf. Our statute, elucidating the general principles of evidence, contains the following clause: "A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character or motives, or by contradictory evidence; and where the trial is by the jury, they are the exclusive judges of his credibility." B. & C. Comp. § 695. It has been the practice of courts to give this entire section or the substance thereof in charging juries. Construing this clause together with section 1400, supra, it would further appear that section 695, supra, was also impliedly amended, so as to allow the court to inform the jury that a defendant in a criminal action, when he appeared as a witness in his own behalf, is interested in any verdict which they might return—a fact of which they have knowledge without such declaration. *People v. Murray*, 86 Cal. 31, 24 Pac. 802.

An instruction stating that, while the defendant in a criminal action is a competent witness in his own behalf, the jury, nevertheless, have the right to take into consideration his interest in the result of the trial, and all the facts and circumstances of the case, and to give his testimony only such weight as they, in their judgment, think it entitled to—has been held proper. *Smith v. State*, 107 Ala. 139, 18 South. 306; *Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054; *State v. Ryan*, 113 Iowa, 536, 85 N. W. 812; *People v. Calvin*, 60 Mich. 113, 26 N. W. 851; *Gatliff v. Territory*, 2 Okl. 523, 37 Pac. 809; *Emery v. State*, 101 Wis. 627, 78 N. W. 145. Under the rule thus announced, the first part of the charge in the case at bar, which was manifestly modeled after section 2447 (2 Thompson, Trials), a note to which is as follows: "Approved in *State v. Jones*, 78 Mo.

280," is supported by authority, though the jury were not instructed to take into consideration all the facts and circumstances of the case, nor informed that they were the exclusive judges of the defendant's credibility. No request, however, appears to have been made to enlarge the instruction in these particulars.

In *Chambers v. People*, 105 Ill. 409, the following charge was given: "The court instructs the jury, for the people, that they are not bound to believe the evidence of the defendant in a criminal case, and treat it the same as the evidence of other witnesses, but the jury may take into consideration the fact that he is defendant, and give his testimony such weight as, under all the circumstances, they think it entitled to." In that case it was held that such instruction was calculated to mislead, and was, therefore, erroneous. A similar instruction was also condemned in *Sullivan v. People*, 114 Ill. 24, 28 N. E. 381, and *Hellyer v. People*, 186 Ill. 550, 58 N. E. 245.

In *State v. Pomeroy*, 30 Or. 16, 46 Pac. 797, the jury were instructed as follows: "In this case the defendant and members of his family have given testimony. You have no right to reject the testimony they have given, simply because it comes from a source in which there would be strong motives to give the most favorable coloring possible to the facts on behalf of the defendant, but you have a right to consider, and you should consider, that testimony the same as you would other testimony, taking into account the relationship of the parties and the motives which may induce them to testify." The defendant, having been convicted, appealed, and, in reversing the judgment, it was held that the instruction was erroneous, as an expression of opinion on the motives of the witnesses.

Any person who carefully notices the trial of a case before a jury must surely observe the attention which they give to the remarks, gestures, facial expressions, or tones of voice which the judge may adopt, in their evident desire to gain from him some information as to the kind of verdict they think he would expect in the case. Any language, therefore, which might seem even to hint at what the court thought of the merits of a case, ought always to be avoided at a trial of the issue before a jury. Though the judge, in the instruction complained of, said to the jury: "You are not bound to consider the testimony of the defendants as absolutely true, * * * and you are to consider the great temptation which one so situated is under, so to speak, as to procure his acquittal"—he seems to leave an implication that it was incumbent upon them to consider the defendants' testimony as false, and for that reason to reject it. *Clark v. State*, 32 Neb. 246, 49 N. W. 367.

We think the language thus used is not warranted, and hence the judgment is reversed, and a new trial ordered.

ELDRIDGE v. HOEFER et al.

(Supreme Court of Oregon. Jan. 7, 1908.)

1. INFANTS—DECLARATION OF TRUST—VALIDITY.

A minor's declaration of trust is valid until avoided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, § 35.]

2. MORTGAGES—ABSOLUTE DEEDS AS MORTGAGES.

A deed, absolute in form, will be decreed a mortgage, where it was executed to secure the payment of a debt or the performance of an obligation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 60-94.]

3. SAME—EVIDENCE—ADMISSIBILITY.

That a deed, absolute in form, was intended as a mortgage, may be established by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 98.]

4. SAME—REDEMPTION—PERSONS ENTITLED.

Plaintiff, a minor, desiring to purchase land owned by his deceased father, and about to be sold to pay debts of the estate, but having no means, applied to defendant for the loan, who furnished the money pursuant to an arrangement whereby the land was conveyed to a third person, and by him to defendant. In the transactions, the third person was plaintiff's trustee, and his deed to defendant was executed to secure the money advanced. *Held*, that the deed from the third person to defendant, though absolute in form, was a mortgage, and a subsequent quitclaim deed by the third person to defendant did not transfer plaintiff's equitable estate, and plaintiff was entitled to redeem by paying the sum loaned with interest, etc., less the sums he might be able to show by preponderance of the evidence that he had paid on account of the debt, and the rents and profits which defendant received, as mortgagee in possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1730, 1731.]

5. SAME—SUIT TO REDEEM—TENDER.

Since the law does not impose the performance of a vain thing as a condition precedent to a right, a plaintiff, in a suit to redeem land from a mortgage lien, who alleges that he notified defendant of an offer for the land, and that he would pay defendant the sum admitted to be due on the mortgage, if defendant would permit a redemption of the premises, and that defendant refused to comply therewith, need not allege a tender of the sum conceded by him to be due to entitle him to the equitable relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1837.]

6. SAME—INCIDENTAL DAMAGES.

Plaintiff prayed that a deed, absolute in form, conveying land to defendant, be adjudged a mortgage, and that he be permitted to redeem, and claimed damages resulting from his inability to furnish title to a purchaser who offered to pay a specified sum for the land. He did not tender the sum conceded by him to be due to defendant, secured by the deed. *Held*, that plaintiff could not recover the damages, in the absence of a tender.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1788.]

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Suit by F. J. Eldridge against John Hoefler and others. From a decree for plaintiff, defendants John Hoefler and another appeal. Reversed and remanded.

Geo. G. Bingham and P. H. D'Arcy, for appellants. T. G. Halley, A. M. Cannon, and L. K. Adams, for respondent.

MOORE, J. This is a suit by F. J. Eldridge against John Hoefer and Casper Zorn, partners as Hoefer & Zorn, and David Keen, to have a deed, absolute in form, of certain real property, decreed to be a mortgage and Keen declared to be plaintiff's trustee; that a redemption of the land be allowed, within a reasonable time, on the payment of \$14,600, the sum admitted in the complaint to be due from the plaintiff to Hoefer & Zorn, but if such payment cannot be made within the time limited, that the premises be sold, and if the sum realized therefor does not equal \$42,000, the price which it is alleged was offered for the land, that Hoefer & Zorn be required to account for that sum, less the debt so specified. The admitted facts are that plaintiff's father died seised of two farms situated in Marion county, containing 728.89 acres, whereupon his mother was appointed and duly qualified as administratrix of the decedent's estate, to pay the debts of which it became necessary to sell the real property. The plaintiff, desiring to purchase the land, but not having the means with which to pay for it, applied to Hoefer & Zorn for a loan of money for that purpose, but they declined the request because he was not then of age, and for the further reason that his mother held a dower interest in the premises. Mrs. Eldridge, at plaintiff's request, executed a deed of such life estate to Keen, who, at a sale of the land by the administratrix, bid therefor \$14,577.80, to pay which he borrowed from Hoefer & Zorn \$15,600, giving his promissory note for that sum, payable in five years from October 10, 1892, with interest thereon at the rate of 7 per cent. per annum, payable yearly, and also stipulating in the note to pay all taxes that might be assessed against it. The sale by the administratrix having been confirmed, she executed a deed of all the estate the decedent had in the land at the time of his death to Keen, who immediately conveyed the premises to Hoefer & Zorn, taking from them a bond for a deed, wherein they covenanted to reconvey the land to him on the payment of the note. No part of the taxes assessed against the note having been paid to Hoefer & Zorn, Keen, on January 25, 1896, executed to them a quitclaim deed of the premises, without securing a surrender of the note or the indorsement of any payment thereon as a consideration for the conveyance, and in August, 1905, this suit was instituted. The complaint states the facts in detail, the substance of which is hereinbefore set forth, and avers, in effect, that at the time the money was so loaned it was agreed by all the parties hereto that in all the transactions mentioned Keen was plaintiff's trustee, which fact was assented to by Hoefer & Zorn, and

that the original deed, executed by Keen to Hoefer & Zorn, was given to secure the payment of the promissory note, and the bond taken as a defeasance; that when the land was sold to Keen the plaintiff took immediate possession of the premises, which he retained until October, 1893, when he leased the real property, ever since which his tenants had been in possession thereof; that the plaintiff paid the interest on the note for the first three years after it was given, and in October, 1895, he also paid \$1,000 on account of the principal; that about the date last mentioned the plaintiff, desiring to make certain improvements on the land, so as to increase the profits therefrom, and to pay the cost of such betterment from the income received from the premises, entered into an agreement with Hoefer & Zorn whereby they stipulated to accept the rents of the real property in full payment of the interest and taxes, and each year thereafter they received the landlord's share of the crops annually raised on the premises, pursuant to such agreement; that in July, 1905, the plaintiff was offered for the land \$42,000, which sum would then have been paid for the premises, if he could have given a sufficient deed therefor; and that, upon receiving such bid, he notified the defendants thereof, in writing, and demanded that he be permitted to redeem the real property by paying the sum of \$14,600, but they refused to comply with his request and would not join him in executing a deed of the land. The answer denies the material allegations of the complaint, and that any payments were made on the promissory note prior to January 25, 1896, except \$509.50, which sum is the value of grain delivered the preceding year to the defendants; and states that Keen, being unable to pay the note or the interest thereon, and desiring to be relieved from such obligation, executed, with plaintiff's knowledge and consent, a deed of the premises to Hoefer & Zorn in full payment and discharge of the note; that upon the receipt of such deed Keen delivered the possession of all the real property, particularly described in the complaint, to Hoefer & Zorn, who, on April 20, 1896, leased the land to one F. Goffin, and the latter thereafter, and until the commencement of this suit, paid to them the rents, profits, and income of the premises, setting forth the value thereof each year from 1896 to 1904, inclusive, amounting to \$6,902.72, and averring that the estimated rent for 1905 was equivalent to \$682.62; that Hoefer & Zorn paid the taxes for the years 1892 and 1893, the amount of which they could not state, but approximately \$250, and that they also paid the taxes on the real property from 1895 to 1904, inclusive, stating the sum paid each year, amounting to \$2,039.88; that in all the negotiations Hoefer & Zorn refused to deal with the plaintiff, but recognized, and did business with, Keen alone, as the principal, at whose

solicitation they accepted the deed in discharge of the condition of their bond, and in which transaction they dealt in good faith, believing that he was the owner of the real property against all the world but themselves, and that they were acquiring an absolute title in fee to the premises; that on January 25, 1896, the land was of no greater value than the principal and interest then due on the note, and that they had no notice or knowledge that the plaintiff had or claimed any estate or interest in or to any part of the land, except as the tenant or agent of Keen; and that Hoefer & Zorn, in good faith, took possession of all the real property with plaintiff's knowledge and consent January 25, 1896, and have ever since been in the quiet and peaceable possession thereof under a claim of right as the owner in fee simple, and without objection from the plaintiff or any other person, and have received the rents and profits of the land and appropriated the same to their own use. The reply put in issue the allegations of new matter in the answer, and the cause being tried, it was decreed that the plaintiff might redeem the land on or before October 10, 1906, by paying into court for Hoefer & Zorn, in gold coin, \$14,600, upon the receipt of which they were required to execute to him a deed of the premises, but if they neglected to comply therewith, the decree should operate as a deed; that if the plaintiff failed to pay that sum within the time specified, the real property should be sold in the manner provided by law for the foreclosure of liens upon land, and the proceeds arising from such sale applied as in such cases; and that the sum so found to be due should bear interest at the rate of 7 per cent. per annum from October 10, 1906, after which date the plaintiff was to receive the rents and profits of the land. From this decree Hoefer & Zorn appeal. The plaintiff also appeals from the action of the court in refusing to award him a recovery against Hoefer & Zorn of \$42,000, less the debt which he claims to be due.

Without alluding to the testimony on this branch of the case, we think the original deed, executed by Keen to Hoefer & Zorn, who will hereafter be designated as the defendants, was intended by all the parties as a mortgage to secure the payment of \$15,600, as evidenced by the promissory note, and that Keen was acting for the plaintiff as the trustee of an express trust. Though there is some conflict of judicial utterance as to the power of an infant to create a trust, reason and the weight of authority support the principle that a minor may call into existence a trust which is valid until avoided. *Flint, Trusts*, § 11; *Perry, Trusts*, § 33; 28 *Am. & Eng. Ency. Law* (2d Ed.) 868. The rule is universal that, when a deed, absolute in form, was intended by the parties at the time it was executed to be the means of securing the payment of a debt, the performance of a

duty, or the discharge of an obligation, the sealed instrument will, in a suit instituted for that purpose, be decreed to be a mortgage, and such intention may be established by parol. *Hurford v. Harned*, 6 Or. 362; *Stephens v. Allen*, 11 Or. 188, 3 Pac. 168; *Swegle v. Belle*, 20 Or. 323, 25 Pac. 633; *Adair v. Adair*, 22 Or. 115, 29 Pac. 198; *Trust Co. v. Loewenberg*, 38 Or. 159, 62 Pac. 647. The court found, according to the averments of the complaint, that for the first three years after October 10, 1892, the plaintiff paid the defendants the interest agreed upon, and within that time he also gave them \$1,000 on account of the principal, thereby reducing the debt to \$14,600; that about September 30, 1895, he entered into a contract with them, whereby it was stipulated that thereafter they would accept the income and profits of the premises in lieu of the interest and taxes provided for; and that, pursuant to such agreement, the rents, from the time specified, were so received.

The plaintiff, as a witness in his own behalf, referring to the payments which he made to the defendants on account of the promissory note, testified as follows: "The first year's interest I did not pay when it was due, * * * but I got a concession from them for a few months, and I paid them interest on the bank of the Willamette river. I won't say what month, but that was in 1894, but it was summer time and lumber was being unloaded there for them. Q. Well, go ahead and state what you paid. A. Well, then, the next year's interest I borrowed from O. J. Goffin to pay them this \$1,000, and I also borrowed some from him, I don't know exactly how much now, to pay on this interest. I know that I borrowed largely from Mr. Goffin to pay them a \$1,000, which was two years, which was more than a year, past due—this particular \$1,000 I mentioned a while ago having borrowed here. That made a \$1,000 paid on the principal and two years' interest paid in money, and that is all the money that I did pay. Q. Who was present when you paid that money? A. Well, there was nobody present that I remember about when I paid the first year's interest; but Mr. Goffin was with me—Dr. Goffin was with me, rather O. J. Goffin—when I paid the last money to him." On cross-examination this witness was asked the following questions: "Q. You say that this \$1,000 that you claim to have paid that you borrowed that from Mr. Goffin? A. Yes. Well, now, Mr. Goffin got the money for me, and I remember there were two notes—one to a man named Duffer, and one to another, Guston Bros. Q. And you say he (O. J. Goffin) was present when you paid the money to Hoefer & Zorn? A. Yes, sir. Q. Where was it paid? A. In Hoefer's house—Hoefer & Zorn's house at Champoeg. Q. And how was it, in what medium? A. Why, in money. I paid them in money all the time. Q. Gold? A. Well, I don't know. I think—I won't say as to whether it

was gold. It could not very well have been silver. Perhaps it was gold. I won't say as to that. Q. And did Goffin go with you for that purpose? A. I don't know but that some of the money—I don't know but that a part of that money was in a check from Hager of the Oregon City Flour Mill. * * * Q. Now, you think a part of this money you paid to Hoefer & Zorn was a check from Mr. Hager? A. Possibly it was. I think rather it was on account of having gotten this Guston Bros.—Guston Brothers had to sell some wheat to loan this money, and they had the wheat at Mr. Hager's, and I know we were there. There was something about that that I won't be clear and positive about. * * * Q. Now, the first payment, you said that money was paid on the river bank? A. Yes, sir. Q. How much was paid at that time? A. I don't know how much was paid. I know that I got \$1,500 in Portland at that time, and it was my intention to get off of the steamer in Champoeg and pay these people and get some conveyance and go home, and Mr. Hoefer was down there and I got on the boat and come up to the Eldridge Landing and got off there. Q. And you paid him at the boat landing? A. I paid him. They were putting off some lumber, if I remember right, for Hoefer & Zorn. Q. How was that paid? A. Well, that was paid in money. But I won't say as to the kind of money that it was paid in. I can tell you who paid me the money, and where it was paid in Portland at that time. Q. Well, I want to know about the medium in which you paid them. A. Well, I won't say. Q. No checks, were there? A. No; I don't think there was. In fact, I am positive there was not."

O. J. Goffin testified that he had loaned money to Eldridge, and in 1895 went with him to the home of the defendants, where the plaintiff paid them some money, was asked, "Now, have you any idea approximately how much money he paid at that time?" The witness answered, "No; I could not say. In fact, I don't know just how much money it was. I don't just remember how much money I borrowed for him. Then I would turn over some grain to him, and also borrowed about \$40 from a man by the name of Duffer." In cross-examination the attention of this witness having been called to the payments made by the plaintiff to the defendants, was asked, "How much money was it?" and replied, "I could not say. There was considerable money paid, but I don't know just as to the amount of it. Q. Well, considerable money might mean— A. Well, there was some gold there, and some paper there that I know of, and the only thing I have in mind now was I was borrowing some money some time before that, and he told me that he wanted that money to make a showing with Hoefer & Zorn. That is the words that he used, because I remember it. Q. Did you ever borrow money for him? A. I had to borrow money for him ever since 1891. I

borrowed money in 1891 for him, and 1892, '93, '94, and made deals like that for him right along just to help him out."

The defendant Hoefer testified that he never received from the plaintiff any money on the bank of the river, and that no interest was paid prior to 1895, but that he did receive from Goffin, who had leased the premises, a quantity of grain of the value of \$509.50, which sum was credited to Keen. The defendant Zorn also testified that no part of the principal had ever been paid, and that no money as interest had ever been received, but that Goffin had delivered some rent.

The plaintiff further stated, on oath, that a part of the land in question was overflowed, and, desiring to drain the inundated portion, he procured a survey of the route for a ditch and ascertained that the cost of making the necessary improvement would be \$3,000, or more; that Goffin, to whom the premises had been leased, offered to advance the money necessary to dig the conduit, if he could retain the rent until he was repaid the outlay, but would not undertake the enterprise unless the defendants consented, in writing, to such appropriation of the rents; and, referring to the attempt made in the fall of 1895, to obtain their assent, the witness testified as follows: "I went to Hoefer & Zorn then with Goffin myself, and they refused; and I told them that the farm in that condition could not be made to pay the interest and taxes. Whereupon Mr. Hoefer & Zorn said that they would take the farm for interest and taxes, and I said, 'Very well', and gave Mr. Goffin, as my tenant, there in their presence, instructions to turn over all the landlord's interest in that particular part of the ground to them until further notice, and that is about the way it has stood to the present day. Q. Where was this conversation? A. At Hoefer & Zorn's house at Champoeg. Q. Did your tenant continue to pay them the rents and profits? A. Yes, I believe they did. They never paid it to me. I didn't ask them for any accounting, and I never agreed to make an accounting to them. That is, O. J. Goffin was to turn over the landlord's interest to them, that is, much or little. They took it in lieu of interest and taxes." On redirect examination, in referring to the attempt made to secure the defendants' consent to appropriating the rents in making the improvements, the plaintiff was asked, "Why did Goffin want that assurance?" and he replied, "Well, he knew that my note was going to fall due—I call that my note, this note they say was signed by Keen—in 1897, and that was in 1895, and he didn't figure perhaps that the farm would make enough money to pay him in two years, and he thought I might be foreclosed."

O. J. Goffin testified: That in the fall of 1895 he secured from the plaintiff a lease of the premises for the term of 10 years, stipulating in the demise to give as rent one-third of the crops raised and to dig a ditch

to drain the overflowed part of the real property, retaining the rent reserved until he was reimbursed for the outlay. That he assigned his interest in the lease to his father, and, desiring to obtain the defendants' written consent thereto, he with the plaintiff called upon them for that purpose, but they refused to ratify the agreement, saying: "I took Eldridge with me there to explain the matter and try to influence Mr. Hoefer & Zorn to put their name on there. That my father was very much dissatisfied and would not go ahead with the ditch; and at the time the conversation came up that they could not farm the land to any advantage without the ditch. It is a fact to-day; and I had previous to that tried to dig the ditch with the help of Eldridge, and had to give it up on account of not having enough money, and they were angry. Casper [Zorn] was doing the talking with Mr. Eldridge. They were angry; and Eldridge told him he could not possibly pay on that place and could not pay interest and taxes there unless there would be something done toward clearing up that bottom; and Casper spoke up and said he would pay the taxes and interest for the rent of that farm; * * * and then Eldridge turned around and told me, asked me if I heard that, and he said, 'You pay the rent to them. I am satisfied.' Q. Then he told you that? A. Yes, sir. Q. Then you went away? A. Well, we stayed around there, and we talked about it a little more, and we still tried to get them to sign a contract for this ditch." Goffin further testified that, at his suggestion, his father thereafter secured from the defendants a lease of the premises, but that he did not think the plaintiff ever knew anything about it.

The defendants, as witnesses in their own behalf, severally testified that they never entered into any agreement with the plaintiff whereby they stipulated to receive the rent in lieu of the interest and taxes, but that on April 20, 1896, and after they secured Keen's second deed, they, as the owners of the land, leased it to F. Goffin, who thereafter, as their tenant, delivered to them the rent agreed upon for the use of the premises.

The foregoing excerpts from the testimony show the conflict as to the payments of interest and principal, claimed to have been made by the plaintiff on account of Keen's promissory note prior to January 25, 1896, when the second deed was executed to the defendants, and also indicates the controversy as to the alleged agreement of the latter to accept the rent in lieu of the interest and taxes. The theory of plaintiff's counsel is that their client never consented to the execution of the second deed, and though he was informed thereof soon after the sealed instrument was made, he knew that the equitable estate in the premises, which Keen held in trust for him, and of which the defendants had knowledge, was not thereby transferred, and he supposed that F. Goffin, who had secured

from his son an assignment of the lease, was, as plaintiff's tenant, delivering to the defendants the share of the crops raised on the premises, pursuant to their stipulation to receive the rent in place of the interest and taxes, and hence no accounting was required. The defendants' counsel maintain that their clients dealt with Keen in relation to the land, and, having obtained his deed of January 25, 1896, they, as owners in fee, leased the premises to F. Goffin, who thereafter delivered to them the share of the crops agreed upon, and for this reason no accounting for the rents was necessary.

It is impossible to reconcile the testimony, and any conclusion that may be reached on the facts is doubtful. A moment's computation will disclose that the annual interest on the sum loaned, at the rate specified, is \$1,092. It seems improbable that the plaintiff would have paid three installments of interest and the further sum of \$1,000 on account of the principal, without taking any receipt therefor, or seeing that these sums were indorsed on Keen's note. That the plaintiff did not obtain from the defendants written evidence of the alleged payments or observe that the sums of money claimed to have been paid were indorsed on the negotiable instrument, or give any reason for his failure in these respects, are circumstances tending to discredit his testimony. So, too, the plaintiff's inability to fix the time when the alleged payments were made, or to state the amount of money which he claimed to have given the defendants, are also circumstances tending to weaken his declarations under oath. It must be admitted that in paying out small sums of money a person might not remember the medium or denomination of the coin or currency used, or, if he were daily disbursing large sums of money, it is possible that he might forget the details of the transaction. The testimony does not show that the plaintiff's business was of such magnitude that the giving of \$1,092 could be classed as an insignificant sum, or that such payment was with him a matter of common occurrence, and for these reasons it would seem that he should have remembered the time, place, and circumstances of the respective alleged payments, including the medium in which they were made. It will be remembered that the plaintiff testified that, in order to make a payment on the note, O. J. Goffin borrowed money for him from one Dufier and also from Guston Bros., for which promissory notes were given, without stating what sums were thus obtained. Goffin testified that he borrowed money for the plaintiff, saying he secured for that purpose \$40 from one Dufier. It is quite probable that the person last mentioned from whom a loan was thus obtained is the same individual indicated by the plaintiff as Dufier. The loan of \$40 is the only money particularly specified by this witness, which sum is so small, when compared with a year's interest on the

promissory note, that it would appear from his use of the qualifying word "considerable," as employed to express the amount of money which the plaintiff paid the defendants in his presence, that he did not mean thereby a very large sum. This witness further testified that, in addition to the money which he borrowed for the plaintiff, he also turned over to him some grain, which delivery would seem partially to corroborate the defendants' testimony that the only payments ever made on account of Keen's note was some grain, for which proper credit was given. All the testimony relating to the alleged payment of interest and principal for the first three years after the making of the promissory note has been hereinbefore set forth, a careful consideration of which, when examined by the light of reasonable probabilities, convinces us that the entire payments made by the plaintiff to the defendants within the time thus indicated amount only to \$509.50, as testified to by the latter. The testimony also shows that the plaintiff represented to the defendants that, unless a ditch was dug, so as to drain a part of the land, thereby increasing the arable area, the interest and taxes stipulated to be paid could not be obtained from the premises by cultivation. According to the plaintiff's own admission, he was more or less in arrears all the time in the payment of the interest, and never paid any part of the taxes mentioned. In consequence of this default the defendants complained at the time it is asserted the rents were accepted in lieu of the interest and taxes. It would seem improbable that the defendants agreed to such terms when they knew that the share of crops stipulated to be given for the use of the premises was not equivalent in value to the interest and taxes.

It would further appear, from Goffin's testimony, that though some negotiations, in relation to the alleged agreement to accept the rent in lieu of the interest and taxes, had been attempted, thereafter efforts were made to obtain the defendants' written indorsement on the lease, to the effect that the tenant might be permitted to apply the rent on account of the expense to be incurred in digging the ditch, and that he might retain possession of the land until the cost of making such improvement was repaid from the revenue to be derived from the source mentioned. The subsequent attempt to secure such consent induces the conclusion that there had been no meeting of the minds of the plaintiff and defendants on this branch of the case, and hence no contract, as alleged, was ever consummated between them in relation thereto. No accounting has been demanded by either party, nor is there any testimony in the transcript from which the value of the rents received by the defendants can be legally determined. We entertain no doubt that the original deed executed by Keen was intended by the parties as a mortgage; and we also think that the subsequent deed did

not transfer to the defendants the plaintiff's equitable estate in the land, and therefore a redemption from the lien or a foreclosure thereof should be decreed, in view of which the plaintiff should be charged with the sum loaned and the interest thereon at the rate of 7 per cent. per annum from October 10, 1892, and the taxes annually assessed against the note, as provided for therein, if the amount of such burden can be segregated from the defendants' assessment of money, notes, and accounts; that the plaintiff should be credited with \$509.50, admitted in the answer to have been received, and such other sums of money or credits as he may hereafter be able to show, by a preponderance of the testimony, that he has paid or delivered on account of the promissory note, and also credited with the value of the rents and profits of the land which the defendants, as mortgagees in possession, have received since January 25, 1896, when they secured Keen's second deed.

It will be remembered that the plaintiff alleged that he was offered for the land \$42,000, upon receiving which bid he notified the defendants thereof and demanded of them that he be permitted to redeem the real property, by complying with the conditions stated, but that they refused to accede to his request. The complaint does not allege a tender or an offer to pay \$14,000, the sum admitted by the plaintiff to be due. The rules of law do not impose upon a party to a suit or action the performance of vain things, as a condition precedent to the enforcement of a right; and when the plaintiff averred that he notified the defendants of the alleged offer for the land, and that he would pay them the sum which he admitted to be due, if they would permit him to redeem the premises from their lien, and they refused to comply therewith, the complaint stated facts sufficient to entitle the plaintiff to the equitable relief which he sought, without alleging a tender or an offer to pay the sum conceded by him to be due to the defendants. *Lovejoy v. Chapman*, 23 Or. 571, 32 Pac. 687; *Fitzgerald v. Kelso*, 71 Iowa, 731, 29 N. W. 943.

The plaintiff's theory of the transaction is that the original deed executed by Keen was intended to secure the payment of a debt, and hence the sealed instrument is a mortgage. A lien having been thus created, the only way its discharge could have been secured was by tendering to the defendants the amount due on the promissory note, which was not done. Though the averment of a tender or an offer to pay such sum is not necessary to be stated in a complaint, as a condition precedent to the right to redeem property from a lien, when such right is denied by the adverse party, for the reason hereinbefore stated, yet we think that the money admitted to be due the defendants should have been presented to them before they could be in default, so as to render them liable for the sum asserted to have been offered for the land, but no tender

having been made, the court properly denied this part of the relief.

The decree will, therefore, be set aside, and the cause remanded, with directions to take further testimony as to the amount due on the note; and after that sum is ascertained in the manner indicated, a decree will be rendered as originally given, with such modifications as the changed conditions may require.

STATE v. TAYLOR et al.

(Supreme Court of Oregon. Jan. 7, 1908.)

1. ASSAULT—ASSAULT WITH COWHIDE—SELF-DEFENSE.

The offense under B. & C. Comp. § 1766, declaring a punishment for one who assaults another with a cowhide, having at the time in his possession a gun or other deadly weapon, with intent to intimidate and prevent the other from resisting, cannot involve the element of self-defense in favor of the assailant.

2. SAME—UNNECESSARY FORCE IN REMOVING TRESPASSER.

The gist of the offense under B. & C. Comp. § 1766, being to beat another with a cowhide, or like thing, while being armed with a deadly weapon, with intent to intimidate and to prevent the other from resisting, the statute does not apply to an altercation or ordinary assault and battery, though the assailant is armed with a gun; so that, where the element of removal of a trespasser by defendant is involved, the use of more force than necessary for such purposes, while constituting an assault, would not be a violation of such statute.

3. SAME—INFORMATION.

The crime of "assault being armed with a cowhide," denounced by B. & C. Comp. § 1766, declaring a punishment if any person shall assault another "with a cowhide, whip, stick, or like thing," under certain conditions, is not charged by an information, which in the preliminary part names defendants' offense as "assault, being armed with a leather strap," and in the charging part states that they, being armed with a leather strap, assaulted a person, a description of the leather strap being necessary to show that it was a like thing to a cowhide, whip, or stick.

Appeal from Circuit Court, Baker County; William Smith, Judge.

R. H. Taylor and another were convicted under B. & C. Comp. § 1766, and appeal. Reversed and remanded.

Chas. H. Carter and Woodson L. Patterson, for appellants. Gustav Anderson, for the State.

EAKIN, J. Information was filed against the defendants seeking to charge them with the crime of assault, being armed with a cowhide, as defined by B. & C. Comp. § 1766, and which provides: "Assault, Being Armed with a Cowhide. If any person shall assault, or assault and beat another with a cowhide, whip, stick, or like thing, having at the time in his possession a pistol, dirk, or other deadly weapon, with intent to intimidate and prevent such other from resisting or defending himself, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than ten years." The information

is in the following language: "R. H. Taylor and John S. Traut, the above-named defendants, are accused by Leroy Lomax, district attorney of the Eighth judicial district of the state of Oregon, by this information, of the crime of 'assault, being armed with a leather strap,' committed as follows: The said R. H. Taylor and John S. Traut did on the 8th day of April, A. D. 1907, in the county of Baker, and state of Oregon, then and there being and acting together, and being then and there armed with a leather strap, unlawfully and feloniously assault, strike, hit, and beat one Exilda Mitchell upon the body and head of her the said Exilda Mitchell with said leather strap, which said leather strap the said R. H. Taylor and the said John S. Traut then and there had and held in his hands while within striking, hitting, and beating distance of her the said Exilda Mitchell. The said R. H. Taylor and the said John S. Traut having at the time in his possession a pistol and a gun, the said pistol and the said gun being then and there a deadly weapon, with intent then and there and thereby to intimidate and prevent her the said Exilda Mitchell from resisting or defending herself, contrary to the statutes in such cases made and provided," etc. Defendants were tried thereon, and convicted of the crime sought to be charged, and on June 27, 1906, sentenced to one year in the penitentiary. Exceptions were taken at the trial to various instructions given by the court, of which instructions we shall notice only the second and third, relating to the right of self-defense, and liability for assault in case more force is used than is necessary for such defense, and the right to defend the possession of real property.

This statute was evidently not intended to cover cases of ordinary assault, or assault with a dangerous weapon, as defined by B. & C. Comp. §§ 1771, 1772, but is intended to cover a particular offense, where the assailant, having in his possession a gun with intent to intimidate the object of his attack and thus prevent resistance, administers a cowhiding or beating. This offense can by no possible construction involve the element of self-defense in favor of the assailant. The intention to intimidate by means of a gun is the element that makes it a felony, by which the assailed person is compelled, through fear, to submit to the punishment. Neither could there be any element of trespass involved in the case. To constitute a liability under this statute, the defendant must be armed with a deadly weapon, with the intent and for the purpose of intimidation, to enable him to administer a cowhiding upon the object of his attack, and whether the assailed person is a trespasser or resists such assault can constitute no defense to the assailant; but the proof in such a case must be clearly brought within the spirit of the statute, and it cannot be made to apply to the case of an altercation, or an ordi-

nary assault and battery, even though the assailant is armed with a gun. If the element of the removal of a trespasser from one's property is involved, as presented to the jury by the third instruction, then the use of more force than is necessary for that purpose would constitute an assault, but would not be evidence of a violation of this statute.

Instruction No. 2, as given by the court, reads: "If a person is assaulted by another, such person is then justified in using such force as may be reasonably necessary to defend himself; but if such person under pretext of self-defense exceeds the bounds of what is reasonably necessary for such defense, then such person would nevertheless be guilty of the assault." Here the court instructs the jury that if the defendants are assaulted, they have a right to resist such assault, but an excess of force in such resistance would constitute guilt under this statute, which lacks the principal element of that crime, viz., being armed with intent to intimidate, and thus enable them to inflict the punishment. In Mississippi, under a similar statute, it is held that the gist of the offense is in being armed with a pistol with intent to intimidate the person assaulted and prevent him from defending himself. *Lawson v. State*, 62 Miss. 558.

The case was presented to the jury upon the theory that if the defendants, being armed, assaulted Mrs. Mitchell, they were guilty, or, if they acted at first in self-defense, but used more force than was necessary in such defense, they were guilty of the crime charged, thus losing sight of the element of intimidation to enable defendants to administer a castigation; hence the second instruction is erroneous in authorizing a verdict of guilty of the charge upon proof of more force than necessary for defense of the person, and the third instruction contains a similar error, in authorizing a conviction if more force is used than necessary to remove a trespasser from real estate.

The sufficiency of the indictment is also questioned by the defendants, in that it does not charge the crime for which they were tried. In the statute of 1864 the name of this crime is given in the index to the sections at the beginning of chapter 43, of which it is a part, and also on the margin opposite section 527, its original number, as, "assault, being armed with a cowhide," and was so adopted by the Legislature, and the name of the crime thus became part of the law (*State v. Vowels*, 4 Or. 324; *State v. Nease*, 46 Or. 433, 80 Pac. 897), and "assault, being armed with a strap," does not name the crime defined by this section. However, an error in the name of the crime in the preliminary part of the information is not fatal if the charging part is sufficiently specific. *State v. Sweet*, 2 Or. 127; *State v. Jarvis*, 18 Or. 380, 23 Pac. 251. But the charge is, "did assault, strike, hit, and beat one Exilda Mitchell . . . with said leather strap."

The allegation contains nothing to bring the strap within the class of instruments mentioned under "cowhide, whip, stick, or like thing." In Alabama, under a similar statute providing that an assault with a cowhide, stick, or whip, having in his possession a pistol with intent to intimidate, an indictment that charged an assault with a rope, stick, or whip was held sufficient to sustain a conviction for assault, but insufficient if the conviction had been for the offense charged. *Higginbotham v. State*, 50 Ala. 183. Where the instrument used is not one of those named in the statute, then it must be so described as to bring it within the class named. Where a statute, in defining a crime committed by use of weapons, mentions certain weapons "or other deadly weapon," it is held that those named in the statute need not be described as deadly weapons, but if another than those named in the statute is relied upon as coming within the term "other deadly weapon," it must be so averred as to bring it within that designation. *State v. Sebastian*, 81 Mo. 514; *State v. Hoffman*, 73 Mo. 256; *State v. Painter*, 67 Mo. 84; *State v. Porter*, 101 N. C. 713, 7 S. E. 902. The language of this statute is, "with a cowhide, whip, stick, or like thing." If the instrument used was one mentioned in the statute, the description of it need only disclose that fact; but if, as in this case, it is some other instrument relied upon as coming within the term "or like thing," then it must be so set forth to disclose that it is a like thing to a cowhide, whip, or stick, and it is not sufficient to refer to it as a leather strap. Therefore the information is insufficient to charge the crime defined by B. & C. Comp. § 1768, but is sufficient to charge the crime of assault and battery.

Therefore the judgment of the lower court will be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

(50 Or. 463)

ROBINSON v. R. ROBINSON CHEESE CO.*

(Supreme Court of Oregon. Jan. 7, 1908.)

APPEAL AND ERROR—TRANSFER OF CAUSE—TRANSCRIPT—TIME FOR FILING.

B. & C. Comp. § 549, requires an appellant to file a transcript within 30 days after the perfection of the appeal. *Held*, that where, on notice of appeal, the trial judge entered in the bench docket a memorandum that appellant was given 60 days to file a bill of exceptions, the memorandum did not amount to an order enlarging the time to file a transcript.

Appeal from Circuit Court, Tillamook County; Wm. Galloway, Judge.

Action by R. Robinson against the R. Robinson Cheese Company. From a judgment in favor of respondent, defendant appeals. Motion to dismiss the appeal granted.

W. H. Holmes, for appellant. Ralph R. Dunlway, for respondent.

*Rehearing denied February 11, 1908.

MOORE, J. This is a motion to dismiss an appeal. The plaintiff, on May 2, 1907, secured in the circuit court for Tillamook county a judgment against the defendant, a corporation, whereupon the latter in open court gave oral notice of appeal, and on the same day served and filed an undertaking therefor. The judge at that time entered in the bench docket the following memorandum: "May 2d. Motion for new trial denied. Counsel for defendant saves exceptions and gives notice of appeal, and is given sixty days to file bill of exceptions. Plaintiff takes judgment." Though no exception was taken to the sufficiency of the sureties in the undertaking, and no other order obtained enlarging the time for the performance of any act relating to the appeal, the transcript was not filed in this court until July 22, 1907. The statute regulating the manner of taking appeals contains the following clauses: "Within five days after service of said undertaking, the adverse party or his attorney shall except to the sufficiency of the sureties in the undertaking, or he shall be deemed to have waived his right thereto. * * * From the expiration of the time allowed to except to the sureties in the undertaking, * * * the appeal shall be deemed perfected." B. & C. Comp. § 549. "Upon the appeal being perfected, the appellant shall, within thirty days thereafter, file with the clerk of the appellate court a transcript. * * * If the transcript * * * is not filed with the clerk of the appellate court within the time provided, the appeal shall be deemed abandoned, and the effect thereof terminated, but the trial court or the judge thereof, or the supreme court or a justice thereof, may, upon such terms as may be just, by order enlarge the time for filing the same." Id. § 553.

An examination of these provisions in connection with the facts hereinbefore stated will show that the appeal was perfected May 7, 1907, but that the transcript was not filed in this court within 30 days thereafter. The question presented by this motion is whether or not the entry in the bench docket of the memorandum hereinbefore quoted can be construed as an order enlarging the time to file a transcript. The filing of a transcript in an appellate court is the consummation of the means whereby that tribunal obtains jurisdiction of a cause. A bill of exceptions cannot be incorporated into a record until it has been made a part thereof by being allowed and certified to by the judge. When a court by an order enlarges the time in which to file a transcript, it thereby impliedly extends the time in which to secure a bill of exceptions, on the assumption that the greater regulation necessarily includes the less; but, as an order in an inferior matter does not embrace a superior prescription, it follows that the memorandum hereinbefore set forth, if it be treated as an order duly made and entered, does not enlarge the time for the filing of the transcript.

No jurisdiction of the appeal having been obtained, the motion must be allowed; and it is so ordered.

FARRELL v. PORT OF COLUMBIA et al.
(Supreme Court of Oregon. Jan. 8, 1908.)

CONSTITUTIONAL LAW—AMENDMENT OF STATE CONSTITUTION—SUBMISSION TO POPULAR VOTE.

Const. art. 4, § 1, as amended in 1902, reserves to the people the power to propose amendments to the Constitution and to enact or reject them at the polls, independent of the legislative assembly, and provides that, on petition filed with the Secretary of State, the amendment shall be submitted to the people, and, if approved by a majority, shall become operative. Article 17, § 1, provides that an amendment to the Constitution may be proposed in the legislative assembly, and if agreed to by a majority shall be referred to the legislative assembly next to be chosen, and that if the amendment shall be agreed to by a majority of that legislative assembly the amendment shall be submitted to the voters, and if a majority of them shall ratify the same such amendment shall become a part of the Constitution. *Held*, that article 11, § 2, as amended in June, 1896, prohibiting the Legislature from creating corporations by special laws, was legally adopted, though not twice submitted to and approved by the people; article 17, § 1, having no reference to an amendment made under article 4, § 1.

On petition for rehearing. Petition denied.
For former opinion, see 91 Pac. 546.

PER CURIAM. A petition for rehearing was filed in this case in September last. Its consideration was deferred at the request of counsel for defendants, that they might submit an additional argument in its support, and they have just advised that no such argument will be filed. Except on one point the petition is a reargument of the cause, and, notwithstanding the able presentation of counsel, we are constrained to adhere to the former opinion.

It is insisted, however, for the first time, that the amendment of section 2, art. 11, of the Constitution, adopted in June, 1906, prohibiting the Legislature from creating corporations by special laws, was not legally adopted, because it was not twice submitted to and approved by the people. By section 1, art. 4, as amended in 1902, the people reserve to themselves the power to propose amendments to the Constitution and enact or reject them at the polls, independent of the legislative assembly. This section provides that upon a petition of not more than 8 per cent. of the legal voters of the state, proposing any measure, being filed with the Secretary of State not less than four months before the election at which such measure is to be voted upon, the same shall be submitted to the people, and if approved by the majority of the votes cast thereon shall become operative. There is no requirement that an amendment proposed under this section shall be submitted to and approved by the people more than once, and section 1, art. 17, can have no ref-

erence to such an amendment, since the power reserved to the people is "independent of the legislative assembly."

Petition for rehearing denied.

CITY OF EUGENE v. LANE COUNTY.

(Supreme Court of Oregon. Jan. 7, 1908.)

1. MUNICIPAL CORPORATIONS—ASSESSMENT OF TAXES.

Where, under a city charter, taxes on property within the city, for road purposes within the city, should have been levied by the city, but the same were levied by the county, and the county collected them, as required by B. & C. Comp. § 3094, and the taxes were voluntarily paid, the city was entitled to recover them from the county.

2. TAXATION—RECOVERY OF TAXES PAID.

Where a void tax is voluntarily paid, it cannot be recovered back.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 999.]

Appeal from Circuit Court, Lane County; J. W. Hamilton, Judge.

Action by the city of Eugene against Lane county. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is a proceeding brought by the plaintiff to review the action of the county court of Lane county in disallowing its claim for road tax money collected by the county from the taxable property within the city of Eugene. The claim presented by the plaintiff against the county recites that the county court of said county did on January 7, 1904, levy a tax against all taxable property in said county, including property within said city of Eugene, in which was computed for road purposes one mill on each dollar, which tax was computed on the assessment roll for the year 1903, and that the same levy was made for a similar purpose January 11, 1905, and computed on the tax roll for the year 1904, and again on January 6, 1906, computed on the tax roll for the year 1905, and that of the taxes so levied there was collected by the county and turned over to its treasurer of the tax so computed for road purposes upon the taxable property within said city of Eugene a total of \$5,291.44, and that on the 16th day of June, 1906, the said county court, after consideration, disallowed said claim, and the plaintiff brought the said proceeding to the circuit court of the state of Oregon for Lane county by writ of review, and by it the writ was sustained, and the county court directed to allow the said claim with interest from June 16, 1906; and the county has brought the case to this court by appeal.

Woodcock & Potter, for appellant. Williams & Bean, for respondent.

EAKIN, J. (after stating the facts as above). The city charter of 1893 (Laws 1893, p. 564), in force at the time of the levy of January 7, 1904, and January 11, 1905, pro-

vided (section 127) that the city shall constitute an independent road district, and for road purposes is expressly taken from the jurisdiction and control of the county court. The charter of 1905, in force at the time of the levy of January 6, 1906, by section 114, which corresponds with section 127 (page 595) of the charter of 1893, in taking from the county the jurisdiction over the territory within the city of Eugene for road purposes, also expressly takes away the power to levy taxes for road purposes, and road and poll taxes are by both charters given over to the control of the city, and the city is authorized to levy a road tax to be collected as other taxes. By section 3098, B. & C. Comp., which has been in force since 1893, cities and school districts are required, after making their tax levy, to notify the county clerk thereof, and by section 3094 the county clerk shall include such city and other tax levies with the county levy in extending the same upon the tax roll, and they shall be collected by the sheriff as other taxes are collected. It has been decided by this court, in *Salem v. Marion County*, 25 Or. 440, 36 Pac. 163, and *Oregon City v. Clackamas County*, 32 Or. 491, 52 Pac. 310, that, where the county collects road taxes belonging to the city that should have been collected by the city officers, the county is required to pay over the same to the city, and this is conceded by defendant; but it is claimed that the case at bar does not come within the ruling in *Salem v. Marion County*, for the reason that the road tax levy in the latter case, even within the city, was properly made by the county court, but that it was the duty of the city's officers, and not the sheriff, to collect the tax. In this case, as well as in that, the county had no right or claim to the money. It properly belongs to the city. In *Salem v. Marion County*, supra, the tax was collected by the wrong officer, while in this case it was collected by the right officer, but the levy made by the wrong body; and the whole reliance by the defendant, to justify its refusal to pay the money over to the city, is that it is liable only to the taxpayers, and not to the city. However, if the levy was void and might have been resisted by the taxpayer, yet, when he has voluntarily paid it, he is precluded from questioning the regularity of the proceeding or the validity of the levy. It is held in *Brown v. School District*, 12 Or. 345, 7 Pac. 357, that the collection of a void tax may be enjoined, or payment thereof may be made under protest and the amount recovered back. But when once voluntarily paid by the taxpayer he is precluded from thereafter attacking its validity.

It is generally conceded that a tax voluntarily paid cannot be recovered back, and it is immaterial in such a case that the tax has been illegally levied. Before a taxpayer can recover it back, the tax must be illegal and the payment must have been made un-

der compulsion. Cooley, Taxation (2d Ed.) 805, 809. In *People ex rel. v. Brown*, 55 N. Y. 180, 187, where the validity of the tax was questioned by the collector, the court say: "The defendant cannot claim to retain the money as the representative of the taxpayers. There is no relation of principal and agent, or trustee or cestui que trust, existing between the taxpayers and the collector; and it does not appear but that it was paid by them voluntarily, and under circumstances which would prevent their recovering it back from any one." Similar language was used in *Berrien County Treasurer v. Bunbury*, 45 Mich. 79, 85, 7 N. W. 704, 706: "He received it in payment of taxes, and as money belonging to the public. Whose money is it? Those who were assessed voluntarily paid it in satisfaction of their tax dues and in the discharge of their duty as citizens. * * * Can it be an answer to this suit brought for its recovery to say: * * * But it could not have been obtained if the taxpayers who freely paid and do not complain had held back for compulsory measures? We think not." See, also, *Lovington et al. v. Board of Trustees*, 99 Ill. 564; *O'Neal v. Board of School Com'rs*, 27 Md. 227. Cooley, Taxation, 705, says the collector "would not be permitted to rely upon technical objections which might be made to the right of the public to the money. If he receives the money to the use of the public, he should account for it; and it is immaterial that those who have paid it might successfully have resisted the collection from them." "The principles here stated are applicable, not merely to the case of a defect in the official authority, but to the

case, also, in which defects, either technical or substantial, might have been urged to the tax the officer has enforced." In *Salem v. Marion County*, supra, it is said: "The principle that an obligation rests upon all persons, natural and artificial, to do justice, so that, if a county obtain money or property of others without authority, the law, independent of any statute, will compel restitution or compensation, is not questioned."

By the terms of the statute above cited, the county is made the tax collector for cities and school districts, and it stands in that relation to them in all proceedings in relation thereto. If the county tax collector collects a void municipal tax and turns it over to the municipality, the remedy of the taxpayer, if he has saved his rights, is against the municipality, and not against the collector. Cooley, Taxation, 805. The county's position is wholly untenable. It has levied a road tax within the city, evidently in good faith, believing that that was the method for raising road taxes for the city, but now says that the city, and not the county, should have made the levy, and that it will, therefore, keep the money, on the theory that the city has no title to it. Although it was the duty of the city to have levied the tax, the county court assumed to do so, and then collected it, as was its duty, if properly levied. The city, by its conduct in claiming the tax, has ratified the levy, and the taxpayer has voluntarily paid the tax: hence it is clear that the fund is the property of the city, and the county is not justified in refusing to pay it over.

The judgment of the lower court is affirmed.

O'NEILL v. POTVIN.

(Supreme Court of Idaho. Jan. 22, 1908.)

Rehearing denied.

For former opinion, see 93 Pac. 20.

PER CURIAM. A petition for a rehearing has been filed herein, and the main contention is that the judgment roll in the case of Potvin v. Malenfant shows that the court never acquired jurisdiction to enter judgment in that action, and counsel contends that the affidavit and order for service of summons by publication are before the court, and ought to be considered.

It is true the affidavit and order for service of summons by publication are contained in the record, but under our statute are no part of the transcript on appeal, and for that reason this court cannot consider them. As stated in the opinion in this case, the judgment roll in cases where the complaint is not answered consists of the summons with the affidavit or proof of service and the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment. On the trial of this case only the judgment roll in the case of Potvin v. Malenfant could be legally admitted as evidence as to the jurisdiction of the court to enter judgment in that case, and if the judgment roll in that case contained papers not constituting a part of the judgment roll, that court could not legally consider them, nor could such papers be considered on appeal by this court.

Section 4148, Rev. St. 1887, provides how the proof of service of summons and complaint must be made, and is as follows:

"Proof of service of summons and complaint must be as follows:

(1) If served by the sheriff, his certificate thereof;

(2) If by any other person, his affidavit thereof; or

(3) In case of publication, the affidavit of the printer, or his foreman or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons in the post office if the same has been deposited; or

(4) The written admission of the defendant. In case of service otherwise than by publication, the certificate or affidavit must state the time and place of service."

It will be observed that the third paragraph of said section applies to the proof of service of summons when the service has been made by publication, and it is there provided that the proof of such service is the affidavit of the printer or his foreman or principal clerk, showing the same, and an affidavit of the deposit of a copy of the summons in the post office, if the same has been deposited. As the statute provides just what the proof of service consists of, this court is not empowered to amend that section, and hold that the proof of service of

summons by publication shall consist of the affidavit and order for the publication of summons, in addition to the affidavits provided for in said section.

It appears to us that the provisions of said section make it too clear to admit of any controversy as to just what papers the proof of service of summons by publication consists of. As no change could result in the opinion heretofore filed by granting a rehearing, a rehearing is denied.

CANADIAN BANK OF COMMERCE v. WOOD, Judge.

(Supreme Court of Idaho. Dec. 31, 1907.)

1. CERTIORARI—OTHER ADEQUATE REMEDY.

Under the provisions of Rev. St. 1887, § 4962, a writ of review may be granted by any court except a probate or justice's court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, or adequate remedy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, §§ 4, 41.]

2. SAME—WHEN ALLOWED.

Under this statute, two things must be shown to exist before a writ of review will be issued: First, that an inferior tribunal, board, or officer, exercising judicial functions, has exceeded its jurisdiction; and, second, that there is no appeal, nor, in the judgment of the court, any plain, speedy, or adequate remedy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, §§ 4, 41.]

3. SAME—APPEALABLE ORDER.

An order made by a judge allowing claims, and disallowing others, against an estate, and directing a receiver to pay, out of the funds in his hands, such claims as the judge has allowed, and distribute the funds in the hands of the receiver, according to the order and judgment of the judge, is an appealable order or judgment, and certiorari will not lie to review such order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 5.]

4. SAME—PETITION.

An allegation in a petition for writ of certiorari that, if an appeal be taken, the expense will be heavy and disproportionate to the amount the plaintiff will recover, is not a reason why the appeal will not be a plain, speedy, and adequate remedy, and does not warrant this court in reviewing the judgment by writ of certiorari.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 5.]

(Syllabus by the Court.)

Application by the Canadian Bank of Commerce for writ of certiorari to Fremont Wood, judge of the Third judicial district. Writ denied.

Samuel R. Stern, Ezra R. Whitla, and I. N. Smith, for petitioner. John P. Gray and J. H. Forney, for defendant.

STEWART, J. On August 3, 1907, Judge Fremont Wood, judge of the Third judicial district of the state of Idaho, sitting at chambers at Wallace, Shoshone county, Idaho, and within the First judicial district of the State

of Idaho, filed in said court the following order or judgment:

"In the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone. George B. McAuley and Van B. DeLashmutt, Plaintiffs, v. The Coeur d' Alene Bank, a Corporation, Defendant. Decree. Be it remembered, That the above-entitled action came on to be heard before the judge of the above-entitled court, sitting at chambers in Wallace, Idaho, on the 20th day of April, 1907, the Honorable Fremont Wood, judge of the Third judicial district of the state of Idaho, presiding at the request of the Honorable W. W. Woods, judge of the above-entitled court, said judge of the above-entitled court, being disqualified by reason of the fact that he had been attorney for the receiver of the said bank, and the said receiver, Abner G. Kerns, being personally present and represented by his attorneys, J. H. Forney, John P. Gray, and Henry S. Gregory; and Joseph P. Keane, claiming to be a creditor of the said bank, being personally present and represented by his attorney, Albert H. Featherstone; and the Canadian Bank of Commerce, claiming to be a creditor of said bank, and being represented by its attorney, Samuel R. Stern; and George Stewart, claiming to be a creditor of said bank, being represented by his attorney, A. H. Conner; and John Reedy, Alexander E. Mayhew, Mrs. E. J. Jackson, and Edward Doyle, claiming to be creditors of said bank, being represented by their attorneys, A. H. Conner, Walter H. Hanson, and James A. Wayne; and all of the persons so interested, or claiming to be interested, thereupon consented to the hearing of all matters in connection with the said action before the said court, and the said judge sitting in chambers on the said day, and no objection being made—the court proceeded to hear the said cause on the report of the receiver, filed the 14th day of January, 1907, and upon the petitions of Joseph P. Keane, George Stewart, and John Reedy, Alexander E. Mayhew, Mrs. E. J. Jackson, and Edward Doyle, and the complaint and records and files in the said action, and evidence was introduced and heard by the court, and after argument of counsel for the respective parties present, the court took the said cause under advisement. And now, at this time, the court having fully considered the said cause, and being advised in the premises, and having made its finding of fact and the conclusions of the law therefrom, it is hereby ordered, adjudged, and decreed as follows: (1) That the former order of this court, dated the 20th day of April, 1907, ordering, adjudging, and decreeing that the sum of ten thousand dollars (\$10,000) be fixed and allowed as the sum of money to be paid to the said receiver for his compensation and expenses in the employment of counsel, and that the same be in full payment for all services rendered to April 20, 1907, and for such other services as may be rendered in

the ordinary administration of the said estate, and directing the said receiver to pay the said sum of money for the said services be, and the same hereby is, confirmed and made a part of this decree; and that the former order of this court, dated April 20, 1907, ordering, adjudging, and decreeing that the expense account of the receiver for moneys expended by him as such officer up to and including the 14th day of January, 1907, amounting to the sum of four hundred eighty dollars and thirty-two cents (\$480.32), be allowed, is hereby confirmed and made a part of this decree. (2) That the claim of the Bank of British Columbia, amounting to the sum of fourteen thousand four hundred and five dollars and forty cents (\$14,405.40) principal, be, and the same is hereby, disallowed, and that the said Canadian Bank of Commerce, claiming to be the assignee and successor in interest of the said Bank of British Columbia, receive nothing from the said receiver. (3) That the claims of Joseph P. Keane, and each and all of them be, and the same are hereby, disallowed, and that the said Joseph P. Keane receive nothing from the said receiver on account of said claims. (4) That the said receiver proceed to close the administration of the affairs of the said Coeur d' Alene Bank; that a notice be published for a period of ——— weeks in the 'Idaho Press' a weekly newspaper published at Wallace, Idaho, and in 'The Times,' a daily newspaper published at Wallace, Idaho, directing the creditors of the said bank to apply to the said receiver for the payment of their claims, and that the said receiver pay the said claims, together with interest, in proportion as the assets in the hands of the receiver bear to the entire amount of claims of the said creditors. That the said receiver also give personal notice in writing to such creditors whose address is known to him; that in the event any of the said creditors of the said bank do not apply to the said receiver on or before the 1st day of ———, 190—, for the payment of their said claims, the claims of such creditors as fail to make application on or before said 1st day of ———, 190—, shall then be disallowed, and any moneys remaining in the hands of the said receiver after said 1st day of ———, 190—, shall be applied proportionately among these creditors who have appeared and applied for the payment of their claims, as in this decree provided, in payment of any balance due upon their said claims, and the interest thereon; and that the interest so to be paid by the receiver is hereby fixed at the sum of ——— per cent. per annum. (5) That upon the distribution of the money in the hands of the said receiver, as provided in this decree, and upon the filing by the said receiver of proper vouchers showing the payment thereof, the said receiver shall be entitled to be discharged. (6) That the said receiver be allowed the sum of two hundred fifty dollars (\$250) for necessary expenses in

closing the administration of the estate of the said bank, and in making the distribution as provided in this decree. (7) That the report of the said receiver, filed on the 14th day of January, 1907, be, and the same is hereby, approved except as by this decree modified. Dated this 27th day of July, A. D., 1907. Filed Aug. 3, 1907. Fremont Wood, Presiding Judge."

Thereafter, and on the 7th day of October, 1907, the plaintiff herein filed a petition praying for a writ of certiorari to review said order or judgment. The writ was issued, commanding the defendant to certify to this court a full and complete transcript and record in said proceedings, on the 18th day of November, 1907, and was served upon the defendant by acknowledgment of service on the 15th day of October. On the day set for the return, the defendant appeared and filed a motion to quash the writ upon a number of grounds, one of which is that service of said writ was not made upon the parties in interest in the proceeding, as shown in the petition for the writ. After argument, the court was of the opinion that the affidavit and notice of the hearing should have been served, not only upon the defendant, the judge who made said order, but upon all other parties shown by the record to be real parties in interest, or whose interests would be directly affected by the proceedings under paragraph 5, rule 28 of this court. 32 Pac. xii. Under Rev. St. 1887, §§ 4963 and 4967, and this rule, it is not necessary that any of the parties, except the defendant, should have been named as defendant, but it was necessary that the names of the parties really interested should be disclosed by the petition, and that service of such affidavit and notice should be made upon such persons. The effect of a failure to serve such parties is not a ground for quashing the writ, but, at most, calls only for a postponement of the hearing until such parties have reasonable notice of the time of such hearing. *Baker v. Superior Court*, 71 Cal. 583, 12 Pac. 685; *Havemeyer v. Supreme Court*, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192. The court, therefore, in this case, postponed the final hearing of this cause to the 15th day of December, 1907, and required that notice of such hearing be given to all parties disclosed by the petition to be parties in interest, or whose interest would be affected by such proceedings. Service was duly made upon such parties, and the cause was submitted thereafter upon the motion to quash the writ. The motion contains nine different grounds, the first eight of which go to the sole question as to whether or not a writ of certiorari would lie in this action. Rev. St. 1887, § 4962, provides: "A writ of review may be granted by any court, except a probate or justice's court, when an inferior tribunal, board or officer exercising judicial functions, has exceeded the jurisdiction of such tri-

bunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy." Conceding, therefore, without deciding, that Judge Wood had no jurisdiction to enter the judgment complained of, yet if the petitioner herein had the right to appeal from said order, the writ of certiorari would not lie to review said judgment or order.

In the case of *Chemung Mining Co. v. Hanley*, 11 Idaho, 302, 81 Pac. 619, this court had under consideration the question as to whether an order appointing a receiver pending the litigation was an appealable order. Justice Sullivan, speaking for the court in that case, says: "Under the provisions of section 9, art. 5, of our state Constitution, this court has jurisdiction to review, upon appeal, any decision of the district court or the judges thereof. An order granting or refusing a motion for the appointment of a receiver is a decision, and such decision is appealable, therefore the order of the district court denying the appointment of a receiver in this case, is an appealable order."

In the case of *Dahlstrom v. Portland Mining Co.*, 12 Idaho, 87, 85 Pac. 916, this court had under consideration the provisions of said section, and Justice Sullivan, speaking for the court, said: "It will be observed that two things must be shown to exist before a writ of review will be issued. The first is that an inferior tribunal, board or officer exercising judicial functions has exceeded its jurisdiction; and, second, that there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy. If in the case at bar, the petitioners had an appeal, the motion to quash the writ must be granted."

In the case of *Grant v. Superior Court*, 106 Cal. 324, 39 Pac. 604, a writ of prohibition was sought to arrest the action of the superior court in making an order fixing the compensation of a receiver appointed by such court, and the court says: "We are of the opinion that, whether the proceeding which the petitioners seek to arrest is or is not without or in excess of the jurisdiction of the superior court, the writ of prohibition ought not to issue, for the reason that the petitioners have a plain, speedy, and adequate remedy by appeal from any order the court may make by which they could be injuriously affected." And, further: "If we are right in the conclusion that any party aggrieved by an order of the court directing him to pay the receiver's compensation, or directing payment out of a fund in which he is interested, has an appeal from such order as from a final judgment in an independent proceeding, collateral to the main action, and that he may stay all proceedings upon such order pending his appeal by filing a proper undertaking, there can be no need of a writ of prohibition in such a case, and it will not lie."

In the case of *Grant v. Los Angeles*, etc.,

Ry., 116 Cal. 71, 47 Pac. 872, the court had under consideration appeals from two orders of the superior court; the first, an order fixing the compensation of a receiver in the action, and the other, an order denying an application of the appellant to vacate a former order, and substituting him as plaintiff in the action in place of the entered party or original plaintiff. The objection was made that such orders were not appealable and that both appeals should be dismissed. In discussing this question, the court says: "As to the order fixing the receiver's compensation, while not nominally one from which the statute authorizes a direct appeal, and while it sufficiently appears that it is not a special order made after final judgment, it is nevertheless an adjudication from which an appeal will lie. The order not only fixes the compensation of the receiver, but taxes such compensation as costs in the action, as against all the parties, and directs and authorizes the receiver to apply toward its payment the balance of a fund remaining in his hands as such receiver. Such an order, however, it may be designated, is, in legal effect, 'a final judgment upon a collateral matter arising out of the action,' and is 'appealable by any party interested in the fund.'"

In the case of *Elliott v. Sup. Ct.*, 144 Cal. 501, 77 Pac. 1109, 103 Am. St. Rep. 102, the petitioner sought to review by certiorari certain orders of the superior court of San Diego county, made after final judgment. In relation to the payment of certain expenses of the receivership and services of attorneys for the receiver, the court says: "If the order complained of is appealable, certiorari cannot be invoked, and certiorari will not lie to review orders of the superior court directing a receiver in an equity case to pay counsel fees, if there is a remedy by appeal therefor." Rev. St. 1887, § 4962, is practically the same as section 1068, Kerr's Code of Civil Procedure of California.

An examination of the judgment sought to be reviewed in this case discloses that said judgment affirms certain action taken by the same court in a former order, and paragraph 2 of the decree adjudges that the claim of the Bank of British Columbia, amounting to the sum of \$14,405.40, principal, is disallowed, and the Canadian Bank of Commerce, claiming to be the assignee and successor in interest of the said Bank of British Columbia, receive nothing from the receiver. Thus it will be seen that by this judgment the plaintiff herein, who claimed over \$14,000 due out of said estate, the decree disallows such claim entirely. In paragraph 3 of the decree, the claim of Joseph P. Keane is disallowed. In paragraph 4, the receiver is directed to close the administration of the affairs of the Coeur d'Alene Bank, and to apply the moneys received therefrom in proportion as the assets in the hands of the receiver bear to the entire amount of the claim of said creditors, and that in the event any of the cred-

itors do not apply to the receiver by a certain date for the payment of their claims the claims of such of said creditors who fail to make application shall be disallowed, and any moneys remaining in the hands of the receiver shall be applied proportionately among those who have appeared and applied for the payment of their claims as this decree provides. Paragraph 5 of the decree directs that upon the distribution of the money in the hands of the receiver the receiver shall be discharged, and that he be allowed the sum of \$250 for necessary expenses in closing the administration of the estate. It will thus be seen that, by this decree, the plaintiff herein, who made a large claim, was denied any relief whatever, his claim being disallowed in toto, and the funds in the hands of the receiver were directed to be paid out by the receiver and distributed according to the terms of the decree. This decree was a final judgment. It directed the payment of money in the hands of the receiver. It adjudicated and allowed claims against the estate, and disallowed others, and, under the law, it ordered the receiver to pay out and distribute a fund in which the plaintiff and others claimed an interest. It was a final judgment as to plaintiff's claim. Clearly an appeal would lie therefrom, and the right of appeal excludes the right to proceed by certiorari.

In the case of *Dahlstrom v. Portland Min. Co.*, 12 Idaho, 87, 85 Pac. 916, this court said: "If, in the case at bar, the petitioner had an appeal, the motion to quash the writ must be granted."

In the case of *Stoddard v. Sup. Ct.*, 108 Cal. 303, 41 Pac. 278, the court says: "It may be readily admitted that the court had no jurisdiction to make the order, but, as the order is appealable, certiorari will not lie because it lies only where there is no appeal." And, again: "We have been referred to no case in which it has been held that under our Code a writ of certiorari will lie to reverse an appealable order. That the appeal does not afford a plain, speedy, and adequate remedy makes no difference; the provision of the statute governs."

In the case of *White v. Sup. Ct.*, 110 Cal. 54, 42 Pac. 471, the court said: "Void judgments and orders are not less appealable by reason of that fact, and, when that remedy is afforded, it excludes the right to certiorari notwithstanding the order be void in the extreme sense."

In the case of *Southern Cal. Ry. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789, the court reviews the various California cases passing upon this question up to that time, and approves the doctrine that the writ will not lie where there is an appeal provided by law. Counsel for plaintiff, however, contends that an appeal would not furnish a plain, speedy, and adequate remedy, and, as grounds, alleges in his affidavit "that, in view of the peculiar circumstances in this case, affiant and his associates are of the opinion that

the court will ultimately hold that the said Canadian Bank of Commerce, said appellant, has no plain, speedy, or adequate remedy, except in the issuance of a writ of certiorari as provided for by the statutes of the state of Idaho; that to attempt to take this appeal means the expenditure of almost a prohibitory sum of money; that owing to the small amount to be distributed to the creditors it is questionable in the minds of affiant and his associates whether or not a sufficient dividend will ultimately be declared to give to the appellant the relief to which it should be properly entitled; that the proposed bill of exceptions, without an amendment, is a very voluminous bill, containing between 60 and 70 pages, and this without amendments, and without considering the printing of briefs, and then to send up the records in this case of appeal means an expenditure of a very large sum of money, scarcely permissible in view of the amount of the dividend likely to be recovered, even in the event of the ultimate allowance of the claim in question." This is the ground upon which the plaintiff relies to show that an appeal would not be a plain, speedy, and adequate remedy. We are not aware of any case wherein it has been held that an appeal is not a plain, speedy, and adequate remedy because the appeal would cost a large sum of money. This is no reason why a writ of review should be issued. If this court should issue the writ in this case, and require the defendant to certify to this court the record, the same expense, almost, which would be incurred by the appellant upon appeal will be shifted to the defendant upon the return to the writ. This reason is no reason at all for not taking the appeal. If an appeal would lie from said order, it was the plaintiff's duty to pursue that remedy. Excessive costs to be incurred on appeal is not a reason why the judgment should be reviewed by a writ of certiorari. The aggrieved party must be relegated to the remedy pointed out by the statute. If the appellant desired to have the order reviewed in the method pointed out by law, he could have secured a stay of execution of said judgment as provided by law. The stay being provided by the statute, and the question of expense being the only reason why the legal remedy was not pursued, is not sufficient to authorize this court in setting aside the method provided by statute for reviewing the judgment, and establishing a new and different method.

The judgment, therefore, sought to be reviewed by writ of certiorari being an appealable judgment, it would be wholly unprofitable, and the court would not be authorized to consider the question as to the jurisdiction of the defendant to enter the judgment complained of.

The motion to quash the writ will be sustained. Costs awarded to the defendant.

AILSHIE, C. J., and SULLIVAN, J., concur.

(76 Kan. 848)

RENARD et al. v. BENNETT et al.

(Supreme Court of Kansas. Dec. 7, 1907.

Rehearing Denied Jan. 16, 1908.)

1. DEATH—PRESUMPTION—ABSENCE.

Following *Modern Woodmen v. Gerdorn*, 72 Kan. 391, 82 Pac. 1100, 2 L. R. A. (N. S.) 809, it is held that the inference of death to be derived from the unexplained absence of a person from his home for a period of seven years is, at best, only a presumption, and it cannot arise, unless the absence remains unexplained after diligent inquiry is made of the persons and at the places where tidings of the absentee, if living, would most probably be had.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 1-3.]

2. SAME.

The removal of a person to another part of the country, or his mere absence from a former home, where he has been unheard of for seven years, does not create the presumption of death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 1-3.]

3. SAME—NECESSITY OF INQUIRY.

If the absentee left without intending to return, and there is a change of domicile, the fact that he has not communicated with, or is unheard of, by those remaining at his former home, will not raise the presumption of death. That presumption does not arise until due inquiry has been made at his last-known domicile, and of the persons likely to know of his whereabouts, if living.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 1-3.]

(Syllabus by the Court.)

Error from District Court, Cloud County; W. T. Dillon, Judge.

Action by Edward Bennett and Nettie Seyster against Arthur E. Renard and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

Park B. Pulsifer and C. L. Hunt, for plaintiffs in error. F. W. Sturges, for defendants in error.

JOHNSTON, C. J. This was an action by Edward Bennett and Nettie Seyster, children of Orrin E. Bennett, to recover an undivided one-half interest in a tract of land lying near the city of Concordia, and they asked for partition as well as rents and profits. The tract was formerly owned by D. W. Williams, who conveyed an undivided one-half interest to Orrin E. Bennett, and together they operated a brewery on the land until 1881, when the prohibitory law went into effect. About that time Williams removed to Missouri, while Bennett remained at Concordia, and for a few years gave the property some attention. In a foreclosure proceeding against Williams the sale of the land was decreed, and the sheriff sold the same to the First National Bank of Concordia, conveying the property by a deed dated May 5, 1892. On December 21, 1900, the bank executed a deed purporting to convey the property to the Renard Bros., who were named as defendants in this action. The theory of the action is that Bennett's interest in the tract had never been sold or transferred by any of the prior instruments or proceedings, that

Bennett was dead, and that his interest had passed to his children, who were his only heirs. When plaintiffs had introduced their testimony, which was largely devoted to an attempt to show the death of Orrin E. Bennett, its sufficiency was challenged by a demurrer to the evidence which the court overruled, and at the end of the trial it was adjudged that Edward Bennett and Nettie Seyster each owned an undivided quarter interest in the property in question, the rents and profits were determined, and the partition of the property directed. The only claim of the Bennett children to a share in the land in controversy is based on heirship or inheritance from their father, and it therefore devolved upon them to establish his death. There was no direct proof of death as a fact, and to supply this lack they offered testimony which was intended to raise the presumption of death. The controlling question is, were the circumstances proven sufficient to end the presumption of life and start the presumption of death? and, if not, then the demurrer to the evidence should have been sustained, as counsel for Renard Bros. contend. When the action was brought, Bennett had been absent from Concordia for more than 15 years, but his mere absence from that city, although it extended for more than 7 years, did not create the presumption of death. That presumption cannot arise from a change of residence, or a removal from the place where the family or relatives reside. It is the unexplained absence from the absentee's last-known residence or places of resort for the 7-year period that gives rise to the presumption. Nor is it enough that he is absent and unheard of for this period, but the presumption can only arise after diligent inquiry of persons and at places where news of him, if living, might likely be obtained without gaining information concerning him.

The identical question was before the court in *Modern Woodmen v. Gerdorn*, 72 Kan. 391, 82 Pac. 1100, 2 L. R. A. (N. S.) 809. Gerdorn, an unmarried man, left his home in Kansas and went to California, where he obtained employment. After several letters to members of his family, and some changes of location, he ceased to communicate with them, and no tidings of him were received by his father and mother for more than 7 years. He carried life insurance in a fraternal society, which was claimed by beneficiaries who insisted that he was dead. It appeared that only a limited inquiry as to whether he was living had been made by them, his father being the only witness who testified on the subject, and it was shown that he had not inquired of all the people and at all the places where news of the son, if living, might have been obtained. On this state of the case it was held that it was not a question of whether there was some testimony to support the finding of death, but it was rather whether facts indispensable to

start the presumption of death had been produced. Justice Burch, in a carefully prepared opinion, in speaking of the missing party and the circumstances which might give color to his absence, said that he "was a young, unmarried man, in good health, with the wander-lure upon him, trying his fortunes in a distant state, able to make his own way in the world, but whose circumstances had become such, or whose disposition towards his relatives had so far changed during his absence from home, that he no longer advised them, as he had been in the habit of doing, of changes in his affairs, of his plans, and of his movements from town to town." In treating of the inquiry which should be made and the preliminary proof necessary to start the presumption of death, it was said: "In order that the presumption of life may be overcome by the presumption of death there must be evidence, not merely of absence from home or place of residence for the period of 7 years, but there must be a lack of information concerning the absentee on the part of those likely to hear from him, after diligent inquiry (quoting authorities). It is conceived, however, that the character of the inquiry, the persons of whom it must be made, and the place or places where it must be made are all to be determined by the circumstances of the case, with the obligation always upon the person who is to derive a benefit from the death of the absentee to exclude by the best evidence, and with as much certainty as possible, reasonable belief that he continues to live." After referring to the fact that inquiry was not made of certain intimate friends with whom the absentee might have communicated, the opinion proceeded: "All those persons who, in the ordinary course of events would likely receive tidings if the party were alive, whether members of his family or not, should be interrogated, and the result of the inquiry should be given in evidence, or the testimony of the parties themselves should be produced at the trial. * * * Any word received by any one who might naturally be expected to hear at any time within the 7-year period destroys the presumption of death, and unless the resources of this field of information have been exhausted, an allegation of death cannot successfully be sustained."

The principles applied in that case control the present disposition of the one before us. While Bennett had been absent from Concordia for a long period of time, it is clear that there has not been the diligent inquiry for him essential to the presumption, that is, the inquiry has not exhausted "all patent sources of information, and of others which the circumstances of the case suggest." He took his departure from Concordia about 1890, leaving a family consisting of a wife and three children, one of whom has since died, and also an aged mother. A married sister of his lives in Concordia, another married

sister in Kansas City, Mo., and a half-brother near Frankfort, Kan. It is in testimony that he had a passion for gambling, one of the witnesses stating that "that was really what he lived for," and that he gambled whenever "he had the money to gamble with." Before he left he had become estranged from his wife, and, as one witness expressed it, "he wanted to go away from the family." His relations with his mother were friendly, but he did not want to live in the same town with his wife. He went West, and within six months after leaving he wrote a letter to his mother from a town on the Pacific Coast stating that he was in good health and was just about to sail on a vessel from that port to one in Alaska. About the same time he wrote a similar letter to his son William, who afterwards died in the Philippines. His wife, who died in 1894, never received a letter from him, nor did he ever write to his surviving children, Edward and Nettie. There was a rumor that he had been seen by some one in a town in the state of Washington, who was not within speaking distance, and his sister wrote a letter addressed to him at that place but received no reply, and, although there was a return address on the envelope, the letter was never returned to her. When his mother died, which occurred about a year after he left Concordia, notices of action to be taken in the probate court towards a settlement of her estate were published in the newspapers, and copies of these papers were mailed to him at the town where rumor said he had been seen. The sending of the letter and the newspapers was the extent of the inquiry made to find Bennett in his new home in the West. Rumors of his having been in Kansas City, Mo., reached some of the members of his family, but they did not appear to have any foundation. It does not appear that his children, who are claiming his property as an inheritance, ever made any effort to find their father. The testimony of his brother who lives in Kansas was not produced, nor was that of his sister who lives in Kansas City, Mo., nor of the brother-in-law, a former partner, who still resides at the latter place. More than that it was not shown that any inquiry was made at the place from which the letters to his mother and son were written. His letter to his mother gave the name of the place on the coast, but which the witnesses could not remember, and that furnished a clue from which those interested might have learned something of him, the name of the ship upon which he sailed, as well as his destination and subsequent domicile in Alaska. It does not appear that any inquiry was made in Alaska, nor any effort to learn from sailing lists, public records, or other sources of information what had become of the absentee. According to his own statement, his departure from his Kansas home was final and permanent. It was a case of a change of domicile, and therefore little can be based upon

the fact that he did not return to Concordia. Since the removal was permanent and without an intention to return, a more extended inquiry should be made. It should extend to the new home. It is absence from his last known domicile that gives rise to the presumption. It was said of the absentee in the Gerdom case that "there was nothing to indicate that a purpose to return was bound up with his going." Here there was an avowed purpose to stay away from Concordia, and in the letters received from him there was no hint of an intention to return. It is quite unlike a case where there is a sudden disappearance of one of good habits, who is successful in business and respected by his neighbors, having a good home and pleasant relations. There were no attachments to draw Bennett back to Concordia, no business interests, and the only property left was incumbered and unprofitable. There is no proof of illness, disease, dangerous occupation, or disposition to suicide, nor yet that he had been exposed to any specific perils likely to have ended his life, to support the presumption. On the other hand, it does appear that he was a healthy, vigorous man, in middle age, as there was testimony that he was from 55 to 59 years of age at the time of the trial, and besides there is an absence of any special circumstances inconsistent with the continuation of life. The patent defect in the testimony, however, is the lack of diligent inquiry. To establish a death and right of inheritance, plaintiffs rely only upon the presumption arising from absence. The inference of death to be derived from unexplained absence is, at most, only a presumption, and it cannot arise, unless the absence remains unexplained after diligent inquiry is made of the persons and at the places where tidings of him, if living, would most probably be had. *Modern Woodmen v. Gerdom*, supra; *Iberia Cypress Co. v. Thorgeson*, 116 La. 218, 40 South. 682; *Barr v. Chapman*, 30 Wkly. Law Bul. 265; *Burnett v. Costello*, 15 S. D. 89, 87 N. W. 575; *Hitz v. Ahlgren*, 170 Ill. 60, 48 N. E. 1068; *Francis v. Francis*, 180 Pa. 644, 37 Atl. 120, 57 Am. St. Rep. 668; *Posey v. Hanson*, 10 App. D. C. 496; *Latham v. Tombs*, 32 Tex. Civ. App. 270, 73 S. W. 1060; 2 Greenl. Ev. (Lewis' Ed.) § 278; 13 Cyc. 301. Diligent inquiry, as held in the Gerdom Case, required the interrogation of the members of Bennett's family with whom he might have communicated; but it appears that there was a failure to produce the testimony of a sister and a brother which was accessible, and could easily have been obtained. The rule of that case also required that reasonable inquiry should have been made at the place on the Pacific Coast where Bennett was when the letter to his mother was written, and also at his last domicile or places of resort in Alaska, which might have been ascertained by inquiry. Until diligent inquiry is made, and the sources from which information is likely to be obtained have been exhausted,

the presumption of death does not arise and hence there was error in overruling the demurrer to plaintiff's evidence.

The judgment will therefore be reversed, and the cause remanded for further proceedings.

(77 Kan. 806)

MINOR v. FIKE.

(Supreme Court of Kansas. July 5, 1907.
Rehearing Denied Jan. 16, 1908.)

1. COMPROMISE AND SETTLEMENT—DISCHARGE OF LIABILITY.

A compromise and settlement of a bona fide dispute, though the amount agreed to be paid may be much less than is actually due, if supported by a consideration and fairly made, bars a recovery on a claim included in the settlement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Compromise and Settlement, §§ 54-65.]

2. SAME—EVIDENCE.

In an action by the former owner of land sold by a broker for a higher price than he had reported to recover part of the excess, evidence held to support a finding that the parties had compromised and settled their dispute prior to the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Compromise and Settlement, § 94.]

Smith, J., dissenting.

Error from District Court, Thomas County; Charles W. Smith, Judge.

Action by P. C. Minor against J. N. Fike. Judgment for defendant, and plaintiff brings error. Affirmed.

H. J. Harwi and Garver & Larimer, for plaintiff in error. Asa M. Smith and Chas. Hayden, for defendant in error.

PER CURIAM. Action by Minor to recover from Fike part of the price of a tract of land, the sale of which had been negotiated by Fike. Minor had previously purchased the land through Fike, and before the transfer was consummated it was again sold through Fike to another. It was alleged that Fike agreed to sell it on commission; that later he reported the sale at \$4,600, when in fact he had received \$5,900, and therefore Minor asked for the balance, \$1,300. Fike denied that he was to sell the land on commission, but claimed that it was to be a sale at a net price, satisfactory to Minor. Minor agreed to and did sell the land at \$4,600, and before the transaction was closed he learned that Fike had received more than that sum for the land. In a dispute which arose between them Minor insisted that as Fike had gotten more than \$4,600 for the tract he should not only forgive the commission, the compensation for selling the land, but should pay him part of the excess which had been received. After considerable bantering a compromise was made by which Fike agreed to pay and Minor to accept \$30 as a final settlement of the transaction. Fike issued his check for that amount and gave it to Minor, and on the back of the check there was written a receipt or statement that the check was giv-

en as payment and settlement in full on the land transaction. Upon testimony, some of which was conflicting, the trial court found that Minor, knowing and insisting that Fike had received much more than \$4,600 for the land, settled with him, and that this settlement was binding upon both parties.

Granting that there was misrepresentation as to the price received for the land when the sale was reported, it must be held under the testimony and findings of the court that there was no fraud in the compromise and settlement subsequently made. There was knowledge that Fike had received considerable more than was paid to Minor, a dispute as to what portion of the excess should be paid to Minor, and a settlement without fraud as to the amount. A compromise and settlement of a bona fide dispute, although the amount agreed to be paid may be much less than is actually due, is supported by a consideration, and if fairly made bars a recovery on the claim included in the settlement. The settlement in this case, resting as it does on sufficient testimony, makes the findings of the trial court conclusive on this review.

Judgment affirmed.

JOHNSTON, C. J., and GREENE, BURCH, MASON, PORTER, and GRAVES, JJ., concurring.

SMITH, J. (dissenting). The per curiam decision announces, in effect, that all the justices of this court are of one mind regarding the same, and that the case is so clear as to render discussion thereof unnecessary. 6 Words & Phrases, 5285, and authorities there cited. However, I feel compelled to dissent from the decision.

The uncontroverted evidence, to which there is no adverse finding, shows that the agent procured the conveyance of the land from his principal to the real purchaser through a sham purchaser, who paid no consideration therefor; that he falsely reported to his principal the amount received for the land, and concealed the true amount up to and including the time of settlement. He even demanded a commission on the false amount (\$4,600) reported which negatives his claim of a contract that he was to have all he could secure in excess of \$4,600. The concealment of the amount received at the time of settlement was of itself a fraud and vitiates the settlement. I have misread the law of agency, if an agent, knowing all the facts involved in a matter, and knowing his principal's ignorance thereof, can speculate upon his principal's ignorance, and upon his own dereliction of his duty to inform his principal, and thus obtain great advantage to himself through a compromise settlement. The whole effect of the evidence is that the principal did not know, but only suspected or believed that the agent had received more than \$4,600 for the land, although the evi-

dence shows that in the conversation leading up to the settlement he told the agent he knew he (the agent) had received more. The whole transaction is tainted with circumvention, misrepresentation, and concealment in a fiduciary relation in which the law imposes upon the agent the duty of reporting to his principal the full facts, the strictest integrity, and open-handed dealing.

The finding of the court that the principal settled with knowledge that his agent received considerably more than the amount reported is unsupported by any evidence that the principal knew of any specific sum received in excess of the \$4,600 reported. The testimony of the agent as to the conversation between him and his principal at the time of the settlement shows of itself that they were haggling over a small difference. There is nothing in the evidence to indicate that the principal even suspected the sum was \$1,800 or a sum in any way approximating thereto. Thus the agent's fraud procured the settlement, and he should not be rewarded therefor.

(77 Kan. 528)

ROBINS MINING CO. v. MURDOCK.

(Supreme Court of Kansas. Dec. 7, 1907.

Rehearing Denied Jan. 16, 1908.)

1. APPEAL — RECORD — PRESENTATION OF GROUNDS FOR REVIEW.

Where a case has been reversed and sent back for a new trial, proceedings in the first trial are not properly made part of the record on second appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2327-2330.]

2. ACCOUNT, ACTION ON—OPEN ACCOUNT—EVIDENCE.

Evidence, in an action on account, *held* to support judgment for plaintiff.

Error from District Court, Cherokee County; W. B. Glasse, Judge.

Action by J. C. Murdock against the Robins Mining Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Chesney & Sanders, W. R. Cowley, and Clay H. Alexander, for plaintiff in error. S. C. Westcott, Tracewell & Moore, H. C. Finch, and E. E. Sapp, for defendant in error.

PER CURIAM. Action on account for miners' supplies and merchandise sold. There was a trial to the court, and judgment for plaintiff. Defendant brings error.

A former judgment in the same case was reversed for error in admitting evidence of certain statements made by the president of the mining company. *Robins v. Murdock*, 69 Kan. 506, 77 Pac. 506. For some reason not apparent there has been inserted in the record the entire proceedings of the former trial. The trial judge at the settlement of the case made ordered this stricken, and lines were

drawn through the pages referring to the first trial. Plaintiff in error's brief, however, contains hundreds of references to what is termed the "first record," which it is insisted is before us for examination. The cause was remanded for another trial. The second trial had nothing to do with the first, and the record of that trial has no place in these proceedings and cannot be considered. There are 22 assignments of error. Most of these are abandoned in the brief, and we are obliged to ignore others. For instance, an extended argument is made, with numerous citations of authorities, in support of a claim that it was error to overrule a demurrer to the petition, while the record itself makes no reference to any demurrer having been filed or passed on. Again, it is argued that the court committed error in overruling the demurrer to plaintiff's evidence. As there was no demurrer to the evidence filed or presented, this is easily disposed of.

It is argued at great length in the brief that the trial court refused to follow the law of the case as declared in the former opinion in this court. There is no ground for this contention. The only rule of law announced in the former opinion which controls this case is that certain admissions by the president of the mining company not being shown to have been made by him while engaged in the business of the corporation were not admissible as evidence to bind the corporation. Upon the second trial no such testimony was offered.

The principal, and indeed the only, contention deserving consideration, is the claim that the judgment is not supported by the evidence. The petition contained several causes of action. Some of these were on account for supplies sold direct to the Robins Mining Company. The others were for supplies sold to Robins & Co. The latter, it seems, was a partnership, which for several months conducted mining operations on the mining property under a lease. A transfer of all the rights under the lease and of all the property was made to plaintiff in error. The transfer was in writing, and for the nominal consideration of \$100. At the same time the partnership bank account amounting to \$153 was transferred to the new company, and the latter continued the operation of the mine without any apparent change of ownership. Supplies were ordered and furnished in the same way as before the transfer, and cash payments on account were made from time to time by the new company. In several instances the new company paid on account more than the purchases it had made amounted to. The company also assumed other indebtedness of the partners due to the bank. These and other circumstances in evidence were, in our opinion, sufficient to support the judgment.

Judgment affirmed.

(36 Mont. 394)

Ex parte GRAYE.

(Supreme Court of Montana. Dec. 28, 1907.)

1. CRIMINAL LAW—APPEAL—RECORDS—MATTER TO BE SHOWN.

A transcript of the docket of a justice of the peace on a summary prosecution properly forms part of the record on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 579.]

2. SAME—TRANSFER OF CAUSE—DEFECTS—OBJECTIONS—WAIVER.

Where, after a change of venue in a criminal prosecution from a police court to a justice of the peace, defendant appears and expressly waives all informalities and irregularities and submits without objection to trial before the justice, he cannot thereafter object that the justice of the peace had no jurisdiction because of irregularities in the transfer, if the justice has jurisdiction of the subject-matter of the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 216.]

3. SAME—APPEAL—JURISDICTION.

Under Pen. Code, § 2717, providing that appeals from justices of the peace must be tried anew in the district court, the district court does not sit as a court of review, but must try the case de novo, and where the action was properly instituted in the first place, it is immaterial that the justice of the peace lost jurisdiction by conducting the trial in part on a holiday, or by not pronouncing judgment within the time allowed by statute, unless objection was made at the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 571, 584.]

* Application by L. Vernon Graye for writ of habeas corpus. Writ denied.

O. A. Spaulding and E. A. Carleton, for petitioner. Albert J. Galen, Atty. Gen., and E. M. Hall, Asst. Atty. Gen., for the State.

BRANTLY, C. J. Habeas corpus. The petition filed herein alleges, substantially, that on May 10, 1907, the complainant was by complaint under oath, filed in the police court of the city of Helena, charged with a violation of section 457, of the Penal Code; that, having been brought before the police judge under arrest and duly arraigned, he entered his plea of not guilty, and was admitted to bail; that the cause was not set down for trial, but that on May 20th the court, of its own motion and without any showing by affidavit or otherwise, transferred it to the court of S. W. Langhorne, a justice of the peace of Helena township, and forthwith transmitted the original papers in the cause to said justice; that the justice thereupon entered the cause upon his docket and fixed May 29th, at 2 o'clock p. m., as the date of trial; that on the date fixed the trial was begun, but, not being concluded, was adjourned to May 30th, at 10 o'clock a. m., the same being a legal holiday; that the hearing of the evidence was concluded on that day, and the cause taken under advisement until June 1st, at 10 a. m.; that on the latter date the justice rendered his decision finding the defendant guilty and appointing June 3d, at 10 o'clock a. m., as the time for pronoun-

cing judgment; that at the appointed hour the complainant appeared and was sentenced to pay a fine of \$100, and was committed to the county jail until the same should be satisfied; that judgment was thereupon entered by the justice upon his docket; that an appeal was on the same day taken to the district court; and that thereafter, on November 26, 1907, the complainant was by a jury again found guilty, and by the judgment of the court sentenced to a term of four months in the county jail, where he is now detained. It is alleged that this detention is illegal for the following reasons: (1) That the police judge had no power upon his own motion to transfer the cause to the justice's court, and for this reason the justice was without jurisdiction to try it; (2) that, if the justice did have jurisdiction to try it, he lost jurisdiction during the course of the trial by proceeding with it on May 30th, a legal holiday, and by not entering judgment at the close of the trial; and (3) that by reason of the lack of jurisdiction by the justice's court the district court had no power to try the cause and impose sentence. Upon the filing of the petition this court issued the writ to the sheriff, and also a writ of certiorari to the clerk of the district court, requiring him to certify up a copy of the docket of the justice who tried the cause. Upon the production of the prisoner the Attorney General interposed a motion to quash the writ, contending that, since upon the face of the proceedings it appeared that the justice had jurisdiction of the offense, and the complainant voluntarily submitted to a trial, thereafter taking an appeal to the district court, he could not question the jurisdiction of the latter to try the cause and enter judgment. Upon the questions thus raised the cause was submitted for decision.

1. It is conceded by counsel for complainant and the Attorney General that a police judge is authorized by statute to grant a change of the place of trial in a criminal cause, upon a motion supported by a proper showing, either of bias or prejudice of such judge, or prejudice in the citizens of the township, by reason of which in either case the defendant cannot have a fair and impartial trial. Pen. Code, § 2685. We are inclined to the opinion that the concession is properly made, though the question does not arise here, for the reason that the jurisdiction of police judges extends to all misdemeanors enumerated in the statute defining the jurisdiction of these officers (Pol. Code, § 4911, amended by Sess. Laws 1903, p. 27, c. 16), including the offense defined in section 457, supra, and is concurrent with that of justices of the peace. The statute (Pen. Code, § 2682) requires the justice or police judge to enter upon his docket all proceedings in the cause, and, upon a change of the place of trial, to transmit with the files a certified copy of his minutes. For some unexplained reason the police judge failed to observe this require-

ment. There is no provision in the Penal Code indicating what record shall be transmitted to the district court when an appeal is taken. But we must presume that the original files, together with a copy of the docket minutes, constitute the record. This is the requirement in civil cases, the trial being de novo upon the papers filed in the justice's court, unless the court for good cause permit others to be filed. Code Civ. Proc. § 1761. Since in criminal cases the trial is also de novo (Pen. Code, § 2717), in the absence of specific provision on the subject, we must conclude that the same method of procedure must be followed in criminal cases. At any rate, in the absence of specific provision on the subject, this course would seem most appropriate, and it would seem to be necessary, for the reason that the plea is oral, and an appeal may be taken by oral notice at the time of the rendition of the verdict or judgment. Pen. Code, § 2713. A copy of the docket is necessary to show the nature of the plea that a judgment has been entered and that the appeal has been properly taken. Furthermore, on appeal in civil cases each party has the benefit of all legal objections taken in the justice's or police court, and since no bill of exceptions is provided for, the docket furnishes the only means by which some, at least, of the objections may be made to appear. These remarks dispose of the incidental question, made by the attorney general, whether the transcript of the docket properly forms part of the record on appeal.

The absence of the copy of the docket of the police judge does not, however, affect the merits of this application. The justice's docket recites that, when the defendant, accompanied by his counsel, appeared before him on May 20th, he set the cause for trial on May 29th, "all informalities and irregularities being waived by counsel for defendant." It is not a material inquiry, therefore, whether the change of the place of trial was ordered by the police judge of his own motion, or whether it was made upon the application of the defendant. Since it is conceded that he had jurisdiction of the offense under the statute that a complaint was filed giving him jurisdiction of the particular cause, and that the defendant had been properly arrested and brought before him, he could upon proper application order a change of the place of trial. The justice had jurisdiction of the offense. The irregularity of the procedure by which the cause was brought into his court was expressly waived by the defendant. He submitted to a trial upon a complaint charging him with the particular offense. He cannot now be heard to say that the justice did not have jurisdiction of the cause or of his person. He was entitled to make his objection at the time. Having failed to do so, or, rather, having expressly waived the irregularities, the court had jurisdiction to proceed. In *Woldenberg v. Haines*, 35 Or. 246, 57 Pac. 627, there was an application to the justice by the

defendant for a change of venue after answer. The affidavit for the change was not sufficient. The parties, however, thereafter appeared before the justice to whose court the change had been made, and stipulated for a continuance. The defendant had judgment on his counterclaim. Thereupon, upon application of the plaintiff, the judgment was annulled by the circuit court, on the ground that the justice trying the case had not jurisdiction. On appeal the Supreme Court held that the appearance of the parties and their submission of the case waived the irregularity and the jurisdiction was complete. The court said: "Justices' courts having jurisdiction of actions for the recovery of money, when the amount involved does not exceed \$250 (Hill's Ann. Laws 1892, § 908), the transcript sent to the justice's court of Harney district gave it jurisdiction of the subject-matter, and the general appearance of the plaintiff, and his participation in the trial of the action, gave it jurisdiction of his person, and authorized it to hear and determine the issues." The same conclusion was reached in *Magner v. Renk*, 65 Wis. 364, 27 N. W. 26, wherein the affidavit for a change of venue was wholly insufficient; but after the change was directed, the parties proceeded with the trial without objection. *Smith v. Judge*, 46 Mich. 338, 9 N. W. 440, was a case in which the justice before whom it was brought directed a change of venue because, being ill, he was not able to proceed with the trial. The parties appeared before the justice to whose court it was transferred and proceeded with the trial without objection. On application for mandamus to set aside the proceedings had under the judgment, on the ground that it was void because the justice had no power to order the change, it was held that the parties had waived the irregularity of the transfer, and that the judgment was valid. In *Moore v. Railroad Co.*, 51 Mo. App. 504, the court granted a change of venue over the objection of one of the parties. Nevertheless the party objecting appeared in the court to which the case was sent, and went to trial without objection. It was held that the objection to the jurisdiction, after verdict came too late. All of these cases proceeded upon the theory that, since jurisdiction of the subject-matter was conferred by law, errors and irregularities in acquiring jurisdiction of the particular case, and of the person, could be waived by the parties, and the validity of the resulting judgment could not be assailed by reason of them. With this view we agree. It in nowise conflicts with the conclusion, several times announced by this court, that jurisdiction of justices' and police courts must appear affirmatively, and is not aided by the presumption attaching to the judgments of courts of general jurisdiction. *State v. Laurendeau*, 21 Mont. 216, 53 Pac. 536; *Duane v. Molinak*, 31 Mont. 345, 78 Pac. 588; *Oppenheimer v. Regan*, 32 Mont. 115, 79 Pac. 686. Here jurisdiction of the offense is not contra-

verted. That a complaint was filed as the statute requires (Pen. Code, § 2680) charging an offense is admitted. The defendant was arrested and brought before the court and entered his plea. After the cause was transferred to the justice's court and was filed there, he made no objection, but waived all previous irregularities and submitted to a trial. He must be held to be bound by this action. And it is immaterial to inquire whether the transfer was regular. There is some conflict in the decisions on this point, but with perhaps some exceptions, which it is not necessary to notice here, the better rule is that, if a court has jurisdiction of the subject-matter of the action, a general appearance of the defendant to the merits, without objection, is a waiver of all personal privilege in respect of the particular court in which the action is brought. *St. Louis & San Francisco R. R. Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659. This rule applies to courts of limited, as well as to courts of general, jurisdiction. 2 *Ency. Pleading & Practice*, 613. The following cases, all of which are cited in *Woldenberg v. Haines*, *supra*, either directly or by analogy support this view: *Insurance Co. v. Johnson*, 46 Ind. 315; *Christ v. Flannagan*, 23 Colo. 140, 46 Pac. 683; *In re Whitmore*, 9 Utah, 441, 35 Pac. 524; *Cherry v. Lilly*, 113 N. C. 26, 18 S. E. 76; *Seley v. Parker* (Tex. Civ. App.) 45 S. W. 1026; *Solomon v. Norton*, 2 Ariz. 100, 11 Pac. 106; *Yater v. State*, 58 Ind. 290; *Hazard v. Wason*, 152 Mass. 268, 25 N. E. 465; *Breathwit v. Bank*, 60 Ark. 28, 28 S. W. 511. See, also, *Galveston, etc., Ry. Co. v. Baumgarten*, 31 Tex. Civ. App. 253, 72 S. W. 78; *Railway Co. v. Ramsey*, 22 Wall. (U. S.) 326, 22 L. Ed. 823.

2. The last two contentions may be met by answer to the single question, What was the effect of the appeal to the district court? The statute, as already pointed out (Pen. Code, § 2717), requires the district court upon appeal to try the cause *de novo*, that is, just as if the cause had originated in that court, its jurisdiction being dependent, of course, upon the jurisdiction of the justice's court of the subject-matter and of the parties. It does not sit as a court of review for the correction of errors, but to give the defendant a new trial upon the merits. While it may dismiss a cause on the ground that it has no jurisdiction of the subject-matter, just as the justice should have done, if the action was properly instituted in the first place, the appeal clothes that court with the power to proceed, no matter what irregularities may have attended the trial in the justice's court. *State v. O'Brien*, 35 Mont. 432, 90 Pac. 514. It is therefore immaterial whether the justice lost jurisdiction of the defendant by conducting the trial in part on a legal holiday, or by taking the cause under advisement from May 30th until June 1st, or by not observing the directions of the statute in pronouncing sentence. A party may not, under the guise of an application for a trial *de novo*, insist that

irregularities, to which he made no objection, shall be taken note of, or that the judgment, which is abrogated by the appeal, be reversed on account of them. The case of *State ex rel. Collier v. Huston*, 36 Mont. —, 92 Pac. 476, recently decided, is not in point. In that case the justice took the case on trial before him under advisement for an indefinite time. It was held that this was violative of an express direction of the statute requiring him to render judgment at the close of the trial. Moreover, the cause was not removed to the district court by appeal. If such had been the case, doubtless the conclusion would have been reached that the appeal was a waiver of the irregularity, and that the district court should have proceeded with the trial on the merits. What the result would have been in this case, had an appeal not been taken, it is useless to inquire.

The motion of the Attorney General to quash the writ and dismiss the proceeding is sustained, and the complainant is remanded to the custody of the sheriff for execution of the sentence.

Dismissed.

HOLLOWAY and SMITH, JJ., concur.

DEMERS v. GRAHAM, Sheriff, et al.

(Supreme Court of Montana. Dec. 28, 1907.)

1. CHATTEL MORTGAGES—CONSTRUCTION—TITLE OF MORTGAGOR.

A chattel mortgage only creates a lien, and hence, under Civ. Code, § 3750, providing that a lien transfers no title, does not pass title from the mortgagor to the mortgagee.

2. SAME—ANIMALS AND INCREASE.

Civ. Code, § 3815, providing that a mortgage is a lien upon everything that would pass by a grant of the property, does not apply to the natural increase of domestic animals by procreation, and hence a chattel mortgage on cattle does not cover calves in gestation when the mortgage was executed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 204.]

Appeal from District Court, Missoula County; F. C. Webster, Judge.

Action by Alexander L. Demers against Davis Graham, sheriff, and others. From a judgment for plaintiff, M. H. Prideaux appeals. Reversed and remanded.

Harry H. Parsons, for appellant. Marshall & Stiff, for respondent.

SMITH, J. The only question for determination in this case is whether a chattel mortgage of certain cows covers their calves in gestation at the time the mortgage was executed, but born prior to foreclosure; there being no reference in the mortgage to the increase of the cows. The defendant, Graham, holds in his possession, as sheriff of Missoula county, the sum of \$600, the proceeds of the sale of 87 calves, sold by him under a stipulation that he should hold the proceeds until the final determination of this action. The plaintiff claims

the money by virtue of the fact that he held a chattel mortgage on the mothers of the calves at the time the young were born. The appellant, Prideaux, claims to be entitled to the sum by virtue of a sale of the calves to him by Sloan, the mortgagor, after the sheriff had seized but before he sold the same under plaintiff's mortgage. Prideaux set forth in his answer the respective claims of the parties, as above recited. The district court of Missoula county sustained a general demurrer to the answer, and, in default of further pleading by Prideaux, entered a judgment in favor of the plaintiff and against the defendant Graham, as sheriff, for the sum of money in dispute. From that judgment Prideaux has appealed.

The law is well settled in this state that a chattel mortgage only creates a lien and does not pass title from the mortgagor to the mortgagee. *Bennett Bros. Co. v. Tam*, 24 Mont. 457-467, 62 Pac. 780; *Mueller v. Renkes*, 31 Mont. 100, 77 Pac. 512. Such lien transfers no title. Civ. Code, § 3750. The question of the extent of the lien created, in those jurisdictions where no title passes, has been a fruitful source of litigation for many years. The immediate question that we are to decide has never been before this court, and we feel therefore that in the determination of the same we should point out what seem to us to be the principles involved, and not merely cite the precedents of the courts. The Supreme Court of California, in the case of *Shoobert v. De Motta*, 112 Cal. 215, 44 Pac. 487, 53 Am. St. Rep. 207, took occasion to examine and differentiate the decisions on this subject in the following language: "It has been held in some states that the lien of a mortgage of domestic animals extends to the increase of the animals during the life of the mortgage, whether the terms of the mortgage include such increase or not, and, following these decisions, such a rule is stated in text-books upon chattel mortgages. It will be found, however, upon examination of these cases, that the decisions therein are based upon the principle of the common law, which was in force in those states, that by the mortgage the mortgagee is vested with the title to the mortgaged property, and becomes the owner thereof; and that in the case of domestic animals, applying another rule of both the common and the civil law, that 'the brood belongs to the owner of the dam or mother, partus sequitur ventrem' (2 Blackstone's Commentaries, 390), he thereby becomes the owner of such increase, and, being the owner, his title in any action at law must prevail. The earliest application of this rule was in the case of a mortgage of a female slave (*Hughes v. Graves*, 1 Litt. 317), which was decided in Kentucky in 1822, and was afterward followed in Maryland in 1836, in the case of *Evans v. Merriken*, 8 Gill. & J. 39, which also involved the offspring of a female slave which had been mortgaged; and these cases are cited as the authority upon which cases involving the same question have been

decided in other states, in some instances referring also to the principle upon which the rule rests, and in others merely referring to the cases as an authority (*Cahoon v. Miers*, 67 Md. 573, 11 Atl. 278; *Gundy v. Biteler*, 6 Ill. App. 510; *Ellis v. Reaves*, 94 Tenn. 210, 28 S. W. 1089). The rule has also been stated in many other cases in which the question was neither involved nor decided (*Kellogg v. Loveley*, 46 Mich. 131, 8 N. W. 690, 41 Am. Rep. 151; *McCarty v. Blevins*, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262; *Gans v. Williams*, 62 Ala. 41); and there is still another line of decisions in which it has been sought to uphold the propriety of the rule by holding that the increase which was in gestation at the execution of the mortgage was inferentially included therein as a part of the mortgaged property (*Funk v. Paul*, 64 Wis. 35, 24 N. W. 419, 54 Am. Rep. 576; *Rogers v. Hyland*, 69 Iowa, 504, 29 N. W. 429, 58 Am. Rep. 230; *Edmonston v. Wilson*, 49 Mo. App. 491). Another line of decisions limits this application of the rule by holding that the increase is subject to the lien of the mortgage only for so long a time as the young are in a state of nurture from the mother. *Rogers v. Gage*, 59 Mo. App. 107; *Darling v. Wilson*, 60 N. H. 59, 49 Am. Rep. 305; *Forman v. Proctor*, 9 B. Mon. (Ky.) 124. The want of logical sequence in this limitation has been felt by the courts, and some of them have sought to place their decision upon the fact that, while the young were following the mother, a purchaser from the mortgagor had notice by that fact that it was her offspring, and subject to the mortgage, and was thus prevented from claiming to be a purchaser in good faith. Placing the decision on this ground is, however, necessarily a repudiation of the principle upon which all the above cases rest, for, if the mortgagee is in fact the owner of the increase, the question of good faith in a purchase from the mortgagor is immaterial. Prior to 1873 the giving of a chattel mortgage in this state vested the mortgagee with the title to the property mortgaged (*Heyland v. Badger*, 35 Cal. 404), and, while this rule of law prevailed, the foregoing decisions would have been applicable. The Civil Code, however, went into effect at the beginning of that year, and under its provisions the mortgagor is not, by the execution of the chattel mortgage, divested of his title to the property, but still remains its owner, while the mortgagee has only a lien thereon. Civ. Code, § 2888; *Bank of Ukiah v. Moore*, 106 Cal. 673, 39 Pac. 1071. Consequently the foregoing decisions cannot be regarded as having authoritative force, but the rights of the parties must be determined upon the general principles controlling the relations between a mortgagor and mortgagee. In the absence of any express agreement upon the subject, the lien created by a mortgage is limited to the property which is described in the mortgage, and does not include other property of the same character which the mortgagor may have afterward acquired and placed with the mortga-

ed property. Jones on Chattel Mortgages, §§ 138, 154. If the mortgagor retains the possession of the mortgaged property, he is at liberty to deal with and use it as is its owner, and whatever income or profit may be derived from such use belongs to him, and not to the mortgagee. See *Simpson v. Ferguson*, 112 Cal. 180, 40 Pac. 104, 44 Pac. 484, 35 Am. St. Rep. 201. If, in the case of sheep, the use to which he puts the ewes is for breeding lambs, there can be no sufficient reason given why the lambs that are dropped by the ewes should belong to the mortgagee, any more than the wool which is sheared from their backs. We are aware that the Supreme Court of Texas, in *First Nat. Bank v. Western Mortgage, etc.*, Co., 86 Tex. 636, 26 S. W. 488, held that, although by the laws of that state the mortgagor of personal property remains the owner thereof after the execution of the mortgage, the foregoing decisions control the right of the mortgagee to the increase of domestic animals; but the opinion in which the decision is given merely states the proposition without presenting any reasoning in its support, and does not meet with our approval. We are not called upon to determine in the present case whether, if the lambs in question had been in gestation at the date of the mortgage, they would have been included as a part of the property mortgaged, but we hold that, inasmuch as they were begotten upon the ewes after the mortgage was executed, the mortgagee has no lien upon them, or right to their possession." This case was supplemented by the later case of *First Nat. Bank v. Erreca*, 116 Cal. 81, 47 Pac. 926, 58 Am. St. Rep. 133, wherein the facts relative to the time at which the offspring were begotten are like those in the case at bar. In that case the court said: "The present case presents a question which was not involved or decided in that case, i. e., whether the lien of the mortgage includes lambs in gestation at its date, but upon the principles of that case it must be held that they are not so included. As the lien of the mortgage extends only to the property described therein, and as the mortgagor remains the owner of the property mortgaged, he has an unrestricted right to sell or dispose of its fruit or increase. His right to dispose of lambs in gestation or wool upon the backs of the sheep at the date of the mortgage is the same as would be his right to dispose of oranges which were on the trees, or wheat which was in the ground or standing in the field when a mortgage of the land was made." We think these cases correctly state the rule of law, and we adopt the conclusions reached together with the reasons assigned therefor.

Section 3893 of the Civil Code reads as follows: "The increase of property pledged is pledged with the property." Counsel for appellant contends that this legislative language ought to be interpreted as showing an intention to lay down a different rule as to pledges, from that pertaining to chattel mortgages.

We are inclined to think there is merit in the suggestion.

On the part of the respondent our attention has been directed to section 3815 of the Civil Code, reading as follows: "A mortgage is a lien upon everything that would pass by a grant of the property." It is contended that the foregoing language, applied to this case, means that the lien of the mortgage attached to the calves in question. This section is found in the Code under the following article heading: "Mortgages in General." It applies, therefore, to both real estate and chattel mortgages. There is this analogy between real estate and chattel mortgages, that both are simply liens. *Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782. A mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage. Civ. Code, § 3816. While in possession of mortgaged real property the mortgagor may collect and appropriate to his own use the rents and profits thereof. 20 Am. & Eng. Ency. Law (2d Ed.) p. 979, and cases cited. Growing crops may be the subject of chattel mortgage, even though the owner of the same also owns the land upon which they are growing. And this rule prevails even in those jurisdictions where growing crops are part of the realty. 8 Am. & Eng. Ency. Law (2d Ed.) 311; Civ. Code, § 3876. Now it will not be contended that a grant of the land would not pass title to a growing crop. So, too, the sale of a cow would undoubtedly carry with it her unborn calf; but we cannot assent to the conclusion that because thereof, a chattel mortgage describing the cow only would also create a lien upon her offspring.

The statute referred to by the learned counsel is comprehensive, and the construction to be placed upon it should be reached only after full consideration in any particular case in which it may be invoked. We do not think it wise or necessary in this case to construe it further than to hold that it does not apply to the natural increase of domestic animals by procreation. We think, if the Legislature had intended that the lien of a chattel mortgage describing particular animals should attach to their young thereafter to be born, it would have said so plainly, as it did in the case of a pledge. In the absence of such a declaration it seems reasonable to hold that because the mortgage is simply a lien passing no title the mortgagor in possession has the right to deal with the property as his own, and in the case of domestic animals may dispose of the young not mentioned in the mortgage as he sees fit. This construction leaves to the mortgagee the security described in the mortgage, and does away with the confusion that experience has taught invariably follows the adoption of any other rule. If, in cases like this, it be intended to include the offspring, the mortgage should so state.

The judgment of the district court of Missoula county is reversed, and the cause is re-

manded, with instructions to vacate the order sustaining the demurrer to the appellant's answer, and to enter an order overruling the same.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J.,
concur.

DEARDEN v. SAN PEDRO, L. A. & S. L. R. CO.

(Supreme Court of Utah. Dec. 17, 1907.)

1. CARRIERS—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—EVIDENCE.

In an action against a carrier for injuries in a collision between a water car and a passenger coach, evidence *held* to show a defective brake chain on the water car.

2. EVIDENCE—WEIGHT AND SUFFICIENCY—INFERENCES FROM EVIDENCE.

It is not essential, before a fact is made evident, that its existence be established by positive and conclusive evidence, especially when it pertains only to the identity of a thing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2446.]

3. CARRIERS—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—PRESUMPTION AND BURDEN OF PROOF.

Where the engine and water car were uncoupled from defendant's train, and a flying switch made with the water car, which became uncontrollable because of the breaking of a brake chain, and the car on that account collided with a passenger coach, causing plaintiff's injuries, the fact that the chain broke was sufficient evidence of its defective or unsuitable character to make a *prima facie* case against, and cast the burden of explanation on, defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1283.]

4. SAME—QUESTIONS FOR JURY.

In an action against a carrier for personal injuries sustained in a collision between a water car and a passenger coach while a switch was being made, evidence examined, and *held* sufficient to take the case to the jury as to the negligence of defendant's servants in the handling and management of the cars.

5. SAME—PRESUMPTION AND BURDEN OF PROOF.

Where the engine and water car were uncoupled from defendant's train, and a flying switch made with the water car, which became uncontrollable because of the breaking of the brake chain, and the car on that account collided with a passenger coach, causing plaintiff's injuries, there arose, in conformity with the maxim "*res ipsa loquitur*," a *prima facie* presumption that the accident was due to the negligence of defendant or its servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1283.]

6. SAME.

In an action against a carrier for personal injuries, where it is shown that the injuries were sustained under circumstances where the maxim "*res ipsa loquitur*" applies, plaintiff is not required in the first instance to prove any particular defect by evidence other than that establishing the *prima facie* presumption, even though the facts with respect to some defect are unnecessarily alleged with particularity in the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1282-1294.]

7. TRIAL—INSTRUCTIONS—KNOWLEDGE OF JURORS.

In an instruction to the jury that it is their duty to pass upon the merits of the case,

according to the evidence given in open court, and exclude from their minds any special knowledge that any of them may have concerning the matter, "except such matters as are of common knowledge," the use of the words "except such matters as are of common knowledge," is not objectionable.

Appeal from District Court, Fifth District; Joshua Greenwood, Judge.

Action by Joseph H. Dearden against the San Pedro, Los Angeles & Salt Lake Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. N. Whitecotton and Pennel Cherrington, for appellant. W. F. Knox and Powers & Marioneaux, for respondent.

STRAUP, J. This action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff while a passenger on the defendant's train. Plaintiff had judgment, from which the defendant appeals.

That the plaintiff was a passenger and that his injury, if any, was received while he was being transported by the defendant, are not controverted. The train ran from Milford to Newhouse, this state. It consisted of an engine, a combination baggage and passenger coach, a box car, a flat car loaded with lumber, and a water car, or water tank. It stopped at a place called the "Old Hickory Switch," where the engine and the water car were uncoupled from the train, and a flying switch made with the latter car. In so doing, the brake chain of that car broke as the brakeman was winding the brake with a stick. The car got beyond his control and collided with the passenger coach on which the plaintiff and other passengers were with such force as to break the king bolt, to slide the water tank containing 7,000 gallons of water weighing about 56,000 pounds, and to push back the lumber on the flat car. When the chain broke, the brakeman called out "No brake," and jumped from the car. Some one called to the passengers to "get out of the car." As the passengers arose to leave, the conductor, who also was on the passenger coach, told them to be seated. Fearing the passengers in their attempt to get off the car might be thrown under it, the conductor closed the car door to prevent their leaving, and then jumped from the car. When the collision occurred, the passengers were all thrown to the floor or against the seats of the car. These facts do not seem to be in dispute.

The plaintiff in his main case also introduced evidence in support of allegations in the complaint that the water car was equipped with a defective and unsuitable brake chain. He and another witness, a Mr. Powell, who also was a passenger, testified that after the train was made up at Milford, and while it was standing near the platform of the depot, they examined the brake chain of the water car and found it spliced with baling wire, badly worn. About 10 minutes after the examination was made the train was moy-

ed to one end of the yard. It remained there while the witnesses and others, including the engineer of the train, went to dinner. In about one-half hour after the examination the train departed. These witnesses testified that after they examined the brake chain, no switching was done to their knowledge; that they did not see the water car taken out of the train; that to their best knowledge the water car which was examined by them was in the train when it left Milford, and was the same water car with which the flying switch was made, and which collided with the passenger coach; that when the train reached "Old Hickory" the cars in the train were in the same position as they were when the examination was made at Milford; that the brake chain examined by them was at the end and center of the car. Another witness testified for the plaintiff that the brake chain on the water car which collided with the passenger coach was at the end and center and not on the side of the car. That the water car with which the flying switch was made was taken out of the train which left Milford on that trip, and that the chain broke as the brake was being applied by the brakeman, there is no conflict in the evidence. The plaintiff and the witness Powell were asked if they would swear positively that the car which they examined at Milford was in the train when it departed, and whether it was the same car which collided with the passenger coach. One of them answered: "I think it was. I think it was the same car all right. Well, I am almost positive it was." He was asked: "Will you swear that this was the same car? A. Yes; I think I could. Q. You think you could, but do you? A. I think that it is. I think it is the same car that I saw at Milford. Q. That is as far as you will go? A. Yes, sir; to the best of my judgment. Q. What makes you think so? A. Why, it looked just like it." The other witness testified that to his best judgment the water car which he examined at Milford was in the train when it left Milford and was the same water car that collided with the passenger coach. He further testified: "I don't know that that car went in our train to Frisco that day. I wouldn't swear that it did." He also testified that if the car which collided with the passenger coach had the brake and brake chain on the side, it was not the same car as was examined by him at Milford.

The first assignment of error is based upon the ruling of the court denying the defendant's motion for nonsuit. It is urged that the motion should have been granted for the reason that plaintiff's case was predicated alone upon allegations of negligence relating to a defective and unsuitable brake chain on the water car; that because the plaintiff alleged the facts of such negligence with great particularity, before he was entitled to recover he was required to prove such defect, and the defendant's negligence with respect to it,

substantially as alleged, unaided by and independent of any presumption of negligence arising from the circumstances of the breaking of the chain and of the collision; that the plaintiff failed in his proof, in that the evidence is insufficient to show that the water car concerning which the plaintiff and his witness testified as having had a defective brake chain was in the train when it left Milford, and was the same car as collided with the passenger coach. Before it can be said that the ruling of the court was erroneous the appellant must necessarily maintain the affirmative of all these propositions. We think it has failed, not only as to one, but as to all of them. The complaint consists of nine paragraphs, and covers nearly nine pages of the printed record. It is not necessary here to set it forth at length. It charges negligence with respect to the defective brake chain with great particularity, and specifically points out the character of the defect. It also charges negligence with respect to the making of a flying switch under detailed circumstances. It also charges negligence in the management and handling of the cars by the defendant's servants, and in their permitting one to collide with the other. The complaint is not open to the construction contended for by appellant, that the allegations of negligence are confined alone to a defective and unsuitable brake chain.

We think the contention made that the evidence is insufficient to prove a defective brake chain on the water car is likewise untenable. The only claim made in this regard is that because the witnesses would not swear positively that the car on which they saw the defective brake chain was the same car taken out of the train at "Old Hickory," and which collided with the passenger coach, the proof was insufficient to show that it was the same car. The testimony of the witnesses on this point has already been referred to. We think it quite sufficient to justify a finding that it was the same car. Of course it was not impossible, after these witnesses examined the water car in the train at Milford, and before the train departed, that the defendant, unknown to them, might have switched that water car out of the train and put another water car in its place. That such was done is not probable, under the circumstances. No witness testified to such fact, nor is there anything in the evidence from which the inference could be drawn that such was done. Because of its better knowledge, the proof of such fact would naturally be expected to come from the defendant rather than from the plaintiff, especially since it involved the proving of an affirmative by the defendant and a negative by the plaintiff. However, it is not essential, before a fact is made evident, that its existence be established by positive or conclusive evidence, especially when it pertains, as here, only to the identity of a thing. If such were the case, the rule of evidence per-

mitting the drawing of inferences and the deducing of facts from other facts is rendered useless. The fact that the chain broke, under all the circumstances of the case, was sufficient evidence of its defective or unsuitable character to make a *prima facie* case, and to cast the burden of explanation on the defendant. Though it were conceded that the plaintiff failed to prove the defective brake chain as alleged, he still was entitled to go to the jury upon the alleged acts of negligence with respect to the carelessness of the defendant's servants in the handling and the management of the cars. The evidence in support of these allegations was sufficient to send the case to the jury. The appellant does not claim, nor could the claim be successfully made, that if a plaintiff alleged several independent and separate acts of negligence, any one of which, if proved, was sufficient to entitle him to recover, his right of recovery would be defeated if he only proved one and not all the alleged acts. Eliminating the allegations in the complaint with respect to the defective brake chain, and all the testimony of the witnesses relating to the chain being spliced with worn wire, the complaint is still left good, and the evidence sufficient to entitle the plaintiff to recover.

Aside from these considerations, the motion for nonsuit was properly overruled, because of the presumption of negligence arising in conformity with the maxim "*res ipsa loquitur*." That the plaintiff was injured by reason of the breaking of the chain and of the collision of cars operated and managed by the servants of the defendant while he was being transported as a passenger was amply shown by the testimony. From the facts and circumstances which the plaintiff showed in this regard a *prima facie* presumption arose that the accident was due to the negligence of the defendant or its servants. 3 Hutchinson on Carriers (3d Ed.) §§ 1413, 1414; Moore on Carriers, p. 769; 3 Thompson, Com. on Law of Negligence, § 2754. Had the plaintiff averred the relation of passenger and carrier, negligence in general terms arising from the breaking of the chain, and the collision of cars on which the plaintiff was being transported and which were operated and managed by the defendant's servants, and a resulting injury, counsel for appellant concede that the evidence, in conformity with the maxim, was sufficient to let the case to the jury. But it is urged that, since the plaintiff made specific allegations of negligence with respect to a particular defective and unsuitable brake and brake chain, he was required to prove such facts specifically as alleged by some direct evidence, independent of, and in addition to, any presumption arising from the application of the maxim. That is to say, while the presumption arising from the maxim showed negligence of some kind on the part of the defendant, it did not sufficiently

show the particular negligence alleged with respect to the defective brake chain; and since the plaintiff by his specific allegations confined his actionable negligence to a particular thing or defect, his right of recovery must be limited to the negligence concerning such thing or defect. Such claim is necessarily based upon the assumption (1) that the complaint contained no allegations of negligence, except such as related to the defective brake chain; (2) that the evidence is insufficient to show such a defect; and (3) that in a case, such as this, where the plaintiff is not required to allege nor prove in the first instance a particular defect, or any specific act or acts of negligence, he is required to make such proof, if a particular defect or a specific act is alleged, independent of, and unaided by, any presumption of negligence arising from the circumstances, when such presumption points not alone to the particular thing or things alleged, but as well to other acts of negligence on the part of the defendant not alleged.

We have already held against the appellant on the first and second propositions assumed by it. We are also of the opinion that its contention cannot prevail as to the third. When it is shown that a person has sustained an injury under circumstances where the maxim referred to applies, he is not required in the first instance to prove any particular defect by evidence other than by the *prima facie* presumption, although the facts with respect to some defect are unnecessarily alleged with particularity in the complaint. All that the plaintiff here was required to aver and prove to entitle him to recover was the relation of passenger and carrier, that the accident through which he received his injuries was connected with the means or instrumentality used by the defendant in the transportation, and an injury resulting therefrom. When such facts were shown, a *prima facie* presumption arose that the accident was occasioned by the defendant's negligence, and the burden was cast on it to show that it was not at fault and that the accident was not caused by its negligence. Because the plaintiff alleged and attempted to prove more than he was required to do did not displace the presumption of negligence as an element in his case nor change the rule of evidence with respect to the burden of proof. Had the plaintiff averred his freedom from contributory negligence when, as is the rule in this jurisdiction, such averment is not essential, the burden of proving such fact being upon the defendant, it might almost as well be said he was required to prove it before he was entitled to recover. The essential and ultimate fact alleged in the complaint and in dispute was the negligence of the defendant in causing the collision. A *prima facie* case of such negligence was proven by the showing of the circumstances of the collision heretofore referred to. That the plaintiff averred and un-

dertook to show a defective brake chain as evidence of negligence causing the collision, did not waive nor affect the presumption of negligence arising from the circumstances, which was in itself sufficient to show such negligence. A relevant fact may frequently be proved in several different ways. The circumstances from which the presumption referred to arose were evidence for plaintiff of the fact of the defendant's negligence causing the collision. The evidence of a defective brake chain which the plaintiff produced was also some proof of such negligence, and was in aid of and not adverse to the presumption. And though he had failed in such proof, the presumption of negligence which had been shown to exist independent thereof was in no wise displaced nor weakened. We are of the opinion that no error was committed in overruling the motion for nonsuit. Other assignments of error are made, based upon the charge of the court and its refusal to charge as requested by the defendant. They present the same questions which we have already considered.

Complaint is also made of the following charge: "In deciding this case I charge you are the sole and exclusive judges of the facts. You should look only to the evidence introduced and allowed to remain as evidence in the trial. You should not allow outside matters of any kind to influence your minds. It is your duty to pass upon the merits of this case according to the evidence given in open court, and exclude from your minds any special knowledge that any of you may have concerning this matter, except such matters as are of common knowledge. You should take into consideration the whole of the evidence relating to the case and all the facts and circumstances proved at the trial." Exception is taken to the language "except such matters as are of common knowledge." This instruction did no more than to tell the jury that they had a right to avail themselves of such general knowledge as all men possess, but not to resort to any special knowledge possessed by them. No error was committed in giving the charge. *Sanford v. Gates*, 38 Kan. 405, 16 Pac. 807; *Craver v. Hornburg*, 26 Kan. 94.

We think the judgment of the court below should be affirmed. It is so ordered. Costs to respondent.

MCCARTY, C. J., and FRICK, J., concur.

GESAS v. OREGON SHORT LINE R. CO.
(Supreme Court of Utah. Dec. 21, 1907.)

1. TRIAL — NONSUIT — MOTION — SPECIFICATION OF GROUNDS.

A motion for nonsuit must specify wherein it is claimed the proof is deficient, so that plaintiff may supply it, if he is able to do so.*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 371.]

**Frank v. Bullion Beck, etc.*, Min. Co., 19 Utah, 35, 56 Pac. 419; *Skeen v. O. S. L. Rd. Co.*, 22 Utah, 413, 62 Pac. 1020.

2. SAME.

Where, on motion for nonsuit, plaintiff offered to supply proof as to the points wherein it was claimed to be deficient, and such offer would have occasioned no unreasonable delay in, or interference with, the trial, he ought to have been permitted to do so, since, if not afforded such opportunity, the rule requiring specification of particulars on which the motion of nonsuit is based is in part rendered useless.

3. WITNESSES — COMPETENCY — MEANS OF KNOWLEDGE.

That offered witnesses, in an action for injury sustained in attempting to pass between cars obstructing a crossing, were boys 9 and 12 years old, who had been standing between trains and were climbing over the cars, did not authorize the court to conclusively assume that they had no such means or opportunity as to have heard the bell had it rung, or that there was such a want of attention on their part as to prevent their hearing it had it rung.†

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 80–85, 97, 98.]

4. TRIAL—NONSUIT.

Where plaintiff's offer on a motion for nonsuit was not that offered witnesses would merely testify that they did not hear the bell, but that the bell did not ring, and the whistle did not blow, the court ought either to have assumed the fact in evidence as offered, or to have given plaintiff an opportunity to so prove it, and not merely have assumed the fact in evidence that witnesses did not hear the bell.

5. RAILROADS — OPERATION — DUTY TO USE CARE.

The duty of a railroad company to use reasonable care in the operation of trains is not confined alone to crossings, but applies to all cases where the failure to exercise it may result in injury to others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 711, 981–987.]

6. SAME—INJURIES TO PERSONS ON TRACK—EVIDENCE—SUFFICIENCY.

Evidence, in an action for injury sustained in attempting to pass between cars obstructing a crossing, held to warrant a finding that the trainmen in the exercise of ordinary care ought to have anticipated that persons might be in the act of crossing, or be on or between or about the cars, and that not to give warning before moving the train would result in injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 964–967, 1140.]

7. SAME.

Where trainmen in charge of a train obstructing a crossing, in the exercise of ordinary care, ought to have anticipated that persons might be in the act of crossing, or be on or between or about the cars, and that not to give warning before moving the train would result in injury, it was their duty to give such warning and failure to do so was negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 964–967.]

8. SAME.

Where railroad crossings had been obstructed for an hour or more, and many persons had passed between or over the cars to the trainmen's knowledge, negligence in moving the train without warning did not depend on notice to the trainmen that the particular person injured was between or on the cars or that his position was one of peril when the train was moved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 964–967.]

9. SAME—TRESPASSER.

One who had remained at a railroad crossing obstructed by a train about half an hour, and then climbed on the cars for the purpose of

†*Haun v. R. G. W. Ry. Co.*, 22 Utah, 346, 62 Pac. 908.

crossing, was not a trespasser, to whom the railroad company owed no duty until it discovered his danger.

10. SAME—EVIDENCE—SUFFICIENCY.

In an action for injury sustained in attempting to pass between cars obstructing a crossing, the railroad company's negligence held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1154.]

11. NEGLIGENCE—DEGREE OF CARE REQUIRED—CHILDREN.

The degree of care required of a child must be graduated to its age, capacity, and experience, and measured by what might ordinarily be expected from a child of like age, capacity, and experience under similar circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 121-129.]

12. RAILROADS—INJURIES TO PERSONS ON TRACK—QUESTION FOR JURY.

Whether a child 8 years old was guilty of contributory negligence in attempting to cross between cars obstructing a railroad crossing, held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1167.]

Appeal from District Court, Third District; M. L. Ritchie, Judge.

Action by Jesse Gesas, by his guardian ad litem, Morris Levy, against the Oregon Short Line Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded for a new trial.

Powers & Marioneaux, for appellant. P. L. Williams, Geo. H. Smith, and J. G. Willis, for respondent.

STRAUP, J. This was an action brought by plaintiff to recover damages for personal injuries alleged to have been sustained by the negligence of the defendant. The accident occurred at Blackfoot, in the state of Idaho. The plaintiff, at the time of the accident, was 8 years of age. It was alleged in the complaint that the defendant obstructed certain street crossings in Blackfoot for 30 minutes by suffering and permitting a train of freight cars to stand upon the street; that the plaintiff and other children desired to pass over one of the crossings thus obstructed; before doing so the plaintiff inquired of the brakeman in charge of the train how long it would stand before the cars would be moved; that the brakeman told him that the cars would not be moved for half an hour; that while the plaintiff, relying upon what the brakeman told him, was attempting to pass between two cars, the servants of the defendant in charge of the train, and with knowledge of the plaintiff's presence, negligently, and without warning, moved the cars, by reason of which the plaintiff was injured. The answer was a general denial and a plea of contributory negligence. At the conclusion of plaintiff's case the defendant's motion for nonsuit was granted, from which judgment of nonsuit the plaintiff has prosecuted this appeal.

The evidence shows that the railroad tracks run north and south through the town of Blackfoot dividing the business district

on the one side and the residence district on the other. Three crossings were blocked by two freight trains, one called the "Mackey" and the other the "St. Anthony" train, for some time over an hour. Plaintiff's father testified: "I went to dinner about 12 o'clock. I went over first to Ellis street, crossing where I usually cross to my home, and I stood there for quite a while. I went to the third crossing in order to get over there. I had to walk across by the tank. It was pretty near a quarter to 1 o'clock before I got to dinner. It took me three-quarters of an hour to get across. The train held those crossings for three-quarters of an hour. The only means of crossing the tracks there on these three crossings was to get over the cars. If I didn't go over the cars, I would have had to walk above the water tank, three crossings and probably two blocks farther. At the crossing where the boy was hurt you couldn't cross at all, unless you went over the train or under it, and one would have to go around the train about six blocks either way if one went north or south. The last time I saw that train upon that track blocking that crossing was at 1:30 o'clock. * * * Plaintiff was 8 years old at the time of the accident. He had been going to school two years and a half." The plaintiff himself testified: "I was waiting there (at the crossing) about half an hour, and the brakeman came along and I asked him how long before the train would be going. He said it would be 30 minutes. * * * When I first saw that brakeman, I was by that first crossing towards the north, the one where I was hurt. We were right by the train when I asked the brakeman when the train would move. He was walking down by the train, and when he went past me I asked him, 'Brakey, how long before the train will be going?' and he said, '30 minutes.' Earl Rogers, Keeny Donell, Frank Dekay, and my older brother Charlie were with me. Charlie and the other boys was about two heads taller than myself. We were all there together when I spoke to the brakeman. My brother went over the top of the train. The brakeman went on up. When I asked him he said I had time if I wanted to. It was at the time my brother went over the train that the brakeman told me I had time to go if I wanted to. After the brakeman told me that I went over the couple. He said I had time. I went over what pulls the cars together so that the engine can pull them. The train gave a jerk, and I fell across the track. We saw men and other boys doing it, so we thought we could. After the brakeman said that to us I saw 10 or 15 other people doing it. I saw 10 or 11 boys and men both going over ahead of me. I was going over to get some money so I could go to the show—to get a quarter from papa so I could go to the show that day. The show was on the other side of the track. It had not started yet. The brakeman said it would be 30 minutes before

the train would go, and that I would have time. I and the other boys with me had waited there half an hour before we saw the brakeman and asked him that. There was two main tracks to get across. We was waiting there for half an hour for Mackay train to get loose. I thought when it left or separated we was all through. I didn't tell the brakeman I was going to climb under the cars. We just asked him if we had time to get over there. He said: 'You have 30 minutes. I suppose you have time.' My brother climbed the side ladder and went over the top, and then I started over the couplings. My foot was caught by the wheels when I fell. I asked the brakeman because I wanted to know how long it was going to stay there before I attempted to go over. After the brakeman told me that the train wouldn't move for half an hour I didn't hear any warning, any bell ring, or any whistle blow. If I had heard a signal, the whistle, or bell, I would know what is meant. When I went to go through that train I looked to see whether an engine was attached and I didn't see any. I looked both sides to see whether an engine was attached to that train or not, and I didn't see any engine at all." Charles Gesas testified: "We had been waiting at the crossing for about half an hour. We wanted to go across there. He [the plaintiff] asked the brakeman how long before the train would move, and the brakeman said 30 minutes. My brother [the plaintiff] crawled over the couple. The couple gave a jerk and threw him down and cut his foot off. I crossed over the cars before he was run over. I never crossed between the couple. I did not attempt to cross over that car before the brakeman told my brother that. Other persons were crossing there, passing through between the train before I started to go over. There were men and children crossing. Ten or eleven crossed under the couples. Some crossed over where Jesse crossed over the bumpers. Others crossed on different cars over different couplings. We had been there about 20 or 25 minutes when the brakeman came along. There were two trains standing on these tracks. He was caught in the St. Anthony mixed train that was on the west track. The other train had uncoupled right there. We walked through. The engine had gone a ways. Then we got in there, and was waiting for the other one to get out, and the brakeman came walking down between them. Then we couldn't get out or in. The brakeman was between the trains when we spoke to him. The people were climbing over both of them until the one opened, and as soon as the other one opened they went through until it closed up. As soon as it closed up they had to go over them again." Earl Rogers testified: "There was a whole lot more boys around there, but me and Charlie and them three stood together. I saw a brakeman there. Jesse asked him how long before the

train would go, and he said it would be half an hour before it would move. Charlie went over the cars. Jesse tried to go through the couplings and it bumped and knocked him down. I saw the wheel pass over his leg. After the first train parted and let us through there we waited a little while close to the other train as we could get. Boys were going right through where Jesse did, and up above; also some men." A Mr. Hillard testified that for 14 or 15 years he had been acquainted with the tracks and the depot at Blackfoot, and was familiar with the running of the trains; that when a train came in the conductor ordinarily got off the caboose when it was in motion and went to the operator, got his orders, and then proceeded to the warehouse to unload; that after the train came to a stop at Blackfoot signals were given before it was moved, and that the signals would be given either by the head brakeman, the rear brakeman, or the conductor. The foregoing is a substantial statement of the evidence, except the testimony of plaintiff relating to his knowledge of the danger, which will be referred to later.

The defendant's motion was based upon the grounds that the evidence was insufficient to show negligence on the part of the defendant, and that the evidence showed contributory negligence upon plaintiff's part. After the motion had been argued, the court, in reviewing the evidence, among other things, observed that it had not been sufficiently shown that the injury occurred on a crossing, or that the train was moved without ringing the bell or blowing the whistle, and, for these reasons, intimated that the evidence was insufficient to show negligence upon the part of the defendant, and that in such view of the case it was not necessary to pass on the question of contributory negligence. Thereupon counsel for plaintiff stated: "In view of what your honor said about the evidence being somewhat obscure as to whether this accident happened on a crossing or not—

The Court: A little later I assume that I will treat it as though it did occur on a crossing. Counsel for Plaintiff: In view of what your honor said about the testimony of the plaintiff not being plain that a bell did not ring, we would like to call the other boys to prove that it did not. The Court: I suppose they would swear they did not hear it, and the court, under those circumstances, would not submit it to a jury. That is one of the points that testimony is always in conflict. People standing around always swear they did not hear it, and railroad people swear they did. If that is all there is to it, even assuming the boys all swear they did not hear the bell ring— Counsel for Plaintiff: (Interrupting.) The Court: I do not think it is necessary to argue it any further. Counsel for Plaintiff: I do not want to argue it. I simply want to ask your honor to allow me to call Charlie Gesas and Earl Rogers to testify whether or not the bell rang

or the whistle blew. And I offer to prove by Charlie Gesas and Earl Rogers that the bell did not ring and the whistle did not blow." Thereupon defendant's counsel objected on the grounds that the offer came too late, and that the testimony offered was irrelevant and immaterial, and would not change the situation. The Court: "If there were any real reason to suppose it would throw any additional light upon it, the mere fact that the application comes too late would not be refused, but the witnesses could not testify that the bell did not ring because it was manifest, standing between two trains, they could not see the bell. They might testify they did not hear it. The court will give you the benefit of that as though it were in evidence, and the application is refused." The motion for nonsuit was thereupon granted.

When the plaintiff rested his case, the only evidence that the train had moved without warning was the plaintiff's testimony that after the brakeman told him that the train would not move for half an hour, and before he attempted to go through, he did not hear the bell ring nor the whistle blow, nor anything to give warning that the train was going to start. We need not consider the question whether this evidence was sufficient to have carried the case to the jury on this point, for the court, after the attention of plaintiff's counsel was called to a want of evidence in this regard, ought to have granted plaintiff's request to supply it. It is well settled in this jurisdiction that a party making a motion for nonsuit is required to "specifically state the grounds upon which the motion is based, and thereby call the attention of the court and opposing counsel to the point on which he relies." *Frank v. Bullion Beck, etc.*, 19 Utah, 35, 56 Pac. 419; *Skeen v. O. S. L. R. Co.*, 22 Utah, 413, 62 Pac. 1020. As stated in the foregoing authorities, the purpose of requiring such specifications is to apprise the plaintiff of the particulars wherein it is claimed his proof is deficient, so that he may supply it if he is able to do so and prevent the expense and necessity of a retrial of the case. If the plaintiff is not afforded such opportunity, upon the making of an offer such as here, occasioning no unreasonable delay in, nor interfering with, the progress of the trial, the rule requiring specifications of particulars upon which the motion is based is, in part, rendered useless. The court, however, did not refuse the proffered evidence because it came too late, but on the assumption that the witnesses by whom it was offered to show the fact did not possess sufficient knowledge to testify to it, because, standing between the two trains at the time in question, they could not see the bell, and hence could only testify that they did not hear it. To such extent the court treated the proffered testimony as in evidence; but, assuming that the fact is always in conflict, and that people standing around always swear they did not hear it and railroad

people swear they did, he would not, under such circumstances, submit the question to the jury. We do not think, however, the court meant to say that the offer was denied, nor that he declined to submit the question to the jury, because the fact offered to be proved was generally in conflict, nor that it would likely be denied by witnesses for the defendant, nor that one did not possess sufficient knowledge to testify concerning it unless he saw the bell, nor that the court meant just what his language fairly imports. We think all the court meant by the observations was that, in view of the surroundings of the witnesses, their situation at the time, and of their lack of attention, it was not probable that they would have heard a bell had it rung, particularly not the bell of the train in question. And the negative testimony of the witnesses that they, under the circumstances which had already been disclosed to the court, did not hear it, would not be sufficient evidence that it did not ring, especially when, as is generally the case, there is some positive testimony that the bell did ring. Undoubtedly there may be a variety of cases where the circumstances are such that the court may conclusively assume that if the bell had rung the witness would not have heard it and his testimony that he did not hear it would not be sufficient evidence to prove the fact that it did not ring. But this was not such a case. Here the means and opportunity of hearing and knowing the fact by the witnesses had been sufficiently shown, especially by the older boy who at the time of the accident had just climbed or was climbing over the top of the car. If not, the plaintiff had the right to show their means of knowledge. That they were boys, 9 and 12 years of age, who had been standing between the trains, and were climbing over the cars on their way to carry placards in the parade, did not authorize the court to conclusively assume that they had no such means or opportunity, or that there was such a want of attention on their part as to prevent their hearing the bell had it rung. The remarks of the court were more pertinent to the weight of the testimony than to its competency. *Haun v. R. G. W. Ry. Co.*, 22 Utah, 346, 62 Pac. 903. Furthermore, the plaintiff's offer was not that the witnesses would merely testify that they did not hear the bell, but "that the bell did not ring and the whistle did not blow." The court ought either to have assumed the fact in evidence as offered, or to have given the plaintiff an opportunity to so prove it. The court did neither. We will therefore review the ruling granting the motion for nonsuit from the standpoint that the train was put in motion without warning.

It is in effect urged by the respondent that no duty of giving warning before moving the train was imposed upon it, and hence it was not negligent in failing to do so. This claim is made on the grounds that the requirement to give warnings and signals ap-

piles only to cases where the train is approaching crossings, or is being operated along or across streets of a town or city; that the duty is owing only to those who are ahead of the engine or train; and that the plaintiff was a trespasser to whom the defendant owed no duty until he was discovered in a place of danger. We think neither of the positions tenable. Because the duty to give signals at crossings and when trains are being run through towns or cities is generally imposed by statute or ordinance, it does not follow that such duty is alone confined to such cases, or that it exists merely because its performance is required by statute or ordinance. It may well exist independent of any statute or ordinance, when measured by the standard of ordinary care and prudence. The rule of law which requires railroad companies to use reasonable and ordinary care in the operation and handling of their trains and cars so as not to injure others is not confined alone to crossings. It applies to all cases where, from all the circumstances surrounding the case, care and prudence are required of them, and where the failure to exercise it may result in injury to others. Railroad companies, like natural persons, must so use their own property and privileges as not to injure the rights of others, and in running and operating their cars they must exercise care proportioned to the danger of injury to others. When in the exercise of such care ordinary caution and prudence require the giving of signals or warning, the failure to do so is negligence. In the case in hand it is made to appear: That the crossings had been blocked by the defendant for about one hour. That many persons of the town had been attracted by some kind of a show or a parade about to take place. Some of them were about the street at the crossings and near the track where the cars stood. A number of them had crossed between the cars and over them. It is but fair to presume that the train operatives well knew these things, or that they, in the exercise of ordinary care, ought to have known them. Moreover, there is evidence in the record that men and boys, in the presence of the brakeman, passed between and over the cars. It was well observed by Mr. Justice Holmes in the case of *Schlemmer v. Buffalo, Rochester, etc., Ry.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681: "Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen." Aside from the knowledge possessed by the brakeman that the plaintiff and his companions and others, were about the cars, a jury may well find from all the circumstances that the train operatives, in the exercise of ordinary care, ought to have anticipated that

persons might be in the act of crossing, or be on or between or about the cars, and that not to give warning before moving the train would result in injury. In a case where the facts were quite similar to those before us, where a boy 8½ years of age "attempted to climb between the cars for the purpose of going to his home and the train started and killed him," it was said: "Whatever may be the law in other jurisdictions, it is very well settled in this state that trains cannot be operated in such places in the same manner that they may be lawfully operated in the country. Such a state of facts calls for the exercise of some additional care in the movement of trains. The care to be exercised is undoubtedly that degree of care which is reasonably adequate to meet and avoid the dangers which ought to be anticipated under the circumstances. *Townley v. Railway Co.*, 53 Wis. 626, 11 N. W. 55; *Whalen v. Railway Co.*, 75 Wis. 654, 44 N. W. 849; *Johnson v. Transfer Co.*, 86 Wis. 64, 56 N. W. 161. It was clearly a question for the jury in the present case to decide whether the trainmen ought, in the exercise of due care, to have anticipated that a child might be present on the track or on the cars when the train started, and, if so, whether some greater degree of care should have been exercised in giving warning of the starting of the train, or some greater precaution taken to guard against such an accident. The train had stood in that place for nearly an hour, blocking all the communication between the two sides of the village. The proof was ample to show that grown persons and children frequently crawled under or climbed over trains at that place under like circumstances. Upon this very day the conductor of the train saw children playing between the tracks and attempting to ride on the cars of his train when it pulled in. The question whether he and his colleagues in the management of the train exercised that degree of care when the train pulled out which ought to have been exercised, in view of the dangers to be reasonably anticipated, was a question for the jury." *Carmer v. Chicago, St. P., M. & O. Ry. Co.*, 95 Wis. 513, 70 N. W. 560. Nor did the defendant's negligence in moving the train depend upon notice to the employes that the particular person injured was between or on the cars, or that his position was one of peril when the train was moved, where the crossings had been obstructed for an hour or more and many persons had passed between or over the cars, to the knowledge of the defendant's employes. *San Antonio & A. P. Ry. Co. v. Green*, 49 S. W. 670, 20 Tex. Civ. App. 5. The plaintiff was not a trespasser, and therefore the contention made that no duty was owing from the defendant until he was discovered in a place of danger is not sound. The evidence tends to show that the plaintiff was rightfully upon the crossing. He was at a place where he had a right to be. His

right to the use of the crossing was in most respects mutual, reciprocal, and equal with that of the defendant, except as to the right of way of passage. He had remained at the crossing about half an hour, waiting for the removal of the obstruction. His climbing upon the cars, under the circumstances, for the purpose of crossing and passing over the obstruction, did not make him a trespasser. *Littlejohn v. Richmond & D. R. Co.*, 49 S. C. 12, 28 S. E. 967; *Mayer v. C. & A. R. R. Co.*, 63 Ill. App. 309; *Krenzer v. Pittsburg, C. & St. L. Ry. Co.*, 151 Ind. 587, 43 N. E. 649, 68 Am. St. Rep. 252. We think the evidence sufficient on the question of the defendant's negligence to let the case to the jury.

We now come to a consideration of the question of contributory negligence. Even an adult may or may not be guilty of negligence, depending upon the circumstances of the case, in climbing over stationary cars obstructing a crossing. In some cases he may be guilty of negligence as matter of law; in others, it is a question of fact for the jury. This is well illustrated in the following cases: *Corcoran v. St. Louis, I. M. & S. Ry. Co.*, 106 Mo. 399, 16 S. W. 411, 24 Am. St. Rep. 394; *Sheridan v. B. & O. R. Co.*, 101 Md. 50, 60 Atl. 280. In the first case the plaintiff was held guilty of negligence as matter of law, where it appeared he attempted to climb over stationary cars without looking to see or knowing whether they were attached to an engine, or were liable to be moved at any time, although the cars were obstructing the street crossing in violation of the city ordinance. In the other case the plaintiff, on his way to dinner, in approaching the crossing, found it blocked by a long freight train. He met a brakeman of the train, who told him to jump over it, but he crawled underneath the cars and crossed in that way. On his return from dinner, going towards the factory where he was employed, he found the train still standing across the street. He met the same brakeman, who again told him to cross the train. The plaintiff hesitated to do so, when the brakeman told him he had plenty of time, and further stated: "We cannot leave here until we get a helper, and probably we will be here an hour," and said that a signal had to be given the engine ahead before starting the train. The plaintiff thereupon took hold of two cars and attempted to get upon the bumpers between them, so as to cross over the train, but just as he got his foot on the bumpers, the train started without signal or warning, and crushed his foot between the bumpers. In holding that the plaintiff was not guilty of negligence, the court said: "The appellant does not appear to have attempted to make the crossing in a negligent manner. To cross over the bumpers between two freight cars when at rest is not necessarily a dangerous operation. The peril of the situation arises from the

danger of the cars starting before the crossing is completed. In the present case the appellant used reasonable care to ascertain when the train would start by making inquiry of one of the brakemen in charge of it, who informed him that it would remain for some time longer until a helping engine came, which would signal its approach by blowing a whistle. Assuming that the appellant had the implied assent of the appellee to make this crossing, we do not think it can be said as a matter of law that he was guilty of contributory negligence in attempting to make it in the manner appearing from the evidence."

The case is somewhat stronger in its facts than is the one in hand in the particulars that the plaintiff was there informed that a signal would be given before the train would be moved, and was invited by the brakeman to cross, while here the brakeman told the plaintiff he would have time to cross if he wanted to. But it must be remembered that the conduct of a boy 8 years of age is not to be judged by the standard applied to an adult. It may well be that the statement made to the boy, if it did not amount to an implied invitation to cross, nevertheless was so understood by him. Though the statement was not an invitation to cross, and though the boy was not justified in accepting it as such, nevertheless it well tended to induce or at least influence him in believing that the cars would not be moved for some time, and that the crossing could be made by him in safety, especially when considered in connection with the other circumstance that he saw others doing so with apparent ease and in safety. The degree of care required of a child must be graduated to its age, capacity, and experience, and must be measured by what might ordinarily be expected from a child of like age, capacity, and experience under similar conditions. If it acted as might reasonably be expected of such a child, it cannot be charged with contributory negligence. It, however, is urged that, notwithstanding plaintiff's age, he had sufficient capacity to know and understand the character of his act and the risks incident thereto, and for that reason his conduct was to be measured by the same standard as is applied to an adult. This is principally based upon the following testimony given by plaintiff on cross-examination: "Q. You knew when you started to cross if the train was standing there it was likely to go most any time? A. I thought— When the Mackay train left, we thought we was all through. Q. When it separated—you didn't know the other train was there until it separated? A. No; we was waiting there for half an hour. Q. You don't know how long the other train had been there, and when it came there? A. No; the Mackay train was there half an hour. Q. Of course you knew that when a train is standing on the track it is likely to move at any time. You never

know when it is going to move? A. No. That is right. Q. You knew that you were taking chances when you undertook to crawl under or over the train, didn't you? A. Yes. Q. You knew— A. I didn't think nothing at the time. Q. I understand. But when you stop to think about it you knew then and do now that it was a dangerous thing to go under or over a train because you don't know when it might start? A. I didn't think of it at all when I done it. Q. If you had stopped to think you would have known it would be dangerous? A. Yes. I think it now after it is already done. Q. You knew that the couplers that were there were not made to stand on, walk across the train on, didn't you? A. I saw so many people do it. Q. But you knew that was not what it was provided for? A. I know it. I know it was provided just to pull the train along. Q. It was not for people to ride or stand on, or anything of the kind? A. No. * * * Q. And you knew if it did move and you were under it or on it somewhere it might shake you off and run over you? A. Yes; I didn't think of that at the time though. Q. You didn't stop to think, did you? A. No. Q. You thought you would get across before it would start? A. Yes, sir; the brakeman told me I would have time. Q. You knew that if it was likely to start you wouldn't have started to go through there if it was going to start? A. No, sir. Q. And you wouldn't have done that because you knew it would be dangerous? A. I know I wouldn't. Wouldn't take chances on my life like that if I knew it was going to go. Q. It was because you thought it was not going to go that made you climb through there? A. Yes. Q. If you thought it was going to go you wouldn't have risked your life, as you say, by going through there? A. This brakeman ought to give me a kick and sent me away from there, knocked me out of there. That is the way I think of it now." This testimony shows that the boy possessed some knowledge that danger was involved in an act of climbing over cars if they were set in motion. But it also shows, especially when read with his testimony on direct examination, that he, from what the brakeman told him, did not anticipate that the cars might be moved. The danger to which he was exposed arose from the starting of the train. The happening of the thing which made his undertaking dangerous was not expected by him. He thought there was no danger because he did not expect the train to move. So thinking and so believing he acted. Is he to be charged with negligence as matter of law because he did not think otherwise, and did not anticipate that the cars might be moved, notwithstanding what the brakeman told him, the length of time the cars had stood blocking the crossing, and

what he saw others doing? We think not. Furthermore, the testimony does not so clearly show that he at the time fully appreciated the danger to which he was exposed, or that he had such thoughtfulness or discretion to avoid it which is possessed by an ordinarily prudent adult person as to require his conduct to be measured by such a standard. The respondent's contention in this regard is well answered by the court in the case of *Thompson v. M., K. & T. Ry. Co.*, 93 Mo. App. 548, 67 S. W. 693, in the following language: "Suppose the fact to be conceded that the plaintiff had sufficient mental capacity to know that it was dangerous to undertake to pass between the cars of defendant's train while it was standing on its track at said station, and that notwithstanding this knowledge of the danger he attempted to pass between such cars and was thereby hurt, is that of itself sufficient to charge him with contributory negligence? A boy may have the knowledge of an adult person in respect to the danger which will attend a particular act, but at the same time he may not have the prudence, thoughtfulness, and discretion to avoid them which is possessed by the ordinarily prudent adult person, and therefore it has become a settled rule of law in this state that a child is not negligent if he exercise that degree of care which, under like circumstances, would be expected of one of his years and capacity. And whether he uses such care in any given case is a question to be left for the jury to decide. *Anderson v. Railroad*, 81 Mo. App. 116; *Riley v. Railroad*, 68 Mo. App. 652; *Burger v. Railroad*, 112 Mo. 249, 20 S. W. 430, 34 Am. St. Rep. 379; *Anderson v. Railroad*, 161 Mo. 411, 61 S. W. 874. The defendant's instructions, as have been seen, told the jury that if it found the fact to be that the plaintiff had sufficient mental capacity to know the danger attending an attempt to pass between the cars, and with this knowledge made such an attempt and was thereby injured, he was guilty of contributory negligence, without reference as to whether or not he had the prudence, thoughtfulness, and discretion to avoid it (the danger) which is possessed by an ordinarily prudent adult person."

While a child 8 years of age may, in some cases, be guilty of negligence as matter of law, the question is generally one of fact for the jury. 1 *Thompson's Commentaries on the Law of Negligence*, § 308; 3 *Elliot on Railroads*, § 1261. We are of the opinion that, under the facts and circumstances of this case, the question here was one of fact.

The judgment of the court below is therefore reversed, and the cause remanded for a new trial. Costs to appellant.

MCCARTY, C. J., and FRICK, J., concur.

TERRITORY ex rel. CLARK, Atty. Gen., v. GAINES, Tax Collector.

(Supreme Court of Arizona. Jan. 18, 1908.)

1. COURTS—MANDAMUS—JURISDICTION—VENUE.

Rev. St. 1901, par. 1294, subd. 16, providing that suits against public officers must be brought in the county in which the defendant holds his office, refers to the venue of cases in the district courts only, and does not apply to a mandamus proceeding in the Supreme Court, the jurisdiction of which extends throughout the state.

2. MANDAMUS—PERSONS ENTITLED TO SUE—INTEREST.

The beneficial interest of the territory in the collection of certain taxes, to an extent in excess of one-third the total amount thereof, is sufficient to entitle the territory to maintain a proceeding by mandamus to compel the county tax collector to sue to collect the tax, within Rev. St. 1901, par. 3074, providing that a writ of mandamus shall be issued on the application of the party beneficially interested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 55.]

3. STATUTES—GENERAL AND SPECIAL LAWS—TAXATION.

Laws 1903, p. 162, No. 92, providing for the collection of delinquent taxes and directing the striking of all taxes due prior to 1888 from the forfeited list, and imposing interest on delinquent taxes only after January 1, 1901, was not objectionable as a special law, as both provisions were general in character.

4. SAME.

The provision of Laws 1903, p. 162, No. 92, that if taxes covered by the provisions of the act should remain delinquent on January 1, 1904, the tax collector should enforce payment with certain penalties and costs by suit, was general, and not special in its application.

5. COURTS—DECISIONS—STARE DECISIS.

Determination of a legal question by the affirmance of a judgment by an equally divided court does not have the force of a cogent precedent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 316.]

6. TAXATION—ACTION TO RECOVER TAXES—COMPROMISE—BOARD OF SUPERVISORS—POWERS.

Rev. St. 1901, par. 973, conferring on boards of supervisors power to direct and control the prosecution and defense of all suits to which the county is a party, and to compromise the same and to do and perform all other acts and things which may be necessary to the full discharge of the chief legislative authority of the county government, did not confer on a county's board of supervisors authority to compromise an action for the collection of taxes.

7. SAME—TERMS OF COMPROMISE.

A compromise of delinquent taxes, made subsequent to the passage of Act March 19, 1903, Laws 1903, p. 163, No. 92, amending Revenue Law, § 91 (Rev. St. 1901, par. 3922), and specifying the conditions under which a board of supervisors may compromise taxes, which compromise was not based on any of the conditions specified, was void.

8. SAME—DUTY TO SUE—DISCRETION.

Under Revenue Law, § 86 (Rev. St. 1901, par. 3017), as amended by Act March 19, 1903 (Laws 1903, p. 163, No. 92), requiring the county tax collector to sue for the collection of delinquent taxes, it is the duty of such officer to bring such suit, in the exercise of which he has no discretion.

Mandamus by the territory of Arizona, on relation of E. S. Clark, Attorney General,

against J. N. Gaines, tax collector of Cochise county. Peremptory mandate granted.

E. S. Clark, Atty. Gen., for petitioner. Ben Goodrich, for respondent.

NAVE, J. This is a proceeding brought in this court by the territory of Arizona, upon the relation of the Attorney General, to compel the tax collector of Cochise county to institute a suit pursuant to Act No. 92, p. 162, of the Laws of the Twenty-Second Legislative Assembly (Laws 1903), to collect delinquent taxes from the Copper Queen Consolidated Mining Company, a corporation. The issues before us are of law; the facts appearing in the pleadings of the respective parties. The more important averments of the petition are that in 1901 the Copper Queen Consolidated Mining Company, a corporation, was the owner of certain real and personal property situated in Cochise county, whereof it made return to the tax assessor; that the property was assessed by that officer; that the board of equalization of that county, upon due notice and hearing, added to the assessed valuation thereof; that the total valuation as increased was \$3,833,034.76; that the territorial board of equalization in that year fixed the rate of taxes for territorial purposes at \$1.17 on each \$100 valuation; that the board of supervisors of Cochise county levied for county purposes a tax of \$2.03 upon each \$100 valuation, whereby there became a total levy for county and territorial purposes in the sum of \$3.20 on each \$100 valuation in said county; that the assessment roll was made, and duplicate thereof placed in the hands of the tax collector; that the total taxes levied as aforesaid on the property of said company amounted to the sum of \$122,657.09; that the said company paid to the county treasurer in partial payment thereof the sum of \$23,265.76; that the remainder of said taxes became delinquent, and was and still is delinquent and unpaid, in the sum of \$99,391.33; that the said delinquent taxes were placed upon the back-tax book; that by virtue of Act No. 92, p. 162, of the Laws of the Twenty-Second Legislative Assembly, it became the duty of respondent to collect said delinquent taxes by suit, which duty respondent has neglected and refused to perform, although demand has been made upon him by petitioner.

Respondent demurs that this court is without jurisdiction of this action, that the petitioner is not shown to have legal capacity to maintain this action, and that Act No. 92, supra, is invalid, wherefore petitioner has no cause of action. Upon the merits, respondent pleads that the Copper Queen Consolidated Mining Company brought suit against the county of Cochise and the tax collector thereof to restrain them from collecting or attempting to collect the taxes in question in excess of the amount tendered; that this suit was determined favorably to the company in the district court, was appealed to this court, and by it reversed and remanded for a new

trial (*County of Cochise v. Copper Queen Consol. Min. Co.*, 8 Ariz. 221, 71 Pac. 946, and *Id.*, 8 Ariz. 459, 76 Pac. 595); that thereafter, by resolution of the board of supervisors of Cochise county adopted on June 7, 1904, said action was compromised; that under the compromise said company paid all the taxes thereby found to be justly and equitably due from it for the year 1901, and, pursuant to its stipulation in the compromise, dismissed that action on June 25, 1904.

1. Respondent contends that by virtue of subdivision 16, par. 1294, Rev. St. 1901, he must be sued in Cochise county, wherefore this court, sitting in Maricopa county, is without jurisdiction of this action. That subdivision reads as follows: "Suits against public officers must be brought in the county in which the officer holds his office." Paragraph 1294 has reference to the venue of cases in district courts only. This is disclosed, not merely by the context, but is irresistibly clear when it is observed that the provisions of that paragraph are inconsistent with the exercise of original jurisdiction by the Supreme Court in any case. In a technical sense, proceedings in this court do not have their venue in a county. Original jurisdiction is unequivocally conferred upon this court in a variety of proceedings, among them, by paragraph 3073, in proceedings in mandamus. Such jurisdiction must be exercised wherever this court may have its seat, but the geographical limits of the jurisdiction are not those of a county, but those of the territory. The demurrer as to jurisdiction is not well taken.

2. It is contended that the territory is without legal capacity to maintain this action, in that it is not beneficially interested. Paragraph 3074, Rev. St. 1901, requires that the writ of mandamus "shall be issued upon affidavit on the application of the party beneficially interested." The petitioner has a beneficial interest in the collection of the taxes in question to the extent in excess of one-third of the total amount thereof. It is true, as urged by the respondent, that the machinery of tax collection is in the hands of the county officers, and that until the taxes are collected the duty does not devolve upon any county officer to account for the territory's proportion of the taxes or to remit it. But to the extent of collecting the territorial taxes, the officers of the county are acting as agents of the territory, and not independent of, or without relation to, the territory and its corporate interest. *County of Sacramento v. C. P. R. Co.*, 61 Cal. 257. We have no difficulty in finding that the territory is beneficially interested in this matter within the purview of the statute. *State v. Gracey*, 11 Nev. 223.

3. It is contended that Act No. 92, supra, is obnoxious to the Harrison act in the respect that it is a special law. This contention has been before us in some aspects and determined adversely to the contention. *Wal-*

lapal M. & D. Co. v. Territory (Ariz.) 84 Pac. 87; *Hughes v. Lazard*, 5 Ariz. 4, 43 Pac. 422. It is now urged that the act makes an unlawful discrimination in that it provides for the remission of all taxes delinquent prior to the year 1888, and in that it imposes interest on delinquent taxes from January 1, 1901, only. With respect to the taxes delinquent prior to the year 1888, the effect of the provision objected to is that of a statute of limitation, applicable to all of a general class. As to the second feature of the special objection, the act prescribes the same procedure for the collection of all taxes delinquent after the year 1888, but provides for the imposition of a charge of interest on delinquent taxes computed only from the 1st day of January, 1901. This, also, is general in its application. As a final objection to the act in this respect, it is pointed out that special penalties attach to those delinquents against whom suit may be brought, it being provided that if on the 1st day of January, 1904, any of the taxes covered by the provisions of the act shall remain delinquent (the act is of date March 19, 1903), the tax collector shall proceed to enforce the payment thereof, together with certain penalties and costs, by suit. This provision is also general in its application. We cannot affirm that any of the classifications involved are unreasonable or unjust. The principles governing such an inquiry have been adequately treated in former opinions. *Bennett v. Nichols* (Ariz.) 80 Pac. 393; *Sanford v. Tucson*, 8 Ariz. 247, 71 Pac. 903; *Maricopa County v. Burnett*, 8 Ariz. 242, 71 Pac. 908. This act, in the features considered, is not obnoxious either to the letter or the spirit of the organic law.

4. Upon the merits, as we have shown, respondent presents as his excuse for refusing to institute suit to collect the unpaid taxes in question, and as a bar to the issuance of a writ of mandate to bring such suit, the acts of the board of supervisors and the Copper Queen Consolidated Mining Company, in compromise of a suit to restrain the collection of these taxes. The Attorney General maintains that the board of supervisors had no power to compromise the action, and contends that the matter is now to be resolved by the application of the doctrine *stare decisis*. He refers us to the case of *Schuerman v. Territory* (Ariz.) 85 P. 1134. We decided that case by divided bench without rendering an opinion, Mr. Justice Sloan not sitting. It is true that the judgment there affirmed determined, among other matters, the precise point now before us; but, the affirmance being by a divided court, it does not have the force of a cogent precedent. *Etting v. U. S. Bank*, 11 Wheat. (U. S.) 59, 6 L. Ed. 419. Wherefore, we will inquire into the matter involved as if it were a matter of novel impression. Respondent finds in paragraph 973, Rev. St. 1901, full authority for the board of supervisors to make the compromise in question. By a

subdivision of that paragraph, there is conferred upon boards of supervisors the power "to direct and control the prosecution and defense of all suits to which the county is a party, and to compromise the same." The defendants in the suit in question were the county of Cochise and M. D. Scribner, the tax collector of that county. Under our revenue law, the board of supervisors has a supervisory function to perform in the assessment and collection of taxes, but assessment and collection do not directly devolve upon that body. Assessments are made by the county assessor, and may be raised or lowered by the county board of equalization. The county board of equalization, although its personnel is that of the board of supervisors, is a distinct tribunal, and is not the board of supervisors. Moreover, after the board of equalization has performed its duties of rectifying undervaluations or overvaluations, it has exhausted its functions. The collection of taxes then devolves upon the tax collector, over whom the board of supervisors exercises only the same control which it exercises over all other county officers. The county of Cochise, as a municipal body, was not a proper party to the suit brought by the Copper Queen Consolidated Mining Company to restrain the collection of the taxes assessed upon it by the board of equalization, and which, by virtue of that assessment, it became the duty of the tax collector to collect. It follows that the board of supervisors did not derive authority from the provisions above quoted to compromise this suit. Its authority would be more appropriately attributable to another provision of the same paragraph, conferring upon that board authority "to do and perform all other acts and things which may be necessary to the full discharge of the duties of the chief legislative authority of the county government." But our system of revenue collection is inconsistent with a theory that, under that or any other provision, a board of supervisors may raise, lower, or remit taxes. The only powers possessed by such boards are those expressly conferred by statute or necessarily implied therefrom. *Santa Cruz County v. Barnes* (Ariz.) 76 Pac. 621; *State v. C. P. R. R. Co.*, 9 Nev. 79. Jurisdiction to remit or compromise taxes we should find conferred in express terms carefully conditioned; it may not be predicated upon an inference. We conclude, therefore, that the attempted compromise pleaded by respondent was void. *State v. C. P. R. R. Co.*, 9 Nev. 79; *Id.*, 10 Nev. 87; *Sacramento Co. v. C. P. R. R. Co.*, 61 Cal. 254. It is cogent that the Legislature, by a necessary inference from its enactment of Act No. 34, p. 56, of the Laws of 1891, has given our statutes the same construction. The parts of paragraph 973, above quoted, and the general system of the assessment and collection of taxes (except as to matters of procedure alone in the collec-

tion of delinquent taxes) have been in effect since 1887. Section 1 of Act No. 34, *supra* (page 56), reads as follows: "That all rebates, adjustments, settlements, or compromises heretofore made by the boards of supervisors, in the various counties, of tax values, tax assessments, or taxes, upon any property or of any suit or proceeding for the collection of any tax or taxes, be and the same are hereby ratified and confirmed, provided, however, nothing herein contained shall be construed or held to mean that the said boards of supervisors shall hereafter have any right, power or authority to rebate, adjust, settle, compromise or diminish any tax, taxes, tax values, assessments or levies, or any suit or proceeding for the collection of any tax or taxes upon any property except as a board of equalization in the manner prescribed by law." This curative act, though not re-enacted in the Revision of 1901, its purpose having been served, is an implicit recognition by the Legislature that such compromises by boards of supervisors were without authority of law.

It is fitting still further to point out that section 91 of the revenue law (Rev. St. 1901, par. 3922), as amended by Act No. 92, *supra*, specifies conditions under which the board of supervisors may compromise taxes. That act took effect on March 19, 1903, and therefore was in effect at the time of the attempted compromise. The compromise was not based upon any conditions upon which a compromise may be made under the authority conferred by that section. Even if the board of supervisors, by virtue of the provisions of paragraph 973, Rev. St. 1901, had possessed the power to compromise taxes, the enactment of a statute specifying the terms upon which taxes may be compromised would have the effect to restrict the authority formerly possessed by it.

Under section 86 of the revenue law (Rev. St. 1901, par. 3917), as amended by Act No. 92, it is the duty of respondent, in the exercise of which he is without discretion, to bring suit to collect the delinquent taxes in question.

The peremptory mandate will issue as prayed.

KENT, C. J., and SLOAN, DOAN, and CAMPBELL, JJ., concur.

In re FRETWELL'S ESTATE. (S. F. 4,884.)
(Supreme Court of California. Dec. 26, 1907.
Rehearing Denied Jan. 23, 1908.)

1. EXECUTORS—RIGHT TO APPEAL—PARTY AGGRIEVED—CREDITOR OF ESTATE—FAMILY ALLOWANCE.

A creditor of an insolvent estate is a "party aggrieved," by an erroneous order making a family allowance to the widow, and may therefore appeal, under Code Civ. Proc. § 963, subd. 3, and section 938, providing that an ap-

peal may be taken from such order by a party aggrieved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 723.]

2. SAME—RIGHT OF ADMINISTRATOR—NOTICE.

It is not material to the right of a creditor of an insolvent estate to appeal from an erroneous order granting a family allowance to the widow that the executor or administrator is also authorized to appeal by Code Civ. Proc. § 963, subd. 3, and section 938, and that such order may be made without notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 723.]

In Bank. Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Proceeding for settlement of estate of Edwin Fretwell, deceased. From an order making a family allowance to the widow, a creditor of decedent appeals. On motion to dismiss. Denied.

John Flournoy, for appellant. Barclay Henley, Jos. K. Hawkins, and Crittenden Thornton, for respondent.

PER CURIAM. This is a motion to dismiss an appeal taken by a creditor of deceased from an order making a family allowance to the surviving wife.

The sole ground of the motion is that a creditor of the deceased may not maintain such an appeal. It appears from the record that appellant claimed in the court below that the estate is insolvent, and that the order making the allowance appears to have been made on that theory, for it limits the allowance to a period of 12 months, and provides that it is made without prejudice to application for a further allowance "in case hereafter said estate should turn out to be solvent." We can conceive of no ground upon which it can be held that a creditor of an insolvent estate, who must look to the general assets for the payment of his claim, is not a party aggrieved by an order of family allowance erroneously made, the necessary effect of such an order being to diminish the amount he would otherwise receive on account of his claim. The statute expressly provides that an appeal may be taken from such order (Code Civ. Proc. § 963, subd. 3), and that any party aggrieved may appeal (Code Civ. Proc. § 938). It has never been held that such a creditor may not maintain an appeal. On the other hand, this court has annulled on certiorari an order requiring an administrator to pay family allowance theretofore ordered during the pendency of an appeal taken by other claimants to the estate from the order granting the allowance. *Pennie v. Superior Court*, 89 Cal. 31, 26 Pac. 617. It does not assist respondent that this court has held that the executor or administrator may appeal from an order directing him to pay moneys as family allowance. Such ruling does not exclude an appeal by a creditor. While the executor or administrator may properly be held to be a party aggrieved by such an order, the creditor may also be such

a party, and, as such, the statute gives him his own appeal. Nor is it material that an order for family allowance may be made without notice.

The motion to dismiss the appeal is denied.

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ROSENBERG BROS. & CO. v. ROSS. (Civ. 372.)

(Court of Appeal, First District, California.
Nov. 14, 1907.)

1. APPEAL—REVIEW—FINDINGS—CONCLUSIVENESS.

Where a finding of the court is not attacked on appeal for insufficiency of evidence to support it, it must be taken as true.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955-3969.]

2. FRAUDULENT CONVEYANCES—WHO MAY ATTACK—TRANSFER BY HUSBAND—VALIDITY AS AGAINST CREDITORS OF WIFE.

Where a person, under a parol agreement with his wife, was the owner of and in possession of a crop raised upon her land, and sold it for a valuable consideration, the transfer was not void as against his wife's judgment creditor, of whom he was not the debtor, and did not come within Civ. Code, §§ 3440, 3442, making certain transfers presumably fraudulent.

3. HOMESTEAD—ESTABLISHMENT—WIFE'S SEPARATE PROPERTY—JOINT HOMESTEAD.

Where a wife selects a homestead from her separate property, she and her husband become vested with a joint title therein to the extent of the homestead, and upon the death of either, the homestead will vest absolutely in the survivor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 245.]

4. FRAUDULENT CONVEYANCES—PERSONAL PROPERTY—DELIVERY AND CHANGE OF POSSESSION—NATURE OF PROPERTY—GROWING CROPS.

Growing crops are chattels not susceptible of manual delivery until harvested, and are not in the possession or under the control of the vendor, within the meaning of the statute requiring an immediate delivery and continued change of possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 459.]

5. SAME—IMMEDIATE POSSESSION—EVIDENCE.

Evidence held to show that a vendee of a growing crop took immediate possession of it as soon as it was severed from the land, as required by Civ. Code, § 3440, making certain transfers of chattels presumably fraudulent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 885.]

6. SAME.

What constitutes an immediate delivery and an actual and continued change of possession of chattels sold must be determined upon the evidence in each particular case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 462.]

7. SAME—SUFFICIENCY OF CONSIDERATION.

Labor and expense incurred by a husband in cultivating and caring for a joint homestead is a valuable consideration for the transfer to him of the wife's interest in a crop to be grown on the land, and hence, though the wife was insolvent, the transfer was not fraudulent and void as to her creditors.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action of claim and delivery by Rosenberg

Bros. & Co. against Frank H. Ross, Jr. Judgment for plaintiff, and from an order denying defendant a new trial, he appeals. Affirmed.

Will M. Beggs, for appellant. Rogers, Bloomingdale & Free, for respondent.

HALL, J. This action of claim and delivery was brought to recover the possession of a lot of prunes taken by the defendant, as sheriff of Santa Clara county, under a writ of execution upon a judgment against Grace M. B. Odell. Plaintiff recovered judgment for the possession of the prunes, and this appeal is from the order denying defendant's motion for a new trial. The complaint is in the ordinary form of an action for claim and delivery, and defendant justifies under a judgment and execution against Grace M. B. Odell, otherwise Grace M. B. Odell, and in favor of one Mrs. J. M. Sweetzer, upon which levy was made upon the property sued for on the 30th day of August, 1905, as the property of Grace M. B. Odell. The evidence shows without conflict that the prunes were the crop grown during the year 1905 upon the homestead of Grace M. B. Odell and her husband, F. E. Odell, which homestead had theretofore been duly selected by Mrs. Odell for the benefit of herself and husband from her separate property. In the month of January, 1905, F. E. Odell and his wife, Grace M. B. Odell, entered into a parol agreement, by the terms of which he agreed to do all the work and bear all of the expenses of cultivating and caring for the premises, and in return the crop was to belong to him. He lived on the premises, performed all the work, and paid all the expenses of caring for the place, and cultivating and gathering the crop. On the 29th day of July, 1905, said F. E. Odell, by an instrument in writing, sold for a valuable consideration the crop of prunes then growing on the trees to Rosenberg Bros. & Co., a copartnership, and to whose business and contracts plaintiff succeeded. The prunes were taken possession of by the defendant under the writ issued on the Sweetzer judgment against Mrs. Odell August 30, 1905, at which time they were all on the homestead premises, part being in trays, part in the field, part in bins in a barn, and part in boxes bearing the name of F. E. Odell. Mrs. Odell at all times during the year 1905 was insolvent and unable to pay the Sweetzer judgment. The court found that plaintiff, on the 30th day of August, 1905, was, and ever since had been, the owner and entitled to the possession of the lot of prunes sued for, and gave judgment accordingly.

Appellant contends that the transfer of the fruit by Mrs. Odell to her husband F. E. Odell was void as against Mrs. Sweetzer, the judgment creditor of Mrs. Odell, under sections 3440, 3442, Civ. Code, and that for this reason the findings in favor of plaintiff were not sustained by the evidence, and a new

trial should have been granted. We do not think that this contention can be sustained. In addition to the general finding above referred to, the court also found that F. E. Odell performed all the work and labor, and bore all the expenses in cultivating and raising said crop of prunes, and was the owner thereof and in the possession of the same at the time he sold them to Rosenberg Bros. & Co. This finding is not attacked in defendant's specifications of insufficiency of the evidence to support the findings, and must therefore be taken as true.

Starting with the premises, then, that F. E. Odell was on the 29th day of July, 1905, the owner and in possession of said crop of prunes, the evidence shows that on that day he sold the same to Rosenberg Bros. & Co. for a valuable consideration, and as F. E. Odell was not indebted to Mrs. Sweetzer or to anybody else, so far as the evidence discloses, the provisions of sections 3440 and 3442 of the Civil Code have no application to the sale of the prunes by F. E. Odell to Rosenberg Bros. & Co. The ownership and possession of F. E. Odell on the 29th day of July, 1905, being unchallenged, the ownership and right of possession of plaintiff at the beginning of the action follows from the evidence that plaintiff purchased from F. E. Odell, who was not the debtor of Mrs. Sweetzer. For this reason we think that the court did not err in denying the appellant's motion for a new trial. But if it be conceded that upon the record before us the appellant may attack the validity of the transaction between Grace M. B. Odell and her husband, F. E. Odell, concerning the prune crop in question, we still think the court did not err in refusing defendant's motion for a new trial.

At the foundation of appellant's claim to retain the prunes sued for must be the contention that the prunes were once the separate property of Mrs. Odell. This contention is of course predicated upon the fact that the homestead upon which they were grown was selected from the separate property of Mrs. Odell. But it was selected by her, and upon such selection she and her husband became vested with a joint title therein to the extent of the homestead. *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. 715, 8 L. R. A. 781, 12 Am. St. Rep. 58; *Porter v. Bucher*, 98 Cal. 454, 33 Pac. 335. Upon the death of either spouse a homestead so selected will vest absolutely in the survivor. Section 1474, Code Civ. Proc.; *Weinrich v. Hensley*, 121 Cal. 647, 54 Pac. 254; *Estate of Fath*, 132 Cal. 609, 64 Pac. 995; *Estate of Young*, 123 Cal. 337, 55 Pac. 1011. Mr. Odell was in possession of the homestead upon which the prunes were subsequently grown as fully as was his wife, and he had the same right to such possession that she had, and the same right to the absolute fee thereto in case he survived her that she would have in case she survived him. Neither could alone sell, encumber, or relin-

quish the homestead. Under these conditions it may not be perfectly clear that a growing crop, or rather a crop with only a potential existence, was the separate property of Mrs. Odell.

But conceding that in January, when she made the agreement with her husband, Mrs. Odell had a separate interest in the crop, it is well established that growing crops are chattels not susceptible of manual delivery until harvested, and are not in the possession or under the control of the vendor within the meaning of the statute requiring an immediate delivery and continued change of possession. *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340; *O'Brien v. Ballou*, 116 Cal. 318, 48 Pac. 130. If it be said that it was the duty of Mr. Odell to take immediate possession of the prunes as soon as they were severed from the land (*O'Brien v. Ballou*, supra), we think the evidence in the record sufficient to show that he did take such possession. He was, in fact, in possession of the land, and lived thereon with his wife. Mrs. Odell never had any possession of the prunes except such as was incident to her possession and interest in the homestead. Mr. Odell had at all times the same possession of the land, and did all the work and bore all the expenses of cultivating and harvesting the crop of prunes. The evidence is that Mr. Odell "raised the crop," and that Mrs. Odell had nothing to do with the prunes except that they were grown on the homestead, which was as much in the possession of Mr. Odell as it was in her. "What constitutes an immediate delivery and an actual and continued change of possession is a fact to be determined upon the evidence in each particular case." *Porter v. Bucher*, 98 Cal. 454, 33 Pac. 335; *Byrnes v. Moore*, 93 Cal. 394, 29 Pac. 70; *Claudius v. Aguirre*, 89 Cal. 503, 26 Pac. 1077; *Dubois v. Spinks*, 114 Cal. 280, 46 Pac. 95. The facts of this case make as strong if not a stronger showing of an immediate and continued change of possession than was made in *Porter v. Bucher*, supra, which was held a proper case for the jury. In *Porter v. Bucher* a husband sold to his wife hay in the stack on the homestead raised by him on the homestead. Substantially the only possession taken by the wife in this latter case was to close and fasten the gate to the corral where the hay was, and to cause her stock to be fed therefrom. In the case at bar the husband (vendee) cultivated and harvested the prunes, and in so doing necessarily exercised acts of ownership and possession continually over the prunes.

The evidence is sufficient to show a change of possession sufficient to meet the requirements of section 3440, Civ. Code. The labor and expense incurred and to be incurred by Mr. Odell in cultivating and caring for the premises was a valuable consideration for the transfer to him of the interest of Mrs. Odell in the prunes to be grown. The transfer, therefore, was not as a matter of law fraudulent as one made by an insolvent with-

out valuable consideration. Section 3442, Civ. Code.

No other reason is urged for a reversal of the order, which is therefore affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

6 Cal. App. 761

STECKTER v. EWING et al. (Civ. 371.)

(Court of Appeal, Third District, California.
Nov. 15, 1907.)

1. ADVERSE POSSESSION—ELEMENTS.

Adverse possession sufficient to vest title must consist of actual, open, and notorious occupation, hostile to plaintiff's title, held under a claim of title exclusive of any other right as the holder's own property, continuous and uninterrupted for five years prior to the commencement of the action, and payment of taxes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 65.]

2. SAME—EVIDENCE.

Plaintiff and her husband mortgaged certain land to a bank, she believing that the mortgage contained the land in controversy, which was in the inclosure with the land mortgaged. The bank foreclosed the mortgage, and bought the land and deeded the same to R. in accordance with the description in the mortgage, which plaintiff still believed included all the land. Plaintiff attorned to R. as his tenant, and continued to occupy the land as such for more than 10 years without making any claim of title until after she had surrendered possession to R.'s grantees. Held, that plaintiff's possession of the land in such inclosure not included in R.'s deed was not adverse to him, and that she was not entitled to hold it as against his grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 682-690.]

Appeal from the Superior Court, Napa County; H. C. Gesford, Judge.

Action by M. E. Steckter against J. Z. Ewing and another. From a judgment for defendants, plaintiff appeals. Affirmed.

W. F. Henning, for appellant. F. E., H. L. & L. E. Johnston, for respondents.

HART, J. The plaintiff brought this suit to quiet title to certain real property situated in Napa county. The pleadings upon which the action was tried were the amended complaint and the amended answer thereto, and were verified. The issues tendered by the pleadings involve the claim by the plaintiff of the right to the possession of and title to the land in dispute, and the alleged ownership of the same in the defendant Ewing. The answer pleads the statute of limitations (section 318, Code Civ. Proc.) in bar of plaintiff's cause of action. The court, from the proofs, found in favor of the claim of the respondents that they held title to the property in controversy by adverse possession, and caused judgment to be entered dismissing plaintiff's complaint. It is from said judgment, accompanied by a bill of exceptions, that this appeal is taken.

The premises in dispute are a part of what is known as the Caymus grant, situated in

Napa county, and consists of a tract of land, with appurtenances and improvements, embracing, approximately, 47.42 acres, upon which the appellant and her husband, John Steckter, now deceased, filed a declaration of homestead on the 9th day of March, 1877. This land, so selected as a homestead, adjoins another tract of land, carved out of said grant, consisting of 367 acres, title to which was acquired by appellant and her husband by purchase from one S. C. Hastings on the 29th day of September, 1869, subsequently to the location by appellant and husband upon the land in controversy. The whole property—that acquired from Hastings and the premises in controversy—was enclosed by and within one general fence, sufficient to turn stock, “as early as the year 1864,” and the two tracks thereupon became, to all practical intents and purposes, one body of land. When appellant and husband located on the land in dispute, one Yount was the owner of said Caymus grant, and Hastings later succeeded to the Yount title. There were two surveys of the grant made many years ago, by the first of which the westerly line of said grant was made to correspond substantially with the easterly line of the premises in dispute, and by the second of which the westerly boundary line of the grant corresponded with the westerly line of said premises. Under the last survey it will be seen the contested premises were brought within the exterior boundaries of said grant. Neither the appellant nor the respondents could, however, as to the premises described in the complaint, trace the source of title to or connect it with the Yount title. John Steckter died in the year 1902; but, prior to that event, to secure an indebtedness, he and the appellant executed to the Bank of Napa a mortgage, the date of which does not appear from the record, upon “the lands bounded on the west by the premises described in the complaint, including a portion of the land described in the declaration of homestead,” but not including that portion of the homestead lands lying westerly of said line, and which constitute the subject of this litigation. On the 3d day of April, 1894, after due proceedings, said mortgage was foreclosed, and a sale of the mortgaged premises was decreed by the superior court, and a sale of the same under said decree made on the 5th day of May, 1894, the bank (mortgagee) becoming the purchaser thereof for the sum of \$7,847. A deed to the mortgaged land was thereupon executed to the bank, and thereafter and on the 8th day of November, 1894, the bank sold and transferred said land to one Sumner Raudall, son-in-law of the appellant, for the sum of \$8,000. Randall executed a mortgage on the land to the bank to secure the payment of most of the purchase price of said property. During the period covered by the existence of the mortgage from appellant and her deceased husband to the bank, the appellant remained

in possession of the mortgaged land and resided on the premises described in the complaint. After Randall bought the property he entered into a verbal agreement with appellant by which the latter was to continue in possession of the same in consideration of the payment to Randall of a yearly sum sufficient to meet the interest on his indebtedness to the bank. On the 30th of September, 1903, Randall and wife transferred the property to respondent Ewing, the deed of conveyance describing the land as it was described in the mortgage to the bank and in the deed from the latter to Randall, and within which description the particular premises in controversy were not included. On September 5, 1904, Randall executed to Ewing another deed for the same property, and included therein the premises described in the complaint.

From the evidence it is clear that Randall, as well as the appellant, when he purchased the property from the bank, believed that the premises over which this action arose were a part and included in the description of the property contained in the deed from said bank to said Randall; that the respondent Ewing, when he bought from Randall, believed that the land so purchased included said disputed premises. The appellant admitted that she had always thought the premises described in the complaint were comprehended in the land mortgaged to the bank, and that she did not discover the mistake until after she had given up possession of the whole property to Ewing. At the time Ewing purchased the property the appellant stated to both respondents that her lease from Randall would not expire until the 1st of November, 1903, but, as a matter of fact, she, so far as the record shows, of her own volition, quit the premises and delivered possession thereof to Ewing on the 11th day of October, 1903. She did not at that time, or at any other time, claim to own any of the property. Harris, the executor of the will of appellant's deceased husband, testified that he had always supposed the property mortgaged to the bank and later sold to Randall included the premises in dispute. Both Ewing and Evans testified that when negotiations for the purchase of the property by the first named from Randall were pending they visited the property and that the boundaries of the same as pointed out to them by appellant embraced the land in controversy. Plaintiff admitted that when the mortgage to the bank was executed she supposed the whole property, including the premises described in the complaint, was covered by that instrument, and that she labored under such belief, both as to said mortgage and the deed to Randall, as well as the deed from the latter to Ewing, up to and including the time she quit the premises and surrendered the possession thereof to said Ewing. She admitted paying rent—the sum necessary to pay the annual interest to

the bank—to Randall for the occupation and use of the entire tract. The arrangement as to rent was, according to Randall, afterwards changed, and thereby she agreed to return. In lieu of cash rent, one-third of the crops raised on the place during the year, and later again she agreed to pay the sum of \$500 yearly as rent. Randall made some improvements upon the property during the period of his ownership thereof, said improvements being put upon that part of the land in controversy. In short, all the parties connected with the property from the time of the execution of the mortgage by the appellant and her husband to the bank to the time of the sale to Ewing believed the premises in litigation here were included in the property deeded by the Bank of Napa to Randall, and by the latter to Ewing, and a reasonable inference from such belief by appellant is that the supposition of all parties thereto must have been the same when the mortgage was executed to said bank.

It is to be noted from the foregoing statement of the facts established at the trial that Randall for a period substantially of 10 years had possession, through his tenant, of the premises in question, and openly and notoriously claimed to own the same during all that time, and that the appellant, while holding personal possession and using the premises during said period, admittedly held such possession as tenant of Randall, recognizing by acts and words his ownership, and never during said period of time setting up any claim of ownership in herself or in any manner denying Randall's ownership and right to possession at the termination of the lease under which she held them. It is admitted that Randall paid the taxes upon the entire property from the time the bank conveyed to him until he sold to Ewing.

The appellant contends that the findings of the court upon the important points in the case are either not sustained by sufficient evidence or altogether without support from the proofs. The findings of the court that the plaintiff "has not been the owner or in the possession or entitled to the possession of the premises in dispute," and that defendants "have title and right of, in and to the said premises and to the whole thereof as against plaintiff," are challenged upon the ground that the evidence is insufficient to sustain them; that the evidence is insufficient to support the finding that Randall was, on the 30th day of September, 1903, the owner in fee, in possession and entitled to the possession of said premises, and that he sold the same for a valuable consideration to respondent Ewing; that the evidence is not sufficient to support the finding of adverse possession by Randall, or that plaintiff's cause of action is barred by section 318 of the Code of Civil Procedure; that there is no evidence which supports the finding that the appellant was ever out of actual possession of said premises, etc. The

exceptions to the findings are apparently founded mainly upon the theory that there could be no adverse possession of the land in dispute as against the appellant so long as she remained in actual physical possession of the same, notwithstanding the fact that for a period of 10 years she believed that the bank deeded all the land within the inclosure to Randall, and the further fact that she leased the land, including the homestead, from Randall and during all that time treated him as the owner of the whole thereof and as her landlord. In other words, the argument of appellant is that, inasmuch as the disputed land was not included within the description of the land mortgaged by herself and husband to the bank, nor included within the property conveyed by the latter to Randall, and because, furthermore, she never lost actual possession of the homestead, the statute could not run against her title. This contention, under the facts as established, cannot be maintained.

There are five elements essential to the establishment of an adverse possession sufficient to vest a perfect title: (1) The possession must be by actual occupation, open and notorious, not clandestine; (2) it must be hostile to the plaintiff's title; (3) it must be held under a claim of title, exclusive of any other right, as one's own; (4) it must be continuous and uninterrupted for a period of five years prior to the commencement of the action; (5) payment of taxes. *Unger v. Mooney*, 63 Cal. 595, 49 Am. Rep. 100, and authorities therein cited. The plaintiff herself, as we have seen, admitted that she always believed that the homestead or land in litigation was covered by the mortgage to the bank. She admitted that she believed that the entire tract of land, including the homestead, was conveyed by the bank to Randall. In fact, her belief that Randall bought all the land within the inclosure is best evidenced by the fact that upon the sale to Randall she immediately attorned to him by taking a lease of all the land from him, stipulating to pay, as rent, for the occupation and use thereof, such a sum annually as would pay the interest accruing upon the note from Randall to the bank, given for a large part of the purchase price of the land, and to secure which a mortgage was executed by Randall to the bank. She at all times, up to the day that she surrendered possession to Ewing, treated with Randall, with reference to all the land, as the owner thereof and as her landlord. For a few years she paid the rent as originally agreed upon, and then she and Randall entered into a new arrangement by which she was to return to the latter, by way of rent, one-third of the products raised upon the land. Subsequently the arrangement for cash rent was renewed. Randall himself declares that he supposed all the time that he had purchased the whole tract of land from the bank. In his negotiations with Ewing, he offered to sell the latter the whole body of land within the inclosure, and

it was then not only understood by Randall and Ewing, but also by the plaintiff herself, that the land belonged to Randall. When Ewing visited the premises, having in contemplation the purchase of the place, the appellant pointed out to him the fence line as indicating the boundaries of the land purchased by Randall, and, after the sale to Ewing, surrendered possession voluntarily and without a murmur of protest before the expiration of the term of her lease. Randall, as we have shown, paid the taxes on all the land from the time that he received the deed from the bank to the time of the sale to Ewing. Thus it will be seen that Randall at all times not only claimed the land in dispute, but exercised all acts of ownership and dominion over it openly and notoriously. The possession of the land by the plaintiff was his possession, just as much so as if, when he first purchased the land, he had removed the plaintiff from possession, and put some other tenant in possession, or had taken actual physical possession himself. It does not answer the proposition to say that the plaintiff during the whole period of her tenancy under Randall labored under the mistake that the land in controversy was a part of that mortgaged to the bank and conveyed to Randall. In *Woodward v. Faris*, 109 Cal. 17, 41 Pac. 782, it is said: "Most cases of adverse possession which have ripened into title commenced, I doubt not, in mistake. It must be either by mistake or deliberate wrong. It is through mistake only that one can honestly claim to own that which really belongs to another. But this discussion need not be prolonged, for it is only necessary to set the statute running that the party should be in possession as owner." See, also, *Silvarer v. Hansen*, 77 Cal. 584, 20 Pac. 136; *Grimm v. Curley*, 43 Cal. 250.

All the elements of adverse possession are present in the case at bar. Randall, the grantor of Ewing, from the time he purchased from the bank, was, in contemplation of law, in the continuous, open, notorious, and adverse possession, claiming to hold and own the land in dispute adversely to all persons whomsoever. Counsel says that Ewing, before purchasing, should have inspected the records, and by such inquiry have first determined what portion of the land had been conveyed by deed to Randall and what portion not. The same suggestion has equal force applied to the appellant. In truth Ewing relled, no doubt, to some extent upon the representations of appellant herself as to the extent of the land owned by Randall. But for 10 years she remained in possession of the land as the admitted tenant of Randall, knowing that he claimed ownership of the entire tract, never doubting such ownership, but expressly conceding and recognizing it, and yet never taking the trouble to examine the public records for herself to ascertain whether her homestead had been mortgaged and sold. While the rule of equitable estoppel might not be invoked against her under the circum-

stances of the case (which we do not decide), it may well be suggested that she was guilty of inexcusable negligence in suffering with passive indifference an adverse title to ripen against her before her "very eyes," and that it would hardly be just, after an innocent third party has purchased the land, under the circumstances shown here, to declare that she should be upheld, to the prejudice of such innocent party, in asserting rights lost through her own fault.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

7 Cal. App. 14

NOBLES v. HUTTON. (Civ. 376.)

(Court of Appeal, Third District, California. Nov. 20, 1907. On Rehearing, Dec. 20, 1907; Denied by Supreme Court Jan. 16, 1908.)

1. DEEDS—VALIDITY—INCOMPETENCY OF GRANTOR.

In a suit to set aside a deed on the ground of mental incompetency of the grantor, evidence held to justify a finding of mental incompetency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 638, 639.]

2. SAME—CONFIDENTIAL RELATIONS—BURDEN OF PROOF.

Where a son acted under power of attorney executed by his mother, who was old and infirm, with authority to manage her business, a confidential relation existed between the parties, and the burden rested on the son, obtaining from her practically all her property without valuable consideration, to show that the conveyance was not obtained through fraud or undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 589.]

3. GIFTS—VALIDITY—CONFIDENTIAL RELATIONS—PRESUMPTION.

A gift by one person to another, occupying towards each other confidential relations, is constructively fraudulent, and is only upheld on a showing of special circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, § 86.]

4. PARENT AND CHILD—CONVEYANCE BY PARENT TO CHILD—VALIDITY.

Where a son, dealing with his parent with regard to the latter's property, obtains title thereto without adequate consideration, the transaction will, on principles of equity, be scanned with the strictest scrutiny, and such transaction will be examined circumspectly where the parent is aged and mentally infirm, but not altogether incompetent, and where there are other children for the exclusion of whom from the parent's estate no reasonable account is given or apparent.

5. DEEDS—VALIDITY—CONFIDENTIAL RELATIONS—UNDUE INFLUENCE.

Persons standing in a confidential relation toward others cannot entitle themselves to benefits which those others have conferred on them, unless they show that the person by whom the benefits were conferred had independent advice on the subject given in private, by some one of the latter's own selection, and when not surrounded with dominant influences favoring the transfer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 191-194.]

6. SAME—EVIDENCE.

In a suit to set aside a deed executed by a mother to her son, between whom a confidential

relation existed, on the ground of undue influence, evidence examined and held to justify a finding of undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 641.]

7. SAME — COMPETENCY OF GRANTOR — EVIDENCE.

While, in a suit to set aside a deed on the ground of incompetency of the grantor, the test is the competency of the grantor at the time of the execution of the deed, testimony of the mental competency of the grantor before and after the execution of the instrument is admissible to show the probable condition of the mind of the grantor at the time of the transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 604-606.]

8. APPEAL — REVIEW — FINDINGS — CONCLUSIVENESS.

The weight of the evidence is for the trial judge, who may disregard the uncontradicted testimony of witnesses, and his findings supported by some evidence will not be disturbed on appeal, unless there is such inherent weakness in the proofs as to justify the appellate court in saying that as a matter of law they do not sustain the findings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

9. EVIDENCE—OPINION EVIDENCE—COMPETENCY OF GRANTOR.

Under Code Civ. Proc. § 1870, subd. 10, rendering the opinion of an intimate acquaintance respecting the mental sanity of a person competent, the objection that the husband of a grantor who had not lived with her for nearly a year, and that another person who had not seen the grantor very often for two years prior to the date of the deed, could not testify as to the mental competency of the grantor, was to the weight of the testimony rather than to its competency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2242.]

10. SAME.

On the issue whether a grantor in a deed possessed mental competency, the questions asked witnesses should relate to the grantor's mental competency, and not as to whether he was competent to make a transfer of property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2200.]

11. APPEAL—REVIEW—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, in a suit to set aside a deed on the ground of mental incompetency and undue influence, the evidence justified a finding of undue influence, error in rulings on evidence as to mental competency was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4175, 4177.]

12. DEEDS — VALIDITY — UNDUE INFLUENCE — EVIDENCE.

In a suit to set aside a deed on the ground of undue influence, evidence that no actual consideration passed for the deed at the time of its execution was admissible to show that the deed was void because obtained by undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 603, 605.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Elizabeth Nobles, formerly Elizabeth Hutton, by C. M. Curley, her guardian, against D. D. Hutton. From a judgment for plaintiff and an order denying defendant's motion for a new trial, defendant appeals. Affirmed.

Weldon & Held, for appellant. W. G. Poage and Thomas, Pemberton & Thomas, for respondent.

HART, J. The purpose of this action is to set aside a certain deed, purporting to convey the lands therein described to defendant, and to quiet title to said lands. The plaintiff, having been prior to the commencement of this action adjudged by the superior court to be an incompetent and a guardian of her estate and person thereupon appointed, brought the suit, and is a party hereto by her general guardian. Judgment was awarded to plaintiff, setting aside the deed, and quieting her title to the lands alleged to have been thereby conveyed. The appeal is from the judgment and the order denying defendant a new trial.

The defendant is a son of the plaintiff, and it is charged in the complaint that the latter, while in a state of mental incompetency, conveyed to the defendant, without a valuable consideration, the lands involved in this controversy. It is alleged that the plaintiff, by reason of the infirmities of old age, was without capacity to transact business, or to realize and understand the effect of her act in executing said deed to defendant; that she was illiterate and unable to read, and at the time of the transaction complained of had no opportunity to secure and receive the counsel and advice of any other relative, friend, or acquaintance; that the plaintiff was taken by the defendant and his wife to Ukiah, a distance of about 50 miles from her home, and, while among strangers, signed and acknowledged the deed; that defendant, taking advantage of the said infirmity of mind and illiteracy of plaintiff, and of his relationship to her, imposed upon said plaintiff, and unduly influenced her to transfer to him said property, which, it is alleged, is of the value of about \$6,000. The court found that upon the 17th day of June, 1904, the day upon which the deed mentioned in the complaint was executed as alleged, the plaintiff was "old, infirm, of falling memory, and of unsound mind, and by reason thereof at the time incapacitated from attending to business," and that defendant took advantage of such incapacity, and procured her to sign and acknowledge said deed, conveying to him the property described in the complaint, without any consideration therefor; that the plaintiff in the transaction was without independent advice, and that defendant "by taking advantage of plaintiff's mental weakness and by the use of undue influence arising out of the relationship existing between the parties hereunto, to wit, the relation of mother and son, and of principal and agent, and further taking advantage of the circumstances above recited, procured and persuaded plaintiff to sign and acknowledge" the deed which is the cause of this controversy.

The principal contention of the appellant is that the evidence is insufficient to support

the findings. The testimony upon behalf of plaintiff upon the question of her alleged mental incompetency was mostly from witnesses who saw very little of her during several months prior to the date of the execution of the deed. But the witness Avella, who was a lessee of the plaintiff of certain land, testified that he met and talked with her frequently, and that he noticed that her mind was failing, and that she appeared to have a poor memory, etc. Avella said that after he learned of the execution of the deed, by which she conveyed her property to the defendant, he mentioned the circumstance to her, and that she denied having transferred the land to defendant. This witness expressed the opinion that plaintiff was incapable of understandingly attending to business. There was other testimony upon this point by witnesses who, as stated, had not seen much of plaintiff for three or four months before the transfer was made. Neighbors of plaintiff, testifying for the defense, stated that, up to the time of the transaction out of which this suit arises, she appeared to be of sound mind and fully capable of conducting her business affairs. The attorneys who drew the deed, and who were present when plaintiff signed and acknowledged it, testified that she seemed on that occasion to be intelligent and thoroughly appreciative of the nature and effect of the transaction. It would accomplish no useful purpose to go into all the testimony upon the point under consideration. It is sufficient to say that, while it may be admitted that the testimony offered and received in support of the allegation in the complaint of the mental incapacity of the plaintiff, and her inability to understand and know the nature and result of the transaction involving the execution of the deed, is by no means strong, so far as we are able to judge from the bare record, there is, nevertheless, some testimony to sustain the finding upon that point, and we are not prepared to say that the court was not justified in making said finding. Besides, we do not think that the proposition of the alleged mental incompetency of plaintiff to the extent that she was incapacitated for the transaction of business is of paramount importance in view of other considerations presented by the record.

The evidence shows that, besides the defendant, there were living at the time of the execution of the deed and when the trial was had several children of plaintiff, and that between these children and plaintiff the most amicable filial relations existed. It further appears that the defendant had been, for some time prior to and up to the date of the conveyance to him of the property in dispute, the agent of plaintiff, acting as such under a power of attorney. It is also clear that while, as we have suggested, the evidence may not be strong as to her alleged incompetency, there can be no doubt that the plaintiff had to some extent grown mentally feeble

and of poor memory, and was certainly in a condition of mind in which she could be easily influenced by one in whom she had confidence. The power of attorney to which we have referred clothed the defendant with authority to "sue for and collect all such sums of money, debts, rents, dues and accounts, and other demands whatsoever, which are or shall be due, owing and payable to me or detained from me in any manner whatsoever," etc. The authority thus conferred upon the defendant does not, it is true, at least by express language, relate to the property in controversy, but if, as appellant contends, said power of attorney does not establish confidential and fiduciary relations between the parties as to the property in dispute, there is still much significance in the circumstance of defendant's agency of plaintiff in the fact of the confidence thereby reposed in the defendant by the plaintiff. The evidence shows that the plaintiff was induced by the defendant, prior to the execution of the deed, to leave her farm and take up her residence with defendant and wife. And there is no reason shown why the plaintiff should have given the bulk, if not all, her estate to the defendant to the exclusion of her other children. The circumstances under which the transfer of the property was made to the defendant were, upon their face, such as to create suspicion as to the good faith of the transaction, so far as defendant's part in it was concerned. Indeed, the mere statement of the circumstances discloses, in our opinion, a strong case of constructive fraud. The judge of the court below, who saw and heard the witnesses, and who was in a position to determine the weight to which the testimony of the witnesses was entitled, upon the evidence through which the circumstances attending the transaction were developed, found that not only undue influence was practiced by defendant, but that the transaction was constructively fraudulent. With this finding we do not feel at liberty to interfere. There is no room for doubt, under the evidence as presented here, that the relations existing between plaintiff and defendant were confidential and therefore of a fiduciary character. The evidence clearly shows that the plaintiff reposed in the defendant especial confidence and trust, and the court found that "defendant was at the time of the execution of said written instrument and for many months prior thereto had been continuously the agent of plaintiff, and was by her intrusted with the management and conduct of all her business," etc. The conclusion of the trial court from this finding was that the conventional fiduciary relations between plaintiff and defendant extended to all transactions between them relating to plaintiff's business affairs, whatever of her property they might involve, so far as any dealings defendant might have with her in his own behalf were concerned. With this conclusion we are, as before indicated, perfectly satisfied.

A relation of trust and confidence being established between these parties through the authority as agent vested in defendant by plaintiff, it was the duty of the former to act in perfect good faith in his dealings in his own behalf with said plaintiff in a transaction relating to her property, independent of any consideration of his duty towards her as her son and in her enfeebled condition of mind. When, therefore, he obtained from her, under the circumstances disclosed by the evidence, valuable property—in fact, practically her entire estate—admittedly without a valuable consideration, the burden rested upon him to show that the fructification of the transaction was not attained through fraud or undue influence. This is only a statement in different form of the well-settled rule that a gift by one person to another occupying towards each other confidential relations is constructively fraudulent, and, as the Supreme Court says in *Brison v. Brison*, 75 Cal. 529, 17 Pac. 689, 7 Am. St. Rep. 189, "is only to be upheld upon a showing of special circumstances." By this it is not meant that it is impossible that such a gift may be valid, but that such a transaction, under such circumstances as are shown here, is by presumption of law tainted with fraud, and that the burden of showing the good faith of the same is on the donee. See *Hays v. Gloster*, 88 Cal. 568, 28 Pac. 867, and cases cited. This burden the defendant failed to sustain—that is, he failed to show that the deed was the result of the free agency of the grantor, or not "more the offspring of his own than of her own will."

In *Paddock v. Pulsifer*, 43 Kan. 718, 23 Pac. 1049, where a daughter obtained a deed from her aged and invalid father to a valuable piece of land without consideration and which conveyance was set aside, the Kansas Supreme Court lays down the rule in cases of the character of the present one as follows: "In such a case as this, the burden of establishing the perfect fairness and equity of the conveyance to Mrs. Paddock was thrown upon her, in view of her father's age, sickness, and feebleness of mind, and the close relation of the parties. Confidence was necessarily reposed in Mrs. Paddock. If that confidence was abused in procuring the deed, the trial court very justly set it aside. Added to the "close" natural relationship of the parties here is, it must always be remembered, the further relation of confidence and trust created by the authority as agent conferred upon the defendant by the plaintiff.

But the relation of parent and child, where business transactions are carried on between them, is the source of the very highest considerations of confidence and trust. Confidence in such a case originates in and proceeds from natural laws, and, generally speaking is innate and an essential part of the nature of both, for in whom could a parent repose a greater degree of confidence than in him to whom has been directly transmitted

his own blood, and over whom he has exercised parental dominion and discipline from infancy to matured manhood. So, when a son dealing with his parent with regard to the latter's property, gains an advantage or obtains title to such property without adequate or any consideration, the transaction should, upon principles of equity and fair dealing, be scanned with the strictest scrutiny. And, a fortiori, should such transaction be examined circumspectly when the parent is, as here shown to be, aged and mentally infirm, even though not altogether incompetent, and where there are other children, for the exclusion of whom from the parent's estate no reasonable account is given or apparent. The books are full of cases illustrating the application of the principle as thus stated. In *Comstock v. Comstock*, 57 Barb. (N. Y.) 453, a case in which an aged parent conveyed property to her son with whom she was living and the deed set aside, it is said: "It is a well-settled rule of equity jurisprudence that all gifts, contracts, or benefits from a principal to one occupying a fiduciary or confidential relation to him are constructively fraudulent and void. The court, in such cases, acts upon the principle that if confidence is reposed it must be faithfully acted upon; if influence is acquired it must be kept free from the taint of selfish interest, and cunning and overreaching bargains. In this class of cases there is often found some intermixture of deceit, imposition, or overreaching advantage or other mark of positive or direct fraud. But the principle upon which courts of equity act in regard thereto stands independent of any such ingredient, upon a motive of general public policy. Among the relations subject to the foregoing rule are those of parent and child, attorney and client, and principal and agent."

We have examined with care all the authorities cited by appellant upon the point under discussion and find nothing therein inconsistent with the views here expressed. The case of *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910, was an appeal from the judgment upon the judgment roll alone. The court held that the findings could not be disturbed because, in the absence from the record of the evidence from which the findings were deduced, the evidence was presumptively sufficient to sustain them. It is, however, said in that case: "Transactions like the one under consideration are watched by courts of equity with the most scrutinizing jealousy, and are generally held to be presumptively void. They will be set aside upon the discovery of the least fraud, and every presumption ought to be indulged against them. The person who makes the donation and bestows the confidence is not bound to show that any imposition has been practiced upon him. It is sufficient for him to establish intimate and confidential relations with the donee. Some of the cases hold that undue influence is not to be inferred from the relation of parent

and child, where the gift is from the parent to the child (citing *Millican v. Millican*, 24 Tex. 446); but where the parent is of great age, or is enfeebled by disease, and conveys his entire estate to one child, to the exclusion of other children dependent upon his bounty, the burden is unquestionably upon the donee to show that the gift was made freely and voluntarily, and with full knowledge of all the facts, and with perfect understanding of the effect of the transfer." Citing *Todd v. Grove*, 33 Md. 194, and *Highberger v. Stiffler*, 21 Md. 352, 83 Am. Dec. 593. The rule as it is declared in *Smith v. Mason*, 122 Cal. 426, 55 Pac. 143, while undoubtedly correct as applied to the circumstances under which the deed there was executed, seems to be rather broadly stated, and, as construed by appellant, is opposed to the whole current of authority upon the subject. But in that case it was not alleged or claimed that the grantor was incompetent in any respect to execute the deed to defendant, "nor that he at all mistook its contents, nor that defendant procured it by means of undue influence or fraudulent promises or, indeed, that she made any effort to obtain it."

Here, as seen, it is alleged, and the proven circumstances show, that a confidential relation existed between the parties, and a conveyance made without consideration by one who, if not totally incompetent, was at least enfeebled in mind. The evidence, as already appears, shows that for nearly a year before the deed was executed, the plaintiff resided with the defendant and his wife, and during that time was in constant association with, and the companion of, the latter. She had returned to her farm, but for the purpose of making the deed was brought by the defendant to Ukiah, and when the transaction was consummated she was attended only by the defendant, his wife and the attorneys who were employed by defendant to attend to the business. According to the evidence and findings, she was not given independent advice, nor opportunity to secure it, and was compelled to rely solely for information and advice concerning the transaction upon the defendant and his wife.

It is a well-established principle that persons standing in a confidential relation toward others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had independent advice in conferring them. *Yordi v. Yordi* (Cal. App.) 91 Pac. 348; *Rhodes v. Bate*, L. R. 1st Ch. 257; section 968, 2 Pom. Eq.; *Slack v. Rees* (N. J.) 59 Atl. 466, 69 L. R. A. 393; *Coffey v. Sullivan*, 63 N. J. Eq. 296, 49 Atl. 520; *Haydock v. Haydock's Executors*, 34 N. J. Eq. 570, 38 Am. Rep. 385; *White v. Daly* (N. J. Ch.) 58 Atl. 929. And the advice should be given in private by some one of her own selection, and when the grantor is not surrounded with

dominant influences favoring the transfer. *Slack v. Rees*, supra; *Yordi v. Yordi*, supra; *Coffey v. Sullivan*, supra; *Haydock v. Haydock's Executors*, supra; *Pironi v. Corrigan* (N. J.) 20 Atl. 227. In the last-mentioned case, the language used is peculiarly appropriate here: "It seems to me that the complainant, laboring, as she did, under the continued disadvantages of great age and of dense ignorance and inexperience, and dealing with a person in whom she had the utmost confidence, had especial need of, and was especially entitled to, and should have had the benefit of, a full, free, and private preliminary conference with a competent lawyer or business man, who was employed and paid by her, and in whom she had confidence, and who would be devoted to her interests, and hers only." There are innumerable other cases than those cited upon all the points involved in this case, sustaining the conclusions we have reached; but it would be useless to multiply authorities upon principles so well established and understood in their application to such circumstances as are found here. We may, however, state the sum of the case here in the language of *White v. Daly*, supra, particularly pertinent to the facts in the case at bar: "The situation is obvious—a relation of trust and confidence on the one side; an improvident deed, the product of that trust and confidence, on the other. That the influence was a constantly operating influence is undeniable; that it was an undue influence is demonstrated by the fact that the transaction was improvident, and that the only gainer by it was the person under whose influence the grantor was."

As stated in the beginning of this opinion, the principal claim of the appellant why a reversal should be ordered is that the evidence does not support the findings. In their elaborate and able brief the learned counsel discuss at length and in detail the evidence to show that the findings are barren of sufficient support. It is declared that the evidence shows that some of the witnesses for plaintiff are interested in the result of the action—a fact which we are asked to consider—and that most of the testimony upon the mental condition of the plaintiff is worthy of but little weight, because it relates to a time anterior and subsequent to the date of the execution of the deed, and that, consequently, she failed to make out a case of incompetency at the very time the deed was signed and acknowledged. It is true that the test in a case of this character, where mental incompetency is relied upon to set aside an instrument transferring property, is the condition of the party whose act is challenged upon that ground at the time said act was performed; but it is also true that testimony as to the mental condition of the party before and after the time of the making of the instrument is admissible for the purpose of disclosing circumstances tending to show her probable condition of mind at the time of the

transaction. As before stated, however, the evidence and its weight are matters for the trial judge, trying the facts, to pass upon and determine, and his conclusions thereon, where, as here, there is some evidence to show plaintiff's incompetency when she made the deed, could not be interfered with by a reviewing court, unless there appeared from the record such inherent weakness in the proofs as to justify an appellate court in saying that, as a matter of law, they do not sustain the findings. A trial judge, to whom is submitted the decision of questions of fact, may disbelieve the uncontradicted testimony of certain witnesses and ignore it altogether. This, under our system, is his right and within his province as a trier of the facts. But, as we have attempted to show, even if it may be said that, as a matter of law, the evidence upon mental incompetency is, upon its face, too weak to support the finding upon that point, there are other considerations presented by the record, which, being fully supported by proof, positive and presumptive, justify the judgment.

Certain rulings of the court to which exceptions were reserved at the trial are assigned here as prejudicial errors. The witness Nobles, husband of plaintiff, from whom he had been separated for about a year, and who had not seen her for nearly a year, was permitted, over an objection to give his opinion, as an intimate acquaintance (section 1870, subd. 10, Code Civ. Proc.), of the mental competency of the plaintiff. The objection was upon the ground that the witness had not been shown to have seen the plaintiff on the day of the transaction, etc., and also as to the form of the question. The witness Hayward, asked the same question, was allowed, over objection, to give his opinion as to plaintiff's mental condition. He had not seen her very often for two years prior to the date of the deed, and the objection was that he was not competent to give his opinion within the meaning of the section of the Code admitting such an opinion from an intimate acquaintance. These objections, except as to the form of the questions, were, as we have already suggested, rather to the weight than the competency of the testimony. The form of the questions may not have been strictly within the language of the section, yet the purpose of them was to elicit opinions as to plaintiff's mental sanity. The questions were not as to whether plaintiff was competent to make a transfer of her property (Estate of Taylor, 92 Cal. 564, 28 Pac. 603), but as to her "mental competency." But under the views we have expressed concerning the issue as to mental incompetency the rulings, even if erroneous, are harmless.

It is also contended that the court erred in permitting the witnesses McNab and Hirsch to testify that no actual consideration passed for the deed at the time it was executed. In support of this contention the cases of Hendrick v. Crowley, 31 Cal. 472, and Arnold v.

Arnold, 137 Cal. 296, 70 Pac. 23, are cited. These cases do not sustain the contention. In the last-mentioned case, the court after declaring the very elementary proposition that the terms of a written contract cannot be varied and defeated by parol testimony, says: "No fraud, no undue influence, no mistake was averred or sought to be proved." The testimony here was not offered to vary the terms of a valid written contract, but for the purpose of showing that the instrument was void because obtained by fraud and undue influence.

We find no prejudicial errors in the record. The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

HART, J. We have carefully examined the petition for a rehearing herein, and observe nothing therein persuading a different conclusion from that arrived at in the main opinion. The petition involves practically only a repetition of an argument based upon the evidence and the facts thereby established. We are unable now, as we were upon the original investigation of the record, to see our way clear to hold that the evidence, as a matter of law, is insufficient to sustain the findings of the trial court.

Our attention has, however, been called to two immaterial inaccuracies in the statement of the facts in the original opinion. We therein stated that prior to the commencement of the action the plaintiff, Mrs. Hutton, had been declared an incompetent, and a guardian of her estate and person thereupon appointed by the superior court. The fact is, as we find upon re-examination of the record, she began the action before she was adjudged an incompetent, and the proceeding in which she was so declared was consequently had after the suit was instituted.

We also stated that Mrs. Hutton, prior to the execution of the deed, was induced to leave her farm and take up her residence with defendant and wife; whereas the record discloses that she was living in town at the time she was separated from her husband, and that thereafter she went to the home of the defendant.

It is too clear to justify the time in making the suggestion that these immaterial inaccuracies cannot, in the remotest degree, affect the conclusion at which we arrived in the original opinion. It must be plainly manifest that whether Mrs. Hutton was declared an incompetent before or after the commencement of the suit could have very slight material bearing upon the question of her competency at the time of the transaction from which the suit arises. And whatever weight the circumstance, happening as it really did, might carry, was for the jury to determine. Still less could the fact of her having been taken from her home in Ukiah to the res-

idence of the defendant, before the deed was signed and acknowledged, influence the determination of the ultimate facts in the case.

The petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

6 Cal. App. 774

In re CLAVO'S ESTATE. (Civ. 331.)

(Court of Appeal, Third District, California.
Nov. 16, 1907.)

1. HOMESTEAD—ABANDONMENT.

The removal of a party from premises on which he has declared a homestead after a void execution sale thereof, and his surrender of the possession to the execution purchaser, do not constitute an abandonment of the homestead within Civ. Code, § 1243, providing that a homestead can be abandoned only by a declaration of abandonment, etc., and he cannot declare a second homestead on other land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 320-326.]

2. SAME—DECLARATION OF HOMESTEAD.

Where a wife after executing jointly with her husband a declaration of homestead on his separate property died, the surviving husband held the homestead protected against forced sale, but by the death of the wife the property vested absolutely in him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 259.]

3. SAME.

Civ. Code, § 1265, provides that on the death of a person whose property has been selected as a homestead it shall go to his heirs, etc. Code Civ. Proc. § 1474, as amended in 1880, provides that, where the homestead selected by the husband and wife was selected from the separate property of the person selecting or joining in the selection, it vests on the death of the husband or wife absolutely in the survivor. A wife, after executing jointly with her husband a declaration of homestead on his separate property, died, leaving her husband surviving, who after his second marriage executed a declaration of homestead. *Held*, that on the death of the husband the property did not vest in his heirs, but in the second wife surviving; the husband, though incompetent to select a different homestead, having the right to file a second declaration of homestead on the same property.

4. DESCENT AND DISTRIBUTION—APPLICABILITY OF STATUTES.

The descent of property is governed by the law in force at the death of the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, § 16.]

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

In the matter of the estate of Nicholas Charles Clavo, deceased. From an order setting aside certain property for a homestead to Ann Clavo, widow of the deceased, his heirs appeal. Affirmed.

O. B. Gentry and Bell & York, for appellant. Klerce & Gillogley, for petitioner. Sullivan & Sullivan, for petitioner A. Clavo.

BURNETT, J. The appeal is from an order setting aside absolutely to Ann Clavo, widow of the deceased, certain property as and for a homestead.

Two declarations of homestead upon the

same property appear in the transcript; one executed jointly by Clavo and a former wife in 1877 upon the property as his separate estate, and the other executed by Clavo alone in 1880 after the death of his said former wife and his marriage to Ann Clavo, respondent herein.

Four propositions are submitted by appellant to which brief consideration will be given.

1. It is clear that we are not concerned about the construction of sections 1243 and 1244 of the Civil Code as the question of abandonment of the homestead is not involved.

2. It is urged that a party cannot have two homesteads, and if he attempts to acquire a second while the first is in force, the second is void. This is announced in *Waggle v. Worthy*, 74 Cal. 268, 15 Pac. 831, 5 Am. St. Rep. 440, and it is undoubtedly sound as applied to the facts of that case. It was there correctly held that "the removal of a party from premises on which he has declared a homestead after a void execution sale thereof, and his surrender of the possession to the execution purchaser, do not constitute an abandonment of the homestead, within the meaning of section 1243 of the Civil Code, so as to enable him to declare a second homestead on other land." But as will be seen hereafter the proposition has no material bearing upon the determination of the question at issue here.

3. We think appellant is not entirely accurate in the statement that "the death of Petronella Clavo, the first wife, did not in any manner alter the state or character of the homestead declared August 21, 1877," although admittedly after her death the property continued to retain certain characteristics of a homestead. In *Tyrrell v. Baldwin*, 78 Cal. 470, 21 Pac. 116, it was held that "a homestead selected from community property vests absolutely in the survivor on the death of either spouse, and is not subject to forced sale for the subsequent debts of the survivor." The question involved in the matter of the Estate of Ackerman, 80 Cal. 206, 22 Pac. 141, 13 Am. St. Rep. 116, was whether the surviving husband was entitled to have a homestead set apart to him out of the separate property of the estate of his deceased wife, when at the time of her death they were occupying other and community property which was impressed with the character of a homestead. Although not necessary to the decision it was stated broadly that "the death of one of the spouses did not alter in any way the estate or character of the homestead." The same statement is made in *Sanders v. Russell*, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26. In *Dickey v. Gibson*, 113 Cal. 30, 45 Pac. 16, 54 Am. St. Rep. 321, the rule seems to be more accurately declared as follows: "In the hands of the survivor the homestead is protected against enforced sale precisely as before it had been protected to

the community by its homestead character. * * * By the death of the first wife the homestead property vested absolutely in the surviving husband. As far as the legal title is concerned, it vested in him as fully and perfectly as though no homestead had ever been carved out of it. The limitations and immunities which accompanied the enjoyment of the property under such title modified not the title but its enjoyment, and were only such as the statute imposed. Save as to these limitations and immunities, the homestead ceased to exist." In *Payne v. Cummings*, 146 Cal. 432, 80 Pac. 622, 106 Am. St. Rep. 47, it is said: "The interest of plaintiff in the property after his wife's death became something different and greater than it was in her lifetime. He had then not only the absolute title, but also the absolute right of exemption in the property from all former debts, as well as the right to dispose of it in any way he saw fit." But the result must be the same, as we shall presently see, whether we regard the first or the second declaration as the decisive factor in determining the status of the property at the time of Clavo's death.

4. The vital question is that presented by the fourth proposition of appellant that "upon the death of Clavo the property vested in his heirs and devisees." This contention is diametrically opposed to the provisions of the statute and the decisions of the Supreme Court. It is based upon the language of section 1265 of the Civil Code, which is as follows: "From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor; * * * in other cases upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent." If the foregoing were the only provision on the subject, we could not escape the conclusion reached by appellant; but section 1474 of the Code of Civil Procedure was amended in 1890 so as to read: "If the homestead selected by the husband and wife or either of them, during their coverture, and recorded while both were living was selected from the community property or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife absolutely in the survivor." If the sanction of judicial interpretation of said provisions be needed, we find it in the case of *In re Croghan*, 92 Cal. 371, 28 Pac. 570, wherein it is said: "But the contention of appellants is that it should have been set apart to the widow only for a limited period, after which it should go by operation of law to the appellants as heirs. The facts upon which this contention rests

are these: (1) The said homestead was the separate property of the deceased; and (2) the declaration of homestead was made by the deceased himself. Upon these facts we are clear that the homestead vested absolutely in the widow as survivor." In *Weinreich v. Hensley*, 121 Cal. 653, 54 Pac. 256, it is said: "The devolution of the title to the homestead premises in case of the death of one of the spouses is provided for in section 1265 of the Civil Code, and also in section 1474 of the Code of Civil Procedure. The latter section was amended 10 days later than the section of the Civil Code, and is to be regarded as the latest expression of the legislative will." It is true that both declarations here were filed prior to the time when said amendment went into effect, but this is of no importance, as "the descent of the property is governed by the law in force at the death of the husband." *Tyrrell v. Baldwin*, supra; *Estate of Fath*, 132 Cal. 612, 64 Pac. 905.

If appellant is right in his contention that the property remained impressed with the character of a homestead by virtue of the first declaration, and its status in that regard was not altered or affected in any manner by the death of the former wife, then, of course, it is clear that the second declaration was ineffective for any purpose, and the conclusion also follows that said homestead would inure to the benefit of the members of the second community, and on the death of the husband would vest absolutely in the widow. But the correct view seems to be as follows: The declaration of homestead under the circumstances shown here is for the joint benefit of the spouses. The obvious intent, indeed, of the homestead act, is to secure to every householder or head of a family a home where the family may be sheltered and live beyond the result of those financial misfortunes which even the most prudent and sagacious cannot always avoid. Thus the word itself ordinarily indicates that there must be a family. *McCanna v. Anderson*, 6 N. D. 482, 71 N. W. 769. To constitute a homestead with all its attributes as contemplated by the statute, it must be occupied as a home by the family, except in the single instance provided by the statute for a declaration by one who is not the head of a family.

Upon the death of the first wife the title to the property became vested absolutely in the husband, and he was clothed with complete dominion over it, but by virtue of the statute it still retained some characteristics of a homestead, among them being exemption from execution. While that exemption continued, he could not select another and different homestead. But the title having vested completely in the husband upon the death of his wife, the property could not in the very nature of the case continue as a homestead for the benefit of the second community. The unqualified title of one of the spouses

es to the property is inconsistent with the existence of a homestead for the benefit of both. After his second marriage, in order to clothe the property with all the attributes of a community homestead, it was necessary for the husband to file another declaration. This he did, as he had a right to do, and the effect of it was that upon his death the property vested absolutely in his widow as it would have vested in the former wife under the first declaration if she had survived him.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. App. 1

DAVEY v. SCHUERMAN et al. (Civ. 333.)
(Court of Appeal, Third District, California.
Nov. 16, 1907.)

1. APPEAL—TO WHAT COURT TAKEN—NOTICE.

The test determinative of the court to which an appeal is taken is not the title of the court on the printed back of the transcript or of the briefs, but is the language of the notice of appeal itself.

2. SAME—CALENDARS—STRIKING OFF CAUSE.

Where an appeal has been taken to the Supreme Court, but by mistake the cause was placed on the Court of Appeal calendar, the cause may be removed from that calendar either by striking it therefrom, or transferring it to the Supreme Court.

3. SAME—RIGHT OF REVIEW—REPRESENTATIVE COMPETENCY—SPECIAL ADMINISTRATOR.

An order appointing a special administrator to "preserve and protect" the estate of intestate was sufficiently specific within Code Civ. Proc. § 1412, requiring an appointment to be made by entry on the minutes of the court "specifying the powers to be exercised by the administrator," to authorize the special administrator to appeal from a judgment against intestate, in an action wherein affirmative relief was sought on the ground that intestate had been the owner of the property in dispute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 911.]

4. SAME—TRANSFER OF CAUSE—SERVICE OF NOTICE OF APPEAL.

Under Code Civ. Proc. § 940, providing that an appeal is taken by filing with the clerk a notice thereof, and serving a similar notice on the adverse party, the provision as to service is equally as mandatory as that as to filing, and failure to serve a notice within the required time is fatal to an appeal, though such notice may have been filed within the required time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2173.]

Appeal from Superior Court, Nevada County; F. T. Nilon, Judge.

Action by Samson Davey against V. J. Schuerman. Subsequent to judgment against him, defendant having died, John Mulroy was appointed special administrator, and from an order denying a new trial, he appeals. Appeal dismissed.

Chas. W. Kitts, for appellant. Thos. S. Ford, for respondent.

HART, J. This is an appeal by the defendant from an order denying his motion for a new trial upon a statement of the case.

The action was brought to quiet title to

certain land situated in Nevada county. The plaintiff claims title through a homestead patent issued to him by the government of the United States in the month of August, 1893. The defendant's claim of title is based upon an alleged purchase of the land from the Central Pacific Railroad Company on the 1st day of June, 1891, it being contended that said land was embraced within the grant to said railroad company from the general government by virtue of an act of Congress of the United States, approved July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the government the use of the same for postal, military and other purposes" (Act July 1, 1862, c. 120, 12 Stat. 489), and an act amendatory thereof, approved July 2, 1864, by which the United States granted to said railroad company "each odd-numbered section on each side of the line of its railroad to be located as provided by said acts and which was within twenty miles of said line" (Act July 2, 1864, c. 216, 13 Stat. 356). At the time the homestead patent was issued by the government to the plaintiff the defendant had possession of and was living upon a portion of the disputed land; but subsequently to the issuance of said patent to plaintiff the defendant took a lease of the premises from plaintiff, the same being in writing, at the nominal rental consideration of \$1 per year.

The defendant, after answering by denial the averments of the complaint, sets out, by way of cross-complaint, a history of his title to the land, and upon the facts thus alleged asks for affirmative relief, viz.: That the plaintiff be declared the holder of "said patent and title of said premises in trust for this defendant; that he be directed and obliged to reconvey the same to this defendant," etc. The court found from the evidence all the allegations of the complaint to be true, and accordingly entered a decree quieting plaintiff's title to the demanded premises.

Respondent presents a motion to dismiss the appeal upon three grounds: (1) Because the appellant "had not legal capacity to sue or be sued or take this appeal"; (2) because "this court never obtained jurisdiction of the case"; (3) because the appeal was not taken within the time prescribed by law.

We will first dispose of the second ground of the motion to dismiss in the order in which the several grounds are thus presented. The appellant served upon respondent, on the 7th day of February, 1907, a notice that he appealed from the order "to the Supreme Court of the state of California." According to the clerk's certificate, an undertaking on appeal was filed by appellant on the 6th day of February, 1907. The notice was dated on the 6th day of February, but it does not affirmatively appear when the notice was filed. But for the purpose of the present discussion the date of filing may be passed without further consideration at this time. If the appeal

was perfected or properly taken, it was undoubtedly to the supreme and not to this court. On the back of the fly leaf of the transcript (and the same is true as to the briefs of the respective counsel) the title of the court is as follows: "In District Court of Appeal, Third Appellate District, State of California." The suit is one in equity, and of that class of causes of which, therefore, by the terms of section 4 of article 6 of the Constitution, this court is not vested with appellate jurisdiction, except where, as here, the Supreme Court orders the transfer of the same to a District Court of Appeal for decision. It is apparent from the record that the appellant sought to take his appeal to the proper tribunal, and did do so, if he filed and served his notice within the time prescribed by law, and took such other timely steps as are essential to the perfection of an appeal. But, through a mistake, due perhaps to a misapprehension of the county clerk, such misapprehension being occasioned, no doubt, by the misleading manner of the printed backing on the transcript and briefs, the cause was placed on the September calendar of this court. Counsel for appellant appeared personally in court, and moved for an order transferring the case to the Supreme Court, on the ground that the appeal had in fact been taken directly to that court. The respondent insisted upon his motion to dismiss upon the ground, among others, already enumerated, that this court had no jurisdiction of the appeal. A statement of the nature of the action at once disclosed that the relief sought by both parties was one solely cognizable in a court of equity, and hence it was quite manifest that this court could not acquire jurisdiction of the case by direct appeal. Upon taking up the record after the submission of the cause we conceived it to be our duty, in view of the status of the cause before us, to order the same transferred to the Supreme Court, and accordingly we made such order, and thereafter the case was transferred to this court for decision. Among the papers we find with the record of the case is a document which was filed on the 1st day of November, 1907, a few days subsequently to the order of the Supreme Court transferring the cause here for decision. This document is signed by the attorneys for the respondent, and appears to bristle with indignation because this court transferred the case to the Supreme Court under the authority of rule 32 of this court (78 Pac. xiii), and with considerable warmth the learned counsel declare that it was our duty to have ordered a dismissal of the appeal, and that rule 32 has no application to the circumstances of the case as it appeared on the calendar of this court. It may be that within the ordinarily untrod-den range of the recondite learning of the gentlemen representing the respondent, and therefore esoterically hidden from the common view, there is to be found some sound reason for the exercise by this court of the

remarkable power of ordering a dismissal of an appeal taken to the Supreme Court; but, from our point of view, it seems to be a proposition readily obvious to the average intelligence that this court has no more right to dismiss an appeal to the Supreme Court, merely because the cause has by mistake or through inadvertence found its way to our calendar, than it would have to dismiss any other appeal to that court upon the motion of counsel. It ought not to be necessary to remark that we have no conceivable authority to interfere with the jurisdiction of the Supreme Court. And it ought to be equally as unnecessary to observe that the test determinative of the court to which an appeal is taken is not the title of the court on the printed back of the transcript or of the briefs, but is the language of the notice of appeal itself. The case could have been removed from our calendar by either of two proper methods, viz., by striking it from the calendar, or by the course adopted and pursued by us. By the latter course the cause was certain to go where it properly belonged, without further action. By the former, it is probable that an application to the Supreme Court would have been necessary, in order to get it upon the calendar of that court, for an order, requiring the clerk of this court to transmit the record to the former court, thus causing extra trouble and expense. But in either case it is manifest the cause must have finally gone where it belonged.

We will now proceed to a consideration of the other grounds upon which a dismissal of the appeal is asked. The defendant Schuerman, it seems, died after judgment was had and entered against him by the court below. In order, therefore to prosecute an appeal in this case, Mulroy was, upon petition, appointed special administrator. The order of appointment recited that Schuerman died intestate in Nevada county on December 1, 1906, leaving estate in said county, etc., and that it appears to be necessary that a "special administrator of the estate of said decedent be forthwith appointed to preserve and protect the same." It is contended that neither the order appointing nor the special letters gave Mulroy authority to maintain this appeal, because his powers as such special administrator are not therein specifically pointed out, or, in other words, because he is not so expressly authorized to prosecute the appeal. This contention is based on the language of section 1412 of the Code of Civil Procedure, so much of which as is pertinent to the question here reads as follows: "The appointment may be made at any time, and without notice, and must be made by entry upon the minutes of the court specifying the powers to be exercised by the administrator." We think the language of the order is broad enough and sufficiently specific to bring the matter of maintaining this appeal within the authority and powers conferred upon him as special administrator by the special letters

granted to him, construed by the light of said order of appointment. We can conceive of no more appropriate steps which could be taken by an administrator to "protect and preserve" the property of the estate of his intestate than by prosecuting an appeal from a judgment or order involving the property rights of the estate, and which he may be advised has been erroneously entered against the intestate. The authorities cited by counsel upon this point have no application to the question here. Nor do we think that the case of *Collins v. O'Laverty*, 136 Cal. 35, 68 Pac. 327, and other cases cited to the same point, are open to the interpretation which counsel seem to give them. It is true that the action here is not one for the specific recovery of the possession of the premises; but the issue tendered by the complaint and cross-complaint and consequently to be determined is the title to or ownership of the land, and, if the issue is decided adversely to the claim of the appellant, then at least a potential right of possession would vest eo instanti in the respondent, who, when the same ripened into the right of possession, would be entitled to reduce such right to actual possession. If the parties were reversed in the character in which they appear here as litigants, of course the same would be true. In his cross-complaint the defendant, who was in possession at his death, declares that he is the owner of the land, and alleges that the respondent obtained a pretended title from the government by unlawful means, and asks that respondent be decreed to hold his evidence of title (the homestead patent) in trust for him. The special administrator, in prosecuting this appeal in an action, which, upon a cross-complaint, as we have seen, seeks affirmative relief upon behalf of his intestate upon the ground that the latter was the owner of the disputed property, is, we doubt not, clearly acting within the powers as such administrator granted to him by the court—to preserve and protect the estate of the decedent.

But we are of the opinion that the appeal must be dismissed upon the third ground upon which a dismissal is asked. The statute (section 940 of the Code of Civil Procedure), as it existed at the time the appeal herein was sought to be taken, required that the notice of appeal should be filed and served on the adverse party within 60 days after the order was made and entered in the minutes of the court. Here the order was made and entered on the 8th day of December, 1906, and the notice was apparently filed on February, 6, 1907 (although it is not clear from the record that it was so filed), but not served on the "adverse party" until the 7th day of February, 1907. Thus it appears that service was made on the sixty-first day after the order was made and entered. The statute reads: "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part

thereof, and serving a similar notice on the adverse party or his attorney." It is thus to be observed that two initiatory steps must be taken in order to consummate the appeal—filing of a notice of appeal, and serving a similar notice upon the adverse party or his attorney. A failure to do either of these two things within the time within which a party has the right to appeal is fatal to the taking of the appeal. The statute is the sole source from which the right of appeal flows, and every step which is thereby required to be taken in order to perfect an appeal is jurisdictional, and without observance of which there can be no appeal effected. If the service upon the adverse party or his attorney of the notice one day after the time limited within which an appeal may be taken would be effective, then such service 10 or 20 days thereafter would be equally as effective, and the language of the statute would thus be rendered meaningless. The provision as to the service of the notice is equally as mandatory as that with reference to the filing, and it would not for a moment be contended that a filing of the notice after the time limited by the statute would have any force. To give the section any other construction would amount to an elimination by judicial legislation of the provision as to the time of service of the notice. The Legislature of 1907 (St. 1907, p. 753, c. 410), added a new section to the Code of Civil Procedure, No. 941a, which seems to repeal that part of section 940, supra, requiring the service of the notice upon the adverse party or his attorney. But, as seen, the appeal in the case at bar was attempted to be perfected under said section 940 prior to the approval of section 941a.

The appeal is dismissed.

We concur: CHIPMAN, P. J.; BURNETT, J.

ROSS v. STATE.

(Supreme Court of Wyoming. Jan. 20, 1908.)

1. CRIMINAL LAW—MOTION FOR VERDICT—EXCEPTIONS.

The overruling of a motion for a verdict for accused, made after the state had rested, is not reviewable, where an exception to the ruling is not preserved in the bill of exceptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2807.]

2. RAPE—ASSAULT WITH INTENT TO RAPE—INSTRUCTIONS.

An instruction, on a trial for assault with intent to rape a female under the age of consent, that an attempt of a man to carnally know a female under the age of six years, whether with or without her consent, is an attempt to do a violent injury to her, states but one of the elements of assault as charged in the information alleging that accused attempted to commit a violent injury on the person of a female under the age of 18 years, with intent to carnally know her, and is not objectionable as defining an attempt to commit a felony, or defining an offense unknown to the law.

3. SAME—ELEMENTS OF OFFENSE.

To have carnal knowledge of a female under the age of consent is unlawful, and con-

stitutes a violent injury within Rev. St. 1899, § 4957, punishing one who having the present ability to do so, attempts to commit a violent injury on the person of another.

4. SAME—INFORMATION.

An information alleging that accused attempted to commit a violent injury on the person of a female child under the age of consent, he having present ability so to do, with intent to ravish and carnally know the child, follows, in charging the assault, Rev. St. 1899, § 4957, defining assault and is coupled with an averment of the felonious intent, and is good.

5. SAME—ELEMENTS OF OFFENSE.

Rape, as defined by Rev. St. 1899, § 4964, punishing one having carnal knowledge of a woman forcibly and against her will, or of a woman under the age of 18 years, either with or without her consent, includes assault as defined by section 4957, and where a woman over the age of 18 years, not under duress, and mentally competent, consents to sexual intercourse, there is no assault, but carnal knowledge of a female under the statutory age is conclusively presumed to have been committed with force and against her consent, and her acts constitute no defense to a charge of rape.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 12.]

6. SAME.

Under Rev. St. 1899, § 4964, punishing one having carnal knowledge of a woman forcibly and against her will, or of a female under the age of 18 years, with or without her consent, and sections 4956-4958, punishing an assault with intent to commit a felony, defining assault and assault and battery, an assault with intent to rape a female under the age of consent is committed, though the female did not resist or was willing to perform the sexual act, since the statute changed the common-law definition of assault, and assault and battery, and though under the statute assault implies force, physical resistance is not a necessary element in an assault with intent to rape a female under the age of consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 17.]

7. CRIMINAL LAW—STATUTES—CONSTRUCTION.

The court in construing a statute defining an offense by adding thereto elements not found in the common-law definition is not bound by the construction which obtained with reference to the common-law offense, and where a statute creates and defines a crime, which is a substitute for a common-law offense, the rules appertaining to the latter, except in so far as they are applicable, must yield to the statutory rules of construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 10, 11.]

8. RAPE—ASSAULT WITH INTENT TO RAPE—INFORMATION—"RAVISH."

The word "ravish" presupposes force, and is indispensable in a common-law indictment for rape, but is surplusage in an information charging assault with intent to rape a child under the age of consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 23, 29.

For other definitions, see Words and Phrases, vol. 7, p. 5933.]

9. ASSAULT AND BATTERY—ASSAULT WITH INTENT TO COMMIT FELONY.

In an attempt to commit a felony, the question of assault is not necessarily involved, but in an assault with intent to commit a felony, assault is an essential element and must be proven.

10. STATUTES—INSTRUCTION—LEGISLATIVE INTENT.

Every statute must be construed with reference to its intended scope and the purpose of the Legislature, and where the language used is ambiguous, or admits of more than one meaning,

it will be taken in such a sense as will conform to the scope of the act to carry out the purpose of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 262.]

11. RAPE—FEMALE UNDER AGE OF CONSENT—CONSENT—RESISTANCE.

Rev. St. 1899, § 4964, punishing one having carnal knowledge of a woman forcibly and against her will, or of a child under the age of 18 years, with or without her consent, declares that a female under the age of 18 years is incapable of giving consent to the sexual act, and the incapacity must be construed to extend to and include any attempt to commit the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 14.]

12. SAME—INSTRUCTIONS.

On a trial for assault with intent to rape a child under the age of consent, an instruction that in determining whether the state proved the intent beyond a reasonable doubt, the jury must be satisfied that accused intended to gratify his passions on the person of the child, notwithstanding any resistance on her part, was properly refused, since it is the intent to carnally know a female under the age of 18 years with or without her consent, coupled with an assault, which constitutes the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 17.]

13. SAME — INFORMATION — EVIDENCE — VARIANCE.

There is no variance between an information alleging that accused committed a violent injury on a female under the age of consent, he having present ability so to do, with intent to carnally know her, and evidence showing an act which, if done with intent to carnally know her, comes within the definition of assault and battery as defined by Rev. St. 1899, § 4958, which includes the offense of assault as charged in the information and as defined by section 4957.

14. CRIMINAL LAW — EVIDENCE — INSTRUCTIONS.

Instructions in a criminal case should be predicated on the evidence, and where the evidence shows that accused is guilty of the offense charged, or not guilty, the court is not required to instruct on lower grades of the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1923, 1924.]

15. SAME—EVIDENCE—INSTRUCTIONS.

Where, on a trial for assault with intent to rape a child under the age of 6 years, the evidence showed that accused took the child to a bench in the rear of a building out of sight of persons in the vicinity, and that later accused was seen kneeling before the child in the act of having sexual intercourse with her, the refusal to charge that accused could be found guilty of assault was proper, since, under the evidence, accused could only be found guilty of an assault with intent to rape, or not guilty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1923, 1924.]

16. RAPE—EVIDENCE—SUFFICIENCY.

On a trial for assault with intent to rape a child under the age of consent, evidence held to justify a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 78-82.]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Charles Ross was convicted of assault with intent to rape a child under the age of 18 years, and he brings error. Affirmed.

S. P. Cadle, for plaintiff in error. W. H. Mullen, Atty. Gen., for the State.

SCOTT, J. Plaintiff in error (defendant below) was charged, tried, and found guilty of an assault upon the person of a female child under the age of 18 years with the intent to commit rape. His motion for a new trial was overruled, and judgment was pronounced against him sentencing him to a term of years in the penitentiary, and he brings error.

1. When the state rested its case, the defendant moved the court to instruct the jury to return a verdict in his favor on the ground that the evidence was insufficient to convict. The motion was overruled, and such ruling is here assigned as error. An examination of the record fails to show that any exception was taken to such ruling, or if it was, it is not preserved in the bill of exceptions. The question is not therefore properly before us, and need not be discussed.

2. The court, over the objection of the defendant, gave the following instructions to the jury, viz.: "You are instructed that under the law of this state an attempt on the part of a man to carnally know a female child under the age of six years, whether with or without her consent, would be an attempt to do a violent injury to such child as alleged in the information." It will be observed that this instruction does not purport to describe a complete crime as defined by our statute, but simply one of the elements of assault as charged in the information. In this state there is no such crime defined by the statute as an attempt to commit a felony, nor is the instruction open to the objection that it is a definition of an offense unknown to the statute. The information charges that on the 3d day of April, 1907, the defendant did "unlawfully and feloniously attempt to commit a violent injury on the person of * * * a female child under the age of 18 years, he the said Charles Ross, having then and there the present ability so to do, with intent then and there and thereby unlawfully and feloniously to ravish and carnally know the said * * *." To have carnal knowledge of a female under the statutory age of consent is at least rude as well as unlawful, and within the contemplation of the statute constitutes a violent injury. The acts alleged in the information come within the statutory definition of what constitutes an assault as contained in section 4957, Rev. St. 1899, which is as follows: "Whoever having the present ability to do so, unlawfully attempts to commit a violent injury on the person of another, is guilty of an assault and shall be fined," etc. Assault and battery is defined by section 4958, Rev. St. 1899, as follows: "Whoever in a rude, insolent or angry manner unlawfully touches another, is guilty of an assault and battery." The information follows the language of the statute in charging the assault, and that language is coupled with an averment of the felonious intent at the time, and is a good information. *Bryant v. State*, 5 Wyo., 376, 40 Pac. 518.

As the evidence showed no resistance on the part of the girl or consent to the alleged assault it is claimed on behalf of the defendant that she consented because she did not resist, and it is urged that the instruction is erroneous upon the ground that violence consented to does not constitute an assault, and that the use of the word "ravish" in the information required proof of physical resistance. Rape is defined by section 4964, Rev. St. 1899, as follows: "Whoever unlawfully has carnal knowledge of a woman forcibly and against her will, or of a woman or female child under the age of eighteen years, either with or without her consent, is guilty of rape, and shall be imprisoned in the penitentiary for a term not less than one year, or during life." Section 4956, Rev. St. 1899, is as follows: "Whoever perpetrates an assault or an assault and battery upon any human being with intent to commit a felony, shall be imprisoned in the penitentiary not more than fourteen years." It is clear that a comparison of the above sections shows that rape includes the crime of assault as defined by section 4957, supra, and when a woman over the age of 18 years, who at the time is not under duress or fear, and is mentally competent to do so, consents to sexual intercourse, then there is no assault either in the attempt to have or in the consummation of such intercourse. It is equally true, and all the authorities agree, that carnal knowledge of a female, who at the time is under the statutory age of consent, regardless of the frame and condition of her mind, is conclusively presumed to have been committed with force and against her consent, and her acts and conduct would be no defense to the charge of rape. While this is true as to the crime of rape, there is some conflict in the decisions as to whether a conviction can be had for an assault with intent to commit rape upon a female under the age of consent, where it is shown that she made no resistance, and was willing to perform the sexual act. The above statutory definitions of assault and assault and battery are identical with the corresponding sections of the statutes of Indiana, and differ materially from the common-law definitions. The present ability to inflict an injury is not necessary to an assault at the common law, and any unlawful touching of one against his will with intent to injure constitutes a battery, while under the statute the touching must be unlawful and in a rude, insolent, or angry manner. *Bish. Stat. Crimes* (3d Ed.) §§ 501, 502. By the common law an assault must be accompanied by physical force creating a reasonable apprehension of immediate physical injury to a human being, and a battery was not committed unless the act alleged to constitute it was committed against the will of the injured party. 2 *Bish. New Cr. Law*, §§ 23, 28, 70. The English authorities hold that as an assault implies the use of physical force or violence, there can be no such force or violence necessary or used when

there is no repulsion or resistance, and that there is no assault when the female, whatever her age, does not resist, but consents to the acts which constitute the alleged assault. The rule is stated in Bishop on Statutory Crimes (3d Ed.) § 496 as follows: "While the common form of attempt to commit the ordinary rape is by assault with such intent, and on an indictment for rape there may be a conviction of assault if no technical rule prevents, in matter of principle, and by the better judicial determinations, there cannot be under the common-law rules an assault with intent to have the criminal carnal knowledge of a girl with her consent; because by the common-law rule violence consented to is not an assault, and the statute which makes her consent immaterial in defense of the carnal knowledge does not extend also to the assault." Of the American cases cited in the footnote as supporting that doctrine *Whitcher v. State*, 2 Wash. St. 286, 26 Pac. 268, has been overruled in *State v. Hunter*, 18 Wash. 670, 52 Pac. 249; *Hardin v. State*, 39 Tex. Cr. R. 426, 46 S. W. 803, has been overruled in *Croomes v. State*, 40 Tex. Cr. R. 672, 51 S. W. 924, 53 S. W. 882; *Stephens v. State*, 107 Ind. 185, 8 N. E. 94, was overruled in *Murphy v. State*, 120 Ind. 115, 22 N. E. 106. This rule does not seem to have found much favor with the American courts, for so far as our research has enabled us to determine it is now followed by but two of those courts. *Smith v. State*, 12 Ohio St. 466, 80 Am. Dec. 355; *State v. Pickett*, 11 Nev. 255, 21 Am. Dec. 754. The weight of authority is overwhelmingly the other way, and to the effect that such consent is unlawful and does not waive the assault. *People v. McDonald*, 9 Mich. 150, 152, 153; *People v. Courier*, 79 Mich. 366, 44 N. W. 571; *Cliver v. State*, 45 N. J. Law, 46; *Com. v. Roosnell*, 143 Mass. 32, 8 N. E. 747; *Territory v. Keyes*, 5 Dak. 244, 38 N. W. 440; *State v. Dancy*, 83 N. C. 608; *Hays v. People*, 1 Ill. (N. Y.) 351; *Brown v. State*, 6 Baxt. (Tenn.) 422; *Fizell v. State*, 25 Wis. 364; *People v. Lourintz*, 114 Cal. 628, 46 Pac. 613; *People v. Vann*, 129 Cal. 118, 61 Pac. 776; *State v. Wray*, 109 Mo. 594, 19 S. W. 86; *State v. Grossheim*, 79 Iowa, 75, 44 N. W. 541; *Polson v. State*, 137 Ind. 519, 35 N. E. 907; *Hanes v. State*, 155 Ind. 112, 57 N. E. 704; *Leibschner v. State*, 69 Neb. 395, 95 N. W. 870; *State v. Sargent*, 32 Or. 110, 49 Pac. 889; *Farrell v. State*, 54 N. J. Law, 416, 24 Atl. 723; *In re Lloyd*, 51 Kan. 501, 33 Pac. 307; *Addison v. People*, 193 Ill. 405, 62 N. E. 235; 2 Am. & Eng. Ency. L. (2d Ed.) 987, and page 361, vol. 1 of Supp., and cases cited in the footnotes, 1 McClain, Crim. Law, § 464. The difference in the holdings may, however, be accounted for in the fact that the cases in this country have turned upon the construction of the statutory definition of assault rather than upon the common-law definition of that offense. In construing a statute which contains new and different elements the courts are not

bound by that construction which obtained with reference to the common-law offense. The statutory changes were evidently meant to remedy some imperfections which were recognized to exist. The statute, by apt words, created and defined a new crime which is a substitute for the common-law offense, and the rules appertaining to the latter, except in so far as they are applicable, have to yield to the statutory rules of construction. In *Croomes v. State*, supra, there was a conviction for an assault with intent to commit rape on the person of a female under 15 years of age, that being the statutory age of consent in that jurisdiction. The court say: "The Code provides that any unlawful violence upon the person of another, whatever be the manner or degree of violence, is an assault. There is no statute or construction of a statute on the question of assault saying that the consent of the injured party prevents the act from being an assault. If the act is unlawful, it is an assault. The mere fact that the party injured consents to it does not prevent it from being an assault."

It will be observed that the information charges the defendant with having perpetrated an assault with the felonious intent to "ravish and carnally know." The word "ravish" presupposes force, and was indispensable in the common-law indictment for rape, but does not occur in the definition of that crime given in our statute, and for that reason its use is not necessary in describing the offense. *Tway v. State*, 7 Wyo. 74, 50 Pac. 188. There must be resistance and force used in overcoming such resistance in rape, where the female is over the age of consent, either under the common law or under the statute; and carnal knowledge of a female under the statutory age of consent, and also at the common law when such female is under the age of 10 years, is conclusively presumed to have been accompanied with force and against consent, and in an indictment or information therefor under and following the words of the statute the word "ravish" is unnecessary and may be treated as surplusage. Section 486, Bish. Stat. Cr. (3d Ed.). We are not, however, dealing with the completed offense of rape. The charge is of an assault with intent to commit a felony, and if the intent was to carnally know a female under the statutory age of consent, then such intent was felonious regardless of whether the accused contemplated resistance on her part or not. The word "ravish" as used in the information did not impose any greater burden upon the state than proving the elements of the offense as defined by the statute, and which are charged in the information, and it may therefore be treated as surplusage.

A distinction is made and carried into the decisions between attempts to commit and an assault with intent to commit a felony. In the former the question of assault is not necessarily involved, while in the latter it is an

essential element of the crime charged, and as such must be proven. *People v. Dowell*, 136 Mich. 306, 99 N. W. 23. While the statutory definition of assault implies force, it does not necessarily follow that there must be proof of actual or physical resistance on the part of the person assaulted, for in the absence of such proof the law implies resistance. An assault may be committed under such circumstances that the person assaulted is entirely ignorant of any attempt to commit a violent injury to his or her person, as when the assailant, having the present ability to do so, unlawfully attempts but is interrupted from doing violence to the person of one who is asleep, or of one who is passing along a crowded street. So it may be said that absence of resistance resulting from physical inability or want of opportunity to resist or consent to the act constituting an assault, which proceeds from a disordered or insane condition of the mind, is no consent, and does not strip the act so committed of its criminal character. Putting in fear is not always necessary at common law (section 33, 2 Bish. New Cr. Law), nor is it an element of assault as defined by our statute, though it may be involved in the proof as a part of the *res gestæ*, and if the acts constituting the attempted injury are unlawful, and the other elements are present to constitute an assault, that crime is complete and none the less a crime because of nonresistance by the injured party. The evidence is undisputed, and shows that the girl was between 4 and 5 years of age at the time of the assault, and by all the authorities by reason of her age she had no legal ability to consent to the sexual act; and if that is so, it seems incredible that she could lawfully consent to the acts and preparations which constituted in themselves an unlawful attempt, coupled with a present ability to do a violent injury to her person, simply because the purpose intended was not consummated. In a well-considered case the Supreme Court of Washington say: "The offense of carnally knowing a female child under the age of 12 years necessarily includes the less offense of assault with intent. The complete offense is merely an aggravation of the felonious assault, and the child's legal inability to consent to the sexual act also extends to and includes any attempt to commit it; in other words, she lacks capacity to consent to the force which, in the absence of consent, would constitute an assault." *State v. Hunter*, supra. The acts constituting the alleged assault could have been proven upon a trial on the charge of rape as a part of the *res gestæ*, and evidence that she consented would have been inadmissible as not tending to prove any defense to the charge. The reversal of a conviction of the lesser and included offense of assault with intent to commit rape would scarcely be justified upon the ground that the defendant had not been permitted to show the frame of mind of the one so assaulted when the latter was within the

statutory age of consent. In such a case the law implies resistance, for under the law there can be no consent. In *People v. Verdegren*, 106 Cal. 211, 39 Pac. 607, 46 Am. St. Rep. 234, there was a conviction for an assault with intent to commit rape upon the person of a female child under the statutory age of consent. The evidence showed that she went voluntarily to the room of the accused, and submitted, without resistance, to his advances. The Code defined rape as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances: (1) When the female is under the age of fourteen years. (2)" etc. Pen. Code, § 261. It was there urged as here that there can be no such thing as an assault upon a consenting female, regardless of the fact that she may be under the age, when she can legally consent to the sexual act. The court say: "It is true that an assault implies force by the assailant and resistance by the one assaulted, and that one is not in legal contemplation injured by a consensual act. But these principles can have no application to a case where under the law there can be no consent. Here the law implies incapacity to consent, and this implication is conclusive. In such case a female is to be regarded as resisting, no matter what the actual state of her mind may be at the time. The law resists for her." To the same effect is *People v. Vann*, supra. This rule would not, however, apply when the female was over the age of consent. *People v. Fleming*, 94 Cal. 308, 29 Pac. 647.

The action was not for the redress of a private wrong. The defendant was answerable to the state for such conduct as the state had declared to be criminal. She was a ward of the state, and his conviction was sought not alone to punish him, but also for the moral and salutary effect it would have in preserving the chastity of those similarly situated, and in carrying out the duty it owed to those to whom in its wisdom it had thrown out the protecting arm of the law. Its policy and the intentment of the law is not to withhold punishment until that has been destroyed which was sought to be protected. In *Croomes v. State*, supra, the court say: "To say that the Legislature of Texas would hang a man for the consummated act of rape, and yet not desire to punish him at all for assault with intent to rape under any contingencies, is a proposition to which we cannot agree. Then, if the Legislature did not intend such a construction, we feel constrained, if the language of the statutes is susceptible of a rational, sensible, and reasonable construction that will give validity, strength, and force to every phase of the law, that that construction should be adopted." It is said in *Black, Interp. Laws*, p. 73, that: "It is generally true that, where words in a statute are clear and unambiguous, there is no room left for construction; but when it is plainly perceivable

that a particular intention, though not precisely expressed, must have been in the mind of the legislator, that intention will be enforced and carried out, and made to control the strict letter." And again: "Every statute is to be construed with reference to its intended scope and the purpose of the Legislature in enacting it; and where the language used is ambiguous, or admits of more than one meaning, it will be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute." *Id.*, p. 56. The law having declared that a female under the age of 18 years is legally incapable of giving consent to the sexual act, the intended scope of the law and the purpose of the Legislature in enacting it do not permit of a construction which would limit her incapacity to consent to that act alone, but rather that such incapacity extends to and includes any attempt to commit it. Not having legal capacity to act for herself in such matters, the state, no matter what her frame and condition of mind may be at the time, acts for and in her behalf. In such a case the law regards her as resisting. We do not go so far as to hold under our statute that force is not an element of the crime charged. An assault is an assault whether perpetrated with or without the intent to commit a felony. Our discussion has been limited to the question of the necessity for resistance to an assault, and, as we have seen, physical resistance is not always necessary, and the resistance may be in some cases only such as the law implies. We are of the opinion that physical resistance, as applied in an assault, is not a necessary element in an assault with intent to rape a female under the age of 18 years, as, under the statute she has no legal capacity to consent to the act of carnal knowledge, and every act done in furtherance of a purpose to know her carnally is unlawful and for a felonious purpose, and if such acts were so committed as to constitute an assault without her consent, then no act of hers could waive such assault.

3. The court refused to give the following instruction requested by the defendant, viz.: "In arriving at the conclusion as to whether or not the state has proved the intent beyond a reasonable doubt, the jury must be satisfied, not only that the prisoner intended to gratify his passions on the person of the child, but that he intended to do so at all events, notwithstanding any resistance on her part, and unless you do so find from the evidence, then you are instructed that you must find the defendant not guilty." In considering whether this instruction correctly states the law as applied to the facts, it must be borne in mind that in this case it is the intent to carnally know a female under the age of 18 years, with or without her consent, which is felonious. Such an intent in the absence of any overt act would not be sufficient to convict as lacking the element of assault, yet if attempted to be carried

into effect by such an assault the crime is complete whether such assault be resisted or not. There is a marked distinction in this case and where one has an intent to carnally know a female over the age of 18 years, for in the latter any such intent is only felonious when it is attempted to be carried into effect forcibly and against the will of such female. This instruction carries with it the idea that the felonious intent could only exist when resistance was offered, whether the female be over or under the statutory age of consent. As we have seen, this is not the law with reference to an assault committed with intent to rape a female under that age. *People v. Roach*, 129 Cal. 33, 61 Pac. 574, and other cases, *supra*. The court properly refused to give this instruction.

4. It is urged that the court erred in refusing to instruct the jury that if they were satisfied beyond a reasonable doubt that the defendant assaulted the child, but were not so satisfied that the assault was committed with the felonious intent to commit rape, then they should acquit him of the crime of assault with intent to commit rape, and find him guilty of assault. The evidence in this case tended to show that on the 3d day of April, 1907, some little boys were playing by a ditch in the vicinity of the town of Dietz, in Sheridan county. A female child between 4 and 5 years of age was seen to cross a bridge over the ditch going in the direction of where the boys were, and in doing so, she had to pass near where the defendant was sitting on a pile of dirt. When the little girl came along to where he was, the defendant got up, took her by the hand, and led her to a bench in the rear of a building and out of sight of where the other children were. The mother was informed that defendant had her child, and she went and discovered the little girl sitting on a bench, her clothes above her knees, and the defendant kneeling before her, his pants unbuttoned, and his privates in his hands. Upon being spoken to by the mother the defendant arose and fled, and shortly thereafter an officer discovered him in hiding behind some barrels in the rear of a near-by saloon and arrested him. The defendant testified in his own behalf that he had no intention of carnally knowing the child, that he neither touched her nor led her to the bench, that he was not kneeling before the child, that he was standing up, and that his pants were unbuttoned for the purpose of answering a call of nature, and denied that he fled or was in hiding from the officer. He also introduced evidence to show his reputation for morality with little girls, which was met and combated by evidence properly admitted in rebuttal on behalf of the state tending to show that his reputation in that respect was bad, and upon cross-examination by defendant's counsel incidents of indecent exposure to and chasing of little girls by him were drawn out. It will be observed that the line be-

tween the evidence for the state and the defendant is clear and distinct. If the defendant's testimony be true, he was not guilty of an assault as charged in the information, while the state's evidence tended to show that the defendant, if guilty at all, was guilty of an assault and battery. This did not constitute a variance. *Com. v. Thompson*, 116 Mass. 349. The overt act which was relied upon for a conviction was a rude and unlawful touching of the child. The evidence showed the act to be at least rude, and if done with the intent to carnally know her, such touching was certainly unlawful, and comes within the definition of assault and battery, as defined by section 4958, *supra*, which includes the lesser offense of assault as charged in the information, and as defined by section 4957, *supra*. While this is true, it is only so from a legal standpoint, and it does not always follow that the question of simple assault must be submitted to the jury upon a trial for the greater crime which includes it. The instructions must and should be predicated upon the evidence in the case, and when the evidence shows the accused to be guilty of the higher grade of the offense, or not guilty, the court is not required to instruct upon the lower grades. In *Brantley v. State*, 9 Wyo. 102, 109, 61 Pac. 139, 140, Brantley, upon a conviction for an assault with intent to commit murder, complained that the court refused to instruct the jury that he might under the information be found guilty of an assault only. This court held that upon the evidence he was not entitled to the instruction, and after reviewing the evidence, said: "If guilty at all, he was guilty of an assault and battery. There was no evidence of simple assault." This rule has been the established rule in a long line of decisions by the Supreme Court of Iowa. In *State v. Sherman*, 106 Iowa, 684, 687, 77 N. W. 461, 462, it was assigned as error that the court in a prosecution for rape did not submit to the jury the question of simple assault. The court, after referring to the previous holding by that court to the effect that the right to instruct on a lesser and included offense of the crime must be governed by the evidence, say: "The holding is decisive of the present assignment in this case. If there was not an assault with intent to commit rape, there was no crime committed. No other conclusion could properly be arrived at from the evidence." In the case before us assault and battery was not charged, nor was simple assault proven. Upon the record the defendant could only be found guilty of an assault with intent to commit rape as charged, or not guilty, and the court so instructed.

5. It is urged that the verdict is not supported by the evidence. In support of this contention it is argued that there is no evidence in the case to show that the defendant intended to carnally know the child, or, in other words, that the state failed to prove

the felonious intent which is an essential element of the crime charged. In *Bryant v. State*, 7 Wyo. 311, 51 Pac. 879, 56 Pac. 596, where there was a conviction for an assault with intent to commit murder, the same error was assigned, and this court held that it was unnecessary to prove the specific intent by direct, positive, and independent evidence, and that in such a case the jury should take into consideration all the facts and surrounding circumstances as disclosed by the evidence, and find therefrom whether the acts of the accused constituting the alleged assault were done in pursuance of a felonious intent. It is unnecessary to again repeat the evidence. The jury were fully warranted in finding therefrom that the acts of the defendant were done with the intent to carnally know the child, and this intent being so established together with the other evidence in the case was sufficient to support the verdict. The theory upon which the defendant presented his case to the jury, *viz.*, that his acts amounted only to indecency, did not commend itself to the jury, and, the record being clear of error, the conclusions reached and expressed by their verdict must stand.

It follows that the judgment must be, and it is hereby, affirmed.

POTTER, C. J., and BEARD, J., concur.

HOVEY v. SHEFFNER, Sheriff.

(Supreme Court of Wyoming. Jan. 20, 1908.)

1. HABEAS CORPUS—NATURE OF WRIT—ERRORS.

A writ of habeas corpus is not available to review errors of law not affecting the jurisdiction of the court to make the order under which petitioner is held.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 25.]

2. SAME—RECORD OF COMMITMENT OF PRISONER.

A writ of habeas corpus, issued out of the Supreme Court, will not invoke the appellate or revisory jurisdiction of the court, but merely brings up the body of the prisoner and the cause of his commitment, and not the record of the judicial proceeding, if any, in which the commitment has occurred.

3. SAME—STATUTES—"MANNER" OF EXERCISING JURISDICTION.

Rev. St. 1899, § 5498, provides that it is not permissible to question the correctness of the action of the grand jury in finding a bill of indictment, or of a petit jury in the trial of a case, or of any court or judge while acting within their legitimate province in a lawful manner, by habeas corpus. *Held*, that the word "manner" had reference to the method of acting, and not to the degree of perfection or correctness in the results arrived at, unless the judgment pronounced was absolutely void.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4333-4337.]

4. SAME—JURISDICTION—SCOPE.

Jurisdictional facts cognizable on habeas corpus are not alone those which relate to jurisdiction of the subject-matter and of the person,

but to jurisdiction to render the particular judgment as well.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 23.]

5. CRIMINAL LAW—JEOPARDY—DISCHARGE OF JURY.

Rev. St. 1890, § 5386, provides that if a jury disagree accused shall not be deemed to have been in jeopardy, and that whenever a jury shall be discharged after they have been kept together so long that there is no probability of their agreeing the court shall, on directing their discharge, order the reasons therefor to be entered on the journal, which discharge shall be without prejudice to the prosecution. *Held* that, where it appears that after a reasonable time for deliberation has been allowed a verdict has not been agreed on and there is no probability of agreement, the court may properly discharge the jury without defendant's consent, without prejudice to future prosecution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 341.]

6. SAME — DISCHARGE OF JURY—NONJUDICIAL DAY—LOSS OF JURISDICTION.

A jury, drawn to try petitioner for an offense, being unable to agree, was discharged by the court on Sunday, and thereafter, on a judicial day, the court entered an order holding defendant for trial at a subsequent term, and committed her to the custody of the sheriff until bail should be furnished. *Held* that, if the discharge of the jury on Sunday over petitioner's objection was unauthorized, it did not deprive the court of further jurisdiction of the case, and hence, though such discharge might be ground for plea of an acquittal or of former jeopardy on an attempt being made to retry petitioner, it was not ground for her discharge on habeas corpus.

Habeas corpus on petition of Fay Hovey to obtain her discharge from the custody of Jesse A. Sheffner, sheriff of Natrona county. Discharge denied.

Fred D. Hammond, for plaintiff. William E. Mullen, Atty. Gen., for defendant.

POTTER, C. J. A writ of habeas corpus was issued in this case, by order of the Chief Justice, and made returnable before the court, upon the petition of Fay Hovey, alleging that she is unlawfully imprisoned and restrained of her liberty at the town of Casper, in Natrona county, in this state, by Jesse A. Sheffner, sheriff of said county, under an order and commitment of the district court sitting in and for said county, made and entered November 21, 1907, which order, by reason of certain facts set out in the petition, presently to be stated, is alleged to be insufficient to justify the imprisonment complained of. The sheriff's answer and return admits the imprisonment and restraint of plaintiff, but denies its alleged illegality, and sets out a certified copy of the order aforesaid as his authority in the premises. It appears from the pleadings: That on the 7th day of November, 1907, one of the regular days of the July term of said district court, the plaintiff was placed on trial, after a plea of not guilty, upon an information filed by the prosecuting attorney of Natrona county charging her with the statutory offense of enticing a female of good repute and chastity into a house of ill

fame for the purpose of prostitution. That a jury was impaneled and sworn upon said trial, to whom, after the introduction of evidence, arguments of counsel, and instructions of the court, the cause was submitted on Saturday, November 9, 1907, and they thereupon retired to deliberate upon their verdict. That on the following day (Sunday), November 10, 1907, at the hour of 10 o'clock in the forenoon, the presiding judge of said court convened the same in session, the clerk and sheriff being present, as also the plaintiff here, who was defendant in said cause, and the attorneys for the state; whereupon the jury aforesaid was called into the presence of the court, and upon inquiry by the court reported that they were unable to agree, and that there was no probability of their agreeing or rendering a verdict, and asked to be discharged from a further consideration of the case. Thereupon on said day they were discharged by the court, and an order was then made and entered of that date reciting the report of the jury and that "it thereupon appearing to the court that the jury cannot agree, and that there is no probability of their agreeing, and that they are unable to agree upon a verdict, and for these reasons, it is ordered that the said jury be discharged from a further consideration of the case." It further appears that thereafter at the same term, viz., November 21, 1907, the following order, which constitutes the authority for the imprisonment complained of, was made and entered by said court in the cause aforesaid (omitting the title and caption): "This cause coming on to be heard regularly on the special plea in bar heretofore filed by the defendant, Fay Hovey, and the same having been argued by counsel, and fully considered by the court, it is, this 21st day of November, 1907, by the court, ordered, adjudged and decreed that the special plea in bar of the defendant, Fay Hovey, be and the same is hereby denied and overruled, to which denial and overruling of the court of said plea in bar the defendant here and now excepts, and the court being unable to retry said cause at this present (July term, A. D. 1907) term, it is by the court ordered that the said cause be and the same is hereby continued until the next regular term of this court, the January, A. D. 1908, term, and it is further ordered that the bond in this cause shall be and hereby is fixed at the sum of \$300 for the appearance of said defendant, Fay Hovey, before this court on the first day of the regular January, 1908, term thereof at 10 o'clock a. m., and there to remain and not depart without leave of court and to abide the judgment and order of the court, and it is further ordered that the sheriff of Natrona county, Wyo., be and he is hereby commanded to receive and safely keep the said Fay Hovey and her, the said Fay Hovey, to safely keep and imprison in the jail of said Natrona

county until she, the said Fay Hovey, be discharged by due process of law, and a certified copy of this order shall be the authority of said sheriff of Natrona county. To each and every part of this order the defendant now and here excepts. Done in open court this 21st day of November, 1907." Upon the ground that the discharge of the jury was unlawful and void, for the reason that it occurred on Sunday, an alleged nonjudicial day, and without the consent of plaintiff, or a waiver by her of any of her rights, it is alleged that it operated as an acquittal, and that as a result of the proceedings the plaintiff has been placed in jeopardy for said offense. The defendant admits, by his answer and return, the discharge of the jury on Sunday, but denies that it was a nonjudicial day, and alleges that the jury was discharged because of disagreement. He further alleges that one of the jurors, named in the answer, was not a citizen of the United States, a fact not known to the prosecuting attorney at the time of the impaneling and swearing of the jury, and which could not then have been ascertained by the exercise of ordinary diligence, for which reason it is alleged that the jury was not competent and was not regularly and legally impaneled to try the cause. Plaintiff filed a reply admitting that the juror named was not a citizen of the United States, but alleging that such disqualification was known to this plaintiff at the time, and that being satisfied with him as a juror she accepted him as such and considers that she thereby waived her right to object to him. The cause has been heard by the court upon the pleadings and certain papers offered by the defendant as evidence for the purpose of establishing his allegation as to the disqualification aforesaid of one of the jurors.

We are not advised by the record in this proceeding as to the ground or substance of the special plea in bar, which appears to have been overruled by the order committing the petitioner, or the time when it was filed. The strong inference, perhaps, may be that it was filed after the discharge of the jury, and that it was based upon the ground that such discharge was illegal and void and the proceedings therefore tantamount to a verdict of acquittal, entitling the accused to set up the defense of former jeopardy or acquittal to a second trial upon the information or for the same offense. At any rate the only ground urged here for the plaintiff's discharge upon habeas corpus is that, by reason of the proceedings upon her trial she has been once placed in jeopardy, and that a second trial would violate the provision of the state Constitution that a person shall not be twice put in jeopardy for the same offense. Const. art. 1, § 11. It is urged that at common law Sunday is dies non juridicus, and though there is no local statute expressly prohibiting the sitting of the court or the transaction of

judicial business on that day, that the common law in that respect is in force in this state, since, by statute, the common law of England has been adopted so far as the same is of a general nature, and not inapplicable nor inconsistent with the laws of the state. Rev. St. 1899, § 2095. It is conceded that even at common law it is competent to receive a verdict on Sunday, but it is said to have been so declared for the sole reason that such a proceeding is merely ministerial; and it is contended that the discharge of a jury for disagreement requires a judicial determination that they have deliberated a reasonable time so as to authorize a discharge, and that there is no probability of an agreement, and therefore as a judicial act is illegal when performed on a nonjudicial day. With that proposition as a basis it is contended that the illegal discharge of the jury without a verdict operated as an acquittal of the plaintiff, and that since she cannot legally be again placed in jeopardy she is entitled to be discharged. On the other hand, while it is conceded that at common law Sunday is a nonjudicial day, it is argued that the purpose of the day is far better subserved by discharging a jury unable to agree instead of keeping them together throughout the day and until Monday morning, and that the act may well be regarded as a necessity, and upheld on that ground. It is further contended that the district courts are authorized to sit on Sunday, and to discharge a jury on that day for disagreement, by virtue of the statute of 1895 (Rev. St. 1899, § 3612), which provides that, in addition to the regular terms fixed by law, "each district court shall be open at all times for the transaction of business in the entry of judgments, decrees, orders of course, and such other orders as have been made or granted by the district court, or any judge thereof, and for the hearing and determination of all matters brought before the court or judge, except the trial of issues of fact." Counsel for plaintiff insists that the expression "at all times" in said statute has reference only to days in vacation or recess upon which a court may lawfully sit and transact judicial business, and does not necessarily include Sunday or other nonjudicial days. It is argued that a clear and unequivocal statute to the contrary is required to overthrow the common-law principle prohibiting the transaction of judicial business on Sunday, and that the statute aforesaid is reasonably capable of a construction not interfering with that principle.

The question thus sought to be presented is an important one. If the propositions relied on by plaintiff are sound, and should be disregarded by the district court, and the plaintiff compelled against her objection to undergo another trial, notwithstanding that she has been once in jeopardy for the same offense, or that in legal effect

the result of the former trial was equivalent to an acquittal, an error will be committed. And if, as we suppose, the overruled plea in bar set up the facts here alleged, the order denying it and committing the plaintiff may have been erroneous. The question here upon habeas corpus, however, is not whether error has been or may be committed by the district court, but whether, in committing the plaintiff to the custody of the sheriff to await another trial, the court has exceeded its jurisdiction. In this proceeding we are not concerned with mere errors of law not affecting the jurisdiction of the court to make the order under which the plaintiff is held, nor is it material here whether the discharge of the jury was a void act or not, unless, if held to have been illegal, it divested the court of jurisdiction to proceed further in the cause. And upon this point it is contended on behalf of defendant that the court retained jurisdiction, and that habeas corpus is not the appropriate remedy for the determination of the question of former jeopardy. That the writ of habeas corpus is not endowed with the functions of a writ of error or other proceeding for the review and correction of errors is an elementary rule, and has many times been asserted by this court. *Kingen v. Kelley*, 3 Wyo. 566, 28 Pac. 36, 15 L. R. A. 177; *In re McDonald*, 4 Wyo. 150, 33 Pac. 18; *Miskimmins v. Shaver*, 8 Wyo. 408, 58 Pac. 411, 49 L. R. A. 831; *Fisher v. McDaniel*, 9 Wyo. 457, 64 Pac. 1066, 87 Am. St. Rep. 971; *Younger v. Hehn*, 12 Wyo. 289, 75 Pac. 443, 109 Am. St. Rep. 986; *Hollibaugh & Buntun v. Hehn*, 13 Wyo. 269, 79 Pac. 1044. Hence, authority to issue the writ and determine the legality of a particular imprisonment thereon is frequently if not usually conferred equally upon courts of different grades and the judges thereof, without regard to the appellate jurisdiction of such courts. In this state the power is vested concurrently in the district and supreme courts and the judges thereof, and the right to entertain an application for the writ is not made to depend upon appellate or revisory authority over the judgment, order, or process by which the applicant may be restrained. The writ brings up the body of the prisoner, and the cause of his commitment, but not the record of the judicial proceeding, if any, wherein the commitment has occurred. The strictly appellate or revisory jurisdiction of this court is not invoked, therefore, through the institution of an original proceeding by a petition for habeas corpus, whether the writ be ordered issued by the court or by a justice thereof and made returnable before the court. Neither is the writ of habeas corpus designed to interrupt the orderly administration of the criminal laws by a competent court while acting within its jurisdiction. The occurrence of mere errors or irregularities in a criminal case not affecting the jurisdiction of the trial court will not

authorize a discharge of the accused upon habeas corpus. Jurisdictional facts only are to be considered upon this writ whenever the restraint complained of appears to be under legal process or judicial order. A void process or a void judgment or order of a committing court is ground for the discharge of one held upon it in this summary and collateral proceeding, not because of error merely, but for the reason that the court has acted without jurisdiction, or, having had jurisdiction, has either lost or exceeded it.

Our statute proceeds upon this principle in the provision that "it is not permissible to question the correctness of the action of a grand jury in finding a bill of indictment, or a petit jury in the trial of a cause, nor of a court or judge when acting within their legitimate province, and in a lawful manner." Rev. St. 1899, § 5498. In the case of *In re McDonald*, supra, Chief Justice Groesbeck, speaking for this court, said, in referring to that statute in connection with the facts of the case, that "the court had acted within its legitimate province, for it had jurisdiction of the offense and of the person of the offender," and a decision of the Iowa Supreme Court construing the words "in a lawful manner" in a similar statute was quoted from with approval. In effect, the decision thus approved held that "manner" had reference to the method of acting more than to the degree of perfection or correctness in the results arrived at, so that if a court observes proper methods or means it may be said to be acting in a lawful manner, although it may err in the application of legal principles to such an extent as to involve reversible error. But it was explained that a court would not be regarded as having acted in a lawful manner when the judgment pronounced is absolutely void, since such a judgment would have no support in law. *Elsner v. Shrigley*, 80 Iowa, 30, 45 N. W. 393. This court has adopted the liberal view sustained by the later authorities that the jurisdictional facts cognizable on habeas corpus are not alone those which relate to jurisdiction of the subject-matter, and of the person, but as well to jurisdiction to render the particular judgment. *Kingen v. Kelley*, supra; *Miskimmins v. Shaver*, supra; *Younger v. Hehn*, supra. In *Kingen v. Kelley* it was said: "Lack of jurisdiction of the subject-matter, jurisdiction of the person, or jurisdiction to render the particular judgment assailed, seems to include all cases which render a judgment void or subject to collateral attack in habeas corpus." In the *Miskimmins* Case the applicant was discharged on the ground that the act for which he had been committed as for a contempt by a magistrate holding a preliminary examination did not constitute a contempt in law, and that therefore the magistrate had been without jurisdiction to render the particular judgment. The applicant

had been committed for a refusal to answer certain questions propounded to him as a witness, the expressed ground of his refusal having been that his answers would tend to criminate him. In *Bandy's Case* a sentence to the penitentiary as for grand larceny upon an accepted plea of guilty of petit larceny to an information charging grand larceny was held to have been in excess of jurisdiction, and the applicant was discharged. The sentence appeared to have been based upon the fact that the records of the trial court disclosed a previous conviction of the accused of petit larceny, and, without a charge having been preferred of a second offense, or a plea of guilty thereto or a regular conviction thereof, the court, upon the bare record of such previous conviction, attempted to apply the statute authorizing the punishment prescribed for grand larceny upon a second conviction of petit larceny. There jurisdiction was found wanting to render the particular judgment. In the other cases above cited, previously decided by this court, questions were considered connected with the procedure of courts, and the acts complained of held, if objectionable at all, to have been mere errors or irregularities, and not void as without jurisdiction, though some of the acts were objected to on constitutional grounds. Those cases serve to illustrate the principle now under discussion, but none of them involved a state of facts similar to that presented in this case.

We are therefore to inquire into the legal consequences of the wrongful or illegal discharge without verdict of a trial jury impaneled and sworn in a criminal case to ascertain whether or not the act presents a jurisdictional question, such as would entitle the accused to discharge from further imprisonment upon habeas corpus, in the event that the proceeding in relation to the jury should be held to have been erroneous, either because improper under the circumstances, or void as beyond the lawful powers of the court upon the day of its occurrence. At this day it is unnecessary to cite authority to sustain the right of a trial court, without prejudicing a future prosecution, to discharge a jury in a criminal case, where it appears that after a reasonable time for deliberation has been allowed a verdict has not been agreed upon, and there is no probability of an agreement. In accordance with the general rule upon that subject, now well established on the ground of necessity, the Constitution of this state, in the section containing the provision against a second jeopardy, provides that, "if the jury disagree, * * * the accused shall not be deemed to have been in jeopardy." The statute moreover provides that whenever a jury shall be discharged after they have been kept so long together that there is no probability of agreeing, the court shall, upon directing the discharge, order the reasons therefor to be entered on the journal,

and such discharge shall be without prejudice to the prosecution. Rev. St. 1899, § 5386. It may be conceded that the improper discharge of a jury in a criminal trial after the commencement of jeopardy will render the proceedings equivalent to a verdict of acquittal, so far as such a verdict will constitute a good defense in bar of a subsequent trial for the same offense, either upon the same or another indictment or information, and perhaps also entitle the accused to a judgment of acquittal and discharge upon the same information upon motion in the trial court. When a criminal trial has reached the stage where jeopardy has commenced, and the jury is discharged without the consent of the defendant on trial, without some recognized necessity, or reason authorized by law, it may well be held, as it generally is, since the right of the accused to a verdict at the hands of the jury has been rendered impossible without fault on his part, through the erroneous act of the court, that he may demand that the result be regarded as an acquittal, and he will be protected by the rule forbidding a second jeopardy. And manifestly the same situation arises upon a discharge of the jury, though for a lawful cause, at a time or on a day when the court is without power to sit or make an order discharging them. It does not follow, however, that the erroneous or void discharge of the jury, and the advantage thereby afforded to the accused, will deprive the court of further jurisdiction in the case, or upon another information or indictment for the same offense. It is true that the facts may furnish the accused with a good defense on the ground of former jeopardy; but whether they amount to a sufficient defense or not, either as a matter of law or of fact, is to be determined in the manner provided by law, the same as any other defense. The fact that the defense is based upon an immunity granted by the Constitution offers no valid objection to the court's jurisdiction to hear it and determine upon its sufficiency; nor is the opportunity offered to pass upon the matter incorrectly a ground for denying jurisdiction. The Constitution gives an accused the right to demand the nature and cause of the accusation against him, to have a copy thereof, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses; yet it is apparent that neither the chance that the court wherein the prosecution is pending may commit error in respect to any of those matters, or an actual erroneous ruling thereon, will usually affect the jurisdiction of the court. One of the most frequent objections in a criminal prosecution is the alleged insufficiency of the indictment or information to apprise the accused of the nature and cause of the accusation. It is not, however, generally supposed that an adverse decision upon such an objection, though erroneous, takes away further jurisdiction, unless in-

deed the act sought to be punished constitutes no crime or offense under the law. In *Ex parte Harding*, 120 U. S. 782, 7 Sup. Ct. 780, 30 L. Ed. 824, it was held that a denial of the right to have compulsory process for witnesses was not a jurisdictional objection, and this is in harmony with the general run of decisions on that question. See, also, *In re McKnight* (C. C.) 52 Fed. 799.

The statute clearly contemplates that the trial court has jurisdiction to entertain and determine the plea of former jeopardy. It prescribes that upon arraignment the accused may offer a plea in bar that he has before had judgment of acquittal, or been convicted or been pardoned for the same offense, to which plea the prosecutor may reply that there is no record of such acquittal or conviction, or that there has been no pardon; and a trial of such issue to a jury if necessary is provided for. Rev. St. 1899, § 5331. In this case there has been no judgment of acquittal, and in such case, where the further proceedings are had upon the same information that was before the discharged jury, as well generally where the accused is held to answer upon a second trial to the same information, a formal plea in bar may, perhaps, be unnecessary, though the usual practice we think is even then for the accused to ask and be granted a right to withdraw his previous plea of not guilty and substitute the plea in bar, setting up the facts deemed to constitute former jeopardy. There is, however, authority denying the necessity of the formal plea after a disposition of one trial upon the same information or indictment under circumstances that place the accused once in jeopardy. *People v. Taylor*, 117 Mich. 583, 76 N. W. 158; *State v. White*, 71 Kan. 356, 80 Pac. 589. It is so held in the cases cited upon the ground that the proceedings relied on as constituting the former jeopardy are before the court upon its own record in the case, and that upon the question being raised the court will take cognizance of the facts so disclosed and determine their proper legal effect. The legal effect of an erroneous discharge of the jury without a verdict is neither greater nor less where the act is erroneous because void than where it is erroneous for any other reason, as, for example, where it occurs in the enforced absence of the defendant, or without allowing sufficient time for deliberation, or to accommodate the prosecution in obtaining absent testimony, if that be not permitted, or upon any ground not authorized by law. Whatever the particular imperfection in the proceeding, the only result is a condition protecting the accused against further prosecution upon the ground of former jeopardy. The most that can be said in any case as to the effect of an improper discharge of a duly sworn jury in a criminal case is that it is equivalent to a verdict of acquittal, thereby placing the accused within the protecting clause of the Constitution when confronted with a further prosecution.

The order committing the plaintiff into the custody of the sheriff was made on a lawful day of the court, subsequent to the discharge of the jury. Was it made in excess of jurisdiction? The authorities are numerous upon the subject of the effect upon the jurisdiction of the court of an erroneous discharge of a jury in criminal cases, and, with very few exceptions, the loss of jurisdiction is denied, as well as the right to have the resulting question of jeopardy determined upon habeas corpus. If the court has jurisdiction, it is evident that it is not confined in its exercise to the rendering of a correct decision. As said in *Ex parte Bigelow*, 113 U. S. 328, 5 Sup. Ct. 542, 28 L. Ed. 1005, in discussing the court's jurisdiction upon a claim of former jeopardy, after an alleged improper discharge of the jury pending a previous trial: "It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and decide upon the defenses offered by him. The matter now presented was one of those defenses. Whether it was a sufficient defense was a matter of law on which the court must pass so far as it was purely a question of law, and on which the jury under the instruction of the court must pass if we can suppose any of the facts were such as required submission to the jury." In that case several indictments against the defendant for embezzlement had been ordered by the trial court to be consolidated for the purpose of trial. A jury was thereupon impaneled and sworn, the district attorney made a statement of his case to the jury, and the court then took a recess. Upon reconvening the court decided that the indictments could not be well tried together, and discharged the jury from further consideration of them. The prisoner was thereafter tried against his protest before the same jury upon one of the indictments, and convicted. He asked leave to file a petition for habeas corpus to obtain his discharge, upon the ground that he had been once in jeopardy with regard to all the offenses charged in the several indictments. The Supreme Court refused the writ, basing its decision upon the proposition that the trial court had not lost its jurisdiction by the discharge of the jury, and, though error may have been committed, because of the circumstances in permitting the prisoner to be convicted upon a second trial, it did not go to jurisdiction. It was further said in the opinion in that case: "If the question had been one of former acquittal (a much stronger case than this) the court would have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offense, and, if the identity of the offense were in dispute, it might be necessary on such a plea to submit that question to the jury on the issue raised by the plea. The same principle would apply to a plea of former conviction. Clearly in these cases the court not only has jurisdiction to try and decide the question raised,

but it is its imperative duty to do so. If the court makes a mistake on such trial, it is error which may be corrected by the usual modes of correcting such errors." In *Ex parte Ulrich* (C. C.) 43 Fed. 661, it was alleged that the petitioner had been placed on trial before a state court upon an indictment charging bigamy, and that, pending the trial, after the impaneling and swearing of a jury and partial examination of witnesses, the jury was discharged against the prisoner's protest, and another trial was ordered. Thereupon a writ of habeas corpus was sued out by the prisoner in the United States District Court and the same was granted. Upon appeal to the Circuit Court, the order discharging the petitioner was reversed. Circuit Judge Caldwell, in the opinion, said: "Whether the first jury was discharged without sufficient legal excuse was a mixed question of law and fact to be determined by the court, or by the court and a jury, if the facts were disputed. It is undeniable that the court had jurisdiction to determine that issue. It was the only court that had jurisdiction to determine it in the first instance; and, if it be conceded that the court decided the question erroneously, its jurisdiction over the cause was not thereby lost or in any degree impaired, and its judgment was not void, and is not open to collateral attack."

So we find it laid down as a general rule that the defense of former jeopardy or of former acquittal or conviction does not entitle the prisoner to be discharged on habeas corpus. 21 Cyc. 305, and cases cited; 9 Ency. P. & Pr. 632; *Church on Hab. Corp.* (2d Ed.) § 253 and note; 1 *Bish. New Cr. Proc.* § 821. In the section cited Mr. Bishop states that a discharge of the jury after jeopardy begun, without verdict or the prisoner's consent, operates in law as an acquittal; and on motion, without plea, he is entitled to be set at liberty, but that should the court refuse, habeas corpus will not lie.

One of the early cases on this subject frequently cited and approved is *Wright v. State*, 5 Ind. 290, 61 Am. Dec. 90. There it appeared that the petitioner had been put on trial upon an indictment for murder. The trial progressed until a day deemed by the court to be the expiration of the term, and, as the court was satisfied the trial would not be completed on that day, it discharged the jury over the prisoner's objections, and remanded the latter to jail to await trial at the next term. His discharge from custody under the order so committing him was denied on habeas corpus, although it was held that there was former jeopardy. The court conceded the privilege of every one concealing himself illegally detained in custody to demand the writ of habeas corpus as a matter of right, but said that it did not follow that the court or judge before whom the cause may be brought can in all cases investigate the merits of the detention. A statute existed in Indiana to the effect that on

habeas corpus the legality could not be inquired into of any judgment or process whereby the party is in custody upon a warrant issued upon an indictment or information. The court held that, as the case had not been finally disposed of, and there had not been a release of the prisoner by any judgment of the trial court, he was to be regarded as in custody under the indictment, and habeas corpus could not be employed to discharge him. The case of *Wright v. State* has been followed upon this point in an unbroken line of decisions in Indiana, with the single exception of the case of *Maden v. Emmons*, 83 Ind. 331, and that case was expressly overruled in *Gillespie v. Rump*, 163 Ind. 457, 72 N. E. 138. The case of *Maden v. Emmons* was where the jury had dispersed without rendering a verdict, upon discovering after they had retired that one of their number was not a resident of the county. The case of *Gillespie v. Rump*, which was an appeal from a judgment refusing discharge on habeas corpus, disclosed the following facts: After a jury had been impaneled and sworn upon the trial of the petitioner under an indictment charging the crime of murder, the submission was set aside over the objection of the accused to permit the challenge by the prosecution of one of the jurors on the ground of relationship to one of the defendants. The challenge was made and allowed, and a new juror called and sworn, all over the protests of the defendants on trial. The latter thereupon moved their discharge on the ground of jeopardy, and, it being overruled, filed a special plea in bar, which was also overruled. The trial proceeded, and resulted in a disagreement of the jury and the remanding of the prisoner for another trial. In that state of the case the writ of habeas corpus was sued out. The judgment refusing to discharge was affirmed, for the reason that the question sought to be raised could not be heard and determined on habeas corpus. The various Indiana cases are reviewed in an instructive opinion. It is true that the Indiana cases rest largely upon the provision of their statute above referred to, which, perhaps, may be regarded as more strongly prohibitive of questioning the judgment of a competent court than our own statute. It is evident, nevertheless, that the theory of the Indiana cases is opposed to the loss of jurisdiction in the trial court after an irregular or wrongful discharge of the jury. Indeed, in *Gillespie v. Rump*, it is stated in the opinion that the discharge of a juror and the impaneling of another in his place, even if erroneous, did not deprive the court of jurisdiction, and render the subsequent proceedings void. And it seems clear from a reading of that case that a void judgment, apparent on the record, would even under the Indiana statute be deemed ground for discharge upon habeas corpus. *Ex parte Maxwell*, 11 Nev. 423, was a habeas corpus case before the Supreme Court

of Nevada. The petitioner claimed to be entitled to his discharge because of the discharge of the jury upon his trial after they had been out but three hours, upon the mere statement of the foreman that they were unable to agree, whereby the proceedings became equivalent to an acquittal. The court upheld the contention as to the unwarranted and illegal discharge of the jury and the effect thereof, but remanded the prisoner on the ground that the order holding him for another trial was not void, but voidable only. It was held that the right to claim former jeopardy might be waived. A statute like that in Indiana did not exist in Nevada, but the statute of the latter state was said to extend the power of the court in habeas corpus beyond that at common law. Yet it was remarked that the writ was not intended to operate or to have the force of an appellate proceeding, and that the process or authority holding the prisoner must be absolutely void, and not merely voidable, to justify a discharge upon the writ, where the detention is by virtue of legal process. That a claim of former jeopardy based upon an alleged improper discharge of the jury without verdict will not be determined on habeas corpus is also maintained in Missouri. The principle was announced in an early case where the discharge occurred in the prisoner's absence, and without his consent, after the jury had been out but a few hours (*Ex parte Ruthven*, 17 Mo. 541), and in another case where a verdict of guilty and fixing a punishment unsatisfactory to the court was set aside by the court on its own motion, and the prisoner held for another trial (*Ex parte Snyder*, 29 Mo. App. 256). Though there was a statute in Missouri somewhat like the one in Indiana, it is apparent that it was not deemed to take away the right to habeas corpus where want of jurisdiction appeared, and hence the decisions above cited may be regarded as authority. We think, upon the point that the improper discharge of a trial jury does not divest the court of jurisdiction, although it may have resulted in placing the accused in jeopardy. Indeed in *State ex rel. v. Williams*, 117 Mo. App. 564, 92 S. W. 151, it was held that notwithstanding a party had been in jeopardy and was entitled to be discharged on motion in the trial court, after an improper discharge of the jury pending a previous trial had occurred, yet the court retained jurisdiction, so that prohibition would not lie to restrain further proceedings. See, also, *Ex parte Bedard*, 106 Mo. 616, 17 S. W. 693. In Texas habeas corpus is held not the proper remedy to try the issue of former acquittal, but that the appropriate remedy is by special plea entered in the court wherein the indictment is pending, under which the party is imprisoned. *Pitner v. State*, 44 Tex. 578; *Ex parte Crofford*, 39 Tex. Cr. App. 547, 47 S. W. 533. In the *Crofford* Case the defense was raised upon an alleged discharge of the jury in the

enforced absence of the accused on trial. The court said: "This is not a novel question in Texas. Since the case of *Perry v. State*, 41 Tex. 488, the decisions have been uniform that the writ of habeas corpus cannot be resorted to for the purpose of discharging an applicant on a plea of former jeopardy." However, in *Ex parte Davis*, 89 S. W. 978, the Texas Court of Criminal Appeals had under consideration a case where it was contended that a verdict of not guilty, rendered upon a trial of the accused in one county, constituted a constitutional objection to a trial for the same offense in another county, there having been a serious question in the case as to venue. The Constitution provided that, "No person for the same offense shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction." The court regarded this provision as distinguishing between jeopardy and a verdict of not guilty in a court of competent jurisdiction, and concluded that after a verdict of not guilty the only way to avoid a second trial, if the same is being proceeded with, is to interpose the writ of habeas corpus; and it was said that the statutes and their decisions gave the court great latitude in the issuance of such writ. The other Texas cases above cited were not referred to, and the doctrine of the case last cited evidently applies only to cases where there may have been an actual verdict of acquittal. That no inquiry can be had on habeas corpus as to whether the prisoner was present or absent when the jury impaneled and sworn to try him upon an indictment had been discharged from further consideration of the case, or whether such discharge was proper or not, was held in *State v. Sheriff*, 24 Minn. 87. The court said: "The fact, therefore, if it be one, that the court improperly discharged the jury in the enforced absence of the prisoner, did not dispossess the court of its jurisdiction over the cause." To the same effect, where the jury was discharged for disagreement over the objection of the accused, is the case of *Ex parte McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272. In *Ex parte Hartman*, 44 Cal. 32, whether an arrest of judgment upon a verdict of a less offense under an indictment charging assault with intent to murder constituted jeopardy was held to be a question not competent for consideration in an application for habeas corpus, where the accused, after the arrest of judgment, had been remanded to await the action of the next grand jury upon the charge originally preferred. In *Steiner v. Nerton*, 6 Wash. 23, 32 Pac. 1063, a trial jury had been discharged, the indictment quashed, and later an information filed upon which the accused was being held for trial. Claiming former jeopardy he applied for discharge on habeas corpus, but the same was denied, the court saying: "If the petitioner has been

before in jeopardy for the same offense, that is a proper plea in bar to be tried by the court, and from the decision of which an appeal would lie to this court." A like conclusion was reached in the case of *In re Allison*, 13 Colo. 525, 22 Pac. 820, 10 L. R. A. 790, 16 Am. St. Rep. 224.

The principle under discussion is further illustrated by cases where the claim of former jeopardy has arisen out of circumstances other than the discharge of a trial jury. In a Colorado case the petitioner for habeas corpus was in jail awaiting trial on a charge of murder. He had been once tried and found guilty of manslaughter, and announced himself ready to receive sentence upon the verdict. The court declined to pass sentence, but, over the objection of the petitioner, ordered the sentence set aside, and a new trial had. A motion for the prisoner's discharge was then made on the ground of former jeopardy, and denied, and he was remanded to await trial. On petition for habeas corpus before the Supreme Court, it was held that the defense of former jeopardy could not be raised in that proceeding. It was contended by counsel that as all the facts appeared upon the record in respect to the plea it entitled the party to be heard and to be discharged in the summary proceeding. The court recited a part of the argument, and stated its conclusion as follows: "In support of this proposition they urge that in such circumstances, where the petitioner has already moved the trial court for a discharge upon the ground now urged in support of his application, he should not be subjected to another trial, or the formality of submitting to a jury undisputed questions of fact, the force and effect of which are entirely a question of law. These matters do not change the rule with respect to questions which can be inquired into on applications of this character. It has uniformly been held by this court that in habeas corpus proceedings only jurisdictional questions can be reviewed." The court, in further discussing the question, stated in substance that the trial court had not lost jurisdiction, but was authorized to hear and determine the claim of once in jeopardy, and the question whether there should be another trial, and that, though the court might decide the question erroneously, it would not be divested of jurisdiction, nor would the question be available on habeas corpus. In *re Mahany*, 29 Colo. 442, 68 Pac. 235. In *re Terrill*, 58 Kan. 815, 49 Pac. 158, was a case where a party claimed to have been in jeopardy through a former conviction which had been held void because the trial had occurred when the court was without power to sit. Being held to await another trial, he sought release on habeas corpus. It was held that the question of former jeopardy could not be determined on habeas corpus. To the same effect are the following additional cases, where the claim was made after an alleged previous conviction or acquittal: *State v.*

Sheriff, 45 La. Ann. 316, 12 South. 307; *Com. ex rel. Norton v. Deacon*, 8 Serg. & R. (Pa.) 72; *People v. Ruloff*, 3 Parker, Cr. R. 126; *Ex parte Barnett*, 51 Ark. 215, 10 S. W. 492; *State v. Sistrunk*, 138 Ala. 68, 35 South. 39; *In re Bogart*, 2 Sawyer. 396, Fed. Cas. No. 1596; *State v. White* (Kan.) 80 Pac. 589; *Miller v. Case* (Kan.) 51 Pac. 922. The case of *State v. White*, supra, was not decided on habeas corpus, but the question of jurisdiction on a second trial was before the Supreme Court, on error, the jury having been discharged, as claimed, irregularly upon a previous trial. It was contended that, though no plea of former jeopardy had been presented, and no objection made to the second trial on that ground, the facts were in the record and showed the second trial to have been without jurisdiction. The court, however, held otherwise, expressly stating that the district court did not lose jurisdiction, and that by not having objected to the second trial on the ground of jeopardy because of the alleged improper discharge of the jury the objection had been waived. In the Pennsylvania case of *Commonwealth ex rel. Norton v. Deacon*, supra, the petitioners had been found not guilty on 9 counts of an indictment containing 16 counts, the verdict not referring to the remaining counts. Having been afterwards committed for trial upon the other 7 counts, the prisoners sought their discharge on habeas corpus on the ground that the verdict was in effect an acquittal on the whole indictment. The court refused to discharge for the reason that the court where the indictment was pending had jurisdiction, and if an erroneous judgment should be given the remedy would be by writ of error.

Our investigation of this question has resulted in the discovery of but three cases which appear to be flatly opposed to the principle supported by the array of authorities above cited. One of them, *Ex parte Ulrich* (D. C.) 42 Fed. 587, was afterwards reversed by the Circuit Court in the case of *In re Ulrich* (C. C.) 43 Fed. 661, above referred to. Another case, *In re Bennett* (D. C.) 84 Fed. 324, decided by United States District Judge De Haven, in California, holds that after the reversal of a conviction of a less offense than the one charged a sentence upon conviction of the greater offense upon the same indictment on a second trial in the same court is void in the extreme sense, as in violation of the constitutional exemption of the accused from a second jeopardy. A discharge was, however, refused in that case, for the reason that there had not been an acquittal of the less offense. *Ex parte Glenn* (C. C.) 111 Fed. 257, decided by District Judge Jackson, in West Virginia, holds that an accused is entitled to be discharged on habeas corpus when committed for a second trial upon an indictment after such an improper discharge of the jury at the first trial as to render the trial equivalent to an acquittal. The opinion in the *Bennett* Case refers to the case of *In re Bigelow*, 113

U. S. 328, 5 Sup. Ct. 542, 28 L. Ed. 1005, above cited, but evidently regarded it as inapplicable. The opinion in the Glenn Case does not notice the Bigelow Case, nor indeed any of the authorities laying down the same doctrine. The fact is that in the Bigelow Case the second trial had occurred in the same court upon one of the same indictments involved in the former trial; so that if the proceedings of the former trial amounted to an acquittal upon all the indictments as claimed, the fact appeared upon the record of the court in relation to the indictment under which the second trial was had. It is therefore difficult to distinguish the Bigelow Case from the Bennett and Glenn Cases. That the Bigelow Case continues to be regarded as authority by the Supreme Court upon the question thereby decided is evident from its citation and approval in two subsequent cases. In *re Belt*, 159 U. S. 95, 15 Sup. Ct. 987, 40 L. Ed. 88; *Whitten v. Tomlinson*, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406. In the case last cited it was said with reference to a contention that there had been a previous disposition of the offense charged in another court, "whatever effect it [the other proceeding] might have, if pleaded to a subsequent indictment, affords no ground for his discharge on habeas corpus." The Supreme Court of the United States, however, has had occasion to distinguish between the case of *In re Bigelow* and one where, after one conviction, the accused has been again convicted upon the same indivisible act for the same offense and sentenced upon both convictions. In *re Snow*, 120 U. S. 274, 7 Sup. Ct. 556, 30 L. Ed. 658. In that case *Snow* had been charged, convicted, and sentenced upon three indictments in Utah charging the offense of unlawful cohabitation. The alleged unlawful cohabitation appeared to have been continuous, but it was divided by the prosecution and grand jury arbitrarily into three periods, and an indictment presented covering each period. After serving the sentence upon the first conviction habeas corpus was applied for. The court held that the act throughout the entire period constituted but one offense, and that one conviction and sentence for any part of the period exhausted the power of the court to punish for the offense. Hence, although the constitutional immunity relied upon was the exemption from second jeopardy, the precise ground of the decision was that the court had no jurisdiction to inflict a punishment in respect of more than one of the convictions. This case was followed by *In re Hans Nielsen*, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118. The petitioner there had pleaded guilty to unlawful cohabitation, and was sentenced to pay a fine and be imprisoned in the penitentiary. After he had suffered the penalty he was put on trial for the crime of adultery with the same woman during the same period covered by the indictment for unlawful cohabitation upon which he had been punished. He was convicted over

a plea of former conviction, and again sentenced to the penitentiary. It was held that there had been a double conviction and sentence for one and the same criminal act, and that the last sentence was void as beyond the jurisdiction of the court, the first sentence having exhausted the court's power in the premises. Those cases were deemed to be in line with the leading case of *Ex parte Lange*, 18 Wall. (U. S.) 163, 21 L. Ed. 872.

There may be cases where a prisoner has been discharged on habeas corpus on the ground of former jeopardy, where the question of the right to the writ under the circumstances was not raised. They might be persuasive, but hardly controlling authority where the objection to the use of the writ in such cases is presented. Such a case apparently is *State v. Blevins*, 134 Ala. 213, 32 South. 637, 92 Am. St. Rep. 22. In that case, however, upon a trial for assault and battery, the court, instead of pronouncing judgment on the charge which was tried, found that the accused was guilty of another crime, viz., assault with intent to ravish the complaining witness, and thereupon bound the accused over for his appearance to answer to the latter charge. It might well be held that the court exceeded its jurisdiction in the premises, although the opinion in the case seems to put the discharge upon the ground of former jeopardy. In view of the facts in the case it appears to be distinguishable from the case at bar and other like cases.

The main reliance of the plaintiff is upon the Oregon case of *In re Tice*, 32 Or. 179, 49 Pac. 1038, which, upon the facts, more nearly resembles the case before us than any other coming to our notice. In that case the jury was discharged for disagreement on Sunday, and on the same day the defendant was ordered committed pending a retrial. The fact that the committing order was made on Sunday may distinguish that case from the one here. But the court in that case, while apparently not questioning the general rule that an improper discharge of a jury would not ordinarily deprive the court of further jurisdiction, held that the order of discharge on Sunday being a void act, habeas corpus became a proper remedy for the prisoner's discharge. One of the cases cited by the court in support of its conclusion is *Maden v. Eimons*, 83 Ind. 331, which has since been overruled in Indiana, as above noted. The case of *State v. McGimsey*, 80 N. C. 377, 30 Am. Rep. 90, also cited, was not a habeas corpus case, but was before the appellate court on certiorari, and that was held a proper remedy for the review of the error complained of in the exercise by the court below of its jurisdiction. The case of *Ex parte White*, 15 Nev. 146, 37 Am. Rep. 466, which is also cited, depended upon the application of a different principle. There a magistrate had on Sunday received a plea of guilty and entered a sentence of imprisonment. Under such a condition the accused was clearly held under a void judg-

ment, assuming that the court was not authorized to sit or render judgment on Sunday. Notwithstanding that the Oregon court, for whose opinions we entertain great respect, seems to distinguish the discharge of a jury upon a nonjudicial day from a discharge upon a lawful day for an improper or unauthorized reason in its effect upon the jurisdiction of the court, we think that the case cited is out of harmony with the general line of decisions respecting the jurisdictional consequences of an unnecessary or irregular discharge of a jury on a criminal trial.

We are unable to agree with the reasoning and conclusion of the Oregon case that a void act discharging the jury operates to divest the court of further jurisdiction in the case. As previously suggested, whether the discharge be a void act, because occurring on a nonjudicial day, or improper or unauthorized for any other reason, the trial, through the irregular or unauthorized act, will have come to a close without a verdict, so that, if the act of discharging the jury be held to have been unauthorized and not to have been waived by any act or conduct of the defendant, if a waivable matter, the latter will have been in jeopardy. By such erroneous procedure, however, the court does not divest itself of jurisdiction to hear and determine any further motions, pleas, or other applications that may be presented in the case, and even to hold another trial of the case if a plea of former jeopardy should be heard and overruled, although in doing so grave error may be committed. Suppose it to be conceded that the act of the court in discharging the jury was absolutely void; the prisoner is not held under that order, any more than if he should be held under a warrant of arrest or commitment upon a new information. The old information is still pending and undisposed of, and the plaintiff's commitment is for trial thereon. She has already submitted a plea of some kind in bar of another trial, and that plea has been overruled. Let it be assumed that she interposed in defense of the pending charge the former proceedings, or that she will do so; if it be true that those proceedings amounted to an acquittal, then her plea ought to be sustained, and the court has erred or may err in otherwise disposing of it. But the jurisdiction of the court to hear and determine the plea is clear, it seems to us; and the error, if any, in such determination, may be reviewed and corrected before the proper court in the mode pointed out by law. It ought not to be considered on habeas corpus, in which proceeding this court has no greater authority than a single justice or a district judge would have upon a similar application. We are of the opinion that, though it is possible that the court may have erred, its act in committing the plaintiff was within the legitimate province of the court while acting in a lawful manner, and, by express command of the statute, it is not permissible in this

proceeding to question the correctness of the committing order.

For the above reasons, we think it not only unnecessary, but improper, to consider the other questions presented, and we are constrained to refuse to discharge the plaintiff from the custody of the sheriff.

BEARD and SCOTT, JJ., concur.

CARLSON et ux. v. CURREN et al.
(Supreme Court of Washington. Jan. 15, 1908.)

1. APPEAL—NOTICE—SUFFICIENCY.

Notice of appeal, given in open court at the time the court signs a judgment of dismissal, and regularly entered by the clerk on the court journal under the judge's direction, is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2101.]

2. QUIETING TITLE—EQUITABLE OWNER OUT OF POSSESSION.

Where one out of possession of land claims it by an equitable title against one in possession, he need not bring ejectment, but may sue to quiet title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quiet Title, § 55.]

3. EJECTMENT—PARTIES—JOINDER OF DEFENDANTS.

In ejectment at common law, a plaintiff was not bound to bring separate suits against separate trespassers on his single separate estate, but might sue them in a single action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 140.]

4. QUIETING TITLE—PROCEEDINGS—JOINING ADVERSE CLAIMANTS AS DEFENDANTS.

In an action to quiet title, or to determine the rights of adverse claimants, plaintiff may make all the adverse claimants defendants, even though there be no privity or connection between them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quiet Title, § 65.]

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by Levin Carlson and wife against J. C. Curren and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded, with directions.

See 85 Pac. 627.

Boyle & Warburton, for appellants. T. W. Hammond, for respondents.

FULLERTON, J. The appellants purchased certain lots situated in the city of Tacoma which were sold by the county of Pierce under a judgment entered in a tax foreclosure proceeding, receiving a deed for the property in due course. At the time of the sale the respondents J. C. and Mary Curren were in possession of a part of one of the lots, claiming to hold as tenants of some third person. After the delivery of the tax deed the appellants entered into possession of all that portion of the lots not in possession of Curren and wife, whereupon Curren laid claim to the whole of the premises adverse to the appellants. The other respondents also laid claim to interests in

the property adverse to the appellants. The appellants thereupon brought this action to quiet their title against the claims of all of the appellants and to recover that portion of the lots in possession of the respondents Curren. In their complaint the appellants set up the nature of their estate, alleging that they were owners in fee simple of the premises by virtue of the tax foreclosure proceedings and the sale thereunder and the deed executed in pursuance thereof; that the respondents Curren were in possession of a part of the premises, and claimed the whole of the same adversely to the appellants; that the other respondents also claimed some interests in the premises adverse to the appellants, but that the claim of each and all of the respondents were without right, as neither of them had any right, title, or interest therein whatsoever. The prayer of the complaint was that the appellants be adjudged to be the owners in fee simple of the premises, and their title quieted against the claims of each and all of the defendants, and that they recover possession of the whole of the premises, and the respondents Curren be ejected therefrom. A demurrer was interposed to the complaint upon the statutory grounds: (1) That several causes of action had been improperly united; and (2) that the complaint did not state facts sufficient to constitute a cause of action. The demurrer came on for hearing before the superior court on March 2, 1907, and was, after argument, sustained. On April 15th thereafter the appellants gave notice that they elected to stand on their complaint, and declined to amend, whereupon the court entered judgment dismissing the action. From the judgment so entered, this appeal is taken.

The appellants move to dismiss the appeal for the reason that no sufficient notice of appeal was given. The notice of appeal was given in open court at the time the court signed the judgment of dismissal, and was regularly entered by the clerk on the journal of the court under the direction of the judge. This was in strict compliance with the statute, and sufficient notice to perfect the appeal. We have not overlooked the contention of the respondents, made in their briefs, to the effect that the judgment was entered in their absence and without their knowledge, but this fact does not appear on the face of the record. On the contrary, the judgment on its face is regular, and if it fails to recite the facts truly, the remedy must be found in some other proceeding than a motion to dismiss the appeal. The motion is denied.

The trial judge sustained the demurrer to the complaint on the ground that several causes of action had been improperly united. He seems to have taken the view that, since the respondents Curren were in possession of a part of the land, a different form of action was required to determine their rights than was required to determine the rights

of the other adverse claimants, all of whom were out of possession; that the remedy against the first was ejectment to recover the possession, while an equitable action to quiet title was the remedy against those out of possession. This view of the remedies afforded a claimant in the situation that these plaintiffs found themselves unquestionably finds support in the decisions of this court as they stood at the time the judgment appealed from in this action was rendered. In the early case of *Spithill v. Jones*, 3 Wash. 290, 28 Pac. 531, and many subsequent cases, notably *Reichenback v. Washington, etc., Ry. Co.*, 10 Wash. 357, 38 Pac. 1126, *Krutz v. Isaacs*, 25 Wash. 566, 66 Pac. 141, and *Povah v. Lee*, 29 Wash. 108, 69 Pac. 639, we held that the remedy against one in possession of land was ejectment, since any other remedy would deprive the party in possession to his right of trial by jury. But these cases were overruled on that point in the recent case of *Brown v. Baldwin* (Wash.) 89 Pac. 483. In the last-cited case we held that one out of possession, claiming land by an equitable title, could maintain an action to quiet title against one in possession, and that in such an action full and adequate relief will be granted even to the extent of awarding possession, if such an award be necessary. It was not, of course, there decided that all actions to recover real property were actions of equitable cognizance and triable as such (on the contrary, actions to recover real property, which present purely legal controversies, are still triable as actions at law); but it was decided that, where the claimant's rights were of an equitable nature, he need not resort to the fiction of ejectment and have his case presented to a jury merely because the defendant was in possession of the property. There is therefore no objection to the form of the remedy sought by the appellants.

Nor is the complaint demurrable on the ground of misjoinder of defendants. In actions of ejectment at common law the plaintiff was not bound to bring separate actions against separate trespassers who had intruded upon his single, separate estate. As to him they were all wrongdoers, and he could not know how they claimed, whether jointly or severally, and if severally, how much each one claimed. Each defendant, of course, had the right to defend for his several portion, and by doing so necessarily disclaimed as to the residue, but this fact did not entitle such defendant to a separate trial, nor did it make the action multifarious. *Greer et al. v. Mezes et al.*, 24 How. (U. S.) 268, 16 L. Ed. 661. The same rule applies to actions brought to determine the rights of adverse claimants, or actions to quiet title. The plaintiff may make all of the adverse claimants defendants even though there should be no privity or connection between them. As was said in *Kincaid, etc.*,

v. McGowan, etc., 88 Ky. 91, 4 S. W. 806, 13 L. R. A. 289: " * * * It seems clear that in an equitable action to quiet the title to land, independently of the statutory authority, all of the adverse claimants, whether by independent titles or not, may be joined as defendants. Indeed, as the object to be accomplished is the putting of all litigation about the title to rest, it is not only desirable, but proper, to make all adverse claimants defendants." See, also, *Stemmler v. McNeill* (C. C.) 102 Fed. 680; *Pomeroy's Remedies*, § 869 et seq.; 15 Cyc. 83; 17 Ency. Pl. & Pr. 323.

We conclude, therefore, that the trial court erred in sustaining the demurrer. The judgment appealed from is reversed and remanded, with instructions to reinstate the case and overrule the demurrer.

RUDKIN, MOUNT, ROOT, and DUNBAR, JJ., concur.

(48 Wash. 270)

BROWN et al. v. TRIMBLE et al.

(Supreme Court of Washington. Jan. 15, 1908.)

MECHANIC'S LIEN—AMENDMENT OF NOTICE—STATUTORY PROVISIONS—"BY ORDER OF COURT"—SUFFICIENCY OF ORDER.

Where a mechanic's lien does not sufficiently describe the property, and leave to amend a complaint to foreclose the lien is granted upon sustaining a demurrer thereto, the filing of a new notice or amendment of the old one is not "by order of the court," within Ballinger's Ann. Codes & St. § 5904, providing that a claim of lien may be amended in an action to foreclose same by order of court, as pleadings may be, etc., so that the filing of a new lien notice after the time for filing had expired would be of no force.

Appeal from Superior Court, Kitsap County; John B. Yakey, Judge.

Action by G. H. Brown and others against W. B. Trimble and others to foreclose a mechanic's lien. From a judgment for defendants, plaintiffs appeal. Affirmed.

Frank B. Sayre, for appellants. John G. Barnes, for respondents.

MOUNT, J. The appellants brought this action to foreclose a lien for a balance alleged to be due for plumbing and materials used in the construction of a certain building. The lien notice described the premises as follows: "That certain building or structure situate upon the following described property, to wit: Blake Island in the county of Kitsap, state of Washington." The defendants filed a general demurrer to the complaint. This demurrer was sustained upon the ground that the description of the premises upon which the lien was sought to be foreclosed was not sufficiently definite; it being conceded that Blake Island was composed of some 400 or 500 acres of land, all of which was not owned by the defendants. Leave was thereupon granted to the plaintiffs to amend the complaint. Subsequently, on February 5, 1908,

plaintiffs filed with the county auditor of Kitsap county another lien notice. Thereupon the plaintiffs filed what was termed an "amended complaint," setting up this last-mentioned lien notice, and praying foreclosure thereof for a balance alleged to be due. The respondents filed an answer, denying generally all the allegations of the complaint. The cause then came on for trial. The plaintiffs offered in evidence the last-named lien notice, which showed upon its face that the last services and materials were furnished on May 13, 1905, and that the lien notice was not filed until February 5, 1906, more than eight months intervening between the date of the last labor and materials furnished and the date of the filing of the lien notice. On objection the court excluded this evidence. The statute requires the lien notice to be filed within 90 days from the date of the cessation of labor or the furnishing of materials. Ballinger's Ann. Codes & St. § 5904.

Appellants contend that the notice in this case was an amended notice, and that the court should have received the same in evidence under the provisions of the same section, as follows: "And such claim of lien may be amended in case of action brought to foreclose the same by order of the court, as pleadings may be in so far as third parties shall not be affected by such amendment." Conceding, without deciding, that an amendment to a lien notice may be made after the expiration of the 90-day period, the amendment of the lien notice in this case, if the notice last filed may be said to be an amendment, was not filed or amended by order of the court. Permission to amend the complaint did not authorize the appellants to file a new lien notice, or even to amend the original lien notice. If the appellants desired to amend the lien notice, as well as the complaint, the application and order therefor should have so stated. Not having done so, we think the trial court was right in treating the subsequent lien notice as an original notice which was filed out of time, and therefore of no force.

It is not necessary to discuss other points in the case. The judgment must therefore be affirmed.

HADLEY, C. J., and CROW, RUDKIN, and FULLERTON, JJ., concur. DUNBAR and ROOT, JJ., took no part.

(48 Wash. 218)

STATE v. CONSTANTINE.

(Supreme Court of Washington. Jan. 9, 1908.)

1. WITNESSES—CREDIBILITY—INTEREST OR BIAS—EVIDENCE.

In a prosecution for assault with intent to murder, the fact that a civil action had been begun by the complaining witness against defendant for injuries on account of the assault was material on the question of the credibility of such witness, as it tended to show that he had more than usual interest in the result of the

prosecution; but, that fact being shown, the complaint in such action was properly excluded, since its introduction could add nothing to the proofs.

2. CRIMINAL LAW—EVIDENCE—PRESUMPTIONS—SUPPRESSION OR SPOILIATION OF EVIDENCE.

In both civil and criminal causes a party's fraud in the preparation or presentation of his case, such as the suppression or attempt to suppress evidence by the bribery of witnesses, or the spoliation of documents, can be shown against him as a circumstance tending to prove that his cause lacks honesty and truth.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 735.]

3. WITNESSES—CONTRADICTION—TESTIMONY TO MATERIAL FACT.

In a prosecution for assault with intent to murder, where the complaining witness testified that after he had begun a civil action against defendant for injuries on account of the assault, and after the commencement of the prosecution, a doctor representing defendant approached him, and offered to pay his hospital and medical fees, and for a trip to California, and give him "a bunch of money," if he would abandon the civil action and not appear against defendant in the prosecution, it was erroneous to reject defendant's offer to prove by the doctor that he had never at any time made any such proposition to the complaining witness; since, the latter's evidence being material, it was competent to contradict it.

4. SAME—LAYING FOUNDATION FOR CONTRADICTION.

In such a case it is not necessary, before contradicting the evidence of the complaining witness, to lay a foundation for impeachment, since, where a witness testifies to a material matter as a fact, he can be impeached by merely showing that the matter testified to is untrue.

5. CRIMINAL LAW—EVIDENCE—INSANITY.

In a criminal prosecution, the defense being insanity, a witness for defendant was asked by the state as to certain remarks defendant made to his daughter at the jail. *Held* that, on redirect examination, it was competent for such witness to state what the daughter said to defendant just preceding such remarks, since such evidence would show at least whether defendant's remarks were responsive or otherwise to the daughter's statements; thus indicating in some degree rationality or irrationality.

6. SAME—OPINION EVIDENCE—MENTAL CONDITION.

In a criminal prosecution, the defense being insanity, a witness, in response to the court's inquiry, "Was he sane or insane?" replied: "I am not an expert. I cannot say whether a man is sane or insane. His mind was disordered, I should say." *Held*, that it was erroneous to strike out such answer, since a nonexpert witness may give his opinion as to the mental condition of the defendant in his own language.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1045.]

7. SAME—INSANITY.

In a prosecution for an assault by defendant on his son-in-law, the defense being insanity, caused by defendant's daughter's recital to him of the acts of cruelty she suffered at the hands of her husband, it was erroneous, after the daughter had testified as to what she told her father two days before the assault, and his appearance during the recital, to exclude a question whether this was the first time she complained to defendant about the trouble existing between herself and husband, since such testimony would have aided the jury somewhat in determining whether defendant's mind was unbalanced at the time when he committed the assault.

8. SAME.

In a prosecution for an assault by defendant on his son-in-law, the defense was insanity, caus-

ed by defendant's daughter's recital to him of the acts of cruelty she suffered at the hands of her husband. Defendant, preceding the assault, went to an attorney's office for advice as to a divorce for his daughter. He was allowed to state what he did and said while consulting the attorney. *Held*, that what the attorney said to defendant should also have been admitted, since the purpose of this evidence, to show defendant's mental condition at the time, would have been better accomplished by submitting the entire conversation.

9. WITNESSES—CONTRADICTION—CORROBORATION OF IMPEACHED OR CONTRADICTED WITNESS.

In a prosecution for assault with intent to murder, defendant, on cross-examination, was asked if he had not ordered his servant to buy him a pistol, saying he intended to kill the assaulted party, to which he replied in the negative. A witness for the state then testified that such occurrences took place. *Held*, that it was erroneous to reject defendant's offer to show by other witnesses that such occurrences never happened, since defendant had the right to offer evidence in support of his answer after the state had impeached it, and, such evidence being a part of the state's case in chief, he had the right to contradict it.

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

William Constantine was convicted of a crime, and he appeals. Reversed, and new trial granted.

Morris, Southard & Shipley, for appellant. Kenneth Mackintosh and John F. Miller, for the State.

FULLERTON, J. William Constantine was informed against by the prosecuting attorney of King county for the crime of assault with intent to murder, committed with a revolver on the person of one Jesse M. Hall. To the information he pleaded not guilty, and on the issue thus made was tried by a jury, which returned a verdict finding him "guilty of assault with a deadly weapon with intent to do bodily harm." On this verdict he was adjudged guilty by the court of the crime defined by section 7058 of the Code (Ballinger's Ann. Codes & St.), and sentenced to a term of one year in the state penitentiary and to pay a fine of \$5,000. From the judgment and sentence, he appeals.

The errors assigned are based wholly upon rulings of the court made in passing upon objections to the admission of evidence. These we will proceed to notice in their order.

When the complaining witness, Jesse M. Hall, was on the witness stand, he was questioned on cross-examination concerning a civil action he had commenced against the appellant to recover damages for injuries suffered on account of the shooting. In the course of the inquiry the complaint itself was offered in evidence, and, on an objection made on the part of the state, was excluded by the court. This ruling constitutes the first error assigned. But we think the ruling correct. The fact that such a civil action had been begun was material on the question of the credibility of the witness, as it tended to show that he had more than the usual in-

terest in the result of the criminal prosecution against the appellant, but all that was material was proven when the fact itself was admitted by the witness. It could add nothing to the proofs to introduce the complaint.

The witness Hall further testified in answer to questions propounded to him by the state that, after the institution of the civil action and the commencement of the criminal prosecution, certain persons (referred to as the appellant's "emissaries" by the state's counsel) purporting to represent the appellant had approached him, and offered to pay the hospital and medical fees he had incurred on account of his injuries, pay for a trip to California or some other place that he might designate, and give him "a bunch of money besides," if he would abandon further prosecution of the civil action, and not appear as a witness against the appellant in the criminal proceeding. On cross-examination he was questioned further concerning these proposals, and stated that one of the persons who approached him was a certain doctor, whom he named. As a part of his defense the appellant produced this doctor, and sought to question him concerning the transaction, asking him, among other things, if he had ever made such a proposition to Hall as had been testified to by Hall while on the witness stand. To this inquiry an objection was interposed and sustained. The appellant thereupon offered to prove by the witness that he had never at any time, either as the representative of the appellant or otherwise, made any such proposition to the witness Hall as had been testified to by Hall. This offer, also, the court rejected. The rulings of the court rejecting this evidence is the second error assigned. The state in its brief seeks to justify the exclusion of this evidence on two grounds: First, that the fact testified to by Hall was a collateral and immaterial matter in itself, and could not be made the basis of contradictory evidence, since the rule is that a witness cannot be contradicted on testimony he may give that is foreign to the issues, even though he testified untruthfully in regard thereto; and, second, that the questions put to the doctor called for evidence tending to impeach Hall, and no proper ground was laid in the examination of Hall for impeaching him. The first ground stated clearly mistakes the law. It is a rule of evidence, as old as the law itself, applicable alike to both civil and criminal causes, that a party's fraud in the preparation or presentation of his case, such as the suppression or attempt to suppress evidence by the bribery of witnesses or the spoliation of documents, can be shown against him as a circumstance tending to prove that his cause lacks honesty and truth. *Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 488; *Chicago City Ry. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29; *Houser v. Austin*, 2 Idaho, 204, 10 Pac. 37; *Cruikshank v. Gordon*, 118 N. Y.

178, 23 N. E. 457; *Waterhouse v. Rock Island Alaska Min. Co.*, 97 Fed. 466, 38 C. C. A. 281; *Graves v. United States*, 150 U. S. 118, 14 Sup. Ct. 40, 37 L. Ed. 1021; *Rice v. Commonwealth*, 102 Pa. 408; *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697; *State v. Hogan*, 67 Conn. 581, 35 Atl. 508; *Keesler v. State*, 154 Ind. 242, 56 N. E. 232; *State v. Rozum*, 8 N. D. 548, 80 N. W. 477; *State v. Roller*, 30 Wash. 692, 71 Pac. 718. In the last cited case this court held that a letter of the defendant, who was under arrest for incest, addressed to his son, requesting the son to persuade the prosecuting witness not to testify against him, was evidence corroborative of other evidence tending to show guilt. The rule that permits acts of this character to be shown in evidence has its foundation in human experience. This experience has demonstrated that men who have meritorious causes do not generally resort to bribery and spoliation to maintain them, but that such conduct is the resort of those who are conscious that the truth, if all is told, will not aid them. In this case this evidence was particularly persuasive. The defense attempted to be maintained was temporary insanity. Manifestly, if the defense was entered upon in good faith, nothing the prosecuting witness could truthfully testify to would be more effective as evidence than the statements of other persons who had an opportunity to observe the defendant's conduct and his condition of mind. The inference is strong, therefore, that the desire to suppress his testimony, if such desire existed, arose from other feelings than consciousness of merit in the defense attempted. The testimony being material, it was, of course, competent to contradict it. It was proper, also, to contradict it in the manner the defense attempted to contradict it. The witness testified to a fact which tended to establish the substance of the issue. It was competent, therefore, for the opposing party to dispute the fact by evidence to the contrary. While the evidence did tend to impeach the prosecuting witness in a sense—that is, it tended to show that he had testified untruthfully—yet it was not that form of impeachment that requires any particular question to be put to him before the impeaching evidence can be introduced. That condition arises only where it is sought to impeach the witness by showing that he has made contradictory statements at some other time and place. In the latter case, it is necessary, before the impeaching evidence can be introduced, to call the witness' attention to the contradictory statements, the time when and place where they were made, the circumstances surrounding their making, and give him an opportunity to deny, admit, or explain them. But, where the witness testifies to a material matter as a fact, he can be impeached by merely showing that the matter testified to is untrue. It was prejudicial error, therefore, for the court to exclude this evidence.

Mr. Vince H. Fabin, called as a witness on behalf of the appellant, after testifying to the appellant's mental condition immediately following the shooting as he observed it, said that he accompanied the appellant's wife and daughter to the jail shortly after the appellant was arrested and placed therein. On cross-examination he was asked concerning the appellant's conduct when his wife and daughter came to him at the jail, and as to certain remarks the appellant made to his daughter at that time. On redirect examination he was asked to state what the daughter said to her father just preceding the statement which the father made, and which he had repeated to the jury. To this question an objection was interposed, and sustained by the court. This was a proper question, and the witness should have been permitted to answer it. The matter under investigation was the condition of mind of the appellant at that time. The state sought to show that his mind was then rational by showing a particular statement made by him to the daughter which tended to indicate rationality. The appellant was entitled, therefore, to place before the jury such part of the entire occurrence as would in any way tend to aid the jury in arriving at the true condition of mind of the appellant. The fact called for would have been of some aid. It would have shown at least whether it was responsive or otherwise to the daughter's statement, and thus indicated in some degree either rationality or irrationality. Since the appellant did not indicate in the record what he expected this evidence to show, this error would not require reversal if standing alone. It is discussed and determined because a new trial must be awarded, and the same question will probably again recur.

In the examination of Mr. W. W. Wilshire the following appears: "The Court: Was he sane or insane [meaning the defendant]? The Witness: I am not an expert. I cannot say whether a man is sane or insane. His mind was disordered, I should say. Counsel for the State: Objected to, and move that it be stricken. The Court: The objection will be sustained." The answer should have been allowed to stand as part of the evidence for the consideration of the jury. A nonexpert witness may give his opinion as to the mental condition of a defendant whose mental condition is the subject of inquiry in his own language. He need not use the words "sane" or "insane" in describing that condition if he thinks some other form of words will more nearly express his ideas.

The prosecuting witness was the son-in-law of the appellant. He had married the appellant's daughter some six months before the shooting occurred. Immediately after their marriage the young couple took up their residence at Butte, Mont. The prosecuting witness did not succeed financially, and the appellant brought the couple to his own home in Seattle, and started his son-in-law in business

in that city. On Saturday evening preceding the Tuesday on which the shooting occurred the daughter came to the father's place of business in a very agitated condition of mind, and in answer to her father's inquiries as to the cause of her agitation made some complaint against her husband, declaring that she could no longer live with him. The father soothed her as best he could, and later on accompanied her home. On the next day, two days preceding the shooting, he went riding with her, and while so riding undertook to reconcile her to her husband. The daughter, apparently in justification of her conduct, related to him some of the acts of cruelty her husband had been guilty of towards her while they were residing in Butte, telling him, also, when he expressed the belief that the difficulties she had recited could be overcome, that there were other things, which shame forbade her telling him, which made it impossible for her to live longer with her husband. It was this recital of his daughter, with some additional particulars which were related to him the next morning, that it is asserted unsettled his reason, and caused him to make the assault complained of. The appellant undertook to prove these facts by the daughter herself. While on the witness stand, she testified to the occurrences, and to the appellant's appearance and conduct during the time she related them to him. She was then asked by counsel if this was the first time she had ever made complaint to her father about the trouble existing between herself and her husband. To this question an objection was interposed and sustained. The court should have permitted the witness to answer. It would have aided the jury somewhat, we think, in determining whether the appellant's mind was unbalanced at the time he committed the act for which he was being tried to know when he was first made acquainted with the fact that the prosecuting witness had been guilty of wrongs towards his daughter. The appellant on the morning of the shooting and preceding that event when to the office of a Mr. Fabin an attorney to consult with the attorney concerning the procurement of a divorce for his daughter. While on the witness stand as a witness in his own behalf, he was allowed to state what he did and said while consulting with the attorney, but was not permitted to relate what the attorney said to him. There would seem to be no valid reason for this distinction. The evidence was admissible, if it was admissible at all, on the principle that it tended to show the then physical and mental condition of the appellant. Surely this purpose would have been accomplished much better by showing this entire transaction as it occurred than by the halting effort made by the witness in his endeavor to segregate his part of the conversation from that of the person with whom he was conversing. On cross-examination the appellant was asked the following question: "Now Mr. Constantine, I

will ask you this question, if on Tuesday morning, the 2d day of October, at about from 8 to 20 minutes after 8 in the morning, you did not come into your meat market and go to your bookkeeper, and say to him, substantially, 'Can you run this business for a day or two, if I am not here?' and he says, 'Yes, I think so?' and you said, 'I don't want you to think, I want to know if you can,' and he says, 'Yes.' You then gave your bookkeeper, Ira Williams, \$20 in gold coin, and you told him, 'Go and get me an automatic pistol, and I will kill that son of a bitch,' and that took place in the presence of Henry Weber and you and Mr. Williams there in your place on that occasion?" To the question he answered, "No, sir." In rebuttal the state put a witness on the stand who testified that the occurrences recited in the question took place substantially as therein related. The appellant thereupon sought to show by the witnesses Hardy and Williams that nothing occurred at the time in question such as the question implied and the state's witness related. An objection was interposed and sustained to this offer of proof, to which the appellant excepted. The court seems to have sustained the objection on the theory that the question asked was an impeaching question, on which the appellant could offer no other evidence than his own statement, and that he could only admit or deny the accusation. But such is not the rule. Conceding that the question was an impeaching question and proper as such, the appellant had the right to offer evidence in support of his answer after the state had impeached it, and the court improperly sustained objections to the evidence offered even on that theory. But the question was not properly an impeaching question. The question called for substantive evidence tending directly to support the issue between the state and the appellant, and should have introduced as a part of the state's case in chief, so that the defendant could have met it when presenting his side of the case. The evidence being, therefore, a part of the state's case in chief, it was error not to permit the appellant to contradict it.

For the errors noted, the judgment appealed from is reversed, and a new trial granted.

HADLEY, C. J., and CROW and MOUNT, JJ., concur.

FOLEY v. McDONNELL.

(Supreme Court of Washington. Jan. 15, 1908.)

1. EXECUTORS AND ADMINISTRATORS—ACTIONS ON CLAIMS—PRIOR PRESENTMENT FOR ALLOWANCE.

Under the express provisions of Ballinger's Ann. Codes & St. § 6235, no action shall be brought against an estate, unless the claim shall have first been presented to the executor or administrator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 764-766.]

2. SAME—ALLOWANCE OF CLAIMS—PRESENTATION.

Ballinger's Ann. Codes & St. § 6196, provides that in cases of nonintervention wills the claims against the estate shall be paid within one year from the date of the first publication of notice to creditors to present their claims, etc. Section 6199a provides that upon publication of notice to creditors to present their claims to the executor of a nonintervention will, for a period of time and in the manner required of executors and administrators holding letters testamentary and of administration, the creditors must present their claims to the executor within one year from the date of the first publication of notice, or they will be barred. *Held* that, in the case of a nonintervention will, creditors must present their claims within one year of the publication of notice, or their claims are barred, as in other classes of wills.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 789-805.]

3. WILLS—CONSTRUCTION—TRUST FOR BENEFIT OF CREDITORS.

Where a nonintervention will makes the executrix trustee of the estate for the purpose of paying creditors, only such creditors are meant as qualify by proving their claims within time, as in other estates, and thereby make themselves beneficiaries of the trust.

4. EXECUTORS AND ADMINISTRATORS—ACTIONS AGAINST EXECUTORS—FAILURE TO PRESENT CLAIM—PRESUMPTION.

In an action brought by a creditor against an estate more than five years after testator's death, where the complaint shows no cause for the delay, and does not allege that notice to creditors to present their claims was not published, it will be presumed that the executrix performed her duty by seasonably publishing the notice, thereby barring the action one year thereafter.

Appeal from Superior Court, Clarke County; W. W. McCredie, Judge.

Action by James Foley against Margaret McDonnell. From an order dismissing the complaint on demurrer, plaintiff appeals. Affirmed.

Thos. O'Day and G. R. Percival, for appellant. Milton W. Smith, for respondent.

MOUNT, J. The lower court sustained a demurrer to the complaint in this case. Plaintiff refused to amend, and an order of dismissal was entered. Plaintiff appeals from that order.

The complaint, in substance, alleges: That on April 21, 1896, plaintiff obtained a judgment against Columbus McDonnell for the sum of \$958.62, besides attorney's fees and costs, upon a promissory note. That said judgment was obtained in the state of Oregon after personal service upon said Columbus McDonnell. That subsequently execution was issued in Oregon and returned nulla bona. That at the time said judgment was rendered the said Columbus McDonnell was alive, and that the defendant in this action was his wife. That afterwards, on the 12th day of March, 1901, said Columbus McDonnell, being then the owner of a large amount of property situate in Clarke county in this state, made his will, which, omitting formal parts, is as follows:

"(1) I direct that my just debts and funeral expenses be first paid out of my estate.

"(2) I give and bequeath unto my executrix hereinafter named all my property, both real and personal, wherever situated, in trust for the purposes herein set forth.

"(3) I give, devise, and bequeath unto my beloved wife, Margaret McDonnell, all my property of every kind and nature, real, personal, and mixed, wherever situated.

"(4) I do not give, devise or bequeath anything to my children * * * knowing that my wife will make such provisions for them as will be right and just.

"(5) I hereby nominate, constitute and appoint my wife, Margaret McDonnell the executrix of this my last will and testament, and I direct that no bonds will be required of her, and she is hereby authorized and empowered to sell and dispose of at private sale or otherwise and in any way she shall deem best any or all of my property, both real and personal, without the intervention of any court, and I hereby revoke all former wills and codicils to wills by me made.

"In witness whereof," etc.

That thereafter, on April 29, 1901, said Columbus McDonnell died in Clarke county, Wash., seised of and owning certain property described. That on May 25, 1901, said will was duly probated in Clarke county, Wash., and the defendant herein, Margaret McDonnell, was appointed executrix and accepted the trust, took possession of all of said property, and now holds and claims the same as executrix, legatee, and trustee under such will. That said property is of the value of \$30,000, and passed to defendant by the terms of the will, in trust for the benefit of creditors of said Columbus McDonnell, deceased. That plaintiff is one of such creditors, and that the said estate is solvent, and that there is now more than sufficient to pay all the creditors thereof. That defendant has been requested to pay the plaintiff the amount due upon the said judgment, but has failed and refused to do so. That Columbus McDonnell, deceased, left no property in the state of Oregon, and plaintiff has no plain, speedy, and adequate remedy at law for the recovery of the amount due on said judgment, and applies to the court to compel the defendant to execute the trust, which she is required to do under said will.

It is contended by the respondent that the action is barred under the statute. It will be noticed that there is no allegation that any claim was ever presented to the executrix and allowed as a claim against the estate, or that no notice to creditors was published as required by law. If the action was brought against the defendant as administratrix or executrix of the estate of Columbus McDonnell, deceased, the complaint must show that the claim was first presented to the executor or administrator in order to state a cause of action. Section 6235, Ballinger's Ann. Codes & St.; *McFarland v. Fairlamb*, 18 Wash. 601, 52 Pac. 239.

The appellant argues that the will above set out makes the defendant a trustee of an express trust, and that, inasmuch as the will is a nonintervention will, it was not necessary for the plaintiff to present a claim to the executrix or trustee within one year or at all, because the statute of limitations has no application as between the cestui que trust and the trustee of an express trust. The statute relating to nonintervention wills provides: "In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided in such last will and testament, and that letters testamentary or of administration shall not be required, and where it also duly appears to the court, by the inventory filed, and other proof, that the estate is fully solvent, * * * it shall not be necessary to take out letters testamentary or of administration, except to admit to probate such will. * * * And after the probate of such will and the filing of such inventory all such estates may be managed and settled without the intervention of the court." Section 6196, Ballinger's Ann. Codes & St. It will be noticed that the will in this case does not provide that letters testamentary or of administration shall not be required. It does, however, provide that the executrix shall sell and dispose of all the property as she may deem best without the intervention of any court. Conceding, however, that this will was intended to be, and is, a nonintervention will, still the statute in the same section provides: "That in all such cases the claims against such estates shall be paid within one year from the date of the first publication of notice to creditors to present their claims, unless such time be extended by the court for good cause shown, for a reasonable time." And section 6199a, Ballinger's Ann. Codes & St., provides: "Upon a publication of notice to creditors to present their claims to such executor, for a period of time and in the manner required of executors and of administrators holding letters testamentary and of administration under the laws of this state, said creditors shall be required to present their claims to the said executor within one year from the date of the first publication of said notice, and if they fail to do so their claim shall be barred." These two provisions last above quoted seem to make it clear that in cases of nonintervention wills creditors shall present their claims within one year of the publication of notice, and failure so to do bars such claim the same as in other classes of wills. It is true this court held otherwise in *Moore v. Kirkman*, 19 Wash. 605, 54 Pac. 24, and possibly in other cases. But these cases arose under the statute before 1897, when the amendments above quoted were made to the statute in force at that time. Under the present statute we are of the opinion that it is the duty of the executor, under wills like the one in question, to publish a notice to creditors, and failure of the creditors to file a

claim within the year bars such claim. It is true the will in this case makes the executrix trustee of the estate for the purpose of paying creditors, but this means such creditors only as qualify by proving their claims within time, as in other estates, and thereby making themselves beneficiaries of the trust. When this is done, the rule contended for by the appellant would no doubt apply.

The complaint does not allege that no notice was published, and we must therefore assume that the executrix did her duty, and seasonably published such notice. Columbus McDonnell died in April, 1901. This action was not begun until September, 1906, and no cause is shown for the delay. We are of the opinion, therefore, that the action is barred, and the judgment must be affirmed.

HADLEY, C. J., and CROW, RUDKIN, and FULLERTON, JJ., concur. DUNBAR and ROOT, JJ., took no part.

KERSHNER v. HENDERSON.

(Supreme Court of Washington. Jan. 9, 1908.)

1. MASTER AND SERVANT—RELATION—DETERMINATION—INDEFINITE TERM.

Plaintiff was employed to attend defendant, an invalid, and did so for a few days, when defendant moved to a distant state, leaving plaintiff in possession of his house. Plaintiff remained on the place several months, and then through defendant's attorney, sent him a bill for services rendered as nurse and caretaker. Defendant replied through his attorney with notification to plaintiff to leave the place, which reply was shown plaintiff by the attorney. *Held* to be sufficient notice to terminate the contract of employment, and that there could be no recovery for services rendered after such notice.

2. SAME—ACTIONS FOR WAGES.

In an action for services rendered as nurse and caretaker of property, where the evidence was conflicting as to plaintiff's right to possession of the property as such caretaker, it was a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 121.]

Appeal from Superior Court, Kitsap County; John B. Yakey, Judge.

Action by John W. Kershner against Fitzhugh Henderson. From a judgment for plaintiff, defendant appeals. Reversed.

William C. Keith, for appellant. W. A. McLeod and C. D. Sutton, for respondent.

FULLERTON, J. In this action the respondent sought to recover of the appellant the sum of \$1,250, alleged to be the reasonable value of certain services which he claims to have performed for the appellant at the appellant's special instance and request. The services consisted of waiting upon the appellant for a few days, and acting as caretaker for some two years of certain real estate which the appellant owned situated in Kitsap county. The answer put in issue the allegations of the complaint, and a trial was had thereon resulting in a verdict and judgment

in favor of the respondent for the sum of \$1,000.

The evidence tended to show that the appellant had a stroke of paralysis in the early part of August, 1903, while residing upon the real estate mentioned, and employed the respondent to attend upon him, evidently expecting to recover within a short time. A few days later he suffered from another stroke, which left him in a practically helpless condition, whereupon a nephew came from some place in Virginia and took him to an asylum in that state for treatment, leaving the respondent in possession of his home upon the real estate. The respondent continued to reside on the property until some time the next spring, when he presented to a Mr. Keith, the appellant's counsel, certain demands or bills for services rendered in caring for the real property. These demands were forwarded to the appellant, who replied thereto by saying that the respondent was not in his employ, and directing him to quit and surrender up possession of the place. There was testimony to the effect, although disputed by the respondent, that this notification and this letter was shown the respondent by Keith. The respondent, however, still continued to reside on the place, and later on brought this action as before stated. On the trial of the cause the appellant requested the court to charge the jury to the effect that if they found that appellant did notify the respondent to quit and surrender the premises on receipt of his demand of payment as caretaker for the same, and that this notification was brought to the respondent's attention, the respondent could not recover for any services performed as caretaker of the premises after that time. This instruction was refused, and constitutes one of the principal errors assigned. The instruction should have been given. The contract of employment, if any existed at all, was a contract for an indefinite time, and could be terminated by either party whenever that party so desired by giving notice to the other. The repudiation by the appellant of the respondent's claim of employment, and the notification given by him to the respondent to quit the premises, was a sufficient notice to terminate the contract, conceding that one existed, whenever it was brought to the respondent's attention. No formal service of the notice was required. By presenting his demand for payment to the appellant through Keith, the respondent authorized the appellant to reply through the same source, and, if he did reply to the effect that the contract was at an end, and this reply was shown the respondent, it was sufficient notice to terminate the contract relation. The respondent's possession of the premises was wrongful from that time on, and he cannot recover for any services performed thereafter as caretaker.

The appellant stoutly maintains that the

respondent's possession was wrongful from the beginning, and that he cannot recover for any services as caretaker of the premises. But on this question we think there is a substantial dispute in the evidence, and that the question was one for the jury.

The other errors assigned merit no special consideration.

For the error noted, the judgment is reversed, and a new trial is awarded.

HADLEY, C. J., and MOUNT and CROW, JJ., concur. DUNBAR and ROOT, JJ., not sitting.

MATSON et al. v. JOHNSON et al.
(Supreme Court of Washington. Jan. 15, 1908.)

1. ACKNOWLEDGMENT—DEEDS—VALIDITY BETWEEN PARTIES.

An unacknowledged deed is good as between the parties, and conveys at least an equitable title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 26, 27.]

2. DEEDS — DELIVERY — SUFFICIENCY — INTENT.

Actual manual delivery and change of possession of a deed are not necessary to constitute an effectual delivery; but whether there has been a valid delivery depends on the intention of the grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 118.]

3. SAME—EVIDENCE—SUFFICIENCY.

Evidence held to show that the grantor in a deed intended to consummate the transaction so as to fully vest title in the grantees, notwithstanding the signature was not acknowledged nor the deed delivered even to the grantor's executor until after the grantor's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 625.]

4. EXECUTORS—SALES UNDER COURT'S ORDER—RULE OF CAVEAT EMPTOR—BONA FIDE PURCHASERS.

The rule of caveat emptor applies with full force to sales by administrators or by executors, and the purchaser acquires only the interest of the estate; hence, where a testator had executed a deed of land to certain minors, though it was not acknowledged nor filed for record in the auditor's office, but had been filed in the office of the clerk of the superior court with the decedent's will, a grantee under an executor's deed of the land made by order of court was not a bona fide purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 599, 600.]

Appeal from Superior Court, Kitsap County; John B. Yakey, Judge.

Action by Theodore Matson and others, by their guardian ad litem, against Andrew J. Johnson and wife and Edward Johnson, executor of the estate of F. Lanston, deceased, to set aside an executor's deed. Judgment for defendants, and plaintiffs appeal. Reversed.

S. S. Langland, for appellants. Willett & Willett, for respondents.

RUDKIN, J. F. Lanston died testate in Kitsap county, in this state on the 15th day

of June, 1902. During his last illness, and a few days before his death, he called in one of his neighbors and directed him to prepare a deed and will in order that he might execute them. A deed was accordingly prepared, purporting to convey the property now in controversy to the three minors, who are plaintiffs in this action. The instrument was signed by the grantor in the presence of two witnesses, but was not acknowledged, because there was no officer present authorized by law to take the acknowledgment of deeds. The grantor stated to those present that he would appoint Mr. Johnson as his executor, and would instruct him to have the deed acknowledged and properly executed. The property described in the deed was of the value of about \$100, and was the only real property owned by the grantor. At the time of the execution of this deed, and as part of the same transaction, Lanston executed a will making various small bequests, which are not material here. The following indorsement was made at the foot of the will by direction of the testator: "Ed Johnson are hereby empowered to appear for the notary publick to have inlaid deed executed." What disposition was made of the will and deed after their execution does not appear, but both instruments were delivered to the executor some time after Lanston's death, and were by him filed in the office of the clerk of the superior court, the will under date of June 18, and the deed on June 23, 1902. The deed was not filed for record in the auditor's office until February 1, 1906. At the time of the execution of the deed and will Lanston was the owner of the real property described in the deed and about \$500 cash in bank. The will was admitted to probate, and Johnson appointed executor thereof. On the 25th day of November, 1905, the real property now in controversy was conveyed to the defendants in this action by the executor of the will pursuant to an order of the superior court made and entered in the estate matter. The present action was instituted by the grantees named in the above deed, through their guardian ad litem, to quiet their title as against the purchasers at the executor's sale, and from a judgment in favor of the defendants the present appeal is prosecuted.

Three questions have been presented for the consideration of this court: (1) Was the Lanston deed ineffective for lack of an acknowledgment on the part of the grantor? (2) Was there a delivery of the deed? (3) Are the defendants bona fide purchasers?

First. An unacknowledged deed is good as between the parties in this state. Such an instrument conveyed at least an equitable title. Devlin on Deeds (2d Ed.) § 465; Edson v. Knox, 8 Wash. 642, 36 Pac. 698; Carson v. Thompson, 10 Wash. 295, 38 Pac. 1116; Bloomingdale v. Well, 29 Wash. 634, 70 Pac. 94.

Second. Was there a delivery of the deed? "Actual manual delivery and change of pos-

session are not required in order to constitute an effectual delivery. But whether there has been a valid delivery or not must be decided by determining what was the intention of the grantor, and by regarding the particular circumstances of the case. Where a father had indicated in various ways that certain property should be bestowed at his death upon his infant son, and for that purpose had executed a deed, of which he, however, retained the possession, effect was given to his intention, despite the fact that there had been no manual delivery of the deed." *Devlin on Deeds* (2d Ed.) § 269. In *Atwood v. Atwood*, 15 Wash. 285, 46 Pac. 240, this court said: "In coming to these conclusions, we have not lost sight of the able argument and large array of authorities contained in the brief of appellant, to the effect that the delivery of a deed does not necessarily require any formal act on the part of the grantor; that it is often a question of intention; that a deed may become operative while the manual possession is retained by the grantor. But in such cases, before the court can find a delivery, the intention to consummate the transaction so as to fully vest the title in the grantee must be clearly shown, and neither the findings of fact by the referee nor by the superior court, nor the evidence in the case, satisfies us that the grantor in the deed under consideration ever did anything with the intention that by doing it he had so delivered the deed as to make it presently operative." What was lacking in the *Atwood Case*, viz., the intention to consummate the transaction so as to fully vest the title in the grantee, was in our opinion clearly and unequivocally shown in this case. The will and deed were executed at the same time and as a part of the same transaction. The real property was omitted from the will no doubt advisedly, and all the surrounding circumstances show conclusively that the grantor intended to convey his real property to these minors, that the deed was executed for that purpose, and in our opinion the mere absence of an acknowledgment is not sufficient to defeat his expressed intentions.

Third. The respondents were not bona fide purchasers, as that term is understood in the law. The rule of caveat emptor applies in all its vigor to sales by administrators or executors in this state, and the purchaser acquires only the interest of the estate. *Towner v. Rodegeb*, 33 Wash. 153, 74 Pac. 50, 99 Am. St. Rep. 936, and cases cited.

We are therefore of opinion that the appellants have shown a clear title to the lands in controversy, as against the respondents, and the judgment of the court below is accordingly reversed, with directions to enter judgment as prayed in the complaint.

HADLEY, C. J., and FULLERTON and CROW, JJ., concur. DUNBAR and ROOT, JJ., not sitting.

STATE ex rel. OREGON & W. R. CO. v. ABRAHAM et al., County Com'rs.

(Supreme Court of Washington. Jan. 9, 1908.)

PUBLIC LANDS — TIDE LANDS — VACATING PLAT.

Under the rule that an act covering the subject-matter of a former act without express words of reservation supersedes the former act in so far as it conflicts with it, Act March 14, 1903, p. 139, c. 92, relating to the vacation of plats, if construed as authorizing the board of county commissioners to vacate plats of tide lands made by the board of state land commissioners, is superseded in that respect by Act March 16, 1903, p. 238, c. 127, authorizing the board of state land commissioners to vacate tide land plats, and the jurisdiction to vacate such plats is vested exclusively in the board of state land commissioners.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Mandamus by the state, on the relation of the Oregon & Washington Railroad Company, against D. R. Abraham and others, as board of county commissioners of King county, to compel respondents to proceed with the hearing of a petition for the vacation of a plat. From a judgment of dismissal, the relator appeals. Affirmed.

W. W. Cotton, H. F. Conner, and John P. Hartman, for appellant. Kenneth Mackintosh, E. B. Herald, and A. J. Tennant, for respondent.

FULLERTON, J. On August 28, 1906, the appellant, being then the owner of certain uplands situated in King county (lying outside of the limits of any incorporated city or town), which had been platted into lots, blocks, streets, and alleys, and recorded under the name of "Ladd's Factory Sites," and being the owner, also, of certain tide lands which had been theretofore platted into lots, blocks, and streets by the board of state land commissioners, petitioned the county commissioners of King county to vacate the plats, assigning as a reason therefor that it had become the owner of all the property the plat of which it sought to vacate, and that its interests alone would be affected by the vacation, and that it desired the vacation in order that it might use the property for terminal grounds of its railroad then in the course of construction. The county commissioners assumed jurisdiction, and granted the petition in so far as it related to the uplands, but declined to act upon that portion of the petition relating to the tide lands, on the ground that it had no jurisdiction to vacate, modify, or otherwise change plats of tide lands made by the board of state land commissioners. The appellant thereupon sued out of the superior court of King county a writ of mandamus commanding the county commissioners to reinstate the proceedings and proceed with the hearing of the petition, or show cause at a date fixed by the court why they had not done so. The commissioners appeared at the hearing and demurred to

the application for the writ, which demurred the trial court sustained and dismissed the proceedings. From the judgment of dismissal the railroad company appealed to this court.

The appellant contends that power to vacate plats of tide lands is vested in the board of county commissioners by Act March 14, 1903, p. 139, c. 92; the part of the act relied upon being the first section thereof, which reads as follows: "That whenever three-fourths in number and area of the owners of any townsite, city plat or plats, addition or additions, or part thereof, shall be desirous of altering the plat or plats, replatting or vacating the same or any part thereof, they may prepare a plat or plats, showing such alterations or replat, drafted upon a copy of the existing plat or plats, or that portion desired to be altered, replatted or vacated, and file the same with the clerk of the board of county commissioners, or city council having jurisdiction of the establishment or vacation and control of the streets to be affected, accompanied with a petition for the change desired." The county commissioners contend that jurisdiction to vacate tide land plats is vested in the board of state land commissioners by the third section of the act of March 16, 1903 (Laws 1903, p. 239, c. 127). That section is as follows: "Whenever all the owners and other persons who have a vested interest in the lands abutting on any street, alley, or other public place, or any portion thereof, in any of the state granted, tide or shore lands lying outside of the limits of any incorporated city or town which have been platted, or which hereafter shall be platted, shall petition the board of state land commissioners, by filing a petition therefor with the Commissioner of Public Lands, the board of state land commissioners is authorized and empowered to vacate any such street, alley or public place, or part thereof, and all such streets, alleys and other public places and portions thereof which shall be so vacated shall be platted and appraised in the manner provided for the platting and appraising of similar lands: provided, that where the area of such streets, alleys or other public places so vacated may be determined from the plat already filed as provided by law it shall not be necessary to survey said street, alley or other public place so vacated, but the area thereof may be determined from such plat already filed." We are of the opinion that the contention of the board of county commissioners must prevail. While the act relied upon by the appellant if it stood alone might be construed as broad enough to vest in the board of county commissioners power to vacate plats of tide lands made by the board of state land commissioners, yet it is evident that the Legislature did not so intend, for the reason that two days later they vested this very power in another board. Nor can the jurisdiction be held to be concurrent. If the first

act did grant the power contended for to the board of county commissioners, it was superseded in that respect by the subsequent act, under the familiar rule that an act covering the subject-matter of a former act without express words of reservation supersedes the former act in so far as it conflicts with it.

The judgment of the lower court is right, and must be affirmed. It is so ordered.

HADLEY, C. J., and MOUNT and CROW, JJ., concur.

In re OREGON & W. R. CO.
OREGON & W. R. CO. v. ABRAHAM et al.
(Supreme Court of Washington. Jan. 9, 1908.)

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Petition by the Oregon & Washington Railroad Company for the vacation by D. R. Abraham and others, as board of county commissioners, and another, of a plat. From a judgment granting insufficient relief, the petitioner appeals. Dismissed.

W. W. Cotton, H. F. Conner, and John P. Hartman, for appellant. Kenneth Mackintosh, E. B. Herald, and A. J. Tennant, for respondents.

PER CURIAM. The controversy forming the subject-matter of this appeal ceased to exist by the judgment of this court in the case of State ex rel. Oregon & Washington Railroad Company v. Abraham, 93 Pac. 325.

The appeal will therefore be dismissed.

STATE ex rel. ESPY ESTATE CO. v.
BOARD OF COM'RS OF PACIFIC
COUNTY.

(Supreme Court of Washington. Jan. 15, 1908.)

1. DRAINS—ASSESSMENTS—AMOUNT.

County commissioners are without power to assess for ditch purposes a greater sum than the amount of the benefits conferred by the improvement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Drains, § 75.]

2. SAME—LEVY OF ASSESSMENT—POWERS.

Where a county created a drainage district, and partially completed a ditch under the act of March 19, 1890 (Laws 1889-90, p. 652, c. 21), and the statute was subsequently held unconstitutional and the curative act of March 19, 1895 (Laws 1895, p. 142, c. 79), provided for new proceedings whereby the obligations incurred under the unconstitutional act might be made a lien on the property benefited to the amount of the benefits, the question of the amount of benefits conferred was one for the board acting under the curative statute, and they were not bound by the acts of the former board under the void statute.

Appeal from Superior Court, Pacific County; A. El. Rice, Judge.

Application by the state of Washington, on the relation of the Espy Real Estate Company, a corporation, for the punishment of

the board of county commissioners of Pacific county for contempt, consisting of an alleged failure to obey a writ of mandamus issued to the board in proceedings for mandamus by relator against the board. From a judgment sustaining a demurrer to the affidavit and dismissing the application, relator appeals. Affirmed.

Sol Smith, for appellant. J. J. Brumbach and H. W. B. Hewen, for respondent.

FULLERTON, J. This is a continuation of the controversy a statement of which is found in the case of *Epy Estate Co. v. Pacific County*, 40 Wash. 67, 82 Pac. 129. After the remittitur went down in that case, the trial court issued a writ of mandamus to the board of county commissioners of Pacific county requiring them to create a fund, pursuant to the provisions of the statute of 1895, for the payment of the indebtedness incurred as set forth in the application for the writ. The board proceeded as directed, and on the hearing found that the lots and parcels of lands subject to assessment were not benefited in an amount equal to the sum now outstanding in principal and interest incurred in the construction of the ditch; but found that the utmost such lands were benefited was an amount equal to the principal of such indebtedness, and for this sum they caused an assessment to be made. The appellant conceived this to be in disobedience of the mandatory order, and instituted this proceeding to punish the commissioners for contempt. A demurrer was interposed and sustained to the affidavit asking for a writ to show cause, and, on the appellant's electing to stand thereon, a judgment of dismissal was entered. This appeal was taken therefrom.

The appellant in its affidavit asking for the writ does not in any wise impugn the motives of the commissioners. It is not charged that they fraudulently or corruptly made the finding that the lands subject to assessment were not benefited to an amount equal to the outstanding obligations, or that the lands were, in fact, benefited in a greater sum than the commissioners levied thereon. The affidavit is silent on these questions. It must be presumed, therefore, that the commissioners performed their full duty, and assessed the lands to the full amount of the benefits conferred upon them by the improvement. These considerations conclude the case against the appellant. Both by the statute under which the commissioners acted and by the fundamental law the commissioners were without power to assess against the lands a greater sum than the amount of the benefits the improvement conferred upon them. This was so held by this court in *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368. In that case we said: "Costs to be assessed for local improvements cannot exceed the benefits conferred. Section 3 of the act of

1895 (Laws 1895, p. 142, c. 79), in effect, so provides. It requires the county commissioners to ascertain the aggregate cost of the ditch and apportion the same to each lot, tract of land, etc., according to benefits resulting from the improvements, not exceeding the amount of said benefits. Under this provision the cost may be less or equal to the benefits. For all portions of the cost exceeding the benefits no assessment can be made on the property benefited." See, also, *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Town of Elma v. Carney*, 9 Wash. 466, 37 Pac. 707; *New Whatcom v. Improvement Co.*, 9 Wash. 639, 38 Pac. 163; *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. Since, therefore, they levied to the full extent of their powers, they cannot be punished for a failure to levy more.

The contention to the effect that the present board of county commissioners in making the assessment are bound by the acts of the former board had under the void statute of 1890 (Laws 1889-90, p. 652, c. 21) is not well taken. Inasmuch as the work performed in pursuance of that statute benefited certain real property affected by it, it was proper for the Legislature to recognize the moral obligation to pay the costs of the improvement, and provide a method by which that moral obligation could be turned into a legal one and made a lien on the property benefited up to the amount of the benefits. But the Legislature was without power to make, and it did not attempt to make, the original assessment a lien on the property without further proceedings. As the act of 1890 was void the proceedings had under it were void, and new notices to the owners of the property and an opportunity to be heard were necessary before the costs of the improvement could be made a fixed lien. The question of the amount of the benefits conferred, therefore, was for the present board to determine, and they did not exceed their powers when they undertook to and did determine it.

The judgment is affirmed.

HADLEY, C. J., and CROW, MOUNT, and RUDKIN, JJ., concur.

JENNINGS et al. v. LENTZ.

(Supreme Court of Oregon. Jan. 21, 1908.)

1. ATTACHMENT—ATTACHING CREDITOR—BONA FIDE PURCHASER.

B. & C. Comp. § 302, provides that from the date of an attachment until it is discharged, or the writ is executed, plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration, provided the sheriff's certificate required by section 301 is filed as required by section 303. *Held*, that an attaching creditor, in order to obtain the rights of a bona fide purchaser, is bound to prove that he in fact acquired his lien in good faith and without notice of outstanding equities.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 553.]

2. WORDS AND PHRASES—"GOOD FAITH."

Good faith is an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all belief of facts which would render the transaction unconscientious. A want of that caution and diligence which an honest man of ordinary prudence is accustomed to exercise in making purchases is in judgment of law a want of good faith, quoting Words and Phrases, vol. 4, p. 3117. See, also, Words and Phrases, vol. 8, p. 7672.

3. VENDOR AND PURCHASER—NOTICE.

Whatever is sufficient to put a subsequent purchaser on inquiry must be considered legal notice to him of the facts inquiry would have disclosed by the exercise of reasonable diligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 477-494.]

4. ATTACHMENT—ATTACHING CREDITORS—NOTICE—RECORDS.

B. & C. Comp. §§ 300-303, 5359, provide that nonexempt real estate shall be liable to attachment by the sheriff making a certificate and filing the same with the clerk of the county in which the property is situated, and that from the date thereof the plaintiff, as against third persons, shall be a purchaser in good faith, and that every conveyance of real property within the state which shall not be recorded within five days after its execution shall be void as against a subsequent bona fide purchaser whose conveyance shall be first recorded. L. having sold certain land to D. for a consideration, half of which was secured by a mortgage thereon, D. within an hour conveyed the property to G., who conveyed it to complainants' grantors. The mortgage to L. was recorded, but the deed to D. was not, and defendant, relying on a statement by L. that he had conveyed the land to D., attached it for D.'s debt, after which the deeds to D. and complainants were recorded. Held, that L.'s statement that he had conveyed the land to D. was rebutted by the record which showed that the title still remained in L., which record only gave notice of the facts therein stated and warned defendant to make further inquiries as to D.'s title to the premises, so that he was not a bona fide purchaser under his attachment, entitled to priority against complainants.

Eakin, J., and Slater, C., dissenting.

Appeal from Circuit Court, Baker County; William Smith, Judge.

Suit by Martha J. Jennings and others against William Lentz. From a decree for complainants, defendant appeals. Affirmed.

W. L. Patterson, for appellant. C. P. Murphy, for respondents.

KING, C. This is a suit to remove a cloud upon the title to 100 acres of land in Baker county, and is brought here on an appeal from a decree of the circuit court in favor of plaintiffs. On and prior to April 23, 1902, the land was owned and in the actual possession of Frank Lentz. On the date named, in consideration of \$500, one half of which was paid in cash and the balance by a note due one year after date, secured by a mortgage on the property, he executed a warranty deed to the premises to Robert Duvall, who, within an hour after receipt of the conveyance, and without entering into possession, executed a like deed therefor to Mary E. Gardner, who had furnished the money for the purchase, and for whom, with-

out the grantor's knowledge, Duvall was acting as agent in the purchase from Lentz. On the same day that the deed to Duvall was executed Lentz recorded his mortgage in the proper records of that county, and soon thereafter removed from the land, leaving no one in possession, and, so far as manifested by the evidence, no one was in actual possession of the land when this suit was filed. The deed to Gardner was given subject to the Lentz mortgage, which with the deed from Lentz to Duvall was left by Mrs. Gardner with M. S. Hughes, who was to take them to the clerk's office for record; but for some unexplained reason they were not recorded until 30 days later. On October 3, 1903, Mrs. Gardner, by warranty deed and for a valuable consideration, transferred the property to plaintiffs' grantors, who, by like deed, conveyed it to plaintiffs. Shortly after Frank Lentz had deeded the property to Duvall he informed the defendant of the transfer, to whom it appears Duvall was indebted in the sum of \$145, which indebtedness was incurred some time prior to the transfer of the property by Lentz. Defendant then had his attorneys examine the records of the county for the purpose of ascertaining if the debtor still owned the property, which resulted in their finding a record of the mortgage on the property from him to Frank Lentz, but the record title to the land in the mortgagee. Without further information than the statement by Frank Lentz to the effect that on April 23d he had conveyed the land to Duvall, and the record of the mortgage named, the defendant, on May 7, 1902, caused the land to be attached in an action filed against Duvall on the \$145 claim, in which proceeding judgment was obtained, execution issued thereon, and the property sold to satisfy the judgment, which property was purchased by defendant, he receiving a sheriff's deed therefor, through which he here claims title.

There is no controversy as to the facts, leaving for adjudication the question as to which has the better title under the facts as stated. Our statute provides that any real property of the debtor not exempt from execution shall be liable to attachment, which shall be attached by the sheriff making a certificate containing the title of the cause, names of the parties, and description of the realty, with a statement showing the property to have been attached, and filing the same with the clerk of the county in which the property is situated; that from the date thereof until discharged, or writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith for a valuable consideration; that his rights as such shall attach immediately upon the filing of such certificate; and that every conveyance of real property within this state which shall not be recorded within five days after the execution thereof shall be void as against any subsequent purchaser in good faith for

a valuable consideration, whose conveyance thereof shall be first duly recorded. B. & C. Comp. §§ 300-303, 5359.

In order, therefore, to determine whether defendant's title is superior to that of plaintiffs, it is necessary to ascertain only whether, in lieu of the course pursued, he would have been a purchaser in good faith, if with the limited knowledge of the status of Duvall's title at the time of the levy defendant had purchased the property from him and paid a valuable consideration therefor. If answered in the affirmative, he has the better title and must prevail; otherwise plaintiffs have the superior title, and are entitled to the relief demanded. Under the law as it existed prior to the adoption of the statute mentioned, to the effect that after the filing of the attachment proceedings the creditor shall be deemed a purchaser in good faith, the creditor, by virtue of his attachment, acquired a lien only on the actual interest which the debtor had in the property. *Riddle v. Miller*, 19 Or. 468, 23 Pac. 807. It is obvious that the statute on this point was intended to modify this rule, and to give the attaching creditor, regardless of the actual condition of the debtor's title, additional protection by placing him in the same position as a bona fide purchaser for value, in case of failure on the part of the real owner to observe the requirements of the recording acts. But, in construing these acts, it has been repeatedly held, and has become a settled rule in this state, that an attaching creditor, although placed on an equality with a purchaser by this statute, cannot insist on any greater protection than would be granted to such purchaser; and, in suits in equity, the claim of a bona fide purchaser for value is an affirmative defense, which must be pleaded, thereby placing the burden of proof in such cases upon the party relying thereon. *Weber v. Rothchild*, 15 Or. 385, 15 Pac. 650, 3 Am. St. Rep. 162; *Wood v. Rayburn*, 18 Or. 3, 22 Pac. 521; *Rhodes v. McGarry et al.*, 19 Or. 222, 23 Pac. 971; *Marks et al. v. Miller*, 21 Or. 317, 28 Pac. 14, 14 L. R. A. 190; *Simpkins v. Windsor*, 21 Or. 382, 28 Pac. 72; *Dimmick v. Rosenfeld*, 34 Or. 101, 55 Pac. 100; *Flegel v. Koss*, 47 Or. 366, 83 Pac. 847; *Haines v. Connell*, 48 Or. 469, 87 Pac. 265; 88 Pac. 872. In discussing this feature, Mr. Chief Justice Thayer, in *Rhodes v. McGarry*, *supra*, observes: "It seems to me that, notwithstanding the language of the Code above set out, an attaching creditor, in order to be deemed a purchaser in good faith of the property as against one having an outstanding equity, must allege and prove all the facts necessary to establish that character of ownership in favor of a purchaser of such property as against such an equity. It can hardly be supposed that the Legislature intended, by the provision of the Code referred to, to place an attaching creditor upon any more favorable grounds, with reference to

his rights in the property attached, than those occupied by a purchaser of the property; nor to deem the former a purchaser in good faith, except under the same circumstances in which the latter would be deemed such a purchaser. Any other view would lead to absurd consequences, and occasion injustice. It would enable a party to cut off an outstanding equity by resorting to an attachment when he would not be able to accomplish it by a direct purchase of the property. Such a result was obviously not contemplated by the adoption of the said provision of the Code." As the answer is sufficient to bring the defendant's position within the rule announced, it becomes necessary to determine whether this plea is sufficiently supported by the evidence to entitle defendant to be deemed a purchaser in good faith. Words & Phrases (vol. 4, p. 3117) defines "good faith" as being "an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious." And the rule is that "a want of that caution and diligence which an honest man of ordinary prudence is accustomed to exercise in making purchases is, in judgment of law, a want of good faith" (Id., vol. 4, p. 3117); and whatever is sufficient to put a subsequent purchaser on inquiry must be considered legal notice to him of those rights, and when the purchaser omits to observe that ordinary precaution he must be charged with a knowledge of all facts he might have learned by the exercise of reasonable diligence in making inquiry as to matters to which his attention had been directed. *Dembitz, Land Titles*, §§ 132, 133; *Bent v. Coleman et al.*, 89 Ill. 364; *Citizens' Nat. Bank v. Dayton*, 116 Ill. 257, 4 N. E. 492; *Pringle v. Phillips*, 5 Sandf. (N. Y. Sup. Ct.) 165.

The precise question, as here presented, is before this court for the first time, and we are referred to no case in which the point under a similar state of facts as here disclosed has been distinctly passed upon, nor have we found one, but an application of the principles stated are decisive of the issues presented. The result hinges upon the sufficiency of the inquiry made in reference to the debtor's rights in the premises. In this connection it is urged that the mortgage from the debtor to his grantor, being of record, when considered with the grantor's statement to the creditor to the effect that he had conveyed the property to the debtor on a prior date, without further inquiry, constituted sufficient evidence of the debtor's ownership therein to justify the attachment. It will be remembered, however, that the record at the same time disclosed the title to the property to be in Frank Lentz. When, therefore, it is made to appear from the record that the title is in a person other than

the debtor, the record of a mortgage on the land, given by such debtor, is not notice, or satisfactory evidence, that he is the owner of the premises mortgaged. A public record does not give notice of any facts not stated in it, or of facts that a person would not expect in the ordinary course of business to be found there. A person in the ordinary course of business affairs would not have expected to find a mortgage of record given by Duvall, unless he also appeared by the records to be the owner of the property mortgaged. From this it follows that, when the record disclosed the title to be in Lentz, the record of a mortgage given to him by Duvall did not constitute notice or evidence that the latter was the owner of the mortgaged premises. *Webb, Record Title*, §§ 158, 160; *Security Trust Co. v. Loewenberg*, 38 Or. 159, 62 Pac. 647; *Roberts v. Bourne*, 23 Me. 165, 39 Am. Dec. 614; *Pierce v. Odlin*, 27 Me. 341; *Losey v. Simpson et al.*, 11 N. J. Eq. 246; *Bingham v. Kirkland et al.*, 34 N. J. Eq. 229; *Calder v. Chapman*, 52 Pa. 359, 91 Am. Dec. 163; *Doswell v. Buchanan*, 3 Leigh. 365, 23 Am. Dec. 280.

The statement by Frank Lentz that he had conveyed the land to Duvall was rebutted by the record itself showing the title still to be in the person making the statement. The record of the mortgage was not only inadequate for the purpose claimed, but even if considered in connection with defendant's inquiry from Duvall's grantor, it cannot be held sufficient, in the absence of further investigation, to impart such notice as "an honest man of ordinary prudence is accustomed to act upon," when making a purchase of real property; and if not such as would be deemed sufficient for an actual purchaser, it must be conceded under the adjudications of this state, that it is insufficient to protect the defendant as an attaching creditor. As stated in *Bent v. Coleman*, 89 Ill. 364, 368: "A person about to purchase this tract of land would naturally inquire into the title of the vendor. He would ascertain his source of title. This is the ordinary, and usually the first, inquiry." It appears that Duvall was known to be in the vicinity of the land when the attachment was made, and had defendant intended to purchase the land outright, it would have been his duty to ascertain, and he would probably have endeavored to learn, whether he had any title to convey. Had this been done, it is presumed he would have been told the truth, resulting in no purchase having been made; and, if made, defendant, under such circumstances, would have taken nothing under his deed as against Duvall's successors in interest. He could not, under such circumstances, have been a purchaser in good faith; and, as stated, he can be in no better position as an attaching creditor. When defendant was informed of the sale to Duvall, and that he became the owner, it had reference only to his ownership on April 23d, which was prior to the attach-

ment, and it did not necessarily follow that the title was in him at the time of the levy; nor does it appear that defendant was in any manner informed that his debtor either was, or claimed to be, the owner at that time, and, finding the record evidence of title in the debtor's supposed grantor, this was sufficient to put him on inquiry, and made it imperative that he should make further investigation before acting, or else assume the risk of Duvall having no title. "It was not incumbent on him to exhaust every possible source of information." (*Johnson v. Erlandson*, 14 N. D. 518, 105 N. W. 722), but it was his duty to use at least reasonable diligence in that respect, or, in the event of his failure to do so, to abide the consequences. When he examined the records, and, in place of finding the title in the debtor, found it in a third party, he was in a far different position than that of a person attaching property on a claim against one, who, under the records, holds the apparent title; for Duvall, when the levy was made, had neither the apparent nor the actual title. In the case of *Davis v. Lutkiewicz*, 72 Iowa, 254, 33 N. W. 670, to which our attention is directed, the grantor had the deed in his possession, which the court held was better evidence of title than a record thereof, as the record would have imparted no notice not disclosed by the original deed, and when the person holding and exhibiting such instrument represented himself to be the owner of the property, the purchaser had such evidence of title as to justify him in acting accordingly. In this respect the case mentioned is very different from the one under consideration, in which the debtor had neither the actual title, nor any evidence thereof; nor does it appear that he claimed to be the owner of the land, nor that, after discovering the status of the title of record, any effort was made to ascertain from any one likely to be in possession of the desired information whether at the time of the levy the debtor either was, in fact, or claimed to be, such owner.

After a careful consideration of the facts disclosed by the record, and of what we deem the principles of law applicable thereto, as announced and recognized by previous decisions of this court, we are impelled to hold that plaintiffs have the better title, on the ground that, when the records of the clerk's office of the county in which the land may be situated fail to show any title in the debtor, but disclose it to be in another, and the title in fact is not in such debtor, and the extrinsic evidence at hand is insufficient to warrant the creditor in acting on the theory of the debtor being the owner thereof, such attaching creditor must abide the risk incurred by his levy, and take only "what accident throws into his net as he finds it, and he cannot claim the benefit of a fiction to get more than his debtor really owned." *Cowley v. McLaughlin*, 141 Mass.

181, 182, 4 N. E. 821. See, also, *Haynes v. Jones*, 5 Metc. (Mass.) 292; *Hamilton-Brown Shoe Co. v. Lewis*, 7 Tex. Civ. App. 509, 28 S. W. 101.

The decree of the court below should accordingly be affirmed.

EAKIN, J. (dissenting). I am unable to concur in the foregoing opinion. The real point upon which the decision turns is that the purchaser from a grantee whose deed is not recorded is, by reason of that fact alone, put upon inquiry, and consequently charged with notice of the prior unrecorded conveyance from such grantee; and I refer to the rights of the attaching creditor as those of a bona fide purchaser for value without notice, as that is what the statute says he shall be deemed. It is conceded that if the grantee's deed is on record, a purchaser from him is not put upon inquiry or notice of a prior unrecorded deed. He takes a good title, if in fact ignorant of it. There are many cases where there can be no record of one's title, such as title by descent or by adverse possession, but that fact cannot prejudice one's right to purchase or attach. I dare say that it is an everyday occurrence that purchases are made from grantees who have not yet had their deeds recorded. In such a case the purchaser is bound to search the record for a conveyance from the apparent owner, as disclosed by the record, as well as from his own vendor, but the fact that his vendor's deed is not recorded cannot put him upon any other inquiry, or charge him with notice of any other facts. B. & C. Comp. § 5359, provides that: "Every conveyance of real property within this state hereafter made, which shall not be recorded as provided in this title, within five days thereafter, shall be void against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded." From this it seems clear that the recording statute has no reference to the title acquired by the purchaser from one whose deed is not recorded, but affects the title only of him who fails to record his deed until a prior deed from his grantor, of which he had no notice, is recorded. The statute contains no suggestion or imputation that one can purchase only from him who appears, from the record, to be the owner, or if he does so, it is at his peril. The effect of the opinion in the case is that, if one purchases from a person who is not disclosed by the record to be the owner, he gets only such title as his grantor actually has at the time of the purchase, regardless of the provisions of the recording statute. This is the holding in *Flynt v. Arnold*, 2 Metc. (Mass.) 619. The effect of our statute (B. & C. Comp. §§ 302, 5359) is that the attachment can reach the actual interest had in the property by the debtor at the time of the attachment, and as to this remedy the registration laws have

no application whatever, and the attachment can reach only such interest, except that in case of a prior conveyance by the debtor such conveyance will be deemed void if it is unrecorded and the creditor is without notice of its existence, and in that case the attachment will be effectual as though said deed had not been made, and the recording statute, by its terms or intentment, applies only to such unrecorded instrument. In the case of *Davis v. Lutkewiez*, 72 Iowa, 254, 33 N. W. 670, it is said: "An unrecorded deed is valid as to the whole world, except a subsequent purchaser for a valuable consideration without notice. Surely the deed itself is better evidence of title in the grantee than the record of the deed. This deed the mortgagor had and held when *Davis & Sons* took their mortgage. A record of it would have imparted no notice not imparted by the original instrument." The court, further speaking of the case of *Flynt v. Arnold*, supra, which holds that "one who purchases land from a person holding an unrecorded deed purchases at his peril," says: "But this proposition cannot be sustained, because, under our registry laws, the holder of an unrecorded deed has a complete title except as against a subsequent good-faith purchaser without notice." *Johnson v. Erlandson*, 14 N. D. 518, 105 N. W. 722, was a case where *Hogenson*, the original owner, conveyed to *Erlandson*, which conveyance was never recorded. *Erlandson* executed a deed to *Baker*, but it was never delivered, and was fraudulently put on record by *Baker*, and plaintiff claims through *Baker*. The question was whether the fact that the deed to *Erlandson* was unrecorded put plaintiff on inquiry or charged her with notice of *Erlandson's* rights. The court say, in substance, it is urged that the failure to record the deed from *Hogenson* to *Erlandson* was sufficient to put plaintiff upon inquiry and charge her with notice of the facts which inquiry of *Erlandson* would have disclosed. The court further say: "We cannot agree with this argument. The fact that the record failed to show that *Hogenson* had ever parted with his title was constructive notice of *Hogenson's* rights and nothing more. The only subject of inquiry suggested by that fact was the question as to whether or not *Erlandson* had unconditionally acquired *Hogenson's* title. It is admitted that such is the fact." The Massachusetts cases hold that the attaching creditor is not protected in his levy unless the attachment debtor had at the time of the levy a record title, on the theory that that is his means of information (*Cowley v. McLaughlin*, 141 Mass. 181, 4 N. E. 821; *Haynes v. Jones*, 5 Metc. [Mass.] 292); but in the former case the court suggest that if he knew at the time of the attachment that the title had passed to the attaching debtor it might be sufficient. In *Davis v. Lutkewiez*, supra, it may be inferred that the mortgagees had knowledge of the conveyance to their mortgagor, and in *John-*

son v. Erlandson, *supra*, the plaintiff, in taking her title under an unrecorded deed, had the same character of information of its execution as the attaching creditor had in this case, *viz.*, the statement of the grantor in the unrecorded deed. In this case the attaching creditor had information from Lentz, Duvall's grantor, that a conveyance had been made to Duvall; and I am convinced that in such a case a purchaser for value without notice is not, by reason of the absence of the vendor's title from the record, put upon inquiry or charged with notice that the grantee in the unrecorded deed had previously conveyed the property.

SLATER, C., concurs in this dissent.

MILLER v. ACHURCH et al.

(Supreme Court of Oregon. Jan. 21, 1908.)

1. EXECUTION—SALE—SETTING ASIDE—ACQUIESCENCE.

Parties acquiescing in the action of the court in setting aside an execution sale and ordering a resale are bound thereby.

2. SAME—PERSONS WHO MAY QUESTION VALIDITY OF SALE.

At common law the confirmation of a sale on execution might be objected to and the same set aside by plaintiff, defendant, or the purchaser.

3. SAME.

B. & C. Comp. § 242, subd. 1, providing that plaintiff in execution shall be entitled to an order confirming a sale thereunder, unless the judgment debtor or his representatives shall file objections, does not deprive any other interested person than the debtor of the right to object who by common law possessed that right; and hence plaintiff may object.

4. SAME—RESALE—STATUTORY PROVISIONS.

The mere fact that plaintiff in execution refused to receipt to the sheriff for the amount of his bid, or to credit his judgment, would not of itself be evidence of an abandonment or withdrawal of his bid, so that there would be in law no sale to him within B. & C. Comp. § 242, subd. 4, providing that on a resale the purchaser's bid at the former sale shall be deemed renewed and to continue in force, and no bid shall be taken except for a greater amount.

5. SAME—RIGHT TO WITHDRAW BID.

Property having been struck off to plaintiff in execution, he had no right to withdraw his bid, and could be excused only by an order of the court, and, if the sale was considered by the court regular, it had the power to enforce the same, and cancel the judgment *pro tanto*, notwithstanding plaintiff's refusal to receipt to the sheriff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 652.]

6. SAME.

Under B. & C. Comp. § 242, subd. 4, providing that on a resale on execution the purchaser's bid at the former sale shall be deemed renewed, and no bid shall be taken except for a greater amount, and subdivision 3, providing for a repayment to the former purchaser if the property sell for a greater amount to another, where the court in ordering a resale did not include therein any release of plaintiff in execution from his bid, he continued to be bound by it, and the sheriff was bound to consider it as renewed.

Appeal from Circuit Court, Wallowa County; William Smith, Judge.

S. E. Miller obtained a judgment against H. Achurch and James L. Hammack, partners, and a decree of foreclosure. The First Bank of Joseph also obtained a judgment in the same suit against Hammack and wife, which was adjudged to be a second lien on the property. The First Bank of Joseph moved for confirmation of a resale under execution, to which motion Miller filed objections, and moved to set aside the resale, and, from an order overruling his objections and denying his motion and confirming the sale, Miller appeals. Reversed and remanded.

On July 23, 1906, plaintiff obtained a judgment against Achurch & Hammack for the aggregate sum of \$2,933.40, besides costs and disbursements, and a decree for the foreclosure of a mortgage lien upon some town lots to pay the judgment. Defendant First Bank of Joseph also obtained judgment in the same suit against Hammack and wife for the aggregate amount of \$265, which was adjudged to be a second lien and to be paid out of the proceeds of the sale of the property, which was ordered to be made. Execution issued, and on September 25, 1906, a sale took place at which the plaintiff bid \$2,500 for the property, and the same was struck off to him. A return to that effect was made and filed October 6, 1906, from which it appears, after reciting the fact of the sale, that "Miller after bidding said above named sum refused to pay over the money so bidden for said real property and refused to credit the above named sum so bidden on the judgment and execution herein, and has since continued to refuse and neglect to pay over said sum or credit said judgment therewith." Afterwards, on the 27th of October, the sale was set aside on plaintiff's motion, a new execution ordered issued, and the property resold, and the costs thereof charged to plaintiff. At the second sale, plaintiff not appearing, the property was struck off to George Mack for the sum of \$1,500, and a return to that effect was made and filed December 12, 1906. Defendant, First Bank of Joseph, moved for confirmation of the sale, but on May 14, 1907, plaintiff filed his objections to confirmation of the sale, and moved that it be set aside, on the ground that the property had been sold for \$1,000 less than his bid at the former sale, contrary to the provisions of section 242, subd. 4, B. & C. Comp. An order was made overruling the objections and denying plaintiff's motion, and confirming the sale, from which he appeals.

C. E. Cochran, for appellant. C. H. Finn, for respondents.

SLATER, C. (after stating the facts as above). The reason which moved the court to set aside the first sale does not appear in the record, nor is it material that it should, for the action of the court in setting aside the sale was not questioned by any

person interested, and it became legally binding on all parties who acquiesced. If plaintiff has a right to be heard on his motion at all, it seems to us that this second sale must be set aside as a result of the positive declaration of the statute that "upon a resale, the bid of the purchaser at the former sale shall be deemed to be renewed and continue in force, and no bid shall be taken except for a greater amount." Section 242, subd. 4, B. & C. Comp. The question presented by the record is not inadequacy of price alone, but the legal effect of the act of the sheriff in refusing to recognize plaintiff's former bid as renewed and continuing in force, and accepting another bid of a smaller amount. If one is the highest bidder, and the officer fraudulently refuses to recognize his bid and reports the property sold on a different bid, he is entitled to have the sale vacated. Freeman on Ex. p. 1787. It is argued by defendants' counsel that plaintiff cannot be heard to object to the confirmation of the sale for two reasons, namely: (1) That by the terms of section 242, subd. 1, B. & C. Comp., no one but the judgment debtor, or, in case of his death, his representative, may object to the confirmation; and (2) that there was in law no sale to plaintiff under the first execution, but that by refusing either to receipt to the sheriff for the amount of his bid or credit his judgment plaintiff abandoned his bid and thereby withdrew it.

The first of these questions involves the proper construction of the statute. Where the procedure to secure the confirmation of a sale on execution has not been regulated by statute, it has been uniformly held that plaintiff, defendant, or the purchaser is entitled to prosecute a motion or action to set aside a sale, because each of them may be aggrieved thereby, unless from some cause he has ceased to be prejudiced or affected by it, or by his own misconduct he has brought about the wrong of which he complains. Thus a purchaser may move to vacate a sale because the proceedings are not sufficient to give him title, or for any other reason rendering it unconscionable to enforce his bid, and the plaintiff may likewise do the same because some irregularity, misconduct, mistake, or misapprehension has resulted in a sale for an inadequate price, leaving his judgment wholly or partially unsatisfied. 2 Freeman on Ex. § 305; Beckwith v. Mining Co., 87 N. C. 155. And in Flint v. Phipps, 20 Or. 340, 25 Pac. 725, 23 Am. St. Rep. 124, Mr. Chief Justice Strahan delivering the opinion, this court announced the general rule that "courts always exercise full control over their process, so that suitors shall not be prejudiced either in the form of the writ or the manner of its execution"—citing McKee v. Logan, 82 Mo. 524. Has the statute in question then taken from plaintiff the right, which he would otherwise possess, to object to the confirma-

tion of a sale, and has the salutary power, which courts have been accustomed to exercise over their process so that suitors shall not be prejudiced either by the form of the writ or by the manner of its execution been so limited by this statute that it cannot be exercised except upon objections by the judgment debtor or in case of his death by his legal representative? The statute referred to is as follows: "Whenever real property is sold on execution the provisions of this section shall apply to the subsequent proceedings: (1) The plaintiff in the writ of execution shall be entitled, on motion therefor, to have an order confirming the sale, at the term next following the return of the execution, or if it be returned in term time, then at such term, unless the judgment debtor or in case of his death, his representative, shall file with the clerk ten days before such term, or if the writ be returned in term time then five days after the return thereof, his objections thereto." The purpose of this statute, as we read it, is not to prescribe how and under what circumstances a sale may be confirmed, excluding all others, but the plain intendment of it is to fix a time before which confirmation may not be taken by the plaintiff, and to preserve to the judgment debtor or to his legal representative a reasonable time in which he may object, and, in case he does not object within the time therein specified, he shall be deemed foreclosed of that right. The statute expressly recognizes the right of plaintiff to move for confirmation and of the judgment debtor to object, but there is no language therein which by reasonable intendment can be construed to deprive any other interested person than the plaintiff of the right to move for confirmation, who by common law possessed that right, nor to deprive any other interested person than the judgment debtor of the right to object at any time before confirmation. Upon this view of the law plaintiff had the right to present his objections and have the facts determined.

The second point urged by defendants is also insufficient, we think, to deprive plaintiff of the relief he seeks. The mere fact that he refused to receipt to the sheriff for the amount of his bid or to credit his judgment would not of itself be evidence of an abandonment or a withdrawal of his bid. That would be determined by the reason for his refusal. If the proceedings had been so irregular as not to give him a title, or if by an excusable mistake he had inadvertently bid a sum less than the amount of his execution (Ontario Bank v. Lansing, 2 Wend. [N. Y.] 260), he then had sufficient reason to cause the sale to be set aside, and, having knowledge of such facts, he could not receipt or credit his judgment without waiving the right to object to confirmation. Moreover, the property having been struck off to him, he had no right to withdraw his bid, and could be excused only by an order of the

court. 2 Freeman on Ex. § 300. If the sale had been considered by the court fair and regular, it had the power to enforce the sale and cancel the judgment pro tanto, notwithstanding plaintiff's refusal to receipt. These matters were heard and passed upon by the court, and it ordered a resale. The parties acquiesced, and its decision cannot now be questioned by this court. At common law an order for a resale released the purchaser from his bid and entitled him to a return of his deposit (Freeman on Ex. § 304), but section 242, subd. 4, B. & C. Comp., provides that, "Upon a resale, the bid of the purchaser at the former sale shall be deemed to be renewed and continue in force and no bid shall be taken except for a greater amount," and subdivision 3 of the same section provides for a repayment to the former purchaser the amount of his bid if the property sell for a greater amount to any other person. The court in ordering a resale did not include therein any release of the plaintiff from his bid, and he continued, therefore, to be bound by it. Hence the sheriff could not ignore it, but he was bound to consider it as renewed.

From these considerations, the order of the court appealed from should be reversed, and the cause remanded, with directions to set aside the sale and order a resale.

(51 Or. 107)

OREGON ELECTRIC RY. CO. v. TERWILLIGER LAND CO. et al.*

(Supreme Court of Oregon. Jan. 21, 1908.)

EMINENT DOMAIN — PAYMENT OF AWARD — WAIVER OF APPEAL.

B. & C. Comp. § 5102, provides that on payment into court of the damages assessed in condemnation proceedings the court shall give judgment appropriating the lands in question. Section 5103 authorizes either party to appeal, but that the appeal shall not stay the proceedings so as to prevent the corporation from taking possession of the lands. Section 5105 declares that if the judgment is reversed and a new trial had, and at the second trial the jury assesses more damages than before, judgment shall be given in favor of defendant for the excess, and section 5106 provides that, if defendant accept the damages paid to the clerk, he waives his right of appeal, and, if he does not, such sum shall remain to abide the event of the appeal, and shall be invested for the benefit of whom it may concern. *Held*, that where after judgment plaintiff paid the damages awarded into court, and took possession of the land, its right to appeal from the judgment on the award and from the court's order directing the payment of such deposit to the owner of the land was waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 665.]

Appeal from Circuit Court, Multnomah County; A. L. Frazer, Judge.

Proceeding by the Oregon Electric Railway Company against the Terwilliger Land Company and others to condemn land for a railroad right of way. A judgment was rendered on a verdict assessing defendant's damages, from which plaintiff appealed af-

ter paying the amount specified into court, and also appealed from an order on defendant's motion directing the clerk forthwith to pay the money so deposited to the South Portland Improvement Company, the then owner of the land. On motion to dismiss both appeals. Granted.

Wirt Minor, for appellant. A. E. Clark, for respondents.

MOORE, J. This is a motion to dismiss two appeals. A statutory proceeding, analogous to an action at law, was commenced by the Oregon Electric Company, a corporation, against the Terwilliger Land Company, a corporation, to condemn a strip of land 60 feet in width over and across certain lots in the city of Portland. A supplemental complaint was filed in which it was stated that, after the proceedings were instituted, the defendant conveyed the land described in the complaint to the South Portland Improvement Company, a corporation, which latter artificial being was, by order of court, made a party defendant. The answers admitted most of the allegations of the complaint, but averred, *inter alia*, that the true value of the land and the damage which would result from the taking thereof was \$65,000. The replies put in issue the allegations of new matter in the answers, and the cause having been tried, a verdict was returned June 15, 1907, to the effect that the plaintiff was entitled to appropriate the land specified upon the payment to the South Portland Improvement Company of \$27,745, which sum was found by the jury to be the measure of the damages sustained. Five days thereafter the money so awarded was paid into court, upon the deposit of which a judgment was rendered on the verdict, and the plaintiff immediately appealed. The court on July 24, 1907, on the defendants' motion, ordered the clerk forthwith to pay to the party adjudged to be entitled thereto the money so deposited, from which determination the plaintiff took another appeal.

It appears from the undisputed affidavits filed in this court on the part of the defendants that, after the judgment of condemnation was given, the plaintiff took and retained possession of the land, and built thereon a railroad which it is using for its own purposes, and that, pursuant to the order of the court, the South Portland Improvement Company received from the clerk the money so deposited. The defendants' counsel, in support of the motion interposed, invoke a clause of the organic law of this state which declares: "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in case of the state, without such compensation first assessed and tendered" (Const. Or. art. 1, § 18); and insist that, when the plaintiff left with the clerk the sum of mon-

*For opinion on motion to retax costs, see 93 Pac. 930.

ey assessed as damages, the deposit was a voluntary payment of the award, whereby the South Portland Improvement Company became immediately entitled thereto, and that the plaintiff, having taken possession of the land and built its railroad thereon, thereby accepted all the benefits that could be obtained from the adjudication and waived its right to appeal therefrom. The plaintiff's counsel, disputing these propositions, maintain that the fundamental law of Oregon, which asserts that "no person's property shall be taken by any corporation, under authority of law, without compensation being first made or secured in such manner as may be prescribed by law" (Const. Or. art. 11, § 4) permits the remuneration for private property when taken for a public use by any corporation to be secured; that the enactments adopted conformable to the superior rule, authorizing such compensation, when assessed by a jury as damages, to be deposited in court, is intended to secure the payment of the award; and that the statute expressly grants to a plaintiff corporation the right to appeal from a judgment appropriating land, and also confers authority to take possession of the premises, notwithstanding a stay of proceedings may have been executed.

The legislative act referred to, so far as deemed involved herein, contains the following clauses: "Upon the payment into court of the damages assessed by the jury, the court shall give judgment appropriating the lands, property, rights, easements, crossing, or connection in question, as the case may be, to the corporation, and thereafter the same shall be the property of such corporation." B. & C. Comp. § 5102. "Either party to the action may appeal from judgment therein, in like manner and like effect as in ordinary cases; but such appeal shall not stay the proceedings so as to prevent such corporation from taking such lands into possession, and using them for the purposes of the corporation, or from proceeding to exercise the right, enjoy the easement, or make the crossing or connection condemned." Id. § 5103. "If a judgment in such action be reversed, and a new trial had, and at such second trial the jury assesses the damages of the defendant at a greater sum than before, the court shall, in addition to the judgment appropriating the land, right, easement, crossing, or connection as provided in section 5102, give judgment in favor of the defendant for such excess." Id. § 5105. "If the defendant accept the damages paid to the clerk, he waives his right of appeal, and if he do not, such sum shall remain in the control of the court, to abide the event of the appeal, and if the defendant or unknown owner of the land do not appear and claim the same, it shall be invested for the benefit of whom it may concern, as in case of unclaimed moneys in the sale and partition of lands." Id. § 5106. In case a judgment of condemna-

tion is reversed and a new trial ordered, the statute makes no provision that judgment shall be given in favor of the plaintiff for the excess of the money which it has paid into court, if, at a subsequent hearing, the jury assess the defendant's damages at a less sum than was awarded to that party at a prior trial. It will be remembered that section 5102, supra, provides that, when the damages assessed in the manner indicated have been paid into court, a judgment shall be given appropriating the lands to the plaintiff corporation, "and thereafter the same shall be the property of such corporation." It would seem from this clause that the right to the land or easement was thus forever transferred. The property, however, is held by a plaintiff corporation so long apparently as the judgment remains unreversed, for a perusal of section 5105, supra, would seem to indicate that, in case a new trial is had, the court is required to give another judgment of condemnation. It would thus appear that, while a party to a judgment may appeal from some specified part thereof (B. & C. Comp. § 5109), the questions of law appearing upon the transcript may be reviewed (Id. § 555), and the judgment reversed or modified in the respect mentioned in the notice of appeal, and not otherwise (Id. § 556), and that on a reversal of a judgment of condemnation the cause is remanded for retrial on all the issues. It is quite probable that a recognition of such assumed consequences prompted the plaintiff's counsel to specify in the notice of appeal that a review of the entire judgment was sought, and not that part of it which expressed the measure of damages awarded.

The right to take an appeal from a judgment of condemnation is expressly granted by the legislative assembly to a plaintiff corporation. B. & C. Comp. § 5103. An examination of the clause contained in that section of the statute, "but such appeal shall not stay the proceedings so as to prevent such corporation from taking such lands into possession," etc., would seem to denote that the right of a plaintiff, after securing a judgment of condemnation, to use the lands for the purposes of the corporation, notwithstanding a stay of proceedings, is limited to appeals taken by a party defendant. An undertaking on appeal does not stay the proceedings, unless, in addition to the appellant's stipulation to pay all damages, etc., that may be awarded against him on the appeal, he further engage, if the judgment be for the recovery of the possession of real property, that during his possession thereof he will not commit, or suffer to be committed, any waste thereon, and that, if the judgment or any part thereof be affirmed, he will pay the value of the use and occupation of such property, so far as affirmed, from the time of the appeal until the delivery of the possession thereof. B. & C. Comp. § 550. The section of the stat-

ute last mentioned also declares that, to secure a stay of proceedings under a judgment, given for the recovery of money, the undertaking, in addition to the prior stipulations adverted to, must further provide that the appellant will satisfy the judgment, so far as it is affirmed. In the case at bar the judgment given was based upon a recovery of money, the sum of which was paid into court before an appropriation of the land was granted, and the undertaking given by the plaintiff, on the first appeal, contains the necessary stipulations to show that it was designed to prevent the defendants from securing the money so deposited until the appeal could be heard and determined in this court. The undertaking on appeal, specified in section 5103, *supra*, when executed as a stay of proceedings, was evidently not designed to interdict an appellant in any manner, but to restrain a respondent from taking advantage of the provisions of a judgment. The undertaking mentioned, when given to stay proceedings under a judgment of condemnation, regardless of which a plaintiff corporation may take possession of the land or easement specified, is, in our opinion, the undertaking executed by a party defendant. The only provision made by statute for securing the payment of the award is to be found in section 5106, *supra*, to the effect that, if the defendant or unknown owner of the land do not appear and claim the money, it shall be invested for his

benefit. If section 4 of article 11 of the Constitution is applicable to condemnation proceedings, when instituted by a railway company, the legislative assembly has failed to prescribe the manner whereby the compensation of land taken for a public use may be "secured." In the absence of such enactment, we think a fair construction of the several provisions of the statute quoted warrants the conclusion that when a plaintiff corporation pays into court the damages awarded as the measure of the injury sustained, and thereupon secures a judgment of appropriation, it cannot, after taking possession of the land, prosecute an appeal from the judgment under which the use of the premises for the purposes of the corporation has been secured, though the necessary undertaking for a stay of proceedings may have been given. By voluntarily accepting the benefits of the judgment the plaintiff herein, like any other appellant, waived its right to appeal from the adjudication rendered. *Moore v. Floyd*, 4 Or. 260; *Portland Construction Co. v. O'Neill*, 24 Or. 54, 32 Pac. 764; *Bush v. Mitchell*, 28 Or. 92, 41 Pac. 155; *Jacksonville School Dist. v. Crowell*, 33 Or. 11, 52 Pac. 693; *Moores v. Moores*, 36 Or. 261, 59 Pac. 327.

It is unnecessary to consider the second appeal, for, if the first cannot be maintained, the other is equally unavailing.

The motion is therefore allowed, and both appeals will be dismissed.

(75 Kan. 406)

STATE v. WOLFLEY.

(Supreme Court of Kansas. May 11, 1907.)

1. CRIMINAL LAW—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

A conviction upon a criminal charge will not be reversed because of an omission of the trial court to instruct the jury that the facts relied upon to justify a conviction upon circumstantial evidence must be consistent with each other, where no separate request was made with regard to that proposition, and where the court gave an instruction regarding the effect of circumstantial evidence, which was otherwise sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1883, 1884, 1906, 2011.]

2. SAME—PRESUMPTION OF INNOCENCE—REASONABLE DOUBT—INSTRUCTION.

An instruction that "the law presumes and you [the jury] must presume him [the defendant] to be innocent of the crime with which he is charged * * * until he is proved guilty beyond a reasonable doubt by competent evidence" sufficiently indicates that the presumption of innocence is an affirmative force, equivalent to so much evidence in his behalf, at least where no request is made for a more specific statement of the proposition, except in connection with other matters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1905-1922.]

(Syllabus by the Court.)

On petition for rehearing. Denied.

For former opinion see 89 Pac. 1046.

MASON, J. In a petition for a rehearing the defendant's attorneys have again presented at considerable length and with much force the grounds relied upon for a reversal. These have all been re-examined with care, but the court remains of the opinion that no reversible error has been shown. Some of the contentions to which more specific attention has now been directed perhaps require fuller discussion than they received in the original opinion. It was there said that, although many of the instructions asked in behalf of the defendant were correct statements of the law, no complaint could be made of their refusal, because the charge of the court included everything really necessary to be said on the subjects to which they related. It is now pointed out that the instructions given with regard to circumstantial evidence did not include the statement that the circumstances relied upon to establish the defendant's guilt must all be consistent with each other. The correctness of such statement as a proposition of law of course cannot be questioned. Its truth is so obvious, however, as to make its omission from the charge a matter of doubtful importance under any circumstances. There was nothing in what was said to the jury to suggest that a conviction might be based upon facts that were inconsistent with each other. They were informed in set terms that in order to convict upon circumstantial evidence they must find each essential fact in the chain of circumstances to be true beyond a reasonable doubt. They could not by the evidence be convinced

beyond a reasonable doubt of the existence of two separate circumstances or conditions that were inconsistent with each other. A jury may be given credit for knowing this as well before as after it is told to them. It is true that in stating what is essential to a conviction upon circumstantial evidence it is usual to mention the necessity that all the matters relied upon shall be consistent with each other, but this is done ordinarily by way of recital or assumption. The accepted formula is that the facts proved must be not only consistent with each other and with the defendant's guilt, but inconsistent with any other reasonable hypothesis. All reference to the requirement that the facts should be consistent with each other is sometimes omitted, however, doubtless on the theory that it is superfluous. See *State v. Asbell*, 57 Kan. 398, 411, 46 Pac. 770; *State v. Andrews*, 62 Kan. 207, 61 Pac. 808; *Burrill*, Circum. Ev. 737; *Blashfield*, Instr. to Jur. § 314. We cannot regard its omission in the present case as material error, especially as no separate request was made covering this particular point. In four of the instructions asked with regard to the effect of circumstantial evidence the phrase in question was used, and in five others on the same subject and substantially of the same scope it was omitted. The matter was never presented to the court as an independent proposition.

Complaint is also made that the jury were not sufficiently advised concerning the character and effect of the legal presumption of the defendant's innocence. This presumption amounts to something more than a requirement that the state must take the initiative and prove its case beyond a reasonable doubt. It is tantamount to affirmative evidence, and it is right that the jury should so understand it. Five instructions were asked in which this matter was referred to, but no one of them stopped with the mere statement of the rule. In each there was an admonition to observe it, or a direction how to apply it, that was at least unnecessary, and gave the instruction something of the aspect of an argument for the defendant. The distinction between the presumption of innocence and the requirement that the prosecution shall prove its case beyond a reasonable doubt is fully treated in *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481, upon which case the defendant places great reliance. There a conviction was reversed because of the refusal of the trial court to give an instruction reading as follows: "The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty. To the benefit of this presumption the defendants are all entitled, and this presumption stands as their sufficient protection, unless it has been removed by evidence proving their guilt beyond a reasonable doubt."

In the present case the following language was embodied in the charge: "The law pre-

assumes and you must presume him [the defendant] to be innocent of the crime with which he is charged, and each and every material ingredient thereof, until he is proved guilty beyond a reasonable doubt by competent evidence; and if the evidence in this case leaves upon the minds of the jury any reasonable doubt of the defendant's guilt, the law makes it your duty to acquit him." This must be regarded as a sufficient indication that the presumption of innocence is a positive force on the side of the defendant, at least in the absence of a request for a more explicit statement of that principle disassociated from other matters. Substantially the same language has been held sufficient, even where a specific request was made to instruct that the presumption had the force of evidence, as in the cases here quoted from: "A still further contention is that the court erred in refusing the eighth instruction asked by defendant. The instruction reads as follows: 'The court instructs the jury that the law presumes the innocence, and not the guilt, of the defendant, and this presumption is to be *taken by you as evidence in the defendant's behalf*. This presumption of innocence goes with the defendant throughout the trial, and protects him at every stage of the proceedings, entitling him finally to an acquittal at your hands, unless overcome by other evidence which satisfies you of his guilt beyond a reasonable doubt.' It was refused as asked, the words in italics stricken out, and then given. While the presumption of innocence in favor of a defendant upon trial for a criminal offense is a rebuttable presumption, it requires evidence to overcome it, and to show his guilt beyond a reasonable doubt before he can be convicted, yet the calling it evidence adds no significance to its force or effect. After all, it is still a presumption, which the law indulges in his favor. No error was committed, we think, in the refusal of this instruction as asked." *State v. Hudspeth*, 159 Mo. 178, 209, 60 S. W. 136, 144. "Another instruction refused by the court was as follows: 'The law in this case presumes * * * that every man is innocent, * * * and this legal presumption of innocence is to be regarded by the jury in every case as a matter of evidence to the benefit of which the defendant is entitled.' The judge had already of his own motion charged the jury that 'the law presumes every man innocent until he is proven guilty by proper legal evidence, and if you have any reasonable doubt as to the guilt of the defendant, arising from the evidence, you shall acquit him.' * * * The instruction given was a correct exposition of the law. * * * As to the special language of the instruction asked, that 'this presumption of innocence is to be regarded by the jury in every case as a matter of evidence to the benefit of which the defendant is entitled,' we are of the opinion that there was no error in the failure of the judge to use it. It is true that

Mr. Greenleaf uses the same language in one place in section 34, vol. 1, of his work on Evidence, and refers to *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533. Considering the whole of section 34 and the *New Hampshire* case, we see nothing in either that makes the use of the language in question essential or indispensable, nor do we think its use would have strengthened the instruction given. The law presumes, according to all of the authorities, every man innocent of any crime with which he may be charged until and unless the testimony shows beyond a reasonable doubt that he is guilty of it. The charge is in the usual language and is sufficient, and there was consequently no error in the refusal to give the one asked by the defendant's counsel." *A. L. Wooten v. State of Florida*, 24 Fla. 335, 353, 5 South. 39, 1 L. R. A. 819.

It is contended that the state was permitted to introduce evidence the purpose and effect of which was to suggest to the jury that the defendant had been guilty of other crimes than that for which he was on trial. The court is of the opinion, however, that the evidence was not offered for that purpose, and had no substantial tendency in that direction.

Upon the entire record the defendant appears to have had a fair trial. The petition for a rehearing is denied.

(77 Kan. 44)

SPARKS v. SMELTZER.

(Supreme Court of Kansas. Jan. 11, 1906.)

1. PLEADING—DEMURRER.

A demurrer may not be employed to rid a single cause of action or defense of irrelevant, redundant, or improper matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 415.]

2. APPEAL—REVIEW—INTERMEDIATE ORDER.

Where a paper designated as a demurrer is treated as the equivalent of a motion, to strike out a decision of the same is no more than an intermediate order, which cannot be reviewed until final judgment is rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 369, 370, 704.]

(Syllabus by the Court.)

Error from District Court, Lane County; Chas. E. Lobdell, Judge.

Action by George T. Sparks against H. C. Smeltzer. Judgment for plaintiff, and defendant brings error. Dismissed.

Jno. F. Wood, for plaintiff in error. J. S. Simmons, for defendant in error.

JOHNSTON, C. J. On January 10, 1906, H. C. Smeltzer was awarded a judgment against George T. Sparks and others quieting his title to a tract of land in Lane county. The judgment was based alone on a publication notice. On April 24, 1906, Sparks began this action to vacate that judgment, and his petition contained 14 distinct paragraphs, purporting to state reasons for setting the judgment aside. The sufficiency of the petition was challenged by a demurrer alleging that

the facts stated did not constitute a cause of action against Smeltzer. The court overruled the demurrer, and Smeltzer then filed what he termed a "special demurrer," separately attacking 8 paragraphs of the petition on the grounds that they "do not state or tend to state nor partially state any cause of action against the said defendant." A motion was made by Smeltzer to strike the so-called special demurrer from the files, but this was denied, and later the court sustained the demurrer taken separately to the several paragraphs of the petition, and this ruling has been brought here for review. Is the ruling reviewable at this time?

While the petition is divided into a number of paragraphs, it is not contended that each is a separate cause of action, nor that all together constitute more than a single cause of action. On the demurrer addressed to the entire count it was held that a cause of action was stated, and, as we have seen, the special or second demurrer was directed at parts of this cause of action. The demurrer, whatever it may be called, cannot be used to rid a single count of irrelevant, redundant, or improper matter. Under our Code it is hardly accurate to designate demurrers as general or special, as we have no other than the statutory demurrer, and it has no other office than to challenge the sufficiency of pleadings upon one or more of the six specific grounds prescribed by the Code. *Mayberry v. Kelly*, 1 Kan. 116. Some of the parts of the petition attacked by the misnamed demurrer state inferences of fact and conclusions of law, and some are only argumentative in character, and the evident purpose of the challenge was to eliminate from the petition these impertinent and irrelevant matters. A somewhat similar pleading has been treated as a motion to strike out (*Seaton v. Chamberlain*, 32 Kan. 239, 4 Pac. 89), and this one may have been so regarded by the trial court; but if it is so treated, the decision of the motion is no more than an intermediate order, which cannot be reviewed prior to the final judgment or decree. Neither is the ruling refusing to strike out the special demurrer open to review at this time.

The proceeding must therefore be dismissed.

(76 Kan. 577)

GEMMEL v. FLETCHER.

(Supreme Court of Kansas. Jan. 11, 1908.)

On petition for rehearing. Denied.

For former opinion, see 92 Pac. 713.

GRAVES, J. A petition for rehearing has been filed in this case, presenting some matters not discussed in the opinion which we deem proper to consider now.

It is urged that as the undisputed evidence and the findings of the court show that David L. Gemmel paid the original purchase price

of \$10 an acre for the lands in question, and it does not appear that he has been repaid therefor, he should at least be credited with that amount on the judgment entered against him. As an abstract proposition this statement has great force; but as presented in this case it has another phase. The petition contains a statement of facts claimed to constitute the resulting trust sought to be enforced. The answer of David L. Gemmel rests upon the claim that he is the owner in fee of the land and that no trust of any kind exists in relation thereto in favor of the plaintiff. No suggestion is made in it that he has equitable interests of any kind which ought to be protected. The pleadings, therefore, present no issue under which the parties were called upon to, or could properly, present testimony concerning this or any similar equity. The evidence showing payment of the purchase price of the land by David L. Gemmel was not presented for the purpose of establishing a claim for its recovery, but it necessarily came out as a part of the history of the case. This evidence, and the finding of the court thereon, were therefore immaterial under the issues presented by the pleadings. The plaintiff had no occasion or opportunity to show that this money had been refunded to the defendant, and in the absence of any evidence or issue upon the subject we do not feel at liberty to find that it was not, especially when the evidence offered for other purposes indicates that it may have been and probably was repaid.

When David L. Gemmel promised his dying wife to convey the land to the plaintiff, no suggestion was made by him of any right or claim on account of this purchase money, improvements, or other equity. When, afterwards, plaintiff demanded a conveyance of the land, no claim was then made of this kind; and when confronted with an action to compel performance of his promise, where he was called upon to disclose fully all the rights, legal or equitable, or both, which he claimed to have in the land, no such suggestion was made. It appears that he had means in his possession belonging to his wife out of which he might have paid himself; that he and his wife kept their business matters separate and had accounts against each other. While these circumstances were not deemed sufficient to justify an affirmative finding that this money had been refunded, it indicates what the evidence might have shown if the case had been tried under proper issues. We regard these facts as a suggestion that the order here requested in behalf of the defendant as plain equity might, and probably would, be an injustice to the plaintiff. This situation is due to the failure of the defendant, David L. Gemmel, to plead this matter, so that all the facts relating thereto could be presented to the trial court and the rights of the parties intelligently determined. As the case was presented here, we felt compelled to make the order of affirm-

ance as it now stands, and are not satisfied that justice would be subserved by any change therein.

It is urged that the defendant in error could have no standing in equity until he tendered to plaintiff in error an amount equal to the sum invested by him in the land. We do not understand that equity requires a tender where nothing is due. If the plaintiff in error had equities of any kind in the property in controversy, he ought to have so informed the trial court, and sought protection there. This court cannot consider questions outside of the pleadings and proof, and which were not presented by the parties to the district court.

As to the other questions presented by the petition for rehearing, we have nothing to add to what is contained in the opinion heretofore filed.

The petition for rehearing is denied.

(77 Kan. 63)

O'NEILL v. RISINGER et ux.

(Supreme Court of Kansas. Jan. 11, 1908.)

MINES AND MINERALS—MINING LEASE—FORFEITURE.

An oil and gas lease, giving the lessee the exclusive right for a term of years to enter upon lands and prospect and procure oil and gas, and providing, in case no well is drilled within six months, all rights and obligations under the lease shall cease and determine, unless the lessee shall elect to continue the lease in force by payment in advance of an annual rental of \$1 per acre for all the land, and which contains no covenant, promise, or agreement on the part of the lessee to drill a well, or pay the rental, or do anything, is a mere naked option, and the failure of the lessee to drill a well within six months or to make a payment of rental forfeits the lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, §§ 204-207.

(Syllabus by the Court.)

Error from District Court, Wilson County; L. Stilwell, Judge.

Action by Joseph Risinger and Nellie Risinger against James O'Neill. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

John J. Jones and Eugene Mackey, for plaintiff in error. Mikessell & Wilson, for defendants in error.

PORTER, J. On November 2, 1905, Joseph Risinger and wife made and delivered to James O'Neill an oil and gas lease of certain lands in Wilson county of which they were owners. Two of the provisions of the lease are involved in this proceeding. The first reads: "In case no well for oil or gas be drilled on said premises within six months of date hereof, all rights and obligations secured under this contract shall cease and determine, unless the second party shall elect to continue this lease in force as to all of said premises by paying an annual rental of \$1 per acre, payable yearly in advance,

for all of said premises." The second is as follows: "Provided, however, that the second party shall have the right at any time to terminate this lease, by surrendering this lease, released from records, and shall thereafter be released from all obligations and liabilities under the same." No well for oil or gas was drilled within six months of the date of the lease, nor at any time, and the lessee never paid any rental. In July, 1906, the owners of the lands, who are defendants in error, brought this action to recover from plaintiff in error the sum of \$480 for rental of the lands for one year. The petition set up a copy of the lease and alleged that no well for oil or gas was drilled on any of the premises within six months of the date of the lease, nor at any time since, and then alleged that defendant, O'Neill, "elected to retain said premises under the said lease, by failing to surrender the said lease to plaintiffs upon the expiration of the six months within which time a well for oil or gas was to be drilled on said premises." The \$480 was alleged to be due, that no part of it had been paid, and that a demand had been made for it and refused. A demurrer to the petition was overruled by the trial court, and defendant, electing to stand upon his demurrer, brings the case here for review.

Plaintiff in error contends that the lease is merely an option, giving him the right to operate thereunder by drilling a well for oil or gas within six months from the date the lease was executed, and that a failure to do this forfeited the lease unless he elected to continue it in force by paying in advance the annual rental of \$1 per acre, and that a failure either to drill a well within six months or to pay the rent forfeited the lease and the rights of all parties thereunder. On the other hand, it is the contention of defendants in error that the general provision giving the second party the right to terminate the lease at any time by surrendering it, released from the records, controls, and that the failure of plaintiff in error to surrender the lease under this provision continued it in full force and effect. Defendants in error rely upon the doctrine that a "lessee cannot set up his own default in order to terminate the lease, or escape liability under its provisions." The doctrine contended for is stated in *Brown v. Cairns*, 63 Kan. 584, 66 Pac. 639, the syllabus of which reads: "Covenants in a lease, providing for its termination upon failure of the lessee to comply with specified conditions, are for the benefit of the lessor only; and the lessee cannot, by a breach of its covenants, abrogate the lease and thus secure advantage from his own default." The doctrine has no application to a lease of this character. It would undoubtedly control if the lease in question contained covenants requiring the lessee to do anything; for instance, if it required the lessee to drill an oil or gas well within a certain period, his failure to per-

form his covenant could not be taken advantage of by him to declare a forfeiture. But the lease does not bind the lessee to do anything. It is a mere naked option. Under it the control of the premises remains in the grantors. The lessee has the right, if he sees fit, to enter upon the premises and prospect for oil or gas. In case oil or gas is found, the lease provides what shall be done with it, and what the rights and obligations of both parties shall be; but nowhere in the lease does the lessee agree that he will drill a well, or that he will enter upon the premises for any purpose. The absence of any covenant in the lease requiring the lessee to drill a well, or even to enter upon the lands and prospect for oil or gas, or to pay rental for such privileges, creates the distinction between this case and cases like *Brown v. Cairns*, supra, where the lessee was obliged by the terms of the lease to perform certain things. The lease here being a mere option, the doctrine declared in *Brown v. Cairns* has no application. If authorities are needed in support of this proposition the following are directly in point: *Glasgow v. Chartiers Oil Co.*, 152 Pa. 48, 25 Atl. 232; *Snodgrass v. South Penn Oil Co.*, 47 W. Va. 509, 35 S. E. 820. The lease in this case provides in plain language that it shall be no longer binding upon either party in case no well be drilled for oil or gas within the first six months, unless the second party shall elect to continue it in force by paying an annual rental per acre. This provision protects the lessor by preventing the property from being tied up indefinitely; for, if the lessee has failed to complete a well within six months, the lessor knows that the lease has expired, unless within that time the lessee has extended it by making payments in advance for one year. The clause in the lease providing that the lessee should have the right at any time to terminate the lease by surrendering it canceled is a general provision, and must be construed in connection with the other clause, which expressly declares that a failure to drill within six months or to pay rent shall terminate the lease. The latter clause does not pretend to exclude the first from becoming operative. It follows that the demurrer to the petition should have been sustained.

The judgment will be reversed, and the cause remanded, with directions to sustain the demurrer.

(77 Kan. 1)

SHELTON v. BORNT et ux.

(Supreme Court of Kansas. Jan. 11, 1908.)

APPEAL—HARMLESS ERROR.

In an action for damages for unlawfully removing plaintiff's household goods from a dwelling house into the street, where it is admitted on the trial that under the pleadings plaintiff is not entitled to recover any damages for injury to her property, and it appears that she suffered no physical injury of any kind, and the only claim for damages is based upon mental suffering, fright, humiliation, and disgrace occa-

sioned by the acts of defendant in removing the goods, the judgment will not be reversed for alleged error in sustaining a demurrer to the evidence, since it appears that plaintiff was only entitled to nominal damages.

Porter, J., dissenting.

(Syllabus by the Court.)

Error from District Court, Saline County; R. R. Rees, Judge.

Action by Flora Shelton against L. Bornt and Minnie H. Bornt. Judgment for defendants, and plaintiff brings error. Affirmed.

C. M. Holmquist, for plaintiff in error.
Z. C. Millikin, for defendants in error.

PORTER, J. Flora Shelton brought this action to recover damages for the unlawful acts of the defendants in forcibly depriving her of the possession of two rooms in a dwelling house and in removing therefrom her household goods. The petition set forth that on January 9, 1902, she was in the lawful possession of two rooms in a dwelling house in Salina; that on that date the defendants, with wanton and malicious intent to injure, damage, and humiliate the plaintiff, unlawfully broke into, entered, and took possession of said rooms, and removed therefrom plaintiff's household goods, and pitched them into the street. She sued for \$1,000 damages. The case was tried to the court and a jury. At the conclusion of plaintiff's testimony the court sustained a demurrer to the evidence, and this is alleged as error.

The evidence disclosed the following facts: The defendants are husband and wife. The dwelling house in question belonged to the wife; but the husband had some care and control over it, made repairs, and served notices to tenants as agent. Defendants lived in another house on an adjoining lot. In August, 1901, they rented the dwelling house to L. S. Conner, who was to have possession until the following May. On November 30, 1901, Conner rented two of the rooms to plaintiff, and she paid him \$6 for the first month. He gave her a receipt, and also a written statement that she was to have the privilege of occupying the rooms on the same terms until March 1, 1902. About January 1st Conner arranged to remove to Missouri. He surrendered his lease and served the following written notice upon plaintiff: "Salina, Kansas, Jan. 4, 1902. Mrs. Shelton: You are hereby notified to vacate the two rooms you now occupy on or before Jan. 7, 1902. Reason why: I no longer occupy building. L. Bornt, Agent. L. S. Conner, Renter." She told Conner she would get out as soon as she could find rooms. On January 7th L. Bornt, as agent, served her with another written notice to leave. On the 9th day of January plaintiff had arranged to vacate the premises and secured another house. She was downtown for the purpose of procuring a dray to remove her goods. During her absence Mr. Bornt took some men and entered the rooms and began to remove her house-

hold goods and to place them in the street. When she returned and found the men removing her goods in this manner, she was frightened and went downtown and complained to the county attorney and to the mayor. She returned to the house, and found both defendants there, and inquired if she could go in and get some of her property, which was missing. The husband, in the presence of the wife, informed her that the house was locked to her. The wife said: "You had better let her in." She secured the rest of her goods, and soon afterwards they were loaded upon a dray and taken to her new quarters. The evidence showed that the weather was clear, and that the damages, if any, to the property, were trifling. No act of assault or violence was offered to plaintiff or any member of her family. In fact, there is no allegation in the petition of any damages to plaintiff's person or property.

During the trial the following admission was made by plaintiff: "It was conceded by the plaintiff on the trial of this cause that her amended petition did not entitle her to any recovery of damage on account of the injury, if any, to her property, and that she based her right of recovery upon alleged trespass upon her personal rights, and not upon her property rights." The purpose or object of the foregoing admission on the part of plaintiff's attorney is inexplicable, except upon the theory that the petition failed to allege that the person or property of plaintiff was injured. In view of this admission that there was no damage sustained to property, and the fact that the evidence shows that plaintiff suffered no physical injury, there remained nothing upon which to base a claim of damages, except mental suffering caused by the humiliation and disgrace which would naturally follow from having one's household goods emptied into the street. The rule adopted by this court years ago, and followed in numerous cases, denies recovery for injuries caused by mental pain, anguish, or humiliation, except when accompanied by some physical injury to the person. *City of Salina v. Trosper*, 27 Kan. 544; *West v. Telegraph Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; *A. T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453; *Railroad Co. v. Dalton*, 65 Kan. 661, 70 Pac. 645; *Manser v. Collins*, 69 Kan. 290, 76 Pac. 851. It becomes, therefore, unnecessary to look further into the record for alleged error, because, in case we were to determine that the court erred in sustaining the demurrer, the judgment must nevertheless be affirmed, on the ground that nothing but nominal damages were shown.

The judgment will be affirmed.

JOHNSTON, C. J., and BURCH, MASON, SMITH, GRAVES, and BENSON, JJ., concurring.

PORTER, J. (dissenting). I am unable to concur in the doctrine that damages may never be recovered for mental suffering, except as an incident to some physical injury or damage to the person. This is the general rule as applied to cases of negligence, for two sufficient reasons: (1) Such damages are regarded as too remote to justify recovery in cases of negligence, because they could not reasonably be anticipated to result from the accidental or unusual combination of circumstances. (2) The law looks with disfavor upon them, because the proof of their existence lies often wholly within the breast of the one who claims to have suffered, and their allowance would open the door to fraud. I have no quarrel with the rule as applied to cases arising out of negligence, but the reasons suggested for the rule have no application to a case of willful tort. The authorities quite generally agree that in a case like the present the plaintiff would be entitled to recover for disgrace and humiliation suffered by having her family and household goods put into the street, provided she first show that some physical damage was sustained by her. *Moyer et al. v. Gordon*, 113 Ind. 282, 288, 14 N. E. 476; *Kimball v. Holmes*, 60 N. H. 163. And the courts which refuse to uphold damage for mental suffering unaccompanied by injury to the person allow such damages when very slight or trivial injury to the person is shown. In my opinion the rule has no application to a case where the defendant, taking the law into his own hands, has committed a willful tort, and the injuries are the direct and proximate result of his willful wrong.

In support of this doctrine see the case of *Williams v. Underhill*, 63 App. Div. 223, 71 N. Y. Supp. 291. The opinion recognizes the rule, laid down in *Mitchell v. Rochester Railway Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604, that in an action to recover damages for alleged negligence, where the only injury resulting was fright and excitement producing a miscarriage and consequent illness, and the right to recover was denied, but says: "No such rule of proximate damages is applicable to actions to recover damages for willful tort. * * * The reason for limiting liability in actions for negligence is founded in the principle of law governing such actions, viz., that the measure of damage shall be confined to the natural and probable consequences of the act or omission constituting the cause of action. The distinction between such a case and one founded upon a willful tort, such as assault, is very clear." One of the authorities cited is the case of *Preiser v. Wielandt*, 48 App. Div. 569, 62 N. Y. Supp. 890. That was a case where a landlord had notified plaintiff to vacate certain premises, and was informed by plaintiff that his wife was sick and unable to leave her bed without danger. A few days afterward defendant's workmen

commenced tearing down the house, which created a noise and caused plaintiff's wife to become excited and hysterical. Plaintiff removed his wife the next day, and her death resulted from the sickness a few days later. It was held that defendant was liable, although deceased suffered no immediate physical injury, and her death was due solely to fright and excitement. In the opinion in that case it is said: "The defendants had ample remedy by legal process for their summary removal, and, so far as the assault upon the house was designed to accomplish that removal by force, the act was wrongful and unjustified." The opinion further says: "The point is raised, however, by the respondents, that under the decision in *Mitchell v. Railway Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604, there can be no recovery, because there was no actual, immediate, personal injury suffered by Mrs. Preiser, and her miscarriage and death were due solely to fright and excitement. The case referred to has no application to this one. It applies only to actions based on negligence, and not to cases of willful tort. In that case it was held that no recovery could be had for mere fright occasioned by negligence, and as no action would lie for the fright alone, it necessarily followed that none could be maintained merely because the fright was followed by serious consequences. If the act complained of was not in itself actionable, the gravity of the consequences would not make it so. In this case, however, the act of the defendants was in itself wrongful. It was a willful and violent trespass upon the plaintiff's house, for which an action will lie; and if the death of the plaintiff's wife can be clearly and directly traced to it, as a natural and necessary consequence which they might or should have reasonably anticipated, the defendants are liable, even although no actual blow was struck in the course of the destruction of the building. The defendants knew her condition, and the risk to her which was involved in their contemplated act; and it would be ridiculous to say that, without the shadow of a right, they could tear the house down from over her head, with no liability for the consequences unless she chanced to be hit by a falling beam."

After we have said, in the language of Mr. Chief Justice Johnston in the case of *Wilson et al. v. Campbell*, 75 Kan. 159, 88 Pac. 548, 8 L. R. A. (N. S.) 426, followed in *Whitney et al. v. Brown et al.*, 75 Kan. 678, 90 Pac. 277, that "the court rightly told the jury that not even an owner has a right to forcibly take real estate from the peaceable possession of another, no matter how justly he may be entitled to it, and that if Campbell was in the peaceable possession of the premises, and Wilson's men entered the premises when the doors were locked and removed his goods during his absence and against his will, and while his possession continued, it

would constitute a forcible entry under the law of this state," I am unwilling to say to the landlords of the state: "You may take forcible possession of your real estate in the absence of the tenant holding over, you may dispossess his family and turn them into the street with no fear of being held liable for damages, provided that in so doing you take care not to injure his person. You are justified in taking the law into your own hands, and, no matter how much fright, humiliation, and disgrace your acts may occasion to the person or family of the dispossessed tenant, you will not be liable therefor in an action for damages, unless the tenant prove that he suffered some physical injury." It is said in 13 Cyc. 45: "In the absence of personal injury or aggravating circumstances, a party is not entitled to recover damages for mental anguish in connection with injury done to his property; but where the acts complained of are willful and wanton, and the element of malice is apparent, the courts have been inclined to allow damages for injured feelings."

Plaintiff in this case was not a trespasser, and, while she had been served with notice to quit, her refusal to leave the premises had not been persisted in for such a length of time as to make an aggravated case of holding over, or to furnish excuse for extreme measures on the part of the landlord. She had certain rights, including the right not to be forcibly and unlawfully dispossessed. The law furnished the defendants ample remedies, and I think the evidence shows such a willful tort on their part as to warrant the allowance of substantial damages for the humiliation and disgrace suffered by plaintiff, and which resulted directly from their willful and wrongful acts.

(76 Kan. 612)

HARPER v. IOLA PORTLAND CEMENT CO. et al.

(Supreme Court of Kansas. Jan. 11, 1908.)

On petition for rehearing. Denied.

For former opinion, see 93 Pac. 179.

PER CURIAM. In a petition for a rehearing it is pointed out that the record is open to the interpretation that it was an unexploded charge of a "pop hole" which injured the plaintiff. Apparently this is true; but the fact does not affect the decision of the cause or the validity of the opinion rendered.

The plaintiff testified as follows: "Q. I will ask you to state what the rule of the company was at the time you was injured, or previous to that time, and within a short time previous to that time, with reference to finding out whether or not the pop shots that were loaded had exploded. If there was any rule, state that rule. A. Yes, sir; there was a rule of that, that they should find how

many they had loaded to see that they all had went. Q. Who should do that? A. Why, the foreman; that was his place to see they all went. Q. Did the shooter have anything to do about the matter? Who counted them when they went, or who repeated the number? A. The man counted them; and then the foreman counted them, too. Q. What man? A. The one that done the shooting, and then he would come back there and look. Q. Did the same man do the loading and the shooting? A. Yes, sir. Q. Then the rule, as I understand you, was this: That the man who loaded the holes also shot the holes? A. Yes, sir. Q. It was his duty to count the number he loaded? A. Yes, sir. Q. Who counted the number that were shot? A. Why, then the foreman counted them, too. Q. He and the foreman both counted the number of shots? A. Yes, sir. Q. Then suppose a load hadn't gone? A. Well, then he would go back, and hunt it, and shoot it. Q. Who? A. The one that does the shooting. He put something there if they didn't wait to shoot it, so they would know there was a loaded hole there. Q. It was the duty of the shooter to mark it, if he could not shoot it? A. If it was too late, he would tell him he could not shoot it, and he would mark it, and tell them there was a loaded hole such a place—them that was working there by it. Q. From whom would the shooter get his instructions with reference to his duty? A. From the foreman of the quarry. Q. At the time you was injured I will ask you to state whether or not you had any knowledge of any notice that the rock you were drilling upon was loaded. A. No, sir. Q. Did you know of any way of finding out or of telling that rock was loaded? A. No, sir; I had no way of finding out. It looked like any of the rest of them. * * * Q. The rock you drilled—I will ask you to state whether or not, in drilling the rock where you was hurt, you noticed or could tell, from the way it drilled, that it had been drilled before? A. No, sir; could not tell any difference. Q. Was there anything about the location of the rock, or the consistency of it, or the surroundings, that suggest to you, or from which you could tell, that the rock had been drilled? A. No, sir. Q. Was there anything from which you was able to tell that the rock had been loaded? A. No, sir."

The assumption in the petition for rehearing that this position was abandoned upon cross-examination is unsupported by the record. The plaintiff was not cross-examined upon the defendant's duty to mark unshot holes and warn workmen of them, and in respect to the counting of shots he testified on cross-examination as follows: "Q. Whose duty was it to count the shots? A. It was the foreman's duty to count them. He counted them while I was shooting. Q. That is what you are testifying about? A. Yes, sir. Q. Mr. Bliss was your foreman then? A. Yes, sir; I counted them, and I worked under

Lang. He quit after that, and Lang was foreman. Q. Did you count them for Lang? A. He asked me how many holes I had drilled—I had loaded; and I told him I had so many holes to shoot. Q. When he wasn't there, would you shoot them off? A. He was always there. You had to shoot before 9 o'clock, and he would come around and tell me in time, and ask me how many holes I had. Q. He always did that? A. Yes, sir."

A witness, Hardie Jones, testified that it was the duty of the man who did the shooting to count the shots, locate the holes that missed, and afterward shoot them, and that the shooter worked under the direction of the quarry foreman. This evidence supports the contention of the plaintiff in respect to the duty resting upon the defendant. It does not lie with the defendant cavalierly to waive the plaintiff's evidence out of the case by saying he "undertook to concoct some rule or regulation established by and to be personally carried out" by the quarry foreman. In this state it is the province of the jury to weigh evidence and to pass upon the credibility of witnesses.

In the petition for rehearing the following question is asked: "Suppose plaintiff's own statement was true, that defendant promised to repair the lights, but without such repair the plaintiff with full knowledge goes to work; does he not assume the risk of working with the lights as they are?" A full answer may be found in the case of *K. C., M. & O. Ry. Co. v. Loosley* (Kan.) 90 Pac. 990.

All other matters presented by the petition for a rehearing are fully covered by the original opinion, which proceeds upon principles of law long settled in this state and in full accord with justice and right between employers of labor and laborers, who must be furnished a reasonably safe place in which to work.

The petition for a rehearing is denied.

SCHAEFER v. GOLD CORD MINING CO. (Supreme Court of Montana. Jan. 18, 1908.)

1. JUDGMENT—DEFAULT—SETTING ASIDE—AFFIDAVITS ON APPLICATION.

Under Code Civ. Proc. § 774, giving courts power to relieve against default judgments "in furtherance of justice," a party must support his application to open a default by an affidavit of merits, or tender a copy of his proposed answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 311.]

2. SAME.

An affidavit that a corporation against which judgment was entered fully and fairly stated the case to counsel by its president, and that it had a good defense, not being a statement of the facts relied on, did not authorize the opening of the default.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 312, 313.]

3. SAME—NATURE OF REMEDY.

A default judgment will not be opened to allow a demurrer to be interposed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 249, 292-295.]

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Action by Hulda Schaefer against the Gold Cord Mining Company. From a default judgment for plaintiff, and from an order denying a motion to set the judgment aside, defendant appeals. Affirmed.

In December, 1906, this action was commenced in the district court of Lewis and Clark county by filing a complaint and having a summons issued. Service of summons was made upon the defendant on February 14, 1907, by delivering to an officer of the defendant a copy of the summons together with a copy of the complaint. The return of the sheriff, made on the last-mentioned date, however, recited that such service had been made by delivering to the president of the defendant company a copy of the summons. On March 1st the sheriff made application to the judge of the district court for permission to withdraw the summons from the files and correct the return to conform to the facts, and, such permission having been granted, an amended return was indorsed upon the summons, which recites that service of summons was made by delivering to the secretary of the company a copy of the summons together with a copy of the complaint. On March 9, 1907, the plaintiff had the default of the defendant entered for failure to appear and answer or demur, and a judgment was thereupon rendered and entered in favor of the plaintiff for the relief demanded in the complaint. On April 5th the defendant moved the court to vacate the judgment, set aside the default, and permit the defendant to "appear, answer, or demur to the complaint." The ground of the motion was that the sheriff's return had been amended without notice to the defendant, that the defendant had relied upon the defective return first made, and had not appeared in the action within the time allowed by law. This motion was supported by an affidavit of counsel for defendant showing the principal facts set forth above, and which affidavit also recites: "That deponent further says that on or about the 16th day of February, 1907, as aforesaid, E. A. Wetmore, Esq., the president of the said defendant corporation, fully and fairly stated the case in this cause to the undersigned, its counsel, of Helena, Mont., and after such statement was advised by them that the defendant corporation had a good and substantial defense on the merits of the action, and that deponent verily believes the same to be true, and this deponent says that said defendant has a good and meritorious defense to said action." Upon consideration, this motion was denied, and defendant appealed from the judgment and from the order denying its motion.

Henry R. Thompson, for appellant. C. E. Pew, for respondent.

HOLLOWAY, J. (after stating the facts as above). It may be said to be the settled doc-

trine in this state that in an instance of this character, where a party defendant in default applies to the court to have the default set aside, he must, in addition to excusing his default, support his application by an affidavit of merits setting forth the facts constituting his defense, or tender with his motion and affidavit a copy of his proposed answer. *Donnelly v. Clark*, 6 Mont. 135, 9 Pac. 887; *Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739. And there is good reason for this rule. A court would not be justified in setting aside a judgment manifestly just. In order to move the court the defendant must make it appear *prima facie* that the action sought is in the interest of justice; for section 774 of the Code of Civil Procedure gives to the court power to relieve against a judgment entered by default, only when such relief is in furtherance of justice, and it is from such affidavit of merits, or proposed answer, that the trial court is to determine whether the defendant has *prima facie* a defense upon the merits. The statement in the affidavit filed in this instance, that the defendant, by its president, "fully and fairly stated the case in this cause to the undersigned, * * * and this deponent says that said defendant has a good and meritorious defense to said action," is not a statement of facts, and could not enlighten the court upon the subject of the defense intended to be made. Indeed, the defendant did not ask to be permitted to answer the complaint, but did ask to have the default set aside, and that it be permitted to answer or demur. Courts do not open defaults in order to allow demurrers to be interposed. *Bowen v. Webb*, *supra*.

While there is also an appeal from the judgment, no contention is made that the complaint does not state facts sufficient to constitute a cause of action. Appellant's brief is devoted exclusively to a consideration of the appeal from the order.

In the absence of an affidavit of merits setting forth the facts constituting the defendant's defense, or a copy of the answer proposed, the district court did not abuse its discretion in refusing to set aside the default, and the judgment and order are therefore affirmed.

Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

HILL et al. v. ELLINGHOUSE et al.
(Supreme Court of Montana. Jan. 25, 1908.)

1. NEW TRIAL — MOTION — AFFIDAVITS — FILING — TIME.

Code Civ. Proc. § 1173, allows 10 days after notice of motion for a new trial in which to prepare, serve, and file the evidence, statement, etc. A finding and decision having been filed August 30, 1905, on September 6th a written stipulation was made that either party might have 30 days "additional" time in which to give notice of intention to move for a new trial, and

90 days "additional" time in which to prepare, serve, and file affidavits, bills of exception, or statements in support of the motion. Appellant gave notice of motion for a new trial October 7th, and all the affidavits were filed January 3, 1906. *Held*, that appellant was entitled to 30 days in addition to the 4 days of the 10-day period not yet expired when the stipulation was made in which to serve notice of motion for a new trial, and that the 90 days stipulated for in which to file affidavits, bills of exception, or statements, etc., in support of the motion, began to run on the expiration of 10 days after the service of notice, and hence the affidavits were filed in time.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 178.]

2. SAME—SURPRISE.

A motion for a new trial for surprise will be granted only when it is clearly shown that petitioner was actually surprised, that the facts from which the surprise resulted had a material bearing on the case, that the verdict resulted mainly therefrom, and that applicant was not negligent, but that he acted promptly, exercising every means reasonably available to remedy the condition, and that the result of a new trial would probably be different.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 167, 168.]

3. SAME—AFFIDAVITS.

On an application for a new trial for surprise at the testimony of certain witnesses as to the priority of petitioner's right to certain water, he testified that when he talked with the witnesses they stated that when his predecessor in interest was deprived of the water which petitioner claimed "he went and took it," while on the stand the witnesses testified instead that he recognized the rights of others to priority. It did not appear that the finding against petitioner was based on the testimony of such witness, and it was also shown that there were many other witnesses found after the trial who could furnish the evidence petitioner desired. He made no application for a continuance at the trial, nor to have the case reopened until the filing of the motion for a new trial. *Held*, that the application was properly denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 181–183.]

4. APPEAL—NEW TRIAL—REVIEW—RECORD.

Where, on appeal from an order denying an application for a new trial because of surprise, the evidence given at the trial was not in the record, the Supreme Court could not say that certain newly discovered evidence would change the result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2946.]

Appeal from District Court, Madison County; Geo. B. Winston, Judge.

Action by Charles C. Hill and others against Fred. Ellinghouse and others. A decree was rendered in favor of plaintiffs, and an order was entered denying the motion of defendant Alex. McKay for a new trial for surprise, and he appeals. *Affirmed*.

E. B. Howell, for appellants. E. J. Callaway and Word & Word, for respondents.

BRANTLY, C. J. This action was brought to obtain a decree adjudicating the respective rights of the parties plaintiff and defendant against each other and among themselves, to the use of the waters flowing in Indian creek, a tributary of Ruby river, in Madison county. Each of the 11 plaintiffs

claims separate rights, though they were represented by a single attorney. The 8 defendants were represented by the same attorneys, though each filed a separate answer. From this condition of affairs it would seem that the parties plaintiff and defendant made common cause against each other, but, as among themselves, proceeded upon the theory that their respective interests were not conflicting. In any event, the trial resulted in findings of fact and conclusions of law upon each right involved, as to the date of appropriation, the amount thereof, the character of the beneficial use, etc., and a decree was entered accordingly.

The defendant McKay (appellant) is the owner of certain lands situate on Mill creek, another tributary of Ruby river. He also owns a flouring mill, situate on the same stream, which is propelled by water power. It seems that the water diverted by him through his mill ditch, and for the irrigation of his lands on Mill creek, does not, after its release, return to Indian creek, but flows into the channel of Mill creek. The issue at the trial, so far as appellant is concerned, was whether the right asserted by him through his mill ditch was superior to the rights of the other claimants during the season of the year when irrigation was necessary for farming purposes, or whether it was available only during the other portions of the year. The appellant claims as the successor in interest of one Hall, now dead, who, with others, built the mill and constructed the ditch in 1866. The court found that "it was the intention of those who built the mill ditch and appropriated the waters of Indian creek thereby to use the waters for mill and power purposes when the waters of Indian creek were not needed for irrigation purposes." It was accordingly adjudged that the defendant's use must be confined to the autumn, winter, and early spring months, when the "waters of Indian creek are not required for the proper irrigation of lands." This defendant has appealed from an order denying his motion for a new trial. The ground of his motion was surprise, in that two witnesses, introduced by him to establish his right, made statements at the trial directly contrary to what they had induced him to believe they would make when he had interviewed them to ascertain what their testimony would be touching his right. His affidavit in support of the motion states, in substance, that he was charged by his counsel with the duty of finding and producing witnesses in support of his water right through his mill ditch; that in performance of this duty he questioned witnesses John Hatfield and William Fern as to the use of the water in the mill during the time Hall was one of the owners of it; that he questioned them fully, but neither of them disclosed to him any fact or information tending to impair the superiority of his right during Hall's ownership, or tending to

show that Hall ever recognized any right in Indian creek superior to the mill ditch right; that, on the contrary, Hatfield, when questioned by affiant as to the conduct of Hall when the farmers without his consent diverted the water from the mill ditch, told him that Hall "went and took it," meaning and intending that affiant should understand thereby that Hatfield would testify that under such circumstances Hall reclaimed the water, thus asserting the superior right of the mill ditch; that, relying upon the information so given him by Hatfield and Ferm, and believing that they had fully stated the facts to which they would testify, affiant called them to testify in his behalf, and took no steps to secure testimony from other witnesses to establish the facts; that Hatfield testified upon the trial directly contrary to what he had informed affiant prior to the trial, by saying that Hall had an understanding with the farmers below the head of his ditch that when they wanted the water they could take it and shut the mill down, that the farmers took the water whether it was needed for the mill or not, that this arrangement was the result of a bargain, made about the year 1866 with one Bateman and sundry other persons; that William Ferm testified that Hall had obtained permission from certain unnamed persons to build the mill ditch with the understanding that when they needed the water it was to be returned to them; that Ferm, being called by plaintiffs as their own witness in rebuttal, testified positively that Hall had told the witness that he used the water from Indian creek with the consent of the people living along the stream below; that both these witnesses constantly associated with the plaintiffs and their witnesses; and, upon information and belief, he charges that their testimony at the trial was the result of collusion with plaintiffs. It is further alleged that if a new trial should be granted, the appellant can produce six witnesses, naming them, whose testimony will show that Hall, his predecessor, always possessed and asserted the right to the use of the mill ditch, to the exclusion of all other rights below the mouth of that ditch. The affidavits of these witnesses were also used in support of the motion, and, generally, support the Hall right, as claimed by the appellant. The plaintiffs filed no counter affidavits, and hence the statements of the appellant, so far as they are statements of fact, are not controverted.

Do the facts stated make out a case upon which the court should, in its discretion, have granted a new trial? Before proceeding to a determination of this question, however, it is necessary to notice a question of practice, arising upon an objection to the consideration of the affidavits, that they were filed out of time. The findings and decision in the case were filed on August 30, 1905. Of this fact the parties all seem to have had

notice. On September 6th the parties, by their attorneys, entered into a stipulation in writing that any one, either of the plaintiffs or defendants, who might be dissatisfied with the decision, might have 30 days "additional" time in which to give his notice of intention to move for a new trial, and also 90 days "additional" time in which to "prepare, serve, and file" affidavits, bills of exception, or statements in support of his motion for a new trial, in case he desired to make such motion. Notice of intention was given by appellant on October 7th. The affidavits were all filed on January 3, 1906. On the hearing of the motion objection was made that under the terms of the stipulation the affidavits should have been filed within 90 days after September 20th; in other words, since the stipulation was made on September 6th, four days before the time for giving notice had expired (Code Civ. Proc. § 1173), the 90 days stipulated for should be computed from the 10th day after the expiration of this period, or from September 20th. The statute, however (section 1173, supra, subd. 1), allows 10 days after the notice is given in which to prepare, serve, and file the affidavits, statement, etc., in support of the motion. Since this is so, the 90 days stipulated for this purpose clearly began to run on the expiration of 10 days after the service of notice, else the term "additional," used in the stipulation, can have no significance. The effect of the use of this term in the stipulation extending the time for giving notice (supposing that an extension of time for the giving of this notice may lawfully be made), was to allow 30 days besides the 4 days of the 10-day period not yet expired. It was so construed by the parties, and properly so (*Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418); for there can be no addition where there is not something to which it may be made. The same rule must apply to both extensions.

Coming now to the merits of the motion, it is the general rule that a new trial will be granted on the ground of surprise, only when it is clearly shown that the movant was actually surprised, that the facts from which the surprise resulted had a material bearing on the case, that the verdict or decision resulted mainly from these facts, that the alleged condition is not the result of movant's own inattention or negligence, that he has acted promptly and claimed relief at the earliest opportunity, that he has used every means reasonably available at the time of the surprise to remedy the disaster, and that the result of a new trial will probably be different. *O'Donnell v. Bennett*, 12 Mont. 242, 29 Pac. 1044; *Schellhaus v. Ball*, 29 Cal. 605; *Doyle v. Sturla*, 38 Cal. 456; *Chicago & Great Eastern Ry. Co. v. Vosburgh*, 45 Ill. 311; *Hull v. Minneapolis St. Ry. Co.*, 64 Minn. 402, 67 N. W. 218; *Spelling on New Trial & Appellate Practice*, § 201; 14 *Ency. Pleading & Practice*, 723. If at the time the condition arises the party can make use of

other evidence at hand, or can avoid the threatened disaster by securing a continuance, or by submitting to a nonsuit, he must do so; and not only so, but, after these means have failed, he must by his showing make it clear that his allegation is not a mere pretense to cover his own lack of diligence. As was said in *Schellhous v. Ball*, supra: "It is the duty of the courts to look upon applications for new trials upon the ground of surprise with suspicion, for the reason that from the nature of the case surprise may be often feigned and pretended, and the opposite party may be unable to show that such is the case. Hence the party alleging surprise should be required to show it conclusively, and by the most satisfactory evidence within his reach." In *Chicago & Great Eastern Ry. Co. v. Vosburgh*, supra, the court said: "In applications for new trials on such ground it is not only necessary that the party should have been surprised, but that it was in a matter material to the issue, and that it produced injury to the party; that it was not the consequence of neglect or inattention on the part of the party surprised; also that he used all reasonable efforts to overcome the evidence which worked the surprise, or that it was not within his power to have done so by the employment of reasonable diligence." Applying this rule to the appellant's affidavit, we find that it is insufficient in several particulars. It does not appear therefrom, except by way of conclusion of the affiant, what inquiry appellant made of the witnesses whose conduct is complained of; nor does it appear, except in the same way, what they told him they would testify to. Except the statement of Hatfield that Hall said he "went and took it," referring to the water, we have but the conclusion of the appellant as to what the purport of the statements to him by the witnesses were. They may have had the purport and evidentiary value assigned to them by the appellant, but that this is true we cannot say, because the details of them are not before us. The evidence heard by the trial court is not before us. Therefore we cannot say, except from the statements in the affidavit, that the court based its findings as to the mill ditch mainly upon their testimony. So far as we know, there may have been other evidence in the case, and sufficient to justify the finding, even if the witnesses had testified as appellant supposed they would. For while we may infer from the affidavit that they were the only witnesses called by appellant, there is no positive statement that such was the case, or that they were the only witnesses who testified as to the mill ditch. From the affidavit, as a whole, coupled with the fact that many other witnesses were found after the trial was over who could furnish the desired evidence, we think the inference permissible that the appellant was negligent in the search

for evidence to sustain his contention prior to the trial, and that the judge who decided the motion thought so.

There is a total want of any showing of prompt action and diligence on the part of the appellant in his effort to avoid the result of his alleged surprise at the testimony, when it came out. He made no application for a continuance. He did not call the attention of counsel to the matter; nor was it called to the attention of the court. It does not appear that he did not have other evidence at hand or within reach which would have been available. In fact, so far as we can judge, he sat silent during the trial, and, though the cause was tried by the court sitting without a jury, and it was held under advisement from June 4th, the date of the trial, until August 30th, the appellant made no application to have the cause reopened, but still remained silent, thinking, no doubt, that the result would be satisfactory. Evidently the surprise upon which he relies is the surprise at the result, rather than at anything that occurred during the trial. A consideration, which is conclusive, however, is that it is not at all apparent that there is any probability that the result reached by the trial judge would be different if a new trial were granted. As stated above, the evidence is not before us, and though it may be conceded that the new witnesses whose affidavits are embodied in the record would testify as they allege, in the absence of the evidence, we cannot say that a different result would probably be reached.

We are of the opinion that no abuse of discretion is shown, and that the order denying a new trial should be affirmed. It is so ordered.

HOLLOWAY and SMITH, JJ., concur.

WHITE et al. v. BARLING.

(Supreme Court of Montana. Jan. 25, 1908.)

1. APPEAL—REVIEW—NEW TRIAL.

An order granting a motion for a new trial, which does not specify the particular ground on which it was granted, will be approved on appeal, if it was justified on any one or more of the grounds of the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3404-3427.]

2. SAME.

A motion for a new trial, on the ground that the findings are not supported by the evidence, is addressed to the sound legal discretion of the trial court, and its order will not be disturbed, except in a case of manifest abuse of such discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3871-3873.]

3. NEW TRIAL—FINDINGS NOT SUPPORTED BY EVIDENCE.

It is the duty of the trial court to set aside a finding against which it concludes that the evidence preponderates.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 135-149.]

4. EQUITY—NEW TRIAL—MODIFICATION OF FINDINGS—CONTROL BY COURT.

A litigant, in an equity case, may move for a modification of a finding, or for a new trial, and the court may not dictate the method to be pursued.

5. NEW TRIAL—DISCRETION OF COURT—VIEW BY JURY.

Where, in an action to determine water rights, one of the questions was the capacity of plaintiffs' ditch as of the date of defendant's appropriation, made more than three years prior to the date, when the jurors viewed the premises by order of court, and the evidence showed that during the interval the ditch had become greatly out of repair, so that the jurors could not have received much assistance, if any, from viewing the ditch, the court did not abuse its discretion in setting aside the findings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 135-149.]

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

Action by William D. White and another against Fred. W. Barling. Judgment for plaintiffs, and defendant appeals. Affirmed.

This is an action to determine the relative rights of the parties to the use of the waters of Blue creek, a tributary of Yellowstone river. Upon the trial a large number of special interrogatories were submitted to the jury and answered. These special findings were approved by the court, and a decree in conformity therewith rendered and entered. The plaintiffs then moved for a new trial, specifying as one of the grounds, among others, insufficiency of the evidence to sustain certain of the findings. The court, in an order general in its terms, sustained the motion, and the defendant has appealed from the order granting a new trial.

T. S. Hogan and M. J. Lamb, for appellant. O. F. Goddard, for respondents.

HOLLOWAY, J. (after stating the facts as above). It must be conceded to be the rule, now firmly established in this jurisdiction, that, where a trial court has granted a motion for a new trial in an order such as the one before us, which does not specify the particular ground upon which it was granted, the action will be approved by this court, if it was justified upon any one or more of the grounds of the motion. *Walsh v. Conrad*, 35 Mont. 68, 88 Pac. 655; *Fournier v. Coudert*, 34 Mont. 484, 87 Pac. 455; *Case v. Kramer*, 34 Mont. 142, 85 Pac. 878; *Gillies v. Clarke Fork Coal Min. Co.*, 32 Mont. 320, 80 Pac. 370; *Wright v. Mathews*, 28 Mont. 442, 72 Pac. 820; *Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 65 Pac. 106. It is also well settled that a motion for a new trial upon the ground that the findings are not supported by the evidence is addressed to the sound legal discretion of the trial court, and its order will not be disturbed, except in a case of manifest abuse of such discretion. *Fournier v. Coudert*, above; *Case v. Kramer*, above; *Vogt v. Baldwin*, 20 Mont. 322, 51 Pac. 157; *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; *Hagin v. Saille*, 14 Mont. 79, 35 Pac. 514.

One of the principal questions in issue in this case was the capacity of a certain ditch owned by the plaintiffs, and by means of which they conveyed water to their lands; and it was of particular importance to determine the capacity of this ditch at the date of defendant's appropriation, September 19, 1902, which was three years and seven months prior to the date of the trial. The jury found that such capacity was 30 miners' inches, and this finding (No. 28) was approved by the court. Upon motion for new trial this particular finding was attacked, as were others, and, after a hearing, the trial court granted the motion. Upon the question submitted, and of which finding No. 28 is the answer, the evidence offered by the respective parties was extremely conflicting, and it appears to us that different courts might reasonably differ as to the weight of the evidence so offered. At least we are not prepared to say that this record discloses that the evidence upon that subject preponderates in favor of that finding. If the trial court came to the conclusion that finding No. 28 was not supported by the evidence, that is, that the evidence preponderated against that finding, then it was the duty of the court to set it aside. *Harrington v. Butte & Boston Min. Co.*, 27 Mont. 1, 69 Pac. 102; *Patten v. Hyde*, 23 Mont. 23, 57 Pac. 407. But it is said that this finding No. 28, or any other one to which plaintiffs took exception, might have been corrected upon motion to modify the findings, without putting the parties to the trouble and expense of a new trial, and in this appellant is correct. But under our cumbersome practice a litigant in an equity case may move for a modification of the findings, or may move for a new trial, and we know of no rule of law which authorizes a court to dictate to a litigant which method he shall pursue. Plaintiffs did not ask the court for a modification of the findings, but did ask for a new trial, and with their selection of the remedy to be pursued we cannot interfere.

But it is earnestly contended by appellant that, since the trial court directed a view of the premises, and such view was had, the court thereafter abused its discretion in setting aside the findings made. While under some circumstances this argument might be advanced with great force, we think it can hardly be done in this instance. As said above, the effort was directed to a determination of the capacity of plaintiffs' old ditch, as of the date of defendant's appropriation, which was more than three years prior to the date when the jurors viewed the premises; and the evidence tends very strongly to show that during that interval the ditch had become greatly out of repair by reason of stock running over it, the ditch being located for a considerable distance along a hillside. So that, so far as this record discloses, the jurors could not have received very much assistance, if any, by reason of the view of the ditch at the time of the trial.

Appellant relies upon the case of *Ormund v. Granite Mt. Min. Co.*, 11 Mont. 303, 28 Pac. 289, in which case this court reversed the district court for granting a new trial after a view of the premises by the jury. But in the *Ormund Case* it appeared that the only issue was as to whether the plaintiff had made a discovery within the boundaries of his mining claim. Three or four witnesses swore to the discovery. Thirteen witnesses for the defendant swore to the contrary, and their evidence was not rebutted. Under these circumstances this court held that the trial court abused its discretion in granting a new trial, and, in doing so, said, among other things: "In deliberating upon their verdict, they (the jury) had a right to take into consideration their observations in connection with the evidence. It must be understood, however, that the verdict under these circumstances is not to be treated as conclusive upon any issue."

In *Murray v. Heinze*, above, this court had under consideration an appeal from an order granting a new trial in a case in which the jury had inspected the premises; and, in affirming the order of the trial court, this court reviewed the opinion in the *Ormund Case*, and, among other things, said: "There was in the *Ormund Case* apparently a great preponderance of un rebutted testimony in favor of the defendant and in support of the verdict; but in the case at bar the record shows no such preponderance of un rebutted evidence in support of the verdict. Here there is an irreconcilable conflict upon the material issues, which distinguishes it from the *Ormund Case*." We think this observation pertinent and particularly applicable to the case now under consideration.

In conclusion we quote from the opinion in *Walsh v. Conrad*, above, as applicable to the question first considered above in this case, the following: "Upon this question there was a conflict in the evidence; and, as the trial court, which had the witnesses before it, was in a much better situation to judge of the sufficiency of the evidence to sustain the verdict than is this court, we cannot say that this record discloses any abuse of discretion on the part of the court in setting aside the verdict and granting a new trial."

The order from which this appeal is taken is affirmed.

Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

CHICAGO, M. & ST. P. RY. CO. OF MONTANA v. WHITE et al.

KENYON v. CANNON et al.

(Supreme Court of Montana. Jan. 25, 1908.)

1. EMINENT DOMAIN—COMPENSATION — PARTIES ENTITLED—TRUSTEE.

On a petition by a trustee holding the legal title to land condemned for an order that a fund deposited in court in the condemnation pro-

ceedings be paid to him, an answer by some of the beneficiaries that the trustee was insolvent, and that an action for an accounting was pending against him, admitted that he was prima facie entitled to the fund, the proper remedy of the beneficiaries to protect the fund being by a proceeding in the action for accounting.

2. APPEAL—DECISIONS REVIEWABLE—ORDER AFTER JUDGMENT.

An order authorizing the payment of a fund deposited in court in condemnation proceedings to the person entitled thereto is not a special order after final judgment from which an appeal may be taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 521.]

3. SAME—ORDER FOR DELIVERY OF PROPERTY.

The order is not one directing the delivery, transfer, or surrender of property, within Code Civ. Proc. § 1722, as amended by Laws 1899, p. 146, authorizing appeal from such an order.

4. EMINENT DOMAIN—COMPENSATION—PERSONS ENTITLED.

It is only where no dispute arises as to who is entitled to a fund deposited in court in condemnation proceedings that the court can entertain a motion to direct the clerk to pay it over.

5. APPEAL—RIGHT OF REVIEW—PARTY AGGRIEVED.

Beneficiaries are not aggrieved so as to entitle them to appeal from an order directing the payment of a fund in court in condemnation proceedings to their trustee, since their rights under the trust agreement are not affected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 947-951.]

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

Condemnation proceedings by the Chicago, Milwaukee & St. Paul Railway Company of Montana against W. McC. White and others. From an order directing payment of part of a fund in court to John A. Cannon, trustee, O. E. Kenyon appeals. Dismissed.

O. P. Connelly and W. A. Pennington, for appellant. John J. McHatton, for respondent.

SMITH, J. The above-entitled matter was in this court once before, on the appeal of Mary D. Forbis, as administratrix. *Forbis, Adm'x, v. Cannon et al.*, 35 Mont. 424, 90 Pac. 161. The nature of the proceeding is explained in the opinion, wherein the court said: "We decide that, under the issues raised and tried in the district court, John A. Cannon, the holder of the legal title to the land taken, was prima facie entitled to the money that was ordered paid to him, and affirm the order appealed from. We do not decide whether or not it is an appealable order, because that question is not presented in the briefs of counsel. Also, upon the question as to the jurisdiction of the district court to determine the rights of the respective claimants to this money in a summary manner, we express no opinion." It appears from the record that O. E. Kenyon filed an answer to the petition of Cannon and wife, substantially the same as that of Mary D. Forbis, as administratrix, and he now appeals from the same order from which she appealed. Perhaps, in view of the fact that the language employed in the last sentence

of the former opinion may have led the present appellant to believe that upon that appeal the question was given no consideration at all, it is advisable to add something to what was said in *Forbis v. Cannon*. The money was deposited in court by the Chicago, Milwaukee & St. Paul Railway Company of Montana as payment for 105 lots in the city of Butte, the legal title to which was vested in John A. Cannon, as trustee. We held, in effect, that the so-called answers to the Cannon petition set forth no reason why the money should not be paid to Cannon as the person entitled thereto. In other words, no question was raised but that Cannon was still trustee, and that the lots in question were a part of the trust estate. The so-called answering defendants sought to prevent Cannon from receiving the money, because, in another action pending, they were attempting to have him removed as trustee, after accounting for the trust funds. Had this appellant gone before the district court in answer to the Cannon petition, and alleged facts showing that Cannon was not entitled to the money, we have no doubt the district court would have refused to try the issue thus raised or make any summary order in the premises. But when his own pleading, if such it may be called, admitted in effect that Cannon was still trustee, and that the property of which the money was the proceeds was a part of the trust estate, he admitted that Cannon was *prima facie* entitled to the same. We suppose there is no question that a trustee is entitled to the possession of the trust estate. How, otherwise, could he be charged with, and required to account for, the same? That is this case. The appellant's so-called answer requested the court to try, on motion, the question whether Cannon had been faithful, or otherwise, to his trust. In fact, it requested the court to try, on motion, the issues involved in the action brought to remove him. If the appellant desired to have this money safeguarded so that Cannon could not dissipate the same, he should, by some appropriate proceeding in the action for an accounting, have invoked the power of the court having jurisdiction in that case to preserve the fund until the final determination of that action. We indulge in the foregoing remarks upon the merits of this matter, because appellant appears to misconstrue the former decision of this court.

Respondents have moved to dismiss the appeal, for the reason that the order appealed from is not an appealable one. That order is not a special order made after final judgment. Neither is it an order directing the delivery, transfer, or surrender of property such as is referred to in section 1722 of the Code of Civil Procedure, as amended by Laws 1899, p. 146. The order had no connection with the cause in which it was entitled. That cause had been finally determined, and the

money paid into the hands of the clerk. Any controversy as to the disbursement of the money must necessarily have been determined in another action. The special order, made after final judgment, from which an appeal lies, must be an order affecting the rights of some party to the action, growing out of the judgment previously entered. It must be an order affecting rights incorporated in the judgment. The order appealed from had no connection with the judgment in *Chicago, Milwaukee & St. Paul Ry. Co. v. White*. It is only in cases where no dispute arises as to who is entitled to the money that the district court has power to entertain a motion to direct the clerk to pay it over. In this case the so-called answers raised no such issue, and the matter stood as though they had not been interposed. Therefore the court made the order. But it was not appealable, first, because it was not a special order, made after final judgment, such as is contemplated by the Code; and, second, because the appellant was not aggrieved thereby, his rights under the trust agreement remaining *in statu quo*.

The appeal is dismissed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

STATE ex rel. BRASS v. HORN, Police Judge.
(Supreme Court of Montana. Jan. 25, 1908.)

1. SUPERSEDEAS—AUTHORITY TO GRANT.

Under Const. art. 8, § 3, giving the Supreme Court power to issue such writs as may be necessary or proper to the complete exercise of its appellate jurisdiction, the court has power to issue a supersedeas or any other appropriate writ in aid of an appeal which would otherwise be ineffectual.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Supersedeas, §§ 1-4.]

2. APPEAL—REVIEW—MOOT QUESTION.

An appeal from a judgment awarding a writ of mandamus to compel the police judge of a city to transfer a charge against relator to the nearest justice of the peace would be dismissed, where it appeared that the transfer of the cause had already been made; a contention that since Code Civ. Proc. §§ 1726, 1733, do not provide for a stay of the execution of a judgment in such a case, and that since respondent was bound to obey the writ on peril of punishment for contempt under sections 1973, 2170, so that such refusal to review would deprive respondent of his right of appeal granted by Const. art. 8, § 15, being without merit, since, conceding that sections 1726, 1733, do not provide for a stay, the Supreme Court has power to issue a supersedeas or other appropriate writ to effectuate an appeal, under Const. art. 8, § 3.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3122.]

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Mandamus by the state, on the relation of John Brass, to compel Charles Horn, as police judge of the city of Helena, to compel respondent to transfer a charge against relator to the nearest justice of the peace of said

city. From a judgment awarding the writ, respondent appeals. Appeal dismissed.

Edward C. Russell, for appellant. E. A. Carleton, for respondent.

BRANTLY, C. J. On May 20, 1907, the relator was, by complaint filed in the police court of the city of Helena, charged under an ordinance with disturbing the peace. Having been arrested and brought into court, he entered his plea of not guilty, and thereupon made his application to the court, upon affidavit setting forth his grounds therefor, for a transfer of the cause for trial to the nearest justice of the peace in the city. The application was denied. Thereupon he appealed to the district court of Lewis and Clark county for a writ of mandamus to compel the transfer to be made. After a hearing, the court entered judgment awarding the writ. Thereupon the defendant appealed.

As soon as the record was filed in this court, the relator moved to dismiss the appeal on the ground that the defendant had fully complied with the writ, and thus satisfied the judgment, before the appeal was taken. The motion was directed to be submitted at the hearing on the merits. This has been done. It appears from the record and briefs of counsel that the defendant fully complied with the mandate of the district court on the same day the appeal was taken, and that the only purpose sought by the appeal is to have this court decide the moot question whether the statutes defining the jurisdiction of police and justice of the peace courts authorize a change of venue from the former to the latter in cases arising under the ordinances of a city and prosecuted in the name of the city. In *State ex rel. Begeman v. Napton*, 10 Mont. 369, 25 Pac. 1045, this court held that jurisdiction would not be taken of an appeal from a judgment of a trial court directing a writ of mandamus to issue, when it appeared that the writ had been issued and obeyed pending the appeal. The court said: "We are of the opinion that it is not a safe precedent to depart from the rule that courts will hear only genuine controversies, and will not tender advice upon matters not in litigation." In *Snell v. Welch et al.*, 28 Mont. 482, 72 Pac. 988, an injunction had been issued by a district court restraining the defendants from letting contracts under an act of the Legislature providing for a uniform series of text-books for use in the public schools. The defendants appealed. Pending the appeal the parties settled their differences and the contracts were let. The court, on the authority of *State ex rel. Begeman v. Napton*, supra, refused to hear the appeal, saying: "There is nothing in this case now for us to decide. It has been disposed of by the parties themselves pending the appeal." Again, in *Re Black's Estate*, 32 Mont. 51, 79 Pac. 554, there was an appeal by two of the distributees from a decree of distribution and

from an order denying them a new trial. Immediately after the decree had been made and entered, but before the order denying the motion had been made, the appellants made settlement with the administrator, recelpting him in full for their distributive shares. Upon this fact being made to appear to this court, the appeals were dismissed. It was held to be an insuperable objection to the entertainment of the appeals that, in case of a reversal of the decree, the parties would not stand relatively in the same position as when the decree was entered, and so the district court could not retry the issues and do justice to the parties. So here it would serve no useful purpose to reverse the judgment appealed from, because the cause was, immediately upon the issuance of judgment and service of the writ, transferred to the justice, and has doubtless long since been disposed of. The parties cannot, under these circumstances, be put in statu quo. The very purpose of an appeal is to relieve a party who has been aggrieved by the judgment or order complained of, and to restore him to the position occupied by him in the controversy before the judgment was rendered or the order made. On the ground stated in the motion as well as for the reasons stated in *Re Black's Estate*, supra, we do not think the appeal should be determined on the merits.

But counsel for appellant insists that, since the statutes (Code Civ. Proc. §§ 1726, 1733) do not provide a stay of the execution of the judgment in such cases, and since the defendant was bound to obey the writ at the peril of punishment for contempt (Code Civ. Proc. §§ 1973, 2170; *State ex rel. Coad v. District Court*, 23 Mont. 171, 57 Pac. 1095), an application of the rule of the *Begeman* and *Snell* Cases, supra, will deprive him of his right of appeal, guaranteed under the Constitution (Const. § 15, art. 8, as construed in *Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517, and *Raymond v. Raymond*, 32 Mont. 170, 79 Pac. 1056). We shall not pause to consider the question whether the sections of the statute supra prohibit, or do not provide for, a stay in such cases. It may be conceded that they do not; yet it does not therefore follow that the defendant may not nevertheless have a stay of execution and therefore an effective appeal. Under another provision of the Constitution (section 3, art. 8) this court has power to effectuate its appellate jurisdiction by the use of any original or remedial writ which the necessities of a particular case may demand. *Finlen v. Heinze*, supra. This, of course, includes the power to issue a supersedeas or any other appropriate writ in aid of an appeal which would otherwise be ineffectual.

Let the appeal be dismissed.

Dismissed.

HOLLOWAY, and SMITH, JJ., concur.

(50 Or. 495)

FRIE v. MOFFET.*

(Supreme Court of Oregon. Jan. 21, 1908.)

1. PARTITION—POSSESSION—TENANTS IN COMMON—BURDEN OF PROOF.

The burden is on complainant in partition, unless the suit is by one or more tenants in common of a vested remainder or reversion, to allege and prove, if denied, that he and defendant were in possession as tenants in common at the time of the commencement of the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, § 183.]

2. SAME—TITLE—CONTEST.

Where complainant, after being divorced from her husband, sued for partition of property purchased while they were husband and wife, and averred that defendant was in sole possession of the property, and the record disclosed a dispute as to the title and right of possession, she could not maintain partition until the contested title had been determined and she had secured possession in some appropriate proceeding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, §§ 52, 53, 60.]

Appeal from Circuit Court, Malheur County; George E. Davis, Judge.

Partition by Emma Frie against James T. Moffet. From a decree in favor of complainant, defendant appeals. Reversed and dismissed.

This is a suit by Emma Frie against James T. Moffet for the partition of real property. The complaint alleges that plaintiff and defendant are the owners in fee, as tenants in common, of the property in question, but does not allege that plaintiff is in possession as such tenant. On the contrary, it is averred that defendant "has had the sole use and occupancy" of the property since the 1st of November, 1904, and has been receiving the rents and profits therefrom, and prays that he be required to account to plaintiff therefor. A demurrer to the complaint, because it does not state facts sufficient to constitute a cause of suit, was overruled, and defendant answered, denying the material averments thereof, and for a further and separate defense alleging that he is the sole owner of the property, and has been in the exclusive possession thereof since the 17th day of November, 1902. The reply put in issue the averments of the answer, and upon the issues thus joined a trial was had. From the evidence it appears that plaintiff and defendant were formerly husband and wife, but were divorced in October, 1903. On the 17th of November, 1902, and while they were such husband and wife, one J. H. Wright executed a deed, without his wife joining therein, and having but one witness, purporting to convey the property in controversy to them jointly, and delivered it to plaintiff. Shortly thereafter she separated from her husband, and subsequently secured a divorce. About the time of the separation defendant entered into possession of the property in dispute, and has ever since remained in the sole and exclusive possession

thereof. In June, 1904, plaintiff commenced this suit, claiming that the deed from Wright conveyed the property to her and defendant, who were then husband and wife, as tenants by the entirety, which was subsequently dissolved by the decree of divorce, leaving them tenants in common. Defendant claims, however, that he purchased the property of Wright for his own use and benefit, paying a part of the purchase money at the time, and was to receive a deed upon payment of the balance; that the deed made by Wright to himself and plaintiff was without his knowledge or consent, and that he knew nothing about it until after the decree of divorce, when he discovered it in a trunk in his house; that he immediately repudiated the transaction, offered to return the deed to Wright, and thereafter tendered him the balance of the purchase money, and demanded a good and sufficient conveyance from him. Plaintiff on the other hand claims that she was a joint purchaser with defendant of the property, and furnished the money with which to make the first payment, and afterwards paid a part of the balance; that the deed from Wright was made to herself and defendant, with his knowledge and consent, and by his direction. The court below found that plaintiff and defendant were the owners in fee and in possession as tenants in common; that the property could not be divided without great prejudice to their interests, and directed a sale and division of the proceeds. A sale was afterwards made and confirmed, and defendant appeals.

W. H. Brooke, for appellant. Geo. W. Hayes, for respondent.

BEAN, C. J. (after stating the facts as above). We think the decree must be reversed. It is incumbent on a plaintiff in a suit for partition, unless the suit is brought by one or more tenants in common of a vested remainder or reversion, to allege and prove, if denied, that he and the defendant were in possession of the property as tenants in common at the time of the commencement of the suit. *Sterling v. Sterling*, 43 Or. 200, 72 Pac. 741. And this the present plaintiff does not do. She does not allege that she was in possession; but, on the contrary, avers that defendant was and ever since November, 1904, has been in the sole occupancy of the premises, and such are the facts that appear from the evidence. Ordinarily the possession of one tenant in common is the possession of both; but this record discloses a dispute as to the title and right of possession of real property, and until it is determined, and plaintiff secures possession in some appropriate proceeding, she cannot maintain a suit for partition.

Decree reversed, and complaint dismissed.

KING, C., having been of counsel, took no part in this decision.

*Rehearing denied February 11, 1908.

(50 Or. 472)

STANLEY v. J. N. RACHOFSKY & SON.*

(Supreme Court of Oregon. Jan. 21, 1908.)

1. JUSTICES OF THE PEACE—SUMMONS—CONTENTS.

Laws 1905, p. 315, provides that a justice's summons shall require the defendant to appear and answer within seven days from the date of service, or suffer judgment for the sum specified in the complaint with the disbursements of the action, and B. & C. Comp. § 2203, provides that such summons shall be served by delivering a copy thereof, together with a certified copy of the complaint, etc. *Held*, that where a summons properly issued and signed contained sufficient information to warn defendant that a judicial proceeding was pending against him in a particular court, and that if he did not appear and answer a judgment would be taken against him for a specified sum, it was not fatally defective for failure to state the rate of interest demanded and the date from which it was to be computed, such facts appearing from a copy of the complaint served with the summons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 253.]

2. SAME—IRREGULARITY IN PROCESS—SERVICE—REMEDY.

An irregularity in the process or in the manner of its service by which a justice's jurisdiction was acquired must be taken advantage of by some motion or proceeding in the court where the action is pending.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 264.]

3. SAME—COPY OF SUMMONS—CERTIFICATION.

Where a return of service of a justice's summons certified that a copy was served, such return was sufficient proof that the instrument served was a copy under B. & C. Comp. § 2203, requiring only that a copy of the summons be served, and not requiring that it be certified by any one to be a copy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 262, 263.]

4. SAME—TIME TO ANSWER.

Under Laws 1905, p. 315, providing that a defendant in a justice's court shall be required to answer within seven days from the date of the service, he may answer on any one of those dates.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 324.]

5. SAME—APPEARANCE—DOCKET ENTRY.

Laws 1905, p. 315, requires defendant in a justice's court to answer within seven days from the date of service, and B. & C. Comp. § 2211, provides that his plea or answer must be in writing and be filed with the justice. *Held*, that where a defendant in a justice's court could not have been in default until the date on which judgment was rendered, and was in default on the beginning of that day, and the judgment recited that defendant had failed to answer the complaint as required by law, such recital being in the form prescribed by section 786 was sufficient to sustain the judgment without a docket entry of defendant's failure to appear.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 385.]

Appeal from Circuit Court, Grant County; Geo. E. Davis, Judge.

Writ of review by J. C. Stanley against J. N. Rachofsky & Son to annul a justice's judgment recovered by default by the latter against the former. From an order setting the judgment aside, Rachofsky & Son appeal. Reversed and remanded, with directions to dismiss the writ.

*Rehearing denied March 10, 1908.

On February 12, 1907, Rachofsky & Son filed, in the justice's court for the Third justice's district of Grant county, a complaint embracing two causes of action against plaintiff. On the first cause of action judgment was demanded for \$29.60, with interest at 6 per cent. per annum from October 7, 1903, and on the second cause of action for the sum of \$20, with interest at the rate of 6 per cent. from July 15, 1903, and for their costs and disbursements. The summons was issued on February 12th, and required the defendant in the action to appear and answer the complaint within seven days from the date of the service thereof, or suffer judgment to be taken against him for the sum of \$49.60, with interest thereon, with the disbursements of the action. It was returned and filed with the justice on the 21st, with an indorsement thereon showing personal service on February 13th, in Grant county, Or., on defendant, by a delivery to him of a copy thereof prepared and certified by the deputy sheriff, together with a copy of the complaint certified to be such by plaintiff's attorney. After the issuance of the summons, no entry was made by the justice in his docket that in any way referred to the date of the making or filing of any pleading by the defendant, or of his appearance or failure to appear in the action until the 21st, when the following entry was made: "Plaintiff appeared, and it appearing that the defendant has failed to answer the complaint as required by law, it is considered that the plaintiff recover off the defendant the sum of \$59.89, and the disbursements of the action taxed at \$13.90." On March 4, 1907, plaintiff herein sued out a writ of review to set aside and annul such judgment on the ground (1) that no summons was issued as required by law; (2) that there was no service upon the petitioner of the pretended summons; (3) that the justice did not enter in his docket the failure of the defendant to appear; (4) that it does not appear from the judgment as entered in the justice's docket that the defendant therein was ever served with a summons in said action, or that he was served more than seven days prior to the rendition of the judgment; and (5) that the amount for which it was entered does not conform it to the amount specified in the summons, for which judgment would be taken in default of an answer. The lower court set aside the judgment, and Rachofsky & Son appeal.

A. M. F. Kirchheiner, for appellant. Errett Hicks and J. E. Marks, for respondent.

SLATER, C. (after stating the facts as above). The only deficiency in the summons urged as a reason for overturning the judgment is that, although there is given the amount of the principal of the debt for which judgment is demanded, it fails to state the rate of interest demanded, and the date or dates from which it was to be computed. At the time of the commencement of the action,

the law governing trials and proceedings in civil actions in justices' courts provided that the summons "shall require the defendant to appear and answer the complaint within seven days from the date of the service thereof upon him or suffer judgment to be taken against him for the sum specified in the complaint with the disbursements of the action" (Laws 1905, p. 315), and that it shall be served by delivering a copy thereof, together with a certified copy of the complaint, etc. (section 2203, B. & C. Comp.). While it is advisable in the issuance of the summons that the statute should be literally complied with, nothing short of a substantial departure therefrom can properly be held to be fatal to a proceeding under it, and the recent decisions are to the effect that a substantial compliance with statutes of this character is all that is required. *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 805; *Bewick v. Muir*, 83 Cal. 368, 23 Pac. 389; *Clark v. Palmer*, 90 Cal. 504, 27 Pac. 375; *Bucklin v. Strickler*, 32 Neb. 602, 49 N. W. 371; *McPherson v. First National Bank*, 12 Neb. 202, 10 N. W. 707; *Keybers v. McComber*, 67 Cal. 395, 7 Pac. 838; *Shinn v. Cummins*, 65 Cal. 97, 3 Pac. 133; *White v. Iltis*, 24 Minn. 43; *Kimball v. Castagnio*, 8 Colo. 525, 9 Pac. 488; *Warren v. Gordon*, 10 Wis. 499; *Behlow v. Shorb*, 91 Cal. 141, 27 Pac. 546. Doubtless the summons was slightly irregular or defective in the respect mentioned, but it was nevertheless issued and signed by the proper officer, and contained information sufficient to warn the defendant that a judicial proceeding was pending against him in a particular court, and that if he did not appear therein and answer the complaint within a specified time a judgment would be taken against him for a certain sum of money. Upon proper service of such a summons a judgment given for want of an answer would not be void. *North Pacific Cycle Co. v. Thomas*, 26 Or. 381, 38 Pac. 307, 46 Am. St. Rep. 636; *Perry v. Gholson*, 39 Or. 438, 65 Pac. 601, 87 Am. St. Rep. 685. The deficiency in the summons is no more than an irregularity, and such a one as does not affect a substantial right of the defendant, when, as in this case, a copy of the complaint was served with the summons. The relief demanded in the complaint is full and explicit, and carried notice to the defendant of all the facts of which he says the summons was lacking. "But if the complaint is served with the summons," says Mr. Justice Allen, in *McCoun v. Railroad Co.*, 50 N. Y. 176, "the defendant has more full and perfect knowledge of the cause of action and the consequences of default than he could get from the summons alone, and if there is an error or defect in the summons, it carried with it the remedy and correction, and an effectual preventive against error by any one." Also, if there is any irregularity in the process or in the manner of its service, the defendant must take advantage of such irregularity by some motion or proceeding in

the court where the action is pending. *Free-man on Judgments* (4th Ed.) § 126.

2. The second reason assigned in support of the petition is that there was no legal service of the summons on the petitioner, but the return of the officer successfully disproves that averment. It is particularly urged in this connection that, because the copy of the summons delivered to the defendant was certified to by the deputy sheriff instead of the sheriff, it amounted to no service. The statute, however, required only that a copy of the summons be served, and does not require that it shall be certified by any one to be a copy. Section 2203, B. & C. Comp.; *Bank v. Richardson*, 34 Or. 518, 54 Pac. 359, 75 Am. St. Rep. 664. The return shows that a copy was served, and that is sufficient proof that it was a copy.

3. As a further reason for overturning the judgment, it is averred that the justice did not enter in his docket the failure of the defendant to appear as required by section 2198, subd. 4, B. & C. Comp. Plaintiff relies solely upon the decision of this court in the case of *Loan Ass'n v. Osburn*, 38 Or. 568, 64 Pac. 383, to support that contention. It was there held that there must be a substantial compliance with the requirement of that section to authorize the entry of a judgment by default which will not be subject to direct attack. But the state of the law of procedure and practice in justices' courts in civil actions at the time of the commencement of that case is radically different from what it is now. At that time the summons required the defendant to appear at a specified time to answer the complaint, so that he could not appear or answer at any other time, so, also, no formal or written pleadings were required, but they may have been either oral or written (Laws 1893, p. 38), while at the time of the commencement of the present action the defendant is required to answer within seven days from the date of the service, and he may, therefore, answer on any one of those days (Laws 1905, p. 315). And his plea or answer must be in writing and be filed with the justice. Section 2211, B. & C. Comp. It is also material to note that subdivision 4 of section 2198, B. & C. Comp., requiring the justice to enter in his docket the time when the parties appeared or their failure to do so, is a part of the original justices' act of 1864, which recognized an oral pleading. Under such practice the personal appearance of a party and the making of an oral plea could not be evidenced in any other manner than by an entry in the docket of that fact. While the absence of such an entry might have been sufficient proof that no appearance was made, yet the Legislature saw fit to enact that the failure of a party to appear should also be entered. But it did not provide that a failure to file a written plea should be noted by the justice. It is stated in *Hardy v. Miller*, 11 Neb. 395, 9 N. W. 475,

cited in *Loan Ass'n v. Osburn*, supra, that: "The finding of a court that Hardy and wife made 'default of answer' is one of fact. No judgment can lawfully be rendered by default until the time for filing an answer has elapsed, and the authority of the court to render such judgment follows from the failure of the defendant to answer, and not from the particular manner in which the default entered. The essential fact is the failure to answer." The deduction made from this case by Mr. Chief Justice Bean, in the case of *Loan Ass'n v. Osburn*, supra, as applied to the law as it was then, is that "where a record shows that the court convened at the time and place specified in the summons, and after waiting the statutory time a judgment was rendered against a defendant for want of an answer, it will perhaps be sufficient, although no formal default was entered, as the record actually made is practically equivalent thereto." In the case now under review the defendant could not have been in default until February 21st, and he was in default at the beginning of that day on which judgment was entered. Prior to the 21st no entry or record of the defendant's failure to appear and answer the complaint could have been made. When the recitals of the judgment embodied in the record show that in fact the defendant was in default, it is sufficient to authorize the action of the court, and the judgment will be sustained on appeal or error. 6 Pl. & Pr. 56. The judgment recites "that the defendant has failed to answer the complaint as required by law." This is a conclusion, it is true, but one that the court is bound to draw from the state of the record, because there is no entry therein of the filing of any pleading by defendant, and that is sufficient in itself to contravene the assumption that one may have been filed. Under the present state of the law, the recital is sufficient to support a default, especially so since the forms of the docket entries used by the justice in this instance are precisely those set forth in section 786, B. & C. Comp., for the guidance of such courts.

The remaining averments of the petition do not appear to have been relied upon, and we think are without merit. The judgment should be reversed and the cause remanded, with directions to dismiss the writ.

(50 Or. 455)

JACKSON v. SUMPTER VALLEY RY. CO.*

(Supreme Court of Oregon. Jan. 7, 1908.)

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Contributory negligence is a matter of defense and the burden of establishing it is on defendant, unless plaintiff's declaration or evidence establishes it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 229-234.]

*Rehearing denied February 4, 1908.

2. TRIAL—NONSUIT.

The province of a motion for nonsuit is in the nature of a demurrer to the evidence, and when it is sought to take advantage of a defect in the pleadings by such a motion, the pleadings should be construed liberally as if on a motion by defendant for judgment notwithstanding the verdict against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 359-367.]

3. PLEADING—DEFECTS.

A party relying on a technical defect in a pleading is subjected to observance of technical rules.

4. RAILROADS—INJURY TO ANIMALS—CONTRIBUTORY NEGLIGENCE—PLEADINGS.

Where, in an action against a railroad company for killing cows on its track, the company as an affirmative defense alleged that plaintiff negligently herded cows along the right of way within switching limits at a station, with knowledge that the right of way was dangerous, a reply denying the averments of the answer, except that "certain cows of the plaintiff, being then and there under the immediate care, custody, and control of plaintiff," construed liberally in favor of plaintiff, did not admit contributory negligence.

5. SAME.

An answer, in an action against a railway company for killing cows on its track, which alleges that plaintiff negligently herded "certain" cows along the right of way within switch limits at a station, with knowledge of the danger, and that he negligently permitted the stock to remain on and along the track, and that thereby the stock sustained injuries, etc., does not, on a strict construction, raise the defense of contributory negligence, in the absence of any identification of the "certain" cows with those whose killing is sued for.

6. SAME—QUESTION FOR JURY.

In an action against a railway company for killing animals on its track, the question of contributory negligence of the owner *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1639.]

7. TRIAL—QUESTION FOR JURY.

Where different deductions may reasonably be drawn from the evidence in a cause, the issues are for the jury; and, to justify the granting of a nonsuit, the facts and inferences must be undisputed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 336.]

8. RAILROADS—INJURY TO ANIMALS—CONTRIBUTORY NEGLIGENCE.

Whether one is guilty of contributory negligence in turning his stock out to graze on uninclosed lands near a railroad track is a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1639.]

9. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ORDINARY CARE.

One is not guilty of contributory negligence, unless he fails to exercise ordinary care; and there is no want of ordinary care, when, under the circumstances, he does not omit anything which an ordinarily prudent person similarly situated would not have omitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 83.]

10. SAME—QUESTION FOR JURY.

Where both the duty to exercise care and the extent of its performance are to be ascertained as facts, the jury alone can determine what is negligence, and whether it has been proven.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 279-302.]

11. RAILROADS—INJURY TO ANIMALS—STATION GROUNDS.

In an action against a railroad for injuries to animals on its track, the evidence showed that there were about 1½ miles of unfenced track from one station towards another, that it was three-quarters of a mile from the station to the head of a switch for a siding running back towards the station used for storing engines, etc., and that further on in the direction of the other station about 150 yards from the switch was a branch line leaving the main line and forming the head of a "Y." The animals were killed near the switch for the siding. There was nothing to show that the siding was used in connection with a depot at the station. *Held*, that the question whether the animals entered the track within depot grounds was for the jury.

12. APPEAL—REVIEW OF EVIDENCE—BILL OF EXCEPTIONS.

Where the evidence is not in the bill of exceptions, and a transcript of what appears to be evidence is in the record, but the same is not identified by the court, or certified to be any or all of the testimony in the case, the court on appeal will not consider it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2694-2696.]

Appeal from Circuit Court, Baker County; William Smith, Judge.

Action by S. H. Jackson against the Sumpter Valley Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff sues on two causes of action to recover in damages the value of some of his milch cows, which were killed and injured by defendant's moving railroad cars and engine on its track near the town of Sumpter, in Baker county. A nonsuit was granted as to the first cause of action, which is not to be considered here. For the second cause of action it is averred that a number of plaintiff's cows, on August 6, 1906, went upon defendant's unfenced track, and four of them were killed and two were injured by one of defendant's moving trains and engine drawing the same. The answer denies generally the averments of the complaint, excepting defendant's incorporation and ownership and operation of the railroad leading from Baker city to Sumpter on which the cows were killed. As an affirmative defense, it is alleged, in substance, that on August 6, 1906, certain cows of plaintiff being then and there under the immediate care, custody, direction, and control of plaintiff and his servant, one Robert Allen, were by them carelessly and negligently, and without right or authority, wrongfully herded and pastured upon and along defendant's right of way and railroad track, within its switching and station yards, inside the corporate limits of the city of Sumpter, and that plaintiff and his servant, Robert Allen, well knowing that defendant's trains were regularly passing over said tracks and right of way, and well knowing said stock was within defendant's switching yards, and that said right of way and said switching yards were dangerous and unsafe places for said stock to be, and that they had no right to have said stock in said

places, carelessly and negligently permitted said stock to remain upon and along said track and right of way, and that thereby said stock sustained the injuries alleged, if at all, and that whatever damage plaintiff may have suffered from said injuries was due solely to his own said negligence and carelessness in driving and herding his said stock upon and along defendant's track and right of way, as aforesaid, and not to any fault or negligence of this defendant. By the reply, plaintiff denied generally all the averments of the answer, excepting that "certain cows of the plaintiff, being then and there under the immediate care, custody, and control of plaintiff." After the issues were thus joined a trial was had before a jury, and at the conclusion of plaintiff's testimony defendant moved a nonsuit, on the ground that the evidence shows plaintiff to have been guilty of contributory negligence sufficient to bar his right to recover. This being overruled, defendant offered his testimony, and the cause was submitted to the jury, which returned a verdict in favor of plaintiff in the sum of \$380, upon which judgment was entered, from which defendant appeals.

V. W. Tomlinson, for appellant. C. H. McCulloch, for respondent.

SLATER, C. (after stating the facts as above). The first and principal error relied upon to reverse the judgment is the denial by the court of defendant's motion for a nonsuit to the second cause of action. In this state contributory negligence is a matter of defense, and the burden of establishing it is on the defendant. *Johnston v. O. S. L. Ry. Co.*, 23 Or. 94, 81 Pac. 283; *Grant v. Baker*, 12 Or. 329, 7 Pac. 818. But, if plaintiff's declaration or evidence establishes his own contributory negligence, it bars his recovery, no matter where the burden rests. 7 Am. & Eng. Ency. (2d Ed.) 454; *Tucker v. Northern Terminal Co.*, 41 Or. 82, 68 Pac. 426; *Scott v. Oregon Ry. & N. Co.*, 14 Or. 211, 18 Pac. 98.

To support its contention counsel for defendant urges with much earnestness that the pleadings on the part of plaintiff admit that the cattle went upon the track while under the immediate care, custody, and control of plaintiff. This arises, it is argued, from the form of the denial used in the reply. What the pleader intended to admit by excluding the quoted words from the effect of his denial is doubtful. Defendant's counsel arrive at their conclusion by a strict construction of the language quoted, and contend that such should be the rule. But, if their assumption as to the rule of construction and their interpretation of the implied admission be correct, the result would have entitled defendant to a judgment on the pleadings, which they should have asked before going to trial, and not wait to raise the question on motion for nonsuit. The prov-

ince of a motion for a nonsuit is in the nature of a demurrer to the evidence (*Brown v. Oregon Lumber Co.*, 24 Or. 315, 33 Pac. 557), and it is an unusual method of taking advantage of a defect in the pleadings, and the appellant rather than respondent should be held to strict rules. "It has been held," says Mr. Justice Thayer, in *Specht v. Allen*, 12 Or. 117-122, 6 Pac. 494, 495, "that when a pleading did not contain a cause of action or defense as the case might be, and the objection to it was made for the first time at the trial by opposing the introduction of evidence to support it, the party would be deemed to have waived any objection to its sufficiency. I am of the opinion that the party in such case should be compelled to resort to a motion for judgment, notwithstanding the verdict, in case one were to be rendered against him, as the party interposing the pleading ought, when it had not been demurred to, to be entitled to the presumptions a verdict in his favor would afford. That appears to me to be the course the Code intends should be pursued. But, on the other hand, where a party has no sufficient pleading to stand upon, and judgment has gone against him, he is not in a favorable condition to ask for its reversal, particularly where a verdict would not have cured the defect. An appellate court in such a case would, I think, consistently determine that the error had not injured him." So, then, in this instance the reply should be construed as if the question arose upon a motion by defendant for a judgment, notwithstanding the verdict, that is, liberally, so that, if possible, the verdict may be sustained. Under these limitations, we are constrained to hold that the language used in the reply was intended to mean no more than that certain cows of the plaintiff were at the time of the accident under the care, custody, and control of plaintiff, not that they were under his care, custody, or control at the time they went upon the track and right of way of the defendant. When so construed and applied to the testimony hereinafter considered, plaintiff has relieved himself from any necessary inference of negligence on his part. But defendant is in no better condition, even if the language of the reply be construed strictly. A party who relies upon a technical defect is subjected to observance of technical rules. *Hermann v. Hutcheson*, 33 Or. 239, 53 Pac. 489; *Small v. Lutz*, 34 Or. 131, 55 Pac. 529, 58 Pac. 79; *Bilyeu v. Smith*, 18 Or. 335, 22 Pac. 1073. The admission, claimed by defendant to be included in the language of the reply above quoted, could not arise, except that reference be made to the affirmative matter of the answer to interpret it. The words "certain cows of the plaintiff" of themselves do not necessarily mean the cows mentioned in the complaint upon which the cause of action is based. The answer contains the same language, and there is nothing elsewhere there-

in that identifies the "certain cows of the plaintiff" to be those described in the complaint. For all that appears upon the face of the pleadings, the averments of the answer may be true, and yet be no bar to a recovery on the cause of action set forth in the complaint. Plaintiff may have had another and different cause of action, which for some reason he did not see fit to include in his complaint.

It necessarily follows that upon a strict construction of the answer the defense of contributory negligence is not in this case; at least defendant, when judgment has gone against him, is not in a favorable position to ask for its reversal for this particular alleged error. *Specht v. Allen*, *supra*. Assuming, however, that the issue of contributory negligence is made by the answer, we will now examine plaintiff's testimony and ascertain whether any indisputable inference can be drawn from the uncontradicted facts which disclosed the omission or commission of any act by plaintiff or his servant, which the law adjudges negligent. The facts disclosed by the record are: That plaintiff operates a dairy in the vicinity of Sumpter, and had in his herd about 38 cows. That in the month of August, 1906, he pastured his cows for the most part on a farm called in the record the "Jett" place, situate about 2 miles east from the dairy and about 1½ miles south and east of Sumpter Depot, and through which defendant's main line going from Sumpter to Baker City passes, but sometimes the cows were turned out to feed upon the commons. That defendant's track is unfenced from Sumpter Station to the Jett place. On the morning of August 6, 1906, the cows were driven by one of plaintiff's hired men out to feed upon the commons, and left back of the Jett place and in the vicinity of the smelter, which is upon or near a branch road leaving the main line between 1¼ and 1½ miles south and east of the Sumpter Depot and going to Austin. That between the smelter and defendant's right of way and plaintiff's barn or dairy the country is not fenced, and is covered with brush, but affords good pasturage. About 3 o'clock in the afternoon of that day Robert Allen, plaintiff's employé, whose duty was to drive the cows home in the evening, went from the dairy easterly down the valley hunting some stray horses, intending to bring the cows home on his return in the evening. As he went he noticed three of the cows coming towards Sumpter up the track of the branch road from a quarter to a half mile distant from the main track, and about one-half mile from where the cows were killed. The rest were scattered between the Jett place and the smelter. Allen went on down the valley, secured the horses, and returned, arriving in the same vicinity between half past 5 and 6 o'clock. He then saw 15 or 20 head of plaintiff's cows feeding and drifting towards Sumpter on defendant's right of way, and between the arms of a "Y" formed by the branch line to Austin, the main line to Baker City, and

a connecting curve. The horses having taken a canter along the county road towards home, Allen turned out of the road after the cows and drove those nearest him from the "Y" a distance of 200 or 300 yards to the county road, then turned back to get 17 or 18 others which had gone ahead up the main track towards Sumpter beyond the junction a distance of some 450 feet. At this point on the west side of the track there is a rocky point within 5 feet of the center of the track, and on the east side within about 30 feet is Powder river. The space between the track and the river was at one time traveled as a county road, but for a long time prior to the date of the accident it had been filled within a few feet of the track with sawlogs and brush, leaving very little space for loose stock to travel on. But there is a stock trail there, winding through the logs for a distance of 75 to 100 yards, then turns off to the left into the county road. About 150 feet further up the track towards Sumpter from the rocky point is a switch for a short siding called "Sumpter Sliding," and 25 feet beyond this switch is the frog of the switch. Sumpter Depot or Station is three-fourths of a mile distant from the switch. Allen had consumed about 10 minutes of time in getting the first bunch of cows out of the "Y" and into the county road, when he turned back to get the remainder. These were 200 or 300 yards from where the first ones were found, and were feeding along the track towards this rocky point. Before Allen overtook them they had passed this point, and just as he arrived at the point he saw the train coming from Sumpter towards him. He endeavored to get in ahead of the cows and turn them off the track, but the engine struck two of the cows at the frog, injuring them, and killed four others at the switch stand.

The theory of the defense is that Allen was driving the stock homeward when they first went upon defendant's track, and that he was attempting to drive them along this trail on the right of way because by that route it was one quarter of a mile nearer to the dairy than by the county road. But he positively denies both of these assertions, and swears that he never at any time drove them through there; that when he first saw the cows upon the right of way he immediately went to them and began rounding them up and getting them off the right of way into the county road, taking those first that were nearest to him, preparatory to driving them home; that he had been engaged in that matter no more than 10 minutes when the cows were killed. To support its theory, however, defendant on cross-examination of plaintiff offered in evidence, as containing admissions against his interest, what purports to be an owner's statement of stock injured or killed, with plaintiff's name as claimant typewritten at the bottom thereof, under which is written "per, G. E. Allen." This statement is upon a printed blank form furnished by the com-

pany, and is in the form of questions and answers. It contains a statement of the time and place of the accident, a description and the value of the cows injured and killed, and, besides others, these questions and answers: "Was stock in charge of any one at the time? If so, who? Robert Allen. State how you know the stock was struck by the train? The cows were being driven home." Plaintiff swears that he did not personally know how the stock were killed, or whether they were being driven home by any one; that, by telephone, he directed G. E. Allen to fill out and present this claim blank for him, giving Allen, at the time, information about the number, description, and value of the stock, and told him that Robert Allen could give him other necessary facts; that he never saw the blank after it was filled out, and did not know that it contained such answers. Robert Allen swears that he did not give this particular information to his father, G. E. Allen. Under such circumstances, it could hardly be said, as a matter of law, that plaintiff is bound by the answers; but, if he were, it is but a statement, not conclusive, and is subject to explanation. On the face of it without explanation the statement is that at the time of the accident the stock was in charge of Allen and were being driven home by him, not that they were in his charge when they went upon the track. When, however, the statements are placed with the explanatory facts as disclosed by the evidence of Allen, it can at least be said that different deductions may honestly and reasonably be drawn therefrom by different minds, and under such circumstances the question is one proper to be submitted to a jury. *Hedin v. Suburban Ry. Co.*, 26 Or. 155, 37 Pac. 540.

It is also contended by defendants that Allen was negligent in not going first to those cows that were on the main track and removing them; for, it is argued, they were in the most danger, and his duty was to attend to them first. It may be conceded that it is the law that one who sees his cattle in danger upon a railroad track and can by reasonable exertions get them off he is bound to do so (*Milburn v. Kansas City, etc., Co.*, 86 Mo. 104), or that one having stock under his immediate care, custody, and control, who voluntarily drives or puts them in a place of danger, or carelessly permits them to wander from his control into a place of danger, is guilty of contributory negligence (*Keeney v. O. R. & Nav. Co.*, 19 Or. 291, 24 Pac. 233; *Ohio & Missouri Ry. Co. v. Eaves*, 42 Ill. 288). But a motion for a nonsuit is in the nature of a demurrer to the evidence. It admits the truth of plaintiff's evidence and of every inference of fact which the jury may legally draw from it. The sufficiency of the evidence is for the jury, provided the court shall be of the opinion that there is any evidence tending to sustain the complaint. *Brown v. Oregon Lumber Co.*, 24 Or. 315, 33 Pac. 557. And to justify granting a nonsuit

facts should be not only undisputed but conclusions to be drawn from them indisputable. If different minds may honestly draw different conclusions from the facts, though undisputed, the case should be left to the jury. *Peabody v. O. R. & N. Co.*, 21 Or. 121, 26 Pac. 1053, 12 L. R. A. 823. As a matter of law, then, the court cannot say that plaintiff was guilty of contributory negligence in turning his stock out to graze on unclosed lands near defendant's track or depot. That is a question for the jury. *Wilmot v. Oregon R. Co.*, 48 Or. 494, 87 Pac. 528, 7 L. R. A. (N. S.) 202. Nor if plaintiff's testimony is to be believed can negligence be imputed to him because his stock was found upon defendant's track. They were not in his immediate care, custody, or control when they went upon the track, nor in the care of his servant, nor did either of them carelessly permit them to wander from his control into the place of danger where they were found.

If counsel by argument can draw a different inference from the evidence, it is derived only by the process of weighing testimony and by giving credence to one piece of testimony and rejecting another where there is a conflict. But when the right determination of a case depends upon the weight to be given evidence, it is for the consideration of the jury. *Anderson v. North Pacific Lumber Co.*, 21 Or. 281, 23 Pac. 5. It is undisputed, however, that the servant about 10 minutes before the accident found plaintiff's stock in a place which imparted notice of danger, not notice of a present and imminent danger by seeing a train approaching, for that is not the fact, but because the track itself is a warning of possible danger. *Durbin v. Oregon R. & Nav. Co.*, 17 Or. 5, 17 Pac. 5, 11 Am. St. Rep. 778. He did not then know that any train was due from either direction, and he was compelled to act on the assumption that one part of the track was no more dangerous than another. Hence he first attended to those nearest to him. Had the fact been that when he first came upon the ground he saw a train coming from the opposite direction, or that he knew that a train was then due from that direction, it may have been his duty to have gone first to those cows that were nearest to the anticipated danger; but the facts show that Allen immediately upon discovery of the dangerous position of the cows went with reasonable diligence to the scene and made at least some effort in good faith to perform his duty, the degree of which is for the jury. *Richmond v. McNeill*, 31 Or. 342, 49 Pac. 879. There could be no contributory negligence by plaintiff, except there is a failure on his part, or on the part of some person with whose negligence he is chargeable, to exercise ordinary care to avoid the injury, and such lack of ordinary care is the proximate cause of the injury. 7 Am. & Eng. Ency. (2d Ed.) 873. And there has been no want of ordinary care, when, under all the circumstances and surroundings of the case, the person injured, or those whose

negligence is imputable to him, did or omitted nothing which an ordinarily careful and prudent person similarly situated would not have done or omitted. *Id.* 378. When both the duty and the extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence and whether it has been proven. *West Phila. Pass. Ry. Co. v. Gallagher*, 108 Pa. 524; *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67. The court did not err in denying defendant's motion for a nonsuit.

The court refused to instruct the jury upon defendant's request to return a verdict in its favor, and this action of the court is assigned as error. This request was based upon no other contention than that made to support the motion for nonsuit, and that has been considered and disposed of adversely to defendant. Defendant excepted to the giving of this instruction: "Whether or not defendant should have fenced that portion of its track upon which plaintiff's cattle entered is a matter for your determination from the evidence. If you find from the evidence that that portion of defendant's track was within defendant's depot yards, then the defendant was under no obligation to fence; otherwise it should have fenced," and error is assigned on that account. It is insisted that as evidence in this case is not conflicting or uncontradicted, it was not a question for the jury to determine whether or not the defendant ought to have fenced its track at the place or places where plaintiff's cattle were killed, or whether or not such places were within defendant's depot and switching yard, but that it was a matter of law for the court to declare.

Plaintiff's evidence shows that there are about 1½ miles of unfenced track from Sumpter toward Baker City; that it is three-fourths of a mile from Sumpter to the head of a switch for a siding running back towards Sumpter about 200 feet, which is used for storing slab wood for the use of defendant's engines; that further on in the direction of Baker City about 150 yards from this switch the branch line to Austin leaves the main line and forms the head or point of the "Y." The cows were killed near the switch for the "Sumpter Siding," and on the side thereof toward Baker City. There is no suggestion in plaintiff's evidence that Sumpter Siding was a part of or was used in connection with the depot at Sumpter.

The defendant's evidence is not found in the bill of exception; but there is on file a separate transcript of what appears to be some evidence taken in this case, and includes what purports to be some at least of defendant's testimony, but it is not identified in any manner by the court, or certified to be any or all of the testimony in this case, and for that reason it cannot be legally considered. However, as the parties have printed in their briefs some excerpts therefrom, we have not refrained from looking into it. It shows, in substance, that switch-

ing is done daily at the "Y" in reversing engines and trains for the branch line; but this of itself does not tend to make the "Y" or that part of the main track between it and Sumpter Siding a part of the depot grounds of Sumpter Station, three-fourths of a mile distant, or that of itself it constituted a separate and distinct depot or station, within the limitations stated in *Wilmot v. O. R. & N. Co.*, 48 Or. 494, 87 Pac. 528, 7 L. R. A. (N. S.) 202. Switching is not the principal thing that constitutes a depot, but is only an incident of it. In our judgment, the correct distinction is stated in an extended footnote to that case found in 7 L. R. A. (N. S.) 203, where it is said: "A very clearly defined principle regulates this question—the principle of paramount public importance of the public good or convenience over private rights. Fence laws have been passed very generally in all parts of the country, compelling railroad companies to fence their tracks in order to protect individuals from injuries to their stock straying thereon. But at stations where the general public has a right of access, and the necessary transactions of the road require it, an exception either by express language in the statute or by construction of the courts has come to be made in almost every instance to the general obligation to fence, on the ground that the public right of access overrules the private right of protection. The question, then, of how far this exception to the obligation to fence extends, or, in other words, how far or what are station or depot grounds, is decided by determining how far the public convenience requires an open track." There is no public convenience to be conserved at a place used exclusively for switching. The public has no right of access where no passengers get on or off the train or no freight is loaded and unloaded. There is a suggestion in the evidence, however, that sometimes freight billed to Sumpter is put off at this "Y" as an accommodation. But that fact cannot, as a matter of law, be said to be sufficient to create a general public right of access to defendant's tracks at that point, so as to excuse it from the duty of fencing. We are of the opinion, therefore, that the court could not, as a matter of law, declare the place where plaintiff's cows were killed to be a necessary part of defendant's station at Sumpter, or part of an independent station at the "Y," so as to excuse it from the legal duty to fence its tracks.

It follows that the judgment must be affirmed.

THORSEN et al. v. HOOPER et al.

(Supreme Court of Oregon. Jan. 21, 1908.)

1. GARNISHMENT — CLAIMS SUBJECT TO GARNISHMENT—INDEBTEDNESS OF ESTATE.

A debt due from a decedent's estate is not subject to garnishment until the share of the creditor, heir, or legatee has been ascertained

and ordered paid by the court, prior to which the money or funds of the estate are in custodia legis, and not subject to levy.

2. PAYMENT — VOLUNTARY PAYMENT — RECOVERY.

One who voluntarily pays money in satisfaction of an asserted demand, with full knowledge of all the facts, cannot recover it when the transaction is unaffected by any fraud, trust, confidence, or the like because at the time of the payment he was ignorant of his legal rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, §§ 253-266.]

3. SAME—MISTAKE OF FACT.

Payment of an illegal demand made under a mistake of fact may be recovered in an action for money had and received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, §§ 272-281.]

4. SAME.

An administrator having been garnished in a suit in which the attorney for the state represented the creditor, judgment was recovered in favor of the creditor, on which an execution was placed in the hands of the sheriff for service, who notified the administrator that he had an order from the circuit court directing him to pay out of the funds of the estate the amount of the judgment and costs. The administrator thereupon advised with the attorney of the estate without knowledge that he was also representing the creditor in the garnishment proceedings, and was advised that the proceedings were regular, and that he was compelled to pay the money to the sheriff as demanded, which he thereupon did. *Held*, that the circuit court never having made an order in the garnishment proceedings requiring the administrator to pay the amount of the judgment out of the funds of the estate, the payment was made on mistake of fact, and was recoverable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, §§ 272-281.]

Appeal from Circuit Court, Union County; T. H. Crawford, Judge.

Action by J. B. Thorsen and others, as administrators of the estate of H. L. Buell, deceased, against J. A. Hooper and another. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

This is an action for money had and received, and comes here on appeal from a judgment on the pleadings in favor of defendants. The facts are set out in detail in the pleadings of the respective parties. Briefly, they are: That plaintiffs are the administrators of the estate of H. L. Buell, deceased, and N. C. McLeod was their attorney and legal adviser. At the time of his death Buell was indebted to H. C. Brown on a promissory note for \$1,000, with John Graham as surety. After the appointment of plaintiffs Brown presented to them a duly verified claim against the estate of their decedent for the amount due on such note. After such presentation the defendants, Hooper & Hudson, through McLeod, as their attorney, commenced an action at law in the circuit court of Union county against Oscar Eaden and H. C. Brown, partners doing business under the firm name of Eaden & Brown, to recover the sum of \$342.35, and caused a writ of attachment to issue in such action. A copy of the writ, together with a notice of garnishment, was served on J. B. Thorsen, one of the plain-

tiffs, and in answer thereto he stated that "there is a balance due H. C. Brown of \$500, on principal and accrued interest." The defendants afterwards recovered judgment in their action against Eaden & Brown, and an order of the circuit court reciting the attachment of the claim of Brown against the Buell estate, and directing that the attached property be sold as on execution to pay the judgment, costs, and disbursements, and that the "claim in said hands of said administrators may be collected if the proceeds thereof can be so collected by the sheriff under his execution or order of sale herein." A few days later an execution was issued on this judgment, and placed in the hands of the sheriff for service, who notified plaintiff Thorsen, by telephone, that he had an order from the circuit court directing him to pay out of the funds of the Buell estate the amount of the judgment and costs of Hooper & Hudson against Eaden & Brown. Thorsen thereupon advised with McLeod, his attorney, without knowledge that McLeod was also attorney for defendants, and McLeod told him that the attachment proceedings were regular, and that he was compelled to pay the money over to the sheriff as demanded. Thorsen, acting upon the statement of the sheriff as to the nature of the order of the circuit court and the advice of McLeod, paid the money over to the sheriff, and it was afterwards paid by that officer to the defendants. At the time of the service of the garnishment process upon Thorsen no order of the county court had been made for a distribution of the funds of the Buell estate or directing the administrators to pay the claim of Brown, and the promissory note, upon which such claim was based, did not belong to Brown, but had previously been assigned by him to Jennie P. Brown, who subsequently sued and recovered the amount thereon from Graham, the surety.

J. D. Slater, for appellants. C. H. Finn, for respondents.

BEAN, C. J. (after stating the facts as above). The debt due from the Buell estate on the claim presented by Brown was not subject to attachment by Brown's creditor at the time the writ of garnishment was served upon Thorsen, one of the administrators. No order of the county court had been made settling the claim or directing its payment, and until the share of a creditor, heir, or legatee of an estate has been ascertained and ordered paid by the court the money or funds of the estate are in the custody of the law, and not subject to levy under execution or process of garnishment. But the defendants contend that the payment of the money to the sheriff by Thorsen was voluntarily made, and therefore cannot be recovered by him and his co-administrators. It is well settled that one who voluntarily pays money in satisfaction of an asserted demand, with full knowledge of all the facts, cannot recover it when the

transaction is unaffected by any fraud, trust, confidence, or the like, because at the time of the payment he was ignorant of his rights under the law. *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660; *Brumagin v. Tillinghast*, 18 Cal. 265, 79 Am. Dec. 176; *Evans v. Hughes County*, 3 S. D. 244, 52 N. W. 1062; *Commercial Bank of Rochester v. City of Rochester*, 42 Barb. 488; *Erkens v. Nicolin*, 39 Minn. 461, 40 N. W. 567. But it is equally as well settled that when the payment of an illegal demand is made under a mistake of fact it may be recovered in an action for money had and received. *Stokes v. Goodykoontz*, 126 Ind. 535, 26 N. E. 391; *Wolf v. Beaird*, 123 Ill. 585, 15 N. E. 161, 5 Am. St. Rep. 565; *Walker v. Hill*, 17 Mass. 380; *Rogers v. Weaver*, 5 Ohio, 536. These questions are ably and exhaustively considered by Mr. Justice Wolverton, in his opinion in *Scott v. Ford*, 45 Or. 531, 78 Pac. 742, 80 Pac. 899, and it is unnecessary to add to the discussion at this time.

Now it appears from the facts, as alleged in the pleadings in the case at bar, that the payment by Thorsen to the sheriff was made under a mistake of fact as to the nature of the order of the circuit court and upon the advice of the attorney for the defendants, who he supposed at the time was acting for the estate. Thorsen was notified by the sheriff that the circuit court had made an order in the attachment proceedings requiring him to pay the amount of the judgment, recovered by Hooper & Hudson against Eaden & Brown, out of the funds of the estate, and that such order was in the hands of the officer for execution, when, in fact, no such order had been made. Relying upon this statement, and the erroneous advice of the attorney for the defendants, he paid the amount of the judgment out of the trust funds in his hands, and the money was subsequently paid to the defendants. If these facts are true, and for the purposes of this case it must be so assumed, we think that in equity and good conscience plaintiff should be permitted to recover it.

Judgment of the court below will therefore be reversed, and cause remanded, with directions to overrule the motion of defendants for judgment on the pleadings, and for such further proceedings as may be proper, not inconsistent with this opinion.

NOLAN v. HUGHES.*

(51 Or. 187)

(Supreme Court of Oregon. Jan. 21, 1908.)

1. COURTS—PROBATE COURTS—JURISDICTION. The county court, in exercising jurisdiction in probate, is a superior court of general jurisdiction.

2. JUDGMENT—PLEADING—PROBATE DECREE. In pleading a judgment of the county court sitting in probate, it is only necessary to allege that the judgment was rendered in a probate matter, it being presumed therefrom that the

*Rehearing denied March 17, 1908.

court acted within the authority conferred on it by law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1797.]

3. REFORMATION OF INSTRUMENTS—ADMINISTRATOR'S DEED—COMPLAINT.

A complaint to reform an administrator's deed, after alleging the issuance of letters of administration and the application of the proceeds of the sale of all personal property to the payment of administration expenses and debts of the estate, and reciting the filing of a petition for the sale of real estate and the necessity therefor, alleged an order by the county court authorizing the administrator to sell all the real estate of the decedent, including property specially described, the court finding that it was necessary to sell the real estate in order to pay debts and administration expenses. *Held*, that the complaint sufficiently showed that the county court when it rendered the judgment was sitting as a probate court having under consideration a probate matter, and that on the administrator's petition it directed the sale of real estate, the title to which was in question, so that complainant was entitled to the reformation of the administrator's deed on an allegation that by mutual mistake the lands were misdescribed.

Appeal from Circuit Court, Wheeler County; W. L. Bradshaw, Judge.

Suit by J. B. Nolan against Clyde Hughes. From a judgment for plaintiff, defendant appeals. Affirmed.

H. B. Nicholas, for appellant. H. H. Hendricks, for respondent.

EAKIN, J. Plaintiff brings this suit in equity to reform the deed of an administrator, made upon the sale of real estate in a probate proceeding. A demurrer to the complaint was overruled, and a decree rendered for the relief asked, and defendant appeals.

But one question is raised upon this appeal, viz., whether the county court had jurisdiction of the heirs in the probate proceeding to order the sale of the property. This question, however, is not before us upon the facts, but only upon the sufficiency of the pleading.

The complaint, after alleging the issuance of letters of administration to F. M. Templeton, and the application of the proceeds of the sale of all personal property to the payment of expenses of the administration and debts of the estate, and reciting the filing of the petition for the sale of the real estate and the necessity therefor, alleges the order for the sale of the realty in the following language, viz.: "That thereafter, on the 25th day of February, 1895, such proceedings were had in said county court that the said F. M. Templeton, as the administrator of the estate of said decedent, was duly and regularly authorized and empowered, by an order of said court, which was duly entered, to sell all of the real estate of said decedent, including the said E. ½ of S. W. ¼ of section 33, township 8 S., range 25 E. W. M., properly describing it, the court finding that

it was necessary to sell the said real estate of decedent in order to pay the remaining expenses, funeral charges, and claims still due and unpaid against the said estate."

The principal contention of the defendant is that the county court did not have jurisdiction of the parties, and that before it can acquire jurisdiction there must be personal service upon the heirs in the manner provided by law. But the question arises here whether the complaint in this suit sufficiently alleges the decree of the county court. The county court, in exercising the jurisdiction pertaining to probate matters, is a superior court of general jurisdiction, and in such case it is necessary, in pleading the judgment of such court, only that it appear that the judgment was rendered in a probate matter; and thereafter the presumption arises that the court acted within the authority conferred upon it by law. In *Rutenic v. Hamakar*, 40 Or. 444, 450, 67 Pac. 196, 199, Mr. Justice Moore reviews the authorities on both these questions at length, and holds: "In a judgment rendered by a court of general and superior jurisdiction, however, every fact necessary to confer jurisdiction will be presumed in order to support the validity of the judgment. * * * The county court in probate matters is a court of general and superior jurisdiction, * * * and as it is unnecessary to allege a fact which the law will presume, * * * the plaintiff was not required to allege that said court had secured jurisdiction of the person and subject-matter, so that the complaint is not vulnerable to the objection that it does not state facts sufficient to constitute a cause of action, notwithstanding it failed to allege that the order removing the administrator was 'duly' given or made." This ruling is sustained by all the authorities. 11 Ency. Pl. & Pr. 1130; Black, Judgments, § 966. The cases of *Galpin v. Page*, 85 U. S. 366, 21 L. Ed. 959, and *Cox v. Matthews*, 17 Ind. 376, and other cases cited by defendant, are not in point on these questions, as they were before the court upon the facts.

The complaint sufficiently shows that the county court, when it rendered the judgment, was sitting as a probate court, having under consideration a probate matter in the administration of the estate of a deceased person, and that upon the petition of the administrator it directed the sale of the real estate of decedent, the title to which is in question here, and further alleges that, in the execution of the deed to the purchaser at such sale, by mutual mistake of the administrator and the purchaser, viz., by a clerical error, the lands were misdescribed in such deed, and asks that the deed be reformed.

These matters being uncontroverted, this is sufficient to entitle plaintiff to the relief claimed, and the decree of the lower court is affirmed.

(50 Or. 501)

BADE v. HIBBERD.

(Supreme Court of Oregon. Jan. 21, 1908.)

1. JUSTICES OF THE PEACE—APPEAL—RECORD—CONCLUSIVENESS—IMPEACHING BY AFFIDAVITS.

Where the record of a justice's court states that a reply was filed in that court before trial, and the reply is attached to the justice's transcript and returned as one of the original papers in the case, the record cannot be impeached by *ex parte* affidavits because the justice failed to indorse on the reply the date of its filing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 633-636.]

2. RECORDS—FILING FOR RECORD—NECESSITY OF INDORSEMENT.

A paper is filed for record in contemplation of law when it is delivered to the proper officer with the intention that it shall become part of the official record, and by him received to be kept on file, and the filing is not affected by the officer's failure to indorse the paper as filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Records, § 6.]

3. PLEADING — COMPLAINT — OBJECTION ON TRIAL—PRESUMPTION.

Where an objection to the sufficiency of the complaint is made for the first time on the trial by objecting to the reception of any evidence thereunder, the same presumption will be indulged in to support the pleading as if the objection had been made after verdict, and unless the complaint is so defective that it would not be good after verdict the objection will be overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1433-1436.]

4. SAME — INSUFFICIENT DESCRIPTION OF INSTRUMENT SUED ON—CURE BY VERDICT.

An insufficient description of contracts on which suit is brought is merely a defective statement of the cause of action, which would be cured by verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1467-1472.]

5. ACTION—JOINDER—CAUSES ARISING UNDER CONTRACT.

Under the express provisions of B. & C. Comp. § 94, causes of action arising out of contract may be united in the same complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 430-448.]

6. PLEADING — COMPLAINT — SEPARATE CAUSES OF ACTION—SEPARATE STATEMENT—OBJECTION WHEN TO BE TAKEN.

The objection that separate causes of action are not separately stated cannot be raised during the admission of testimony, but should be taken by motion to strike out under B. & C. Comp. § 106, providing that when a pleading contains more than one cause of action, if they be not pleaded separately, the pleading may be stricken out on motion of the adverse party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1151.]

7. CONTRACT — ACTION FOR BREACH — EVIDENCE.

In an action to recover a balance due for services and for merchandise sold, evidence examined, and *held* for the jury.

8. EVIDENCE—PAYMENT—PAYMENT BY CHECK—PAROL EVIDENCE TO EXPLAIN.

A memorandum on a check received in payment of merchandise sold that it is for the balance due on a particular item of indebtedness is not conclusive on the seller, but may be explained by parol.

9. APPEAL—REVIEW—PRESUMPTION — PLEADINGS.

Where a complaint is indefinite as to the character of a contract sued on, but contains averments which seem to imply that it was an express contract, and no objection is made to the complaint until the trial, on appeal the action will be construed as on an express contract.

10. CONTRACTS—RESCISSION.

The fact that defendant, after contracting with plaintiff to cut grain, rented the land upon which the grain was to be grown to a tenant, who was to pay for the cutting of the grain, did not operate as a rescission of his contract with plaintiff, nor relieve him from liability thereon, since plaintiff was not a party to the second contract.

11. TRIAL—RECEPTION OF EVIDENCE—ORDER OF PROOF—ADMISSION IN REBUTTAL OF EVIDENCE PROPER IN CHIEF—DISCRETION OF COURT.

Where defendant placed in evidence during plaintiff's evidence in chief a check given by defendant to plaintiff containing a memorandum implying that it was for the balance due on an item of plaintiff's claim, and introduced evidence to show that plaintiff received the check without objecting to the memorandum, the court could in its discretion allow plaintiff in rebuttal to testify that the memorandum was not on the check when he received it.

Appeal from Circuit Court, Union County; T. H. Crawford, Judge.

Action by G. W. Bade against C. R. Hibberd. Judgment for plaintiff, and defendant appeals. *Affirmed*.

This action was commenced in the justice's court to recover money. The complaint alleges that between January and September, 1906, defendant became indebted to plaintiff in the sum of \$369.50 for work and labor in cutting 79 acres of grain at the agreed price of \$1.25 per acre, amounting to \$98.75, and for 285 sacks of wheat sold and delivered at 95 cents per sack, amounting to \$270.75, which defendant promised and agreed to pay; that no part thereof has been paid, except by the delivery to plaintiff of 120,000 feet of saw logs, at the agreed price of 85 cents per 1,000, amounting to \$102, and by a check of \$187.40, leaving a balance due of \$80, for which judgment is demanded. Defendant by his answer denies all the material allegations of the complaint, and for a further and separate defense avers that on or about the 18th of October, 1906, he and plaintiff had a full and complete settlement for cutting 15 acres of the grain, set out and included in the first item of the complaint, at \$1.25 per acre, and 285 sacks of wheat, mentioned in the second item of the complaint, and it was then and there mutually agreed that the credits referred to in the complaint in the sum of \$289.40 should be applied in full payment for cutting said 15 acres of grain, and for the 285 sacks of wheat and for no other purpose. Plaintiff had a judgment for \$80 in the justice's court, and defendant appealed to the circuit court. A transcript on appeal was filed in the circuit court; but, being incomplete and not properly certified, was, on motion of defendant, withdrawn and

returned to the justice for correction and certification, and as again filed contained a copy of the justice's docket, showing that a reply was filed before the cause was set for trial, and annexed to the transcript is a reply, denying generally all the allegations of the answer, but which has no file marks thereon. Defendant moved the circuit court to strike such reply from the transcript, for the reason that it was not filed by the justice, and neither accompanied or was referred to in the transcript as first filed in the circuit court. This motion was overruled, and trial had, resulting in judgment in favor of plaintiff, from which defendant appeals.

C. H. Finn, for appellant, J. F. Baker, for respondent.

BEAN, C. J. (after stating the facts as above). The motion to strike the reply from the transcript was properly denied. The record of the justice's court states that the reply was filed in that court before trial, and the justice attached such reply to the transcript and returned it as one of the original papers in the cause, and this record cannot be impeached by *ex parte* affidavits. The fact that the justice failed to indorse on the reply the date of its filing is of no consequence. A paper is filed in contemplation of law when it is delivered to the proper officer with the intention that it shall become a part of the official record, and by him received to be kept on file, and such filing is not affected by the officer's failure to indorse the same. *McDonald v. Crusen*, 2 Or. 258; *Conant's Estate*, 43 Or. 530, 73 Pac. 1018.

On the trial defendant objected to the admission of any testimony on behalf of plaintiff, for the reason that the complaint does not state facts sufficient to constitute a cause of action, and because two causes of action are improperly united. The objection to the sufficiency of the complaint being made for the first time on the trial, the same presumption will be indulged in to support the pleading, as if the objection had been made after verdict. *Specht v. Allen*, 12 Or. 117, 6 Pac. 494; *McCall v. Porter*, 42 Or. 49, 70 Pac. 820, 71 Pac. 976; *Patterson v. Patterson*, 40 Or. 560, 67 Pac. 664; *Currey v. Butcher*, 37 Or. 380, 61 Pac. 631. Unless, therefore, the complaint is so fatally defective that it would not be good after verdict, the objection to the admission of testimony in its support was properly overruled. The objection made to the complaint is that the contracts under which the services are alleged to have been rendered and the grain sold by plaintiff to defendant are not sufficiently set out; but this is manifestly nothing more than a mere defective statement and of good cause of action, and such as would be cured by verdict. *Booth v. Moody*, 80 Or. 222, 46 Pac. 884. The causes of action mentioned in the complaint both arise out of contracts, and can be properly united in the same complaint. B. & C.

Comp. § 94. The objection that they are not separately stated should have been taken by motion at the proper time (B. & C. Comp. § 106), and cannot be raised during the admission of testimony.

The plaintiff testified that he cut 79 acres of grain for defendant under a contract by which he was to receive \$1.25 per acre, to be paid in logs at 85 cents per 1,000, and that he sold and delivered to him 285 sacks of wheat at 95 cents per sack; that he received of defendant, on account thereof, 120,000 feet of logs at 85 cents per 1,000, and \$187.40 by check, and identified a check for that amount in his favor signed by defendant, which had, as a memorandum thereon, the words "balance on wheat"; that the logs received by him more than paid for cutting the grain, but that defendant had not paid in full for the wheat. At the close of plaintiff's testimony defendant moved for a nonsuit on the ground that since defendant admitted that the cutting of the grain had been paid by logs delivered to him by defendant, and the check received by him as a payment on the wheat, shows on its face that it was for the balance thereon, nothing remained due plaintiff on the causes of action set out in the complaint. But this motion was properly overruled. While defendant testified that the value of the logs delivered to him by plaintiff, if applied on the account for cutting the grain, would overpay such account, he insisted that there was still a balance due on the wheat sold and delivered. The action is brought to recover a balance of \$80, alleged to be due plaintiff from defendant on the two items mentioned in the complaint, and it can make no difference, so far as the ultimate rights of the parties are concerned, whether the value of the logs be applied on one or the other. The memorandum on the check that it was for the balance due on the wheat was not conclusive on plaintiff, but was subject to be explained by parol, and the weight to be given it was for the jury.

Plaintiff, over defendant's objections and exceptions, gave testimony tending to show that in January, 1906, he contracted with defendant to purchase from him some saw logs, thereafter to be cut, at 85 cents per 1,000, in consideration of which he agreed to cut certain grain for defendant during the following season at \$1.25 an acre. Objection is made to this testimony, because it tends to show an express contract, while it is claimed the complaint is on a quantum meruit. The complaint is somewhat indefinite and uncertain as to the character of the contract sued upon; but it is averred that the work was to be done at an agreed price per acre, which would seem to imply that it was under an express contract, and as no objection was made to the complaint until the trial, it should now be construed as an action on such a contract.

Defendant gave evidence tending to show

that in May, 1906, after the making of the alleged contract with plaintiff, he informed him that he had leased the land upon which the grain was to be grown to one McCulloch, who was to pay for the cutting of the grain and all expenses of the farm after the 1st of March, 1906. Defendant claims that this amounted to a rescission of the contract between himself and plaintiff, and requested the court to so instruct the jury. A rescission of the contract is not pleaded as a defense, nor is the evidence referred to sufficient for that purpose. It is only to the effect that after the making of the contract with plaintiff defendant leased the land upon which the grain was to be grown, and the tenant agreed to pay for the harvesting thereof; but this was a contract between the defendant and his tenant, to which the plaintiff was not a party, and did not relieve defendant from his liability on his contract with the plaintiff.

Complaint is also made because the court permitted plaintiff in rebuttal to testify that the words "balance on wheat," appearing on the check given to him by defendant and introduced in evidence, were not on such check at the time it was delivered; but this evidence was competent, and the order of proof was in the discretion of the trial court.

There are several other assignments of error in the record, but on examination we are satisfied that they are without merit. Judgment of the court below is affirmed.

RODMAN v. MANNING et al.

(Supreme Court of Oregon. Jan. 21, 1908.)

1. APPEAL — FILING NOTICE AND PROOF OF SERVICE — TRANSCRIPT — IMPEACHING OR CONTRADICTING RECORD.

B. & C. Comp. § 549, provides that, when an appeal is not taken at the time the decision is rendered, it may be taken at any time within six months thereafter by serving a notice on the adverse party or his attorney, and filing the original with proof of service indorsed thereon with the clerk. *Held* that, where the notice of appeal as it appeared in the transcript showed that it was filed August 26th, while the indorsement of proof of service was dated September 26th, appellants could not contradict the transcript by extraneous evidence showing that the service was in fact admitted August 28th, and the notice with the indorsement of such admission thereon was afterwards filed with the clerk, the remedy being by application to the court below to correct the record.

2. SAME—WAIVER.

Service and filing of notice of appeal are essential to give the Supreme Court jurisdiction, and cannot be waived by the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2168-2172.]

Appeal from Circuit Court, Lane County; L. T. Harris, Judge.

Action by Jack Rodman against Wm. P. Manning and others. Decree for plaintiff, and defendants appeal. Appeal dismissed.

I. N. Harbaugh and Covert & Stapleton, for appellants. Williams & Bean, for appellee.

PER CURIAM. On August 1, 1907, plaintiff recovered a decree in the circuit court for Lane county against defendants, and from this decree defendants attempt to appeal. The notice of appeal, as it appears in the transcript, shows that it was filed on August 26th, and the indorsement of proof of service is dated the 26th of the following month. The plaintiff moves to dismiss the appeal for want of jurisdiction, because the proof of service of the notice was not indorsed thereon at the time it was filed. The statute provides that, when an appeal is not taken at the time the decision is rendered, it may be taken at any time within six months thereafter by serving a notice on the adverse party or his attorney, "and filing the original with proof of service indorsed thereon," with the clerk. Section 549, B. & C. Comp. It has been held under similar statutory provisions that a notice of appeal, when filed, must be accompanied by proof of service in the shape of an indorsement thereon, and that service cannot be made and proof thereof placed on the notice after it has been filed. *Briney v. Starr*, 6 Or. 207; *Hennessey v. Wells*, 16 Or. 266, 19 Pac. 121. Defendants claim, however, and have filed ex parte affidavits to show, that the dates of filing of notice and acknowledgment of service thereof, as they appear on the transcript, are erroneous, and in fact the service was admitted on August 28th, and the notice with the indorsement of such admission thereon was afterwards filed with the clerk. But, if there is an error in the record in this respect, the remedy is by application to the court below to correct the same, and the transcript as filed here cannot be contradicted or impeached by extraneous evidence. *Briney v. Starr*, supra. Again, it is said that plaintiff has waived the objection by filing his brief in this court; but the service and filing of the notice of appeal are indispensable in order to give this court jurisdiction, and cannot be waived by the parties. *Oliver v. Harvey*, 5 Or. 360; *Wolf v. Smith*, 6 Or. 73.

We need not consider at this time what the effect would have been if defendants had applied to and obtained permission from the court below to withdraw the notice from the files, and had refiled it, after the date of admission of the service thereon, as that question is not before us. Upon the record as it stands we have no alternative, under the previous decisions of the court, but to dismiss the appeal, and it is so ordered.

FIRST NAT. BANK OF POMEROY, IOWA, v. McCULLOUGH et al.

(Supreme Court of Oregon. Jan. 21, 1908.)

1. TRIAL — RECEPTION OF EVIDENCE — ORDER OF PROOF—STATUTORY PROVISIONS.

In an action by a bank on notes transferred to it without indorsement, admission of evidence tending to show that the original holder had agreed to cancel the notes before show-

ing that the one transferring the notes to the bank had knowledge of the agreement is not error, in view of B. & C. Comp. § 842, providing that the order of proof shall be regulated by the sound discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 138-141.]

2. APPEAL—QUESTIONS TO BE CONSIDERED—MATTERS NOT RAISED IN LOWER COURT.

Where a bank sues on notes indorsed to its cashier in his own name only, and the question of the bank's right to maintain the action is not raised at the trial, it cannot be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1184-1189.]

3. EVIDENCE—PAROL EVIDENCE AS TO INDORSEMENT—STATUTORY PROVISIONS.

The provision of the negotiable instruments law (B. & C. Comp. § 4444) that, when an instrument is drawn or indorsed to a person as "cashier" of a bank, it is deemed prima facie to be payable to the bank of which he is such officer, and may be negotiated by the indorsement of either the bank or the officer, was based on the theory that the qualifying word creates an ambiguity as to the real party intended, to explain which parol evidence is admissible; but, where a note is indorsed to N. without any qualifying word, even if N. is in fact the cashier of a bank, parol evidence is not admissible to show that the bank was the party intended as the indorsee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2110.]

4. APPEAL—REVIEW—CROSS-EXAMINATION—BILL OF EXCEPTIONS—MATTERS TO BE SHOWN.

An assignment of error as to permitting cross-examination of a witness regarding matters not testified to on direct examination cannot be considered, when the bill of exceptions does not purport to contain all his testimony on direct examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2900-2904.]

5. BILLS AND NOTES—TRANSFER WITHOUT INDORSEMENT—EFFECT—DEFENSES.

Under the law merchant, which has become a part of the common law, a transfer of a promissory note, payable to order, to bar equities, must be by indorsement to one who has no notice of the equities, and for a valuable consideration before maturity. Hence, where a note is indorsed to the cashier of a bank, who delivers it to the bank without indorsement, in a suit thereon by the bank the note is subject to all equities existing in favor of the makers.

6. SAME—RIGHT OF ACTION—STATUTORY PROVISIONS.

A transfer without indorsement of a promissory note, payable to order, assigns under the law merchant only an equitable right, which could be enforced by suit in the name of the payee only; but under B. & C. Comp. § 27, providing that every action, with certain exceptions, shall be prosecuted in the name of the real party in interest, a bank may maintain an action in its own name on a note transferred to it without indorsement.

7. APPEAL—DECISIONS REVIEWABLE—FINAL ORDERS—DENIAL OF NEW TRIAL.

The denial of a motion for a new trial is not a final order from which an appeal will lie.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 741.]

8. SAME—RESERVATION OF GROUNDS OF REVIEW.

A decision of a trial court is not reviewable on appeal, unless the question was distinctly presented to the trial court for its action. Hence, where the trial court was not requested

to give any instruction involving a consideration of all the testimony, the evidence will not be examined on appeal to determine whether, on the whole evidence, the judgment was right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1309-1314.]

Appeal from Circuit Court, Umatilla County; Henry J. Bean, Judge.

Action by First National Bank of Pomeroy, Iowa, against B. F. McCullough and another. From a judgment for defendants, plaintiff appeals. Affirmed.

This is an action by the First National Bank of Pomeroy, Iowa, a corporation, against B. F. McCullough and M. H. Gillette, to recover on two promissory notes. The facts, so far as deemed material herein, are that on March 2, 1904, and November 23d of that year the defendants obtained from one W. J. Furnish leases of certain lands in Umatilla county for a term which would expire March 1, 1907, agreeing to give for the use of the premises \$640 annually. This sum was evidenced by their negotiable promissory notes, executed to Furnish, for \$512 and \$128, respectively, which instruments, given for the rent of 1905, were payable June 1, 1906. The leases did not contain a covenant to the effect that in case of a sale of the real property the tenancy could be terminated at the option of either party. The landlord, in the fall of 1905, listed the land with one M. L. Moody, an agent, for sale, to whom he duly indorsed the notes, which would mature June 1, 1906. The agent having entered into a contract for the sale of the premises with one G. E. York, the defendants surrendered to the latter the possession of the real property, and relinquished to him all their rights under the leases. The notes mentioned were, prior to their maturity, transferred by the following indorsement: "Pay A. B. Nixon or order, waiving demand and notice of protest. H. L. Moody." The person named as the last indorsee was at the time of such transfer the cashier of the plaintiff bank. No part of the notes having been paid, this action was instituted without any other written transfer of the negotiable instruments. The complaint, embracing two causes of action, is in the usual form, states when the notes were executed, and contains, inter alia, in each count, the following averment: "That thereafter, and before the maturity thereof, said note was indorsed, transferred, and assigned to the plaintiff herein, and plaintiff is now the owner and holder of said note." The answer denies the material allegations of the complaint, states the facts, in substance as hereinbefore detailed, and avers, in effect, that about March 8, 1906, and while the defendants had a crop growing on the leased land, they, at the request of Furnish, who then was the owner and holder of the notes sued on, and at the solicitation of York, who had secured a contract for the purchase of the premises, surrendered to the latter the possession of the real property, in considera-

tion of the cancellation of the notes given for the rent; that at that time Moody, who was then the agent of Furnish, was advised by the defendants of the payment of the notes, which, without any consideration therefor, and not in the ordinary course of business, were delivered to the plaintiff. The allegations of new matter in the answer were denied in the reply, and the cause having been tried, the defendants secured a verdict, and from the judgment rendered thereon, the plaintiff appeals.

John McCourt, for appellant. J. P. Winter, for respondents.

MOORE, J. (after stating the facts as above). It is contended that an error was committed in permitting the defendants to introduce evidence tending to show that the notes sued on were agreed to be canceled by Furnish without having first shown that Nixon, the cashier of the plaintiff bank, had knowledge of the alleged agreement. The order of proof is a matter within the sound discretion of the trial court, the exercise of which will not be disturbed, except for an abuse of such discretion. B. & C. Comp. § 842; Jones v. Peterson, 44 Or. 161, 74 Pac. 661. An examination of the bill of exceptions fails to disclose any misuse of the power thus reposed.

It is maintained that the court erred in striking out, over objection and exception, Moody's testimony to the effect that the notes in question were indorsed to the plaintiff. No question seems to have been raised at the trial as to the right of the bank to maintain this action as the real party in interest. The consideration of the exception reserved is therefore limited to an inquiry as to whether or not parol evidence was admissible to show that the indorsement of the notes to Nixon, though not designated as cashier, was such a transfer as vested the legal title in the bank, and precluded the defendants from maintaining any defense that they might have had against the payee or indorsee. We will examine the cases to which plaintiff's counsel call attention in support of the legal principle which they seek to invoke. In *Arlington v. Hinds*, 1 D. Chip. (Vt.) 431, 12 Am. Dec. 704, it was held that a note made to a town treasurer, "or his successors in office," might be sued by the town. In *National Life Ins. Co. v. Allen*, 116 Mass. 398, it was ruled that a principal might sue in his own name on a nonnegotiable promissory note, given for its benefit, but by its terms made payable to "J. T. Phelps, agent." In *Bank of New York v. Bank of Ohio*, 29 N. Y. 619, in adhering to the rule announced in the case of *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312, it was determined that a bill drawn payable to "D. C. Converse, Esq., cashier," was payable to the bank of which he was the officer. So too, in *Baldwin v. Bank of Newbury*, 1 Wall. (U. S.) 234, 17 L. Ed. 534, it was adjudged that, where negotiable paper was drawn to a per-

son by name, immediately after which appeared the word "cashier," but with no designation of the particular bank of which he was such officer, parol evidence was admissible to show that he was the cashier of the bank which was plaintiff in the suit, and that in taking the paper he was acting as agent for the corporation. The rule to be extracted from these decisions has been embodied in our statute, known as the "Uniform Negotiable Instrument Law," as follows: "When an instrument is drawn or indorsed to a person as 'cashier,' or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer." B. & C. Comp. § 4444. The clause just quoted, and the decisions adverted to, are undoubtedly based on the theory that the employment of the qualifying word "cashier" or other designation of a fiscal office, appended to the name of a payee or indorsee of commercial paper, creates an ambiguity as to the real party intended, to explain which parol evidence is admissible to show who is the principal for whose benefit such agent received or accepted the promise to pay a stipulated sum of money. In the case at bar, however, no official designation is added to Nixon's name, and hence no uncertainty is apparent from an inspection of the indorsement made by Moody to him, and parol evidence was inadmissible to control or vary the terms of the writing. In view of the purpose for which Moody's testimony was evidently offered, no error was committed in striking it out.

It is insisted that the court erred in requiring Moody to be cross-examined, over objection and exception, as to certain matters to which he had not theretofore testified. The bill of exceptions shows that this witness, on direct examination, identified the notes sued on, and stated that he sent them with other negotiable instruments to Nixon, from whom he received a draft in payment therefor. On cross-examination he was required to testify as to other matters, but as the bill of exceptions does not purport to contain all his testimony on direct examination, the error thus assigned is unavailing.

It is argued that, having taken an exception to the following part of the court's charge, an error was committed in giving it, to wit: "I instruct you, gentlemen of the jury, that the indorsement on the notes in question, under the evidence in this case, plaintiff did not come into possession of the notes in controversy in due course, or in the ordinary and usual course of business as recognized by the law; and therefore that any defense which these defendants may have had against said notes, if in the hands of the indorsee, H. L. Moody, will be available to the defendants as against this plaintiff." The uniform practice of merchants in trans-

ferring credits, represented by commercial paper, as a means of purchasing goods or settling accounts, gave rise to certain rules, demanded by the wants and convenience of trading communities, which are known as the law merchant, and have become a part of the common law. 7 Cyc. 520; Woodbury v. Roberts, 59 Iowa, 348, 13 N. W. 312, 44 Am. Rep. 685. An observance of these rules requires that the property represented by a promissory note, payable to order, when transferred to a designated party before maturity for a valuable consideration and without notice, should be evidenced by an indorsement on the instrument, or on a paper attached thereto, in order to bar the equities of antecedent parties. This method of transferring such property constitutes the ordinary or usual course of business, a departure from which is equivalent to a notice of equities, and subjects the negotiable instrument to defenses in the hands of a holder who has acquired a right thereto in any other manner. B. & C. Comp. § 4433; Randolph, Com. Paper (2d Ed.) § 789; Roberts v. Hall, 37 Conn. 205, 9 Am. Rep. 308; Franklin v. Twogood, 18 Iowa, 515; Ellas v. Finnegan, 37 Minn. 144, 33 N. W. 330. In Osgood's Adm'rs v. Artt (C. C.) 17 Fed. 575, Mr. Justice Harlan, in discussing this subject, says: "It is a settled doctrine of the law merchant that the bona fide purchaser for value of negotiable paper, payable to order, if it be indorsed by the payee, takes the legal title unaffected by any equities which the payor may have as against the payee. But it is equally well settled that the purchaser, if the paper be delivered to him without indorsement, takes, by the law merchant, only the rights which the payee has, and therefore takes subject to any defense the payor may rightfully assert as against the payee." A transfer, without indorsement, of a promissory note payable to order, assigns to the holder, under the rules of the law merchant, only an equitable right, to enforce which suit was formerly required to be maintained in the name of the payee. Our statute demands that every action, except in certain cases not involved herein, shall be prosecuted in the name of the real party in interest. B. & C. Comp. § 27. In Moore v. Miller, 6 Or. 254, 25 Am. Rep. 518, it was ruled that the holder of a note, payable to order, which had been transferred without indorsement, could maintain an action at law thereon in his own name. That decision, however, is not based on the section of the statute last referred to, but upon the fact that the evidence showed that the plaintiff therein possessed the title to the note sued on, and had the sole right to receive the money due thereon. As illustrating the right of a holder of a negotiable promissory note, transferred without indorsement, to maintain an action thereon in his own name, see the very able opinion of Circuit Judge Gilbert in First Nat. Bank v. Moore, 137 Fed. 505, 70 C. C. A.

89. This legal principle is here adverted to for the purpose of showing that Moody's testimony was excluded, not on the ground of establishing a right in the plaintiff to maintain an action in its corporate name, but to prove that the bank was an indorsee, in due course, though not named in the evidence of the transfer, nor was any fiscal designation appended to the name of the indorsee from which it could be inferred that the plaintiff was the party intended by the writing. The note sued on having been delivered by Nixon, without indorsement, to the plaintiff, the bank was authorized to maintain an action thereon in its own name; but it took and held the paper subject to all equities existing in favor of the makers, and this being so, no error was committed in giving the instruction under consideration.

It is contended that the court erred in refusing to set aside the verdict and to grant a new trial, on the ground that no contract had been consummated between Furnish and the defendant whereby the notes in question were to be canceled. The rule is settled in this state that the action of a court in granting or denying a motion for a new trial is not a final order from which an appeal lies. This principle has so often been announced that it is unnecessary to cite the cases which uphold the doctrine.

It is argued that as all the testimony given at the trial has been sent up a perusal thereof will conclusively show that no contract was ever entered into between the makers and the payee of the notes whereby they were to have been canceled, and hence the judgment should be reversed, and a new trial ordered. An appellate court is created to review errors alleged to have been committed by lower courts in the trial of law actions, to which rulings exceptions have been duly reserved. No determination of a trial court can be reviewed on appeal, unless the question has been distinctly presented to that tribunal for its action. In the case at bar the court was not requested to give any instruction that involved a consideration of all the testimony, and this being so, that exhibit attached to the bill of exceptions will not be examined.

Other alleged errors are assigned, but, believing them unimportant, the judgment is affirmed.

SENCERBOX v. FIRST NAT. BANK OF IDAHO.

(Supreme Court of Idaho. Jan. 15, 1908.)

1. HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—CONTROL BY HUSBAND.

Under the provisions of section 2498, Rev. St. 1887, as they existed before amendment in 1903 (Sess. Laws 1903, p. 345), the husband had the management and control of the separate property of the wife during the continuance of the marriage, but could not sell or alienate any part of such property, nor incur the same unless by an instrument in writing, signed by

the husband and wife, and acknowledged as provided by law.

2. PROPERTY—MONEY.

Under the provisions of subdivision 3, § 16, Rev. St. 1887, money is declared to be personal property.

3. HUSBAND AND WIFE—APPOINTMENT OF TRUSTEE.

Under the provisions of section 2499, Rev. St. 1887, if the wife has just cause to apprehend that her husband has mismanaged or wasted, or will mismanage or waste, her separate property, she, or some other person in her behalf, may apply to the district court for the appointment of a trustee to take charge of and manage her separate property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 512-523.]

4. SAME.

And until the wife avails herself of the provisions of said section 2499, Rev. St. 1887, the husband has the management and control of his wife's separate property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 512-523.]

5. SAME—MANAGEMENT AND CONTROL.

The words "management and control," as used in said section, have a well-defined meaning, and under the provisions of section 15, Rev. St. 1887, must be construed according to the context and approved usage of the language.

6. SAME—"MANAGE"—"CONTROL."

The power to manage implies the power to control. To manage money is to employ or invest it. The word "control" means to have authority over a particular matter or thing, and the phrase, "management and control," implies the possession of the thing managed or controlled, or the right to the possession thereof.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1540-1552; vol. 5, pp. 4316-4317; vol. 8, pp. 7714, 7717.]

7. SAME.

The rights of married women as to the management and control of their separate property, and their power over it, in this state, depend mainly upon the Constitution and statutes of the state.

8. SAME—HUSBAND AS AGENT.

Under the provision of said section 2498, Rev. St. 1887, prior to amendment, the husband was made the statutory agent to manage and control the wife's separate property, and required no authority from her to constitute him such agent.

9. SAME.

Under the provisions of said section 2498, Rev. St. 1887, money which is the separate property of the wife is placed in the same category as other personal property, and the husband is made the statutory agent for the management and control thereof, and he has the right to its possession, and, under the provisions of said section, the husband was authorized to receive the separate estate of the wife for the purpose of its management and control, whether it consisted of money or other property.

10. SAME—RECEIPT OF HUSBAND.

The husband's receipt to a third party for the wife's separate property is a discharge to the person to whom it is given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 530.]

11. SAME—FUNDS IN BANK.

As to her money, the power of management and control gives him the right to its possession, to draw it out of the bank where it is deposited, to keep it safely or invest it, or redeposit it in another bank, and to check it out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 512-515.]

12. SAME—PAYMENT OF HUSBAND'S CHECK.

The husband, being the statutory agent of the wife, would have as much power over money deposited in the bank in her name as any other trustee would have over a like deposit of trust funds, and the bank would be under the same liability to pay out the money upon his check.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 524-529.]

13. SAME.

The plaintiff, by entering into the marriage relation with her husband under the law, made him her statutory agent for the management and control of her separate estate.

14. SAME.

The husband's management and control of the separate property of the wife is not limited to the property out of her possession, but to all her separate property, whether in or out of her possession at the time the agency begins.

Ailshie, C. J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Ada County; George H. Stewart, Judge.

Action by Anna D. Sencerbox against the First National Bank of Idaho. Judgment for defendant, and plaintiff appeals. Affirmed.

Hawley, Puckett & Hawley, for appellant. W. E. Borah, for respondent.

SULLIVAN, J. This is an action to recover from the respondent the sum of \$2,001.25. The plaintiff alleges that she deposited with the defendant bank at different times, from the 3d day of January, 1898, to the 26th day of May, 1902, the sum of \$4,430.76; that she checked against the same until the deposit was reduced to the sum of \$2,001.25; and that, upon presentation of a check for that amount, payment was refused. The defense is that the entire amount so deposited was checked out either by plaintiff herself or her husband, he issuing checks bearing the name of the plaintiff and signed by himself. However, there were two checks signed by the husband alone. It is admitted that, during the times mentioned in the complaint, the plaintiff and one E. J. Sencerbox were husband and wife. The record clearly shows that the entire amount deposited was at different times paid out upon checks signed as above stated. The cause was tried by the court without a jury, and judgment was entered in favor of the defendant. This appeal is from the judgment.

Several of the errors assigned may be considered together, as they raise but one question, and that is the authority of the husband, under the statute as it existed at the time this transaction took place, to control and manage the separate property of the wife. It appears from the record that the plaintiff was absent from the city much of the time during which said money was drawn out of the bank, and that her husband had charge of her property, and made some sales thereof, and deposited a large part of said sum of \$4,430.76 with the defendant bank in the plaintiff's name, and that he thereafter drew checks against said money so deposited in his own favor or in favor of the plaintiff, and

signed them either in the name of the plaintiff by himself, or by himself alone. For some of the checks so drawn the defendant bank drew drafts in favor of the plaintiff, which were transmitted to her by her husband. It is admitted that she received \$940 in that way. The question presented for determination is whether, under the provisions of section 2498, Rev. St. 1887, and other sections of our statutes bearing upon the rights of husband and wife, the husband had the authority to check against said bank account as he did. That section is as follows: "The husband has the management and control of the separate property of the wife, during the continuance of the marriage, but no sale or other alienation of any part of such property can be made, nor any lien or incumbrance created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon an examination, separate and apart from the husband, as upon a conveyance of real estate." The provisions of that section were in force at the time this transaction occurred, but were repealed in 1903. See Sess. Laws 1903, p. 345.

As said section of the statute stood before it was amended in 1903, there was no exception as to the classes of the wife's separate property that were placed under the management and control of the husband by the provisions of said section. The statute reads: "The husband has the management and control of the separate property of the wife during the continuance of the marriage," etc.; and under the provisions of section 2499, Rev. St. 1887, if the wife had just cause to apprehend that her husband had mismanaged or wasted, or would mismanage or waste, her separate property, she, or any other person in her behalf, might apply to the district court for the appointment of a trustee to take charge of and manage her separate property or estate. She was not authorized to take charge of and manage her separate property under any conditions or facts; but, if a just cause existed, she could deprive her husband of his statutory right thereto. If that was done, it passed into the hands of a trustee. So, until the wife availed herself of the provisions of said section 2499, the husband had the management and control of the separate property of his wife during the continuance of the marriage; but no sale or alienation of such property can be made, nor any lien or incumbrance created thereon, unless by an instrument in writing signed by the husband and wife and acknowledged as provided by law. The words "management and control," as used in said section, are words of well-defined meaning. Those words have not acquired a peculiar and appropriate meaning or definition in and under the provisions of section 15, Rev. St. 1887. They must be construed according to the context and the approved usage of the language. Those words are of broad significance and meaning. The Century Dictionary defines the

word "management" as "the act of managing by direction or regulation; conduct; administration; governing; direction; guidance; care; charge; superintendence." It defines the word "control" as meaning, "subject to authority; direct; regulate; govern; dominate; to have superior force and authority over." The Standard Dictionary defines "management" as "carrying on; directing; conducting; superintendence; having the general management, conduct or direction of something; acting as responsible or executive head"; and defines "control" as "to exercise a directing, restraining or governing influence over; regulate; regulating power; restraining or directing influence." In *Sinking Fund v. Walker*, 6 How. (Miss.) 186, 38 Am. Dec. 433, in defining the word "management," the court said: "The power to manage implies the power to control. It allows the exercise of discretion. It could not be managed without the power to do so, and, by requiring the one, the other was conferred. To manage money is to employ or invest it. It requires no other management." In *Anderson v. Stockdale*, 62 Tex. 61, in defining the word "control," the court said: "To have authority over a particular matter; to check, to restrain, to govern with reference thereto." The words "management and control" are used quite often in our statutes, as where the corporate business of a company is under the control of a board of directors, and an estate is under the management of an administrator, and in all such instances it appears that those words were intended to mean to govern, direct, and manage, in the full sense of those terms. In *Bank of Monroe v. Gifford*, 79 Iowa, 300, 44 N. W. 558, it is held that the control of paper securities implies the possession thereof. See, also, 2 Words and Phrases Judicially Defined, under the word "Control"; also 5 Words and Phrases Judicially Defined, under the words "Management and Control."

It must be understood that the rights of married women as to the management and control of their separate property, and their power over it, in the state of Idaho, does not depend alone on the principles of the common law, or upon the doctrines of the courts of equity, but mainly upon the Constitution and statutes of the state. See *Maclay v. Love*, 25 Cal. 368, 85 Am. Dec. 133. Under the provisions of section 2498, Rev. St. 1887, the husband is made the statutory agent to manage and control the wife's separate property. Now, if money is the separate property of the wife under the statute, unless that is excepted from the management and control of the husband, he certainly has the right to reduce it to his possession, and manage and control it. In the case at bar, the wife had deposited \$794.95 in the defendant bank before her marriage. At the time of her marriage some of her money was deposited in said bank. The husband thereafter made certain collections for her, sold some property, and deposited the proceeds, amounting

to \$3,635.95, in said bank in her name, and thereafter drew out of said bank, by checks and sight draft, \$2,001.25 of the money so deposited, and it is that sum that is involved in this action. The question arises whether the husband, under the statute giving him the management and control of his wife's separate property, had the authority to check or draw said money out of the defendant bank. The question naturally arises whether the money, which is the separate property of the wife, is classed in the same category as other personal property belonging to the wife, and placed, by the provisions of said section 2498, under the management and control of the husband. If it is, to what extent may he go in reducing such cash to his possession? Certainly, under the provisions of said statute the husband might reduce to his possession live stock and other personal property; for, if he is made the statutory agent of the wife to manage and control it, he certainly has the right to its possession. In 25 Ency. of Law, p. 427, it is stated: "The statutes in some jurisdictions expressly provide that the husband shall have the right to manage and control the wife's separate property. This management includes the power to make collection of her debts, and to invest the money of her separate estate coming into his hands, in such manner as he may deem best." In *Evans v. English*, 61 Ala. 422, under a statute giving the management and control of the wife's property to the husband, it is held that: "The power and duty of the husband is to receive the separate estate of the wife, whether it consist of money, choses in action, or other property, real or personal, and his receipt is a good discharge in law or equity to the persons surrendering it to him. This power he exercises solely, and not jointly or concurrently with the wife. The property thus received vests in him as trustee, and he has the right to manage and control the same. It is apparent that the title does not vest in the husband. That remains in the wife," etc.

The question arises under the law whether the wife can defeat the management and control of her separate property by the husband simply by placing her property in the possession of some third person. I think not, as the law provides but one way for her to prevent her husband from managing and controlling her separate estate, and that is by following the provisions of said section 2499—by having a trustee appointed.

In *Evans v. English*, supra, it is there held that it is not only the power, but the duty, of the husband to receive the separate estate of the wife, whether it consists of money or other property; and how can the husband have the management and control of personal property without the right to its possession? And in that case it is held that "the possession vests in the husband while the title remains in the wife."

In *Marks v. Cowles*, 53 Ala. 506, it is held: "The power of the husband is to receive the

property of the wife—a power he is not required to exercise concurrently with the wife. His receipt, therefore, is a full discharge, in law and in equity, to the person to whom it is given. His duty is to manage and control the property," etc.

In *Coleman v. Bank*, 94 Tex. 605, 63 S. W. 867, 86 Am. St. Rep. 871, which is a case very much like the one at bar, after stating that that court was unable to find but little authority upon the question of the management of the wife's separate property by the husband, and that it was largely a matter of statutory regulation, and referring to the statutes, the court said: "But it [the statute] does imply that he may put it to its appropriate use so that it shall produce an income. As to her money, the power of management gives him the right to its possession to keep it safely, and hence to deposit it in the bank and to draw it out. Such being the authority of the husband under the law, he being the statutory agent for the management of her separate property and funds, he would have at least as much power over money deposited in the bank, even in her name, as any other trustee would have over a like deposit of trust funds, and the bank would be under the same liability to pay out the money upon his check." The court then refers to trustees and trust funds, as follows: "If such be the rule as to ordinary agents and trustees, it certainly is the rule in this state as to the husband relative to the wife's separate funds, of which, under our law, he has the sole management. If the money had been deposited by the wife before her marriage, and the fund had remained in the custody of the bank after that event, it would seem that he as sole manager of her separate estate, and he alone, would have the right to withdraw it. * * * The plaintiff, by entering into the marriage relation with her husband, made him the sole agent for the management of her separate estate." That case was decided by the Supreme Court of Texas, January 26, 1901. In that case the Court of Civil Appeals of Texas stated: "It was not contended by the bank that it paid out the money on the checks of Coleman, on the ground that Coleman stated to its officers, at the time he deposited the same, that it was understood that it was to be checked out by him. The husband had the right to check out money." 64 S. W. 933. In the same case (*Coleman v. Bank*, 17 Tex. Civ. App. 132, 43 S. W. 938), on the original hearing of the case, the matter was fully discussed, and the court said, among other things: "She alleges that she was accessible to the bank, and seems to have assumed that it was the duty of the agent of the bank to hunt her up and keep her informed as to the condition of her account. In this she was mistaken." Under the laws of banking, a general deposit of money in a bank creates the relation of debtor and creditor. The bank is the debtor and the depositor is the creditor. In the case at

bar the wife was the creditor and the bank was her debtor.

Under the provisions of said section 2498, the husband is made the statutory agent of the wife, and has the management and control of her separate estate during the continuance of the marriage, unless he is deposited or deprived of his agency, as provided by the provisions of section 2499; then her separate property passes into the hands of a trustee appointed by the court, but not into her management and control. Until his agency is thus terminated, the husband has full authority to collect debts due his wife, and to give full and sufficient receipts or acquittances therefor, and the debtor is as fully protected by such acquittances as if given by the wife herself. The bank debtor stands on the same footing as other debtors. No rational distinction can be drawn between them. Under the following headnote, to wit, "Upon Whose Checks the Bank shall Pay," it is stated at section 432, in 2 Morse on Banks & Banking, as follows: "The indebtedness of the bank upon a deposit is discharged pro tanto by its payments made upon any order, check, or draft signed by any person who would have the power to demand and receive the deposit, regarded as a simple debt, and to give full and sufficient acquittance for it." That, I think, is the correct rule; and if a feme sole had made a loan to an individual, payable on demand, or had deposited money with a person subject to her order, and, before she demands payment, she marries, the husband would, under the provisions of said section 2498, have full authority to demand and collect such deposit or loan, and give a full acquittance therefor. A bank being the debtor, in no manner changes the rule. As stated in the last authority cited, the bank is discharged pro tanto upon payment of a deposit, on the check of any person who had the right to demand and receive the money so deposited, regarded as a simple debt. The money becomes no more sacred from its deposit in a bank, and therefore excluded from the possession of a statutory agent, than money deposited with a friend or with a shopkeeper.

If the Legislature had intended to except the management and control of the wife's money, which was her separate property, from the provisions of section 2498, Rev. St. 1887, appropriate language would have been used for that purpose, but we find no exception whatever. If the husband had the management and control of the wife's separate money, the wife could not control it by putting it in the bank or by delivering it to a friend to be kept for her. The statute does not provide that the management and control of the separate property of the wife shall belong to both the husband and wife, but it declares that it belongs to the husband alone. However unwise we may think the provisions of said section, the court ought not to repeal

or set them aside by construction, by holding that the provisions of said section apply to all of the wife's property except her money.

It appears from the record that at least \$940 of the money so drawn on check out of the bank was sent to the plaintiff by the husband. If he had the right to draw it, as we hold he did, the bank is not required to inquire into the purpose to which he applied said money. 1 Morse on Banks & Banking, § 317. Of course, a bank would not be justified in receiving trust money from a trustee in payment of a personal debt of the trustee due the bank.

From the foregoing, we conclude that the judgment must be affirmed, and it is so ordered. Costs are awarded to the respondent.

STEWART, J., concurs.

AILSHIE, C. J. (dissenting). I dissent from the views expressed by the majority of the court and the conclusion reached thereon. It seems to me that the error into which my associates have fallen arises out of a misconstruction and application of the words "management and control." It is difficult for me to understand how, in the reasonable and ordinary use of those terms, any such meaning can be gathered as given to them in the majority opinion. It is a common maxim that things which cannot be lawfully done directly cannot be lawfully done by indirection and circumvention. The statute gives a married woman a separate property, and, while it confers upon the husband the right of management and control thereof, it does not allow him to alienate or convert the same.

In this case the wife preferred to have a deposit and credit at the bank to having the money itself. When the bank allowed the husband to exhaust that credit without her consent, and to convert the property right she had in such general deposit into another form, class, and character of property, it was clearly acting without any sanction of law or right, and contrary to every principle of banking. The assumption that the husband has a right to convert any article, class, or character of the wife's separate property into some other character or kind of property is directly contrary to section 2498, Rev. St. 1887, prior to its repeal. On the contrary, that section expressly prohibited the husband from making any "sale or other alienation of any part of such property" without the wife's assent and concurrence. "Management and control," as used in the statute, is not synonymous with "convert and dispose of," as the majority opinion seems to indicate. If a wife owned a sewing machine or a cow, the husband was entitled to "manage and control" the same, but he never has in this state had authority to convert the machine or cow into a horse or buggy, or any other class of property, or any other article or piece of the same kind of property, because to "manage and control property" does not

have any such meaning or significance. It is clear to me that the majority opinion contains a construction contrary to the statute and legislative intent. It is scarcely in keeping with the statute to apply the law of agency to a case of this kind. The husband is in no instance or respect authorized to act in the name of the wife or sign her name for any purpose or in any transaction. Since sections 2498 and 2499 have been repealed and supplemented by the act of March 9, 1903 (Sess. Laws 1903, p. 845; Bank of Commerce v. Baldwin, 12 Idaho, 202, 85 Pac. 497), this question is not likely to again arise in this state, and for that reason I refrain from any further expression thereon.

(14 Idaho, 46)

LATER et al. v. HAYWOOD.

(Supreme Court of Idaho. Jan. 7, 1908.)

1. APPEAL—REVIEW—FINDINGS—SPECIFICATIONS OF ERROR—MATERIAL ISSUES.

Where an appeal is taken from a judgment within 60 days from the rendition thereof, to authorize this court to examine the evidence for the purpose of determining whether the evidence supports the findings and judgment, it is necessary that the plaintiff specify the particulars in which it is alleged the evidence fails to support the findings and judgment, and such specification of error must be embodied in and be a part of the bill of exceptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3017.]

2. SAME.

Where the appellant specifies in his brief that the evidence does not support the findings and judgment, and fails to specify such error in the bill of exceptions, this court will not examine the evidence for the purpose of determining whether or not it supports the findings and judgment.

3. SAME—INSUFFICIENT FINDINGS.

Where the trial court fails to find on all the material issues, the judgment will be reversed, unless a finding thereon either for or against the successful party would not affect the judgment entered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4239.]

4. TRIAL—FINDINGS OF FACT.

The finding of ultimate facts includes the finding of all probative facts necessary to sustain the findings of the ultimate facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 931, 959-961.]

5. SAME.

Where probative facts are found, and the court can declare that the ultimate facts necessarily result from the facts which are found, the finding is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 927-931.]

6. SAME.

Where the court fails to find on the material issues in the case, and if a finding had been made thereon the judgment might have been different, it is reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 940-945; vol. 3, Appeal and Error, § 4239.]

7. SAME.

Where the findings made are not conclusive against the plaintiff's right to recover, find-

ings upon other issues necessary to support the judgment must be made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 908-915.]

(Syllabus by the Court.)

Appeal from District Court, Fremont County; J. M. Stevens, Judge.

Action by Peter Later and others against Martha Haywood. Judgment for defendant, and plaintiffs appeal. Reversed.

See 85 Pac. 494.

Caleb Jones, for appellants. Holden, Holden, Holden & Holden, for respondent.

STEWART, J. This case was before this court on a former appeal from a judgment of nonsuit, entered after the plaintiffs had concluded their evidence, and is reported in 12 Idaho, 78, 85 Pac. 494. Upon reversal of the judgment of nonsuit the cause was retried in the district court, and findings of fact, conclusions of law, and a decree entered in said cause, in favor of the defendant. From this judgment the plaintiffs appeal.

The appellants assign 56 errors, 55 of which are errors of law, alleged to have occurred during the trial of said cause. Specification 56 is as follows: "The findings of fact in this case are wholly insufficient to support the judgment, in that they do not respond to the issues in this case, that they are not definite nor certain, that they are contradictory, that they are not supported by the evidence, that they are contrary to the evidence, and that no findings have been made of the most material issues in the case, as presented by the pleading."

A large part of appellants' brief is devoted to a discussion of the question as to whether each finding is supported by the evidence, and as to whether the evidence supports the judgment of the court. Rev. St. 1887, § 4807, provides that "an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment." The judgment in this case was made and filed on the 19th day of December, 1906, and the appeal was taken within 60 days thereafter. Section 4428, Rev. St. 1887, provides: "No particular form of exception is required. But when the exception is to the verdict or decision upon the grounds of the insufficiency of the evidence to sustain it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated, with so much of the evidence or other matter as is necessary to explain it, and no more. Only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or reference thereto, sufficient to identify them, may be made." These two sections must be read together, and while the

former provides that a decision of the court may be reviewed on appeal, when the appeal is taken within 60 days from the rendition of the judgment, the latter section provides that, where the exception is to the decision of the court, upon the ground of insufficiency of the evidence to support the judgment and findings, the bill of exceptions must contain the specifications of the particulars in which the evidence is alleged to be insufficient to sustain the findings or judgment, or it will be disregarded. *Hole v. Van Duzer*, 11 Idaho, 79, 81 Pac. 109; *Coglan v. Beard*, 67 Cal. 303, 7 Pac. 738; *Commercial Bank v. Redfield*, 122 Cal. 405, 55 Pac. 160. The bill of exceptions in this case contains no specifications of error whatever. The specification of error set forth above is found in the brief of the appellant. This is insufficient under the statute. Before this court can consider the sufficiency of the evidence to support the findings and judgment, the appellant must specify the particulars in which it is alleged the evidence is insufficient, and such specification must be embodied in the bill of exceptions. This is only fair to the trial court, for the reason that, if the losing party points out to the trial court the particulars in which he claims the evidence is insufficient to support the findings and judgment, an opportunity is thereby given the trial court to alter his decision or modify it to conform to the facts as they are alleged and proven. In this case, therefore, the court cannot consider the question as to whether or not the evidence is sufficient to support the findings and judgment of the court. In the specification above set forth the appellant alleges that the findings are insufficient to support the judgment, in that they do not respond to the issues, and that no findings have been made of the most material issues in the case as presented by the pleadings.

It is alleged in the complaint: That the plaintiffs were partners under the firm name and style of Later Bros. That on the 15th day of July, 1902, the plaintiffs entered into a contract with one George E. Hill, Sr., which was afterwards performed by the respective parties, by which the plaintiffs were to perform services for Hill and to receive as a part of the consideration the property in controversy in this case, being lots 5 and 6 in block 2 of the town of Rigby, valued at \$675, and were also to receive from said Hill under said contract \$5 worth of water stock in one company, and \$7.50 worth of water stock in another company. That thereafter, on the 20th day of July, before any transfer of said property had been made, the plaintiffs made a sale of the property to one Frederick R. Hays for the sum of \$675, and that Hays, in order to secure a part of the purchase price, was compelled to make a loan of \$400, and, in order to secure the payment of said sum of money, asked the plaintiffs for their consent to use the premises as security. The plaintiffs gave their consent, with the under-

standing that the amount borrowed should be turned over to them. That an agreement was then made between Hays and the defendant, which was acquiesced in by the plaintiffs, by which the defendant was to and did loan to said Hays the sum of \$400, in consideration that the defendant was to be given a deed of the property as security. The deed was given, and it was agreed verbally and has always been understood and agreed between the plaintiffs and defendant and said Hays, that the deed, although absolute in form, was to be considered as a mortgage and as security for the payment of the money borrowed, and that in order to avoid the cost and inconvenience of conveyances from Hill to the plaintiffs, and from the plaintiffs to Hays, and from Hays to the defendant, it was agreed by all the parties, and directed by the plaintiffs, that George E. Hill, Sr., make a deed direct to the defendant; whereupon she advanced Hays the sum of \$400, and executed and delivered an agreement to convey the property mentioned to said Hays on payment of the sum of \$400 and interest. Paragraph 4 of the complaint reads as follows: "The said deed from the said Hill to the said defendant, and the said agreement between said defendant and said Hays, and the verbal understanding and agreement between the said plaintiffs and defendant and the said Hays, were all parts of one and the same transaction, i. e., the conveying or mortgaging of said premises to the said defendant as security for the payment of the said sum of \$400, and interest thereon." The complaint further alleges that thereafter Hays transferred all his right, title, and interest to said property to these plaintiffs by a quitclaim deed; that on the 3d day of January, 1905, the plaintiffs tendered in lawful money of the United States \$400, the amount due said defendant on said loan, and demanded of the defendant that she execute and deliver to them a certificate of discharge of said mortgage and satisfy the same on the records of said county, or convey the property to said Hays; and that the defendant neglected and refused to do so, and still neglects, although the plaintiff is now and at all times has been ready and willing to pay the defendant the sum of \$400, the amount due her. In the prayer the plaintiffs ask that the deed referred to from Hill to the defendant be adjudged a mortgage, and that the plaintiffs be adjudged the legal owners in fee of said premises; that an order be made directing the said defendant to convey the said property to these plaintiffs; that the plaintiffs be given a money judgment against the said defendant for the sum of \$100 for failing to comply with section 3364 of the Revised Statutes of Idaho of 1887, and for costs.

The defendant answered, and for want of information as to the partnership of the plaintiffs denies the same; for want of information she also denies that plaintiffs entered into the contract with George E. Hill, Sr., as

alleged in the complaint, and denies that the plaintiffs were to receive from Hill the real property described in the complaint; and for want of belief denies that the plaintiffs made a sale of said property to Hays in order that he might secure a part of the purchase price by a loan, denies that it was done with the understanding that the amount borrowed should be turned over to the plaintiffs, and denies that Hays procured a loan of \$400 from the defendant, or at all. The defendant further denies that an agreement was made at all between Hays and this defendant, by which the defendant was to or did loan to Hays the sum of \$400, or any other sum, and denies that the deed was given or that it was agreed, verbally or otherwise, that the deed, though absolute, was to be or was considered as a mortgage or as security for such loan, and denies that Hill made a deed to the defendant as security for said \$400, or that said deed was intended to be a mortgage; denies that Hays has any interest in the property or ever did have, and, in answer to paragraph 4, the defendant denies the same as follows: "Denies that said or any deed from said Hill to this defendant, and the said agreement between this defendant and the said Hays, and the alleged verbal understanding and agreement between said plaintiffs and this defendant and the said Hays, were all parts of one or the same transaction, that is to say, the conveying or alleged mortgaging of said premises to this defendant as alleged security for the payment of said sum of \$400, or any other sum or amount or at all, or interest thereon." The defendant then sets up affirmatively that she purchased the property in controversy in this case from George E. Hill, Sr., and wife, and paid therefor \$400, and that they made her an absolute, unconditional warranty deed for the same, and that afterwards she agreed to sell the property to Frederick R. Hays for \$400, with interest thereon at the rate of 12 per centum per annum, and that she has always understood that she purchased the property absolutely and did not receive the same as security for any loan.

This, in substance, is the issue presented by the pleadings in the case. It will thus be seen that the main point of controversy is as to whether or not the conveyance made to the defendant and her agreement to resell the property to Frederick R. Hays and the verbal understandings and agreements altogether constitute one and the same transaction; that is, the conveying or mortgaging of said premises to secure a loan of \$400, and interest.

The court finds, first, the partnership of the plaintiffs as alleged; second, that the plaintiffs did not sell the property to Hays for the sum of \$675, or any other sum or amount; third, that Hays did not at any time procure a loan of \$400, or any other sum or amount, from the defendant, and did not borrow from the defendant the sum of

\$400 or any sum; fourth, that George E. Hill, Sr., did not at any time sell the property to the plaintiff; that no sale of said property was ever made to the plaintiffs, and that the defendant did not understand or agree, nor was it agreed by and between all the parties mentioned, that George E. Hill, Sr., was to make a deed direct to the defendant in order to avoid the cost or inconvenience of conveyances from Hill to the plaintiffs, and from plaintiffs to Hays, and from Hays to the defendant; that the property was not mortgaged by Hays to the defendant as security for the payment of the sum of \$400, or for the security of any sum whatever; fifth, that on the 19th day of January, 1903, the defendant unconditionally purchased of George E. Hill, Sr., and wife, for the sum of \$400, the property described in the complaint, and in consideration of the payment of said \$400 said Hill and wife conveyed said property to the defendant by warranty deed; sixth, that on the 20th day of January, 1903, the defendant agreed conditionally to sell said property to Hays for \$400, and that Hays agreed to buy the same; seventh, that at the time the deed was executed and delivered by Hill and wife to the defendant she understood and always has understood that she purchased the property unconditionally, and that Hill and wife absolutely conveyed the property to the defendant, and that the deed was made, executed, and delivered to the defendant as an absolute conveyance; eighth, that the written agreement made between Hays and the defendant constitutes a conditional sale of the property; ninth, that at the time said written agreement was made the defendant understood that she agreed to sell and convey conditionally such property to Hays according to the terms of the agreement for the sum of \$400; tenth, as conclusions of law, from the facts found, the defendant absolutely and unconditionally owns the property mentioned, and is vested with title in fee therein. Upon these findings the court enters a decree adjudging the defendant to be the owner absolutely and unconditionally of the property described in the complaint and findings.

This court has decided in a number of cases that, when the trial court fails to find on all the material issues, the judgment will be reversed, unless a finding thereon, either for or against the successful party, would not affect the judgment entered. *Tage v. Alberts*, 2 Hasb. (Idaho) 271, 13 Pac. 19; *Carson v. Thews*, 2 Hasb. (Idaho) 176, 9 Pac. 605; *Bowman v. Ayers*, 2 Hasb. (Idaho) 305, 13 Pac. 346; *Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708; *Standley v. Flint*, 10 Idaho, 629, 79 Pac. 615; *Wood v. Broderson*, 12 Idaho, 190, 85 Pac. 490. It is equally well settled that the finding of ultimate facts includes the finding of all probative facts necessary to sustain the findings of the ultimate facts. *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488. And "where probative facts are found,

and the court can declare that the ultimate facts necessarily result from the facts which are found, the finding is sufficient." *Alhambra Add. Water Co. v. Richardson*, 72 Cal. 554, 14 Pac. 379. Examining the findings in this case in the view of these legal principles, it is apparent at first glance that the findings in this case are not responsive to the issues, and that the court has failed to find on the material issue in the case. While the court finds that George E. Hill, Sr., conveyed the property in controversy, absolutely and unconditionally, to the defendant, and that Frederick R. Hays never procured a loan from the defendant, and that the defendant agreed conditionally to sell said property to said Frederick R. Hays, yet more was required in the findings. The findings should have answered the question raised by the pleadings, and that is, whether or not the deed from Hill to the defendant and the agreement between the defendant and Hays and the verbal understanding and agreement between the plaintiffs and the defendant and Hays were all parts of one and the same transaction, and, when taken as such, constitute the conveyance by Hill to the defendant as a mortgage to secure the loan of \$400. It may have been true, and, in fact, it was true, so far as the instrument on its face is concerned, that Hill made an absolute and unconditional conveyance to the defendant. It is also true, so far as the instrument on its face is concerned, that the defendant made a conditional bargain to sell the property to Hays, and it may also have been true that the defendant did not loan Hays the \$400, for the reason that under the peculiar circumstances of the transaction the money paid is alleged to have been paid to Later Bros. These principal probative facts may have all been true, when separately stated, yet if taken as a whole, and each modified, limited, and explained by the other as one transaction, it still might have been true that all these matters constituted one and the same transaction, and that the deed from Hill to the defendant was in fact and in truth a mortgage. The plaintiffs were entitled to a finding upon this issue. It is the "bone of contention" under the pleadings, and it is the center about which, and to support which, all the evidence would certainly have to be directed under the pleadings. A finding upon this question would certainly affect and control the judgment to be entered. If the finding upon this material issue was in favor of the plaintiff, it is apparent that the judgment must follow the finding, and also be in favor of the plaintiff. A failure to find upon this material issue made by the pleadings would affect and control the judgment to be entered by the court; and, it being determined that the findings made by the court are not conclusive against the plaintiffs' right to recover, the failure to find upon other material issues is reversible error. *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364; *Dyer v. Brogan*, 70 Cal. 136, 11

Pac. 589. We are therefore clearly of the opinion that the court failed in this case to find upon the material issues in the case, and that the judgment must be reversed.

The appellant has assigned 55 alleged errors of the trial court in admitting evidence, and in refusing to admit evidence, and in overruling motions to strike out evidence, etc. We have carefully examined each of these questions, and while in some instances the court may have erred in admitting evidence, the errors under the issues of this case were harmless, and could not in any way have prejudiced the plaintiffs. Some of the objections to the admission of evidence were general, such as, "I object." This is not sufficient to secure a review of the ruling of the trial court by this court. If counsel desired to urge in this court that the trial court erred in admitting evidence, or in refusing to strike out evidence, or in refusing to admit evidence, the objection must point out the reason for the objection, and thereby give the trial court an opportunity to pass upon the question presented to this court. It may occur that the trial court, after counsel have given the reason why an objection to the introduction of evidence is made, will readily see the correctness of the position of counsel, and can correct the alleged error before it is too late; so, if counsel desired to present to this court an objection to the admission or rejection of evidence, he should specifically point out the particulars on which the objection is founded.

The judgment, therefore, in this case is reversed, and the lower court is directed to make new findings of fact covering all the material issues in this case, and enter judgment accordingly. Costs awarded to the appellant.

AILSHIE, C. J., and SULLIVAN, J., concur.

HOUGHTON v. LOMA PRIETA LUMBER CO. (S. F. 4,241.)

(Supreme Court of California. Dec. 30, 1907.
Rehearing Denied Jan. 27, 1908.)

1. MASTER AND SERVANT—INDEPENDENT CONTRACTOR—EMPLOYER'S LIABILITY.

A company, calling for bids for the construction of a road, accepted a bid, and a contract, fixing a price for the work and providing for payment of employees by the company's check, was executed. The contractor had formerly been the company's foreman on other roads, and a third person, as foreman of the company, visited the road while the work was being done, and made suggestions, without attempting to control any of the contractor's employees. Held, that the contractor was as a matter of law an independent contractor and the company was not liable for any negligence of which he might be guilty in the course of his employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1241-1243.]

2. APPEAL—VERDICT—CONCLUSIVENESS.

The rule that a verdict on conflicting evidence will not be disturbed applies only where

there is a real conflict, and a verdict against the preponderance of the evidence can be maintained only where the conflict arises on evidence so materially contradicting the testimony on the other side as to leave room in a reasonable mind to find the fact either way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Harriet E. Houghton against the Loma Prieta Lumber Company. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Bishop, Wheeler & Hoefler (William Rix and Alfred J. Harwood, of counsel), for appellant. Sullivan & Sullivan, Theo. J. Roche, and Chas. M. Cassin, for respondent.

McFARLAND, J. This action was brought by plaintiff against defendant to recover damages for personal injuries, alleged to have been sustained by her through negligence of defendant in exploding a blast. The verdict and judgment were for plaintiff, and from the judgment and from an order denying its motion for a new trial, defendant appeals.

Plaintiff, at the time she received the injuries complained of, was walking with her husband, Herbert E. Houghton, since deceased, along the course of an unfinished wagon road, which was being constructed, and when they had reached a certain point a blast nearby, which was intended to remove a stump on the course of the road, was exploded, and from the consequences of the explosion the plaintiff sustained personal injuries for which this action is brought. At the same time, from the same explosion, her husband received injuries which caused his death. An action was brought by this present plaintiff, and certain minor heirs of said Herbert E. Houghton, to recover damages for his death. In that action there was a verdict and judgment for the plaintiffs therein; but on appeal by defendant from the judgment, and from an order denying a new trial, the judgment and order appealed from were by this court reversed. The decision reversing the judgment and order was filed December 6, 1907, and is published in 93 Pac. 82. There were two transcripts on that appeal, one numbered S. F. No. 3,920, which presented the appeal from the judgment, and the other, S. F. 3,837, which presented the appeal from the order denying the motion for a new trial. For brevity we will refer only to S. F. 3,920. The evidence in that case was substantially the same as that in the case at bar. It was contended there, as in the present case, among other things, that the work of constructing the road was being done by A. W. Wyman as an independent contractor with appellant; and the case was reversed because the court erroneously gave certain instructions to the jury to the effect that, although Wyman was an

independent contractor, still the jury might find a verdict against appellant upon the theory that the work of building the road was so intrinsically and necessarily dangerous as to be per se a nuisance, and that, therefore, the rule of respondent superior might apply to appellant, notwithstanding the independent contract. The opinion of this court shows the facts to be that the road was being built in a wild, uninhabited, and almost untraveled mountain region, where there was very little danger or chance of injury from the blasting of a stump on the line of the road, and that the work was not intrinsically and necessarily dangerous, and held that, if the work was being done under an independent contract, the appellant was not liable. The evidence as to the condition of the country where the road was being built was the same in the case at bar as in S. F. No. 3,920, and we adopt the statement as to that matter in the opinion in the latter case, without repeating it here, and we hold, as was there held, that, if the work was being done by an independent contractor, the appellant was not liable.

The instructions upon which the case was reversed in S. F. No. 3,920 do not appear in the case at bar; but, if it appears in this case at bar that the work was done by Wyman as an independent contractor, then appellant was not liable, and the judgment and order should be reversed. And it appears to us quite clearly that the work was being done by Wyman as an independent contractor. Appellant called for bids for the construction of the road by contract, and several different persons, among them Wyman, submitted bids in response to the call. The bid of Wyman was accepted, and the transcript shows a written contract between appellant and Wyman for the construction of the road for a certain specified price. The direct evidence was all to the point that the work was done by Wyman under and in accordance with this contract, he employed the hands who did the work, and had full control over it. There is no direct evidence to the contrary; and we see nothing in the record which substantially conflicts with appellant's evidence on the point, under the rule as to "conflict" of evidence. Respondent relies on certain circumstances, which she contends should induce this court to hold that there was such a conflict as to warrant the jury in finding that the work was not done under an independent contract; but this contention is not maintainable. The circumstance mostly relied on is that while the work was progressing Wyman's employes were paid by checks of appellant. But the manner in which the contract price was paid is a matter of no consequence. Indeed, this manner of payment was provided for in the contract itself. A similar contention was made in *Smith v. Belshaw*, 89 Cal. 427, 26 Pac. 834, where the question was whether certain work was done by an independent contractor, but

the court said: "The principle of law is so well settled that, where one carries on an independent employment in pursuance of a contract by which he has entire control of the work and the manner of its performance, his employer is not liable for any negligence of which he may be guilty in the course of his employment, the citation of authorities is unnecessary labor. Indeed respondent's counsel concedes the law but insists that the evidence is sufficient to sustain the verdict. As already stated, we are unable to find it in the record. The fact that the miners were paid their wages at defendant Belshaw's store, where they had been paid prior to the contract with Dickenson, and the further fact that some of the miners thought they were working for Belshaw, are circumstances too slight to defeat the express and uncontradicted testimony as to the terms of the contract, and the labor performed under it." Another circumstance relied on is that Wyman was formerly in the employ of appellant as its foreman, and as such foreman did work for appellant on other roads; but surely that fact could in no way affect the contractual relations between said parties as to the building of the road in question. Another circumstance is that the foreman of the appellant occasionally visited the road while the work was being done and made some suggestions as to certain features of the work; but he did not attempt to control any of Wyman's employes, and did nothing more than he had a right to do in seeing that the work was being done according to the contract. There were also a few other trifling circumstances of less importance than those above referred to. These circumstances are, in our opinion, clearly insufficient to raise such a conflict of evidence on the point as would justify a jury in finding against the independent contract.

The rule that the finding of a jury on an issue of fact will not be disturbed where there is a conflict of evidence as to such fact applies only to cases where there is a real and not a mere pretense of conflict—where, as bearing on the issue, there is some body and substance to the asserted conflicting evidence. A finding against the great weight and preponderance of the evidence can be maintained on the doctrine of "conflict" only where the alleged conflict rests upon evidence, either direct or circumstantial, which so materially contradicts the testimony on the other side, or is so radically inconsistent with it, as to leave room in a fair and reasonable mind to find the fact either way. This feature of the rule upon the "conflict" of evidence has been heretofore declared by this court. In *Smith v. Belshaw*, supra, the court said: "While we will not disturb the verdict of a jury where the evidence is conflicting upon substantial matters, yet in all cases the verdict must have some meritorious support from the evidence, or be set aside and disregarded." In *Hedge v. Wil-*

liams, 131 Cal. 459, 63 Pac. 721, 64 Pac. 106, 82 Am. St. Rep. 366, the court say: "Upon the part of respondent it is insisted that the verdict of the jury is conclusive as to the capacity in which Fontain was acting in repairing the tank. This contention can only be sound if there was a *substantial conflict of the evidence*." The italics are ours. In *Driscoll v. Cable Ry. Co.*, 97 Cal. 533, 32 Pac. 591, 33 Am. St. Rep. 203, it is said: "The rule is well established that this court will not disturb a verdict where there is a conflict of evidence on material points, and when there is evidence to support the verdict; but such conflict and such evidence must be real and substantial." There are other cases to the same effect. And within the rule so declared there was in the case at bar no evidence which was in substantial conflict with the evidence introduced by appellant which clearly established the fact that the road was built by Wyman as an independent contractor.

For the reasons above stated, the judgment and order appealed from are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

6 Cal. App. 769

PEOPLE v. EBEB. (Cr. 1,444.)

(Supreme Court of California. Jan. 14, 1908.)

1. JUDGES—DISQUALIFICATION—ACTS WITHIN DISQUALIFICATION STATUTE.

Code Civ. Proc. § 170, subd. 2, disqualifies a judge for relationship with an attorney for either party. Subdivision 4 provides that the judge shall forthwith secure the services of another judge to preside at the trial, but that that section shall not apply to the arrangement of the calendar, nor to the regulation of the order of business. Const. art. 6, § 8, provides that the judge of any superior court may hold the superior court in any county at the request of the judge thereof, and that, on request of the Governor, it shall be his duty to do so; and Code Civ. Proc. § 71, adds that in either case the judge holding the court shall have the same power as a judge thereof. *Held*, that the disqualification declared prevented a judge from presiding at an arraignment, the hearing of a plea, or other preliminary steps, beyond those necessary to regulate the order of business and arrange the calendar.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, §§ 235-245.]

2. SAME—CALLING OTHER JUDGE.

Under Const. art. 6, § 8, providing that a judge of any superior court may hold the superior court in any county at the request of the judge thereof, and that, on request of the Governor, it shall be his duty to do so, a disqualified judge on a criminal trial may request, notwithstanding his disqualification, another judge to preside, and a request to so preside is not limited to a request by the Governor.

In Bank. Appeal from Superior Court, Riverside County; Z. B. West, Judge.

Edward J. Ebey was convicted of burglary, and he appeals. Reversed and remanded.

The following is the opinion of the Court of Appeal, Second District, by TAGGART, J., concurred in by ALLEN, P. J., and SHAW, J.:

Defendant appeals from a judgment of the superior court of the county of Riverside, after a conviction upon a charge of burglary, alleged to have been committed in that county. He was arraigned before the superior judge for Riverside county, Hon. F. E. Densmore, and upon his refusal to plead to the information the clerk was ordered to enter a plea of "not guilty" for him. The judge of said court then ordered said cause to be set for trial, and a jury to be drawn to try the issues raised therein, and said judge presided during said drawing. All of these acts and rulings of the court in relation thereto were objected to by defendant on the ground that said judge was related to the attorney for the defendant by consanguinity within the third degree, and therefore disqualified to act in said cause. This was made to appear by affidavit of the attorney for defendant that he and the judge were half-brothers, born of the same mother. On the day set for the trial of said cause Hon. Z. B. West, the superior judge for Orange county, attended upon the court in Riverside county at the request of Judge Densmore, and against the objection of defendant presided at the trial of said cause, which resulted in defendant's conviction. Defendant objected to Judge West sitting at said trial because he did so at the request of Judge Densmore, who, it is claimed, was disqualified to select a judge to try said cause.

These acts of Judge Densmore are the only matters presented in the transcript on appeal as errors of law justifying a reversal of the judgment. The preliminary steps taken are not especially urged, the appeal being rested upon the one question of the power of a judge who is disqualified by relation to counsel for one of the parties to a criminal action to request the judge of another county to sit at the trial of said action. The disqualification relied upon is that created by section 170 of the Code of Civil Procedure, to wit: "No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding: (1) * * * (2) Where he is related to either party, * * * or to an attorney, counsel or agent of either party, by consanguinity, or affinity, within the third degree, computed according to the rules of law." Subdivision 4 of the section provides that when bias or prejudice of the judge is shown he shall forthwith secure the services of another judge to preside "at the trial of the action or proceeding. * * * But the provisions of this section shall not apply to the arrangement of the calendar, or to the regulation of the order of business, nor the power of transferring the action or proceeding to some other court, or the hearing upon [such] affidavits and counter affidavits [upon the showing made upon an application for such transfer]." The Penal Code contains no provision relating especially to disqualification of judges to sit or act in criminal cases, and the only ground for the removal of a

criminal action from the court in which it is pending appears to be "that a fair and impartial trial cannot be had in the county," and this removal can only be had upon the application of the defendant. Pen. Code, § 1033. Section 7 of the Bill of Rights in the state Constitution of 1879 provides that "the right of trial by jury shall be secured to all, and remain inviolate." This means the right as it existed at common law, and includes the right to be tried in the county where the crime is charged to have been committed, as well as to having a jury of the vicinage. *People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75. The provisions of part I of the Code of Civil Procedure (sections 33 to 304) relate to courts of justice and their organization and jurisdiction generally, civil and criminal, but section 397 et seq., as well as the other sections found in the chapter headed "Of the Place of Trial of Civil Actions" (Code Civ. Proc. pt. 2, tit. 4), cannot be applied to criminal causes and affect civil actions and proceedings only. *People v. McGarvey*, 56 Cal. 327. Section 71 of the Code of Civil Procedure re-enacts a portion of section 8 of article 6 of the Constitution of 1879, which reads as follows: "A judge of any superior court may hold the superior court in any county, at the request of the judge (or judges) of the superior court thereof, and upon request of the Governor it shall be his duty to do so." To this constitutional provision section 71 adds, "and in either case, the judge holding the court shall have the same power as a judge thereof."

The disqualification declared by section 170 (Code Civ. Proc.) being shown, we must look to the above constitutional provision for authority for the action of the disqualified judge in procuring a substitute to act in his place. There is but one remedy provided, the calling in of another superior judge. For the selection of this judge two methods are provided—a direct request made to such other judge by the one disqualified, and a request to some other judge by the Governor upon notice of the disqualification. No distinction is made as to the circumstances under which the one or the other shall act. The rule of construction that excludes one branch of the government from interference with another makes for a limitation upon the action of the Governor in a matter pertaining entirely to the judiciary. And so considered, the constitutional provision would be operative as to him, if action upon his part were limited to cases of death, physical disability, or mental incompetency of the judge in whose court the cause was pending; but we are not satisfied that this is or should be the controlling rule in such cases as the one at bar. In civil cases, in addition to the above-quoted constitutional and statutory provisions being applicable, section 397 of the Code of Civil Procedure provides that the place of trial of an action may, on motion, be changed,

"(4) when from any cause the judge is disqualified from acting." In the determination of a number of civil cases the rule of disqualification provided in section 170 is said to be based upon an ancient maxim, founded in the most obvious principles of natural right, that no man ought to be a judge in his own cause. *Mining Co. v. Keyser*, 58 Cal. 315, 322. For the purpose here being considered the law treats counsel and client as one. *Remy v. Olds* (Cal.) 42 Pac. 239. If the judge is disqualified for interest, consanguinity, or other cause in a civil cause, either party may move for a change of venue, and the motion must be granted without hesitation or delay (*Krumdick v. Crump*, 98 Cal. 117, 32 Pac. 800; *Anahelm, etc., v. Jurupa, etc.*, 128 Cal. 568, 61 Pac. 80). He can neither try his own case nor select his judge. *Santa Cruz Bank v. Taylor*, 125 Cal. 249, 57 Pac. 987; *Oakland v. Hart*, 129 Cal. 105, 61 Pac. 779.

A sound policy seems to demand that, independent of the rights of the parties to the action, the judicial tribunals appointed by law to administer justice should be preserved from discredit by a broad and liberal construction of the statute to the end of securing a judgment untainted with bias or interest. Courts should be slow to discover subtle and refined distinctions for indulging a doubtful jurisdiction where the liberty of a citizen is at stake. If the law be not satisfied in a civil case, involving the rights of property only, with the calling in of another judge by the disqualified one, where the right to a transfer is claimed under section 398, of the Code of Civil Procedure, it is difficult to see upon what principle the disqualified judge in a criminal action can be permitted to select the judge to try the cause when both the statute and Constitution furnish a method not open to criticism. Had the suggestion that the Governor be requested to act been made at the time, no doubt the honorable superior judge of Riverside county would have acted upon it, and it is quite probable that the same learned judge from Orange county would have been selected to preside at the trial of the cause. Recognizing that both of the learned judges were actuated by the sincerest desire to keep within the law, and to serve the substantial convenience of both counsel and client, we are still of the opinion that under such circumstances the proper method was to notify the Governor of the disqualification of Judge Densmore, and let him make the request.

While the matter of arraignment and hearing of the plea by Judge Densmore have not been expressly urged by the appellant, we are not prepared to say that these are included within the exceptions covered by the last clause of section 170—"arrangement of the calendar," "regulation of the order of business," "power of transferring," or "the hearing upon affidavits and counter affida-

vits." The section provides that the disqualified judge shall not "sit or act as such." Section 71 of the Code of Civil Procedure and section 8 of article 6 of the Constitution do not limit the request that may be made to a superior judge to the trial of the cause, but provide that, when requested, he "may hold the superior court in any county." The arraignment must be made and the plea entered in open court, and the time that may be allowed for either rests in the legal discretion of the court, that is, the judge. In the case at bar there was a qualified refusal to enter the plea, and the disqualified judge passed upon the question whether or not the circumstances set forth in the record justified the defendant in his refusal to plead. In all these matters the judge clearly "acted as such," and no reasonable construction can include the acts complained of within the terms, "arrangement of the calendar," or "regulation of the order of business." In our opinion, Judge Densmore was not only disqualified to select the judge to try the cause, but should not have presided at the arraignment, the hearing of the plea, or other preliminary steps of the prosecution of the case, beyond those necessary to regulate the order of business and arrange the calendar.

Judgment reversed, and cause remanded for further proceedings in accordance with the foregoing opinion.

Lafayette Gill, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Dep. Atty. Gen., for the People.

PER CURIAM. The application for a hearing in this court, after decision by the district court of appeal for the second district, is denied. In denying the application we desire to say that we do not give our assent to the view of the learned district court of appeal that the judgment should be reversed because the judge who tried the case was the judge of the superior court of another county requested to preside in the superior court of the county in which the case was pending by the judge thereof, who was himself disqualified to try the case. Under the plain and unambiguous language of our constitutional provision (section 8, art. 6), a judge of any superior court may preside in the superior court of any county at the request of the judge of the superior court thereof, and, while so presiding, may act in any matter in which he is not disqualified. But it appears that the disqualified judge presided at the arraignment of defendant, and ordered the entry of a plea therein. We agree with the district court of appeal that he was disqualified to act in this matter, and the portion of the opinion that relates thereto is approved. It follows that the judgment of that court is correct and that there is no necessity for a further hearing in this court.

7 Cal. App. 34

PEOPLE v. HORTON. (Cr. 67.)(Court of Appeal, Second District, California.
Nov. 21, 1907.)**1. LARCENY — INSTRUCTIONS — POSSESSION OF PROPERTY STOLEN.**

In a prosecution for larceny, an instruction that the unexplained possession of stolen property, however soon after the taking, is not sufficient to justify a conviction; that it is a circumstance which, with other testimony, is to determine the question of guilt; yet if defendant was found in possession of the property, this was a circumstance tending to show guilt, but not sufficient, standing alone, to warrant a conviction; that there must be in addition, proof of corroborating circumstances tending of themselves to establish guilt—was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 190-204.]

2. CRIMINAL LAW — APPEAL — HARMLESS ERROR.

In a trial for larceny, it appeared that a claim of ownership of the stolen property was made by defendant when in actual possession, or shortly after a sale of the property by him. The court instructed that unexplained possession of stolen property was not sufficient to justify a conviction without corroborating testimony; but that, if defendant was found in possession, claiming ownership, it tended to show guilt. *Held* that, while the language employed was too broad, and there are conditions under which a mere claim of ownership should not in any degree tend to establish guilt, yet under the rule that convictions will be reversed for alleged errors in instructions only when, from the testimony, it appears that the jury may have been misled, to defendant's prejudice, there was no ground for reversing a conviction.

3. LARCENY—POSSESSION OF STOLEN PROPERTY — EVIDENCE.

The rule that, in order to be a circumstance tending to show the guilt of one accused of larceny, the possession of property after the taking must be personal and exclusive, is satisfied, if the possession be exclusive as to all not participants criminis. As to the latter class, the possession of one is the possession of all.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 170-178.]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Gerdine Horton was convicted of larceny, and appeals. Affirmed.

H. H. Appel, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Appeal by defendant from a judgment and an order denying a new trial upon a conviction of grand larceny.

That the verdict was warranted is most apparent. The evidence in the record is convincing as establishing that defendant and his nephew took the horse in question from the ranch where it was being pastured, brought it to the city of Los Angeles, and sold it for \$115; that the negotiations leading up to the sale were carried on by both uncle and nephew, they claiming to be partners, and when the same were concluded the nephew went into an office and signed a bill of sale, using a fictitious name; that the money was paid to the nephew, who went back to the buggy in which defendant was

seated, and drove off with him; that shortly afterward the defendant, who had before that time been without money, was seen with gold coin in his possession, and told an acquaintance that the horse in question belonged to him, and that he had sold it for \$115. Defendant had, during an earlier hour of the day, sought to sell the horse to others, and represented to a witness that the horse was one of the large band owned by him and his nephew.

Upon the trial the court charged the jury by instruction 6: "You are instructed that the mere possession of stolen property, unexplained by the defendant, however soon after the taking, is not sufficient to justify a conviction. It is a circumstance, which, taken in connection with other testimony, is to determine the question of guilt. Yet, if you believe from the evidence, that the defendant was found in the possession of the property described in the information, or claiming to be the owner thereof, after the alleged taking, this is a circumstance tending in some degree to show guilt, but not sufficient, standing alone and unsupported by other evidence, to warrant you in finding him guilty. There must be, in addition to proof of possession of stolen property, proof of corroborating circumstances tending of themselves to establish guilt. These corroborating circumstances may consist of acts or conduct or declarations of the defendant, or any other circumstances tending to show the guilt of the accused. If the jury believe the property was stolen, and was seen in the possession of defendant shortly after being stolen, the failure of the defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such." By instruction 4: "Before you can convict the defendant of larceny you must believe beyond a reasonable doubt that he is guilty of or in complicity with the original fraudulent taking, and any subsequent connection after the taking would not be larceny." By instruction 7: "The possession must be personal, involving a distinct and conscious assertion of possession by the accused."

The contention of counsel for appellant is that instruction 6 is erroneous. This instruction, omitting therefrom the words, "or claiming to be the owner thereof after the alleged taking," has so often been approved by our Supreme Court that it may be said to have become settled law in this state (*People v. Fagan*, 66 Cal. 534, 6 Pac. 394; *People v. Etting*, 99 Cal. 577, 34 Pac. 237; *People v. Abbott*, 101 Cal. 646, 36 Pac. 129), and such instruction, as given with these words included, is approved in *People v. Velarde*,

59 Cal. 463. We think it unnecessary to a decision of this case to support the same by the authority last cited. The rule is well settled "that judgments will be reversed for alleged errors in instructions only when, looking at the testimony, we can see that the jury may have been misled by them to the prejudice of the defendant." *People v. Strong*, 46 Cal. 304. Applying this rule, we find that the claim of ownership was made by defendant when in actual possession, or shortly after the sale in which he participated. While it may be true, as insisted by appellant, that the language employed is too broad, and that there are conditions and circumstances under which a mere claim of ownership should not in any degree tend to establish guilt, yet we are confronted with nothing in this case which would bring defendant under such an exception.

It is urged further that the possession of property after the taking, that it may be a circumstance tending in some degree to show guilt, must be personal and exclusive possession. The jury was instructed that the possession must be personal, but it does not follow that such personal possession must be exclusive in a strict sense. The rule is satisfied, if it be exclusive as to all not *particeps criminis*. As to the latter class, the possession of one is the possession of each and all.

We find no prejudicial error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 39

SCARBOROUGH v. WOODILL. (Civ. 386.)

(Court of Appeal, Second District, California.
Nov. 22, 1907.)

1. ADJOINING LANDOWNERS—"LINE TREES"—OWNERSHIP.

Under the express provisions of Civ. Code, § 834, "line trees" are those whose trunks stand partly on the land of two or more coterminous owners, and belong to them in common.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Adjoining Landowners, § 46.]

For other definitions, see Words and Phrases, vol. 5, p. 4171; vol. 8, p. 7708.]

2. SAME—RIGHT TO CUT.

Where adjoining owners were co-tenants of certain line trees, neither was at liberty to cut the trees without the consent of the other, if he thereby injured the common property in the trees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adjoining Landowners, § 46.]

3. SAME—PARTITION.

Where a row of cypress trees was growing on the line between adjoining owners, each being a tenant in common of the trees, neither was entitled to make his own partition of the trees by cutting every alternate two trees, and if he did so, he was subject to an action for waste under Code Civ. Proc. § 732, authorizing the maintenance of such action by one tenant in common against another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adjoining Landowners, § 46.]

4. EVIDENCE—JUDICIAL NOTICE.

The Court of Appeal will take judicial notice of the flora and climatic conditions of the country, and from these determine whether certain line trees between coterminous owners were natural timber growing on the land, or trees of an ornamental nature, planted for a special purpose.

5. ADJOINING LANDOWNERS — WASTE — CUTTING LINE TREES—INJUNCTION.

Where plaintiff and defendant owned adjoining orange orchards in Southern California, separated by a row of cypress trees growing on the boundary line, the cutting of every alternate two trees in the entire row for firewood was not a legitimate enjoyment of defendant's estate in common with complainant in the trees, and hence complainant was entitled to an injunction restraining further cutting of the trees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adjoining Landowners, § 46.]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by E. J. Scarborough against A. L. Woodill. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Collier & Carnahan, for appellant. Purlington & Adair, for respondent.

TAGGART, J. Appeal from judgment and order denying motion for a new trial. Plaintiff and defendant own adjoining orange orchards in the county of Riverside, which are separated by a row of cypress trees growing on the boundary line between them. The trees vary in diameter from 13 to 23 inches, and in height from 70 to 75 feet, and the trunks thereof stand partly on one side and partly on the other side of said line. Defendant cut down eight of these trees (every alternate two), and threatened to continue to cut every alternate two trees until he had cut one-half of the entire row. The eight were taken to defendant's home, and used for firewood. The trial court rendered judgment in favor of plaintiff for \$1 damages, and perpetually enjoining defendant from cutting down, injuring, or destroying any of the remaining trees growing on said line.

Line trees are "trees whose trunks stand partly on the land of two or more coterminous owners," and "belong to them in common." Civ. Code, § 834; 28 Am. & Eng. Ency. of Law (2d Ed.) p. 538. While at common law there appears to have existed two views as to the character of the estate created in the adjacent owners of real property by reason of the roots of trees growing near the boundary line extending into and deriving nourishment from the other property, the rule as to trees growing in a hedge that divided the lands of two proprietors was the same as that of our Civil Code. The ownership of the soil was several, in the proprietors of the two estates, while the tree, standing and growing partly on the soil of each, not capable as an entire thing of several ownership by the two, was the property of the two in common, and as tenants in common. *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 329. If the tree stand so nearly

upon the dividing line between the lands that portions of its body extend into each, the same is the property, in common, of the landowners. And neither of them is at liberty to cut the tree without the consent of the other, nor to cut away the part which extends into his land, if he thereby injures the common property in the tree. Washburn on Real Property (3d Ed.) § 7a. The tenancy in common in a "line tree" appears to be of a peculiar nature, and may be stated to be "that each of the landowners upon whose land any part of a trunk of a tree stands has an interest in that tree, a property in it, equal, in the first instance, to, or perhaps rather identical with, the part which is upon his land; and, in the next place, embracing the right to demand that the owner of the other portion shall so use his part as not unreasonably to injure or destroy the whole." *Robinson v. Clapp*, 65 Conn. 365, 32 Atl. 942, 29 L. R. A. 582.

Defendant's estate in the row of cypress trees must be considered merely as that of a tenant in common in the trees themselves, as described by the Connecticut court, with an easement upon plaintiff's lands for the sustenance of such trees. Whatever the character of his holding, it cannot be contended that he is empowered to make his own partition of the trees in his own way. The Code of Civil Procedure expressly provides for an action for waste against a tenant in common. Section 732. Waste is not defined by the Code, so we must look to the common law for this. *McCord v. Oakland, etc., Co.*, 64 Cal. 140, 27 Pac. 863, 49 Am. Rep. 686.

This leads to a consideration of the propriety of the equitable remedy which was awarded by the trial court. Defendant contends that as the parties were tenants in common of the trees no injunction will issue against one at the suit of the other. In neither of the cases relied upon by the appellant was the court dealing with similar facts to those before us upon this appeal. In *Hihn v. Peck*, 18 Cal. 644, it was held that an injunction was not proper pending an action in partition of a large tract of timber land, where neither the insolvency of the tenant in common cutting the timber, "nor any other facts entitling him to an injunction," were averred in the bill. The general rule as to restraint for waste against one tenant in common at the suit of another at common law is stated in *McCord v. Oakland, Q. M. Co.*, 64 Cal. 143, 27 Pac. 863, 49 Am. Rep. 686. But, says the court, he "might be restrained in equity from felling ornamental trees, or from doing other things amounting to wanton and destructive waste, which were called 'equitable waste,' because allowable at law." In the *McCord* Case an injunction was refused because the court would not restrict a tenant in common from the legitimate enjoyment of the estate, and to interfere with the legitimate exercise of that

right would be to deny an essential quality of the title, that is, an undivided occupation. In the same opinion a New York case is referred to, in which an injunction was granted pending the hearing of a bill for partition, because the cutting of the timber in that case was not within the usual and legitimate exercise of the enjoyment of defendant's estate. *Hawley v. Clowes*, 2 Johns. Ch. (N. Y.) 122. As to the issuance of an injunction, Chancellor Kent saying: "The remedy is peculiarly appropriate and proper."

In other jurisdictions the use of the injunction in a proper case seems to be generally approved, and the text writers usually state the rule that a tenant in common will not be granted an injunction against his cotenant, with an exception. In special cases one tenant in common may, on the application of the other, be enjoined from committing waste (cutting timber), but the injunction is sparingly exercised. *Obert v. Obert*, 5 N. J. Eq. 397. Injunctions are but rarely granted to restrain a co-tenant from exercising control over the joint property. To authorize an injunction, it must appear either that the defendant is insolvent, or that the act sought to be enjoined will effect a partial or entire destruction of the estate. *Freeman on Co-Tenancy and Partition*, § 323; *Leatherbury v. McInnis*, 85 Miss. 160, 37 South. 1018, 107 Am. St. Rep. 274. An injunction will be granted to restrain one of the owners of adjoining tracts of land (tenants in common) from cutting down trees growing on the boundary line, where they serve to shelter and protect the buildings of the other, even though their presence be a damage to his land, and notwithstanding the complainant has himself cut down some of the trees. *Musch v. Burkhart*, 83 Iowa, 301, 48 N. W. 1025, 12 L. R. A. 484, 32 Am. St. Rep. 305; *Harndon v. Stultz*, 124 Iowa, 440, 100 N. W. 329; *Robinson v. Clapp*, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582.

It is argued by appellant in the case at bar that neither the complaint nor the findings show any peculiar conditions or circumstances justifying the issuance of an injunction under the authorities cited. This court will take judicial notice of the flora and climatic conditions of the country. It may from these and the character of the trees in question determine whether they are natural timber growing upon the land, or trees of an ornamental nature, planted for a special purpose. From these premises it will be presumed that the cutting of cypress trees for firewood on the boundary line of an orange orchard in Southern California was not a "legitimate enjoyment of the estate" in such trees. We do not think any more specific allegation or finding is necessary to sustain the judgment.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 37

PEOPLE v. MONREAL. (Cr. 64.)

(Court of Appeal, Second District, California.
Nov. 21, 1907.)

1. CRIMINAL LAW—HARMLESS ERROR—INSTRUCTIONS.

Where, in a prosecution for perjury, certain statements contained in the information were material under the issues in the action in which the perjury was alleged to have been committed, and the court charged that, unless the jury found such statements were testified to by defendant and were false, it should acquit, a subsequent charge that if it found all the statements in the information false it should convict was not prejudicial to defendant, though some of them may have been immaterial, since a finding that the immaterial matters were false could not convict defendant, unless the falsity of the material statements was also established.

2. SAME.

In a prosecution for perjury, the admission of evidence to prove the falsity of an immaterial statement contained in the information is not prejudicial error.

3. WITNESSES—IMPEACHMENT—EVIDENCE—RELEVANCY UNDER STATUTE.

Under Code Civ. Proc. § 2051, prohibiting the impeachment of a witness by evidence of particular wrongful acts, except a conviction for a felony, evidence that a witness shortly prior to the giving of her testimony had been guilty of adultery, and that her husband had punished a man found in her room, introduced to impeach the witness, was properly rejected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1121, 1126-1128.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Leo Monreal was convicted of perjury, and he appeals. Affirmed.

F. W. Allender and A. A. Sturges, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. The defendant, convicted of the crime of perjury, appeals from the judgment and an order denying a new trial.

The perjury charge was false testimony in a certain divorce proceeding. This testimony, which is claimed to be false, is set out at great length in the information, and its falsity in every particular was averred and clearly established. Certain statements appearing in the information were material under the issues presented by the pleadings. The court charged the jury that, unless it found such statements were testified to by defendant, and that they were false, that it should acquit. The effect of such charge could only be in the nature of an instruction that such statements only were material. The other charge, that if it found all of the statements contained in the information to have been false it should convict, could not prejudice the defendant, even were some of them immaterial; for, if the material matters were false, the charge is established, and the finding by the jury that other matters not material were also false could work no injury. For the same reason the action of the court in admitting evidence of the brand of beer used, and the price paid therefor,

was not prejudicial error, even were it not admissible as tending to discredit the evidence of the defendant in other material matters, which we are not prepared to affirm.

The court refused to admit testimony tending to show that a witness had been guilty of adultery shortly before offering herself as a witness, and, further, that her husband administered punishment to a man found in her room. There was no error in this (section 2051, Code Civ. Proc.; Estate of James, 124 Cal. 656, 57 Pac. 578, 1008), the acts not bearing upon the matter in issue (Barkly v. Copeland, 86 Cal. 487, 25 Pac. 1).

The trial court refused a charge requested by defendant in relation to the credibility of the defendant as a witness. We find no error in refusing such instruction. People v. Winters, 125 Cal. 329, 57 Pac. 1067; People v. Ross, 134 Cal. 256, 66 Pac. 229.

The judgment and order should be affirmed, and it is so ordered.

We concur: SHAW, J.; TAGGART, J.

CLEMENTS v. WATSON et al. (Civ. 416.)
(Court of Appeal, Second District, California.
Nov. 23, 1907.)

1. ATTORNEY AND CLIENT—ATTORNEY'S COMPENSATION.

In estimating the value of an attorney's services, it is proper to include in the consideration a reasonable retaining fee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 294.]

2. SAME—ACTION FOR SERVICES—ISSUES.

Where, in an action for services rendered by an attorney, a bill of particulars contained the item "retainer, seven months at \$100 per month," and no demand was made for a further bill, it was proper to permit plaintiff to prove certain services rendered which were included in such item.

3. TRIAL—REMARKS OF COUNSEL.

In an action for an attorney's services, there was no prejudicial error in plaintiff's counsel's statement to the jury that it had been called at defendant's request and in his expression of his opinion as to the propriety of a jury passing on the value of an attorney's fee and questioning their ability to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 303-307.]

4. SAME.

Misstatements or improper ones made by counsel to the jury are not grounds for reversal, unless they relate to material matters of fact as distinguished from mere opinion, and are such as to have prejudiced the adverse party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 275-284.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by James I. Clements against John W. Watson and others. Appeal by defendants from a judgment in favor of plaintiff, and from an order denying a motion for a new trial. Affirmed.

H. S. Rollins and J. W. McKinley, for appellants. Frank G. Finlayson, for respondent.

ALLEN, P. J. Appeal by defendants from a judgment and order denying a new trial.

The action was on account of an attorney's fee for services rendered by plaintiff's assignor to defendants. The case was tried by a jury, which rendered a verdict in plaintiff's favor. Several months before the trial defendants demanded a bill of particulars, which was furnished by plaintiff, and contained, among other items, the item: "Retainer, seven months at \$100 per month, \$700." No demand was made for a further bill, and upon the trial the court permitted plaintiff to prove certain services rendered defendants, which were included in said item. This is assigned as error. "In estimating the value of an attorney's services it is proper to include in the consideration a reasonable retaining fee." *Roche v. Baldwin*, 143 Cal. 192, 76 Pac. 956. While the performance of actual services may not be essential in order that a retaining fee may be recovered (*Knight v. Russ*, 77 Cal. 413, 19 Pac. 698), it certainly cannot prejudice defendant to show that upon the faith of such retainer certain specific services were rendered for which he was not otherwise paid, and for which he made no other charge. And, in addition, the value of the retainer may be shown (*Knight v. Russ*, supra), in which case, the bill of items not being objected to, services rendered as affecting such value would not be improper, especially in this case, where the item of retainer at so much per month would indicate that the term employed involved something more than is usually covered by the expression.

The only other error complained of in appellants' brief relates to the action of the court in permitting counsel for plaintiff to state to the jury that it had been called at defendants' request, and then, at length, to express an opinion as to the propriety of a jury passing upon the question of the value of an attorney's fee; and, further, questioning their ability so to do as intelligently as a court might be able to do under like circumstances. Applying the rule that misstatements or improper statements made to the jury during argument as affording ground for reversal must relate to matters of fact material, as distinguished from matters of mere opinion, and, in any event, "must be such as in a material matter to have prejudiced the defendant" (*People v. McMahon*, 124 Cal. 436, 57 Pac. 224), we are unable to see just how defendants were prejudiced by the statements complained of. If the opinion of counsel for plaintiff, as expressed to the jury, in which its ability to intelligently determine the issues was questioned, had any effect, it certainly would not operate against the defendants, who had impliedly expressed confidence in the jury when they called it to pass upon the questions of fact involved.

We find no error prejudicial or otherwise in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 71

CHENEY v. McGARVIN. (Civ. 406.)
(Court of Appeal, Second District, California.
Nov. 23, 1907. Rehearing Denied by
Supreme Court Jan. 20, 1908.)

EXECUTORS AND ADMINISTRATORS—ACTIONS
AGAINST—VARIANCE.

There is no variance between a claim presented for services as a clerk for a certain period at \$20 per week, with a credit amounting to \$7 per week for such period, and proof of employment of plaintiff by deceased at \$20 per week, plaintiff to draw \$7 per week, and leave the balance with deceased with which to furnish a house which was to have been built for plaintiff; the money not being held under a trust, but still being owed for services.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Florence H. Cheney against D. C. McGarvin, administrator of Charles H. Bush, deceased. From an order granting defendant a new trial, plaintiff appeals. Reversed.

F. B. Guthrie and Louis Luckel, for appellant. J. W. McKinley and Oscar Lawler, for respondent.

TAGGART, J. Appeal from an order granting a new trial. Plaintiff presented a properly verified claim against the estate of Charles H. Bush, deceased, of which defendant is administrator, itemized and stated as follows:

To services as general clerk in jewelry store of deceased from July 1, 1903, to May 1, 1904, 43 ¹ / ₇ weeks at \$20.....	\$ 860 57
To services as general clerk in jewelry store of deceased from Dec. 20, 1904, to July 23, 1905, 32 ¹ / ₇ weeks at \$20.....	642 85
	\$1,503 42
By cash received at divers times between July 1, 1903, and July 23, 1905	500 42
Balance due	\$ 943 00

This claim was rejected by defendant, and action commenced thereon by plaintiff within the statutory time. The complaint states the cause of action in two counts, one of which declares on an express promise to pay by the deceased, and the other upon the reasonable value of the services rendered. The evidence introduced by plaintiff to establish the character of her employment, and amount and manner in which she was to be paid for her services, consisted of the testimony of her daughter to an oral agreement between plaintiff and the deceased. This testimony, so far as material to the question here being considered, was: "He (Bush) asked her

(plaintiff) to come to work at a salary of \$20 a week." "She was to come there as clerk to sell jewelry and attend to his store. She also collected rents and attended him when he was sick." "Mr. Bush said my mother was to draw \$7 a week, and leave the \$13 a week remaining with him that she might furnish a home." "My mother lived with me, and Mr. Bush visited us very often. The contract between Mr. Bush and my mother was often spoken about. It was that he was to build a home, and that he was to furnish a home for us." "Mr. Bush said that she was to receive \$20 per week, \$13 of which was retained to be devoted to the purchase of furniture for a residence which was to be constructed by him, and he was to arrange matters by his will so that at his death it should go to my mother. This money was to be held by him and devoted to the purchase of furniture for that place. That was the agreement entered into between himself and my mother." This is the entire evidence relating to the employment of plaintiff. The case was tried by a jury, and a verdict rendered for \$943 in favor of plaintiff, and judgment for that amount, with costs, entered on the verdict.

Defendant moved for a new trial, and his motion was granted, on the ground, as stated in the order, "that a material variance is shown between the proof made and the claim alleged in plaintiff's complaint and as presented to the defendant administrator, and upon no other ground." The theory upon which this ruling is sustained by respondent, and presumably that upon which the court acted, is that by the terms of the agreement proven the money sued for was retained by Bush either in trust, or under some other form of obligation to repay money held in deposit, and no longer due to plaintiff on account of the original services.

The evidence supports the claim presented in respect to there being an original indebtedness of \$20 per week for plaintiff's services as therein set forth. It also shows that the credit given corresponds in amount to the \$7 per week, which plaintiff was to draw under the agreement to which the daughter testified. This, of course, left the \$13 per week in the hands of Bush. He owed this to her as part of her wages for services rendered, if the contract testified to does not show that the character of the indebtedness was changed by agreement or the acts of the parties. The witness says that plaintiff was to leave the \$13 a week with him that she might use it to purchase furniture for a home. He was going to furnish a house for the plaintiff and her daughter, and the plaintiff was to purchase the furniture for it. There was no consideration for the leaving of this money with Bush. There is no question about it belonging to plaintiff by virtue of her having earned it as wages. She might have designated some other person to hold it for her, but like most clerks and employes

she chose to leave it with her employer because she had plans which would enable her to use it better after it had been accumulating for some time. We are not aware of any authority holding that because an employé arranges with his employer to pay him but a portion of his wages, assigning as a reason for not drawing the balance that he desired to leave it in the employer's hands until such time as he could buy the furniture necessary for a home, that any trust relation was thereby created, or that the employer ceased to owe the money to the employé for services rendered. That this purchase of furniture by the plaintiff is connected with the additional offer of the deceased to furnish a home does not alter the matter or change the character of the obligation.

We do not think it necessary to distinguish those cases in which the presentation of a claim based upon a trust is considered. The order granting the new trial is expressly limited as to the grounds upon which it is based, and our consideration thereof is confined to this. *Ben Lomond Wine Co. v. Sladky*, 141 Cal. 621, 75 Pac. 332. In our opinion, there was no variance between the claim presented and the proof adduced to justify the trial court in granting a new trial.

Order appealed from is reversed.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 27

PEOPLE v. LONG. (Cr. 66.)

(Court of Appeal, Second District, California.
Nov. 20, 1907.)

1. CRIMINAL LAW — APPEAL — RECORD — CONCLUSIVENESS.

On appeal in a criminal case from a denial of a motion to direct the clerk to indorse on a written motion for a new trial a certificate of its filing on a certain prior date, and to make the other proper entries on the records of such filing, where the evidence was conflicting as to whether the motion was actually made or presented for filing, the implied finding of the court, necessary to sustain its ruling, that no such motion was made or tendered for filing, is binding upon appeal.

2. SAME — MOTION FOR NEW TRIAL — HOW TO BE MADE.

While under Pen. Code, § 1182, providing that an application for a new trial must be made before judgment, and the order granting or denying it must be immediately entered by the clerk in the minutes, the motion may be filed and thus relieve the mover from stating his grounds at length, and the filed paper may be referred to for the grounds of the motion in detail, the motion must nevertheless be made orally, and the court's attention called to it, and the court moved to grant it.

3. SAME — AMENDMENT OF MOTION.

A motion after judgment to direct the clerk to indorse upon a written motion for a new trial the certificate of its filing on a date prior to judgment, in so far as it attempts to add to what actually occurred is in the nature of an amendment of the motion for a new trial, and is incompetent.

4. SAME—TRIAL—EXCEPTIONS TO ADMISSION OF EVIDENCE—TIME FOR PRESENTING BILL OF EXCEPTIONS.

While exceptions to the granting or refusal of a motion for a new trial, expressly allowed by Pen. Code, § 1172, must be made before judgment, and the order granting or denying it must be immediately entered by the clerk under the express provisions of Pen. Code, § 1182, and must be prepared and presented in a bill of exceptions to the trial court within 10 days after the ruling complained of, under Pen. Code, § 1174, relating to the settlement of exceptions, exceptions to erroneous rulings in admitting or rejecting testimony may also be embodied in a bill of exceptions, which may be presented within 10 days after judgment, and may be used upon appeal therefrom.

5. SAME—OBJECTIONS TO ADMISSION OF EVIDENCE—TIME.

If a question indicates upon its face that the answer will be inadmissible, a party cannot take the chance of a favorable reply, and then, if the answer be unfavorable, object to the question, or move to strike out the answer, if the latter be responsive; but, if the question calls for an incompetent answer, it must be objected to, or the right to have it stricken out is waived, though when the question is unobjectionable, and the answer is incompetent or irrelevant, the answer may be stricken out without previous objection to the question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1630, 1640.]

6. SAME—EVIDENCE—HEARSAY.

On a robbery trial, the complaining witness, in answer to the question if he had said anything to the arresting officer in the presence and hearing of accused, stated over objection that he had told the arresting officer that accused was the man who had robbed him, and that thereupon accused denied it. *Held*, that the answer was hearsay and incompetent, since while an accused must deny an accusation or have his silence construed as an admission of its truth, even where he is in custody, if he does deny it in whole or in part, the accusation or statement is an admission and evidence only to the extent that it is admitted to be correct by accused, the admission and not the accusation being evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 950-983.]

7. SAME—SUFFICIENCY OF OBJECTION.

On a robbery trial, accused objected on valid grounds to a statement of the complaining witness as to what he had told the arresting officer in the presence and hearing of accused, but did not move to strike out the statement. Before the ruling was made the district attorney suggested that the foundation which he expected to lay to make the otherwise improper statement of the witness competent was a reply by accused. The objection was overruled, and the witness testified to accused's reply. *Held*, that the objection being addressed to a line of incompetent evidence being introduced by the district attorney upon an improper theory, and its incompetency being pointed out by accused, and the court and district attorney having considered the objection on its merits, it should have been sustained, independent of any motion to strike out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1633-1640.]

8. SAME—APPEAL—HARMLESS ERROR.

As accused, in the absence of a motion to strike out the witness' statement to the arresting officer, would have obtained no material benefit from a ruling in his favor, the overruling of accused's objection was not reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3137-3143.]

9. SAME—SUFFICIENCY OF OBJECTION.

A specific objection was made to incompetent testimony, the testimony was admitted over the objection, and subsequently, when another witness was testifying to the same matter, it was objected to as incompetent and irrelevant, but was admitted over the objection without a ruling. *Held*, that the error in admitting the prior testimony was not cured by the admission of the latter "without objection," since the grounds of the objection, stated on the admission of the prior testimony, should have been considered when the same evidence was again offered, where the attention of the court was called to the whole line of evidence as incompetent.

10. CONSPIRACY—NATURE AND ELEMENTS—EVIDENCE TO ESTABLISH.

Conspiracies cannot be established by suspicions, nor does mere association make a conspiracy, but there must be evidence of some participation or interest in the commission of the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 105-107.]

11. CRIMINAL LAW—DECLARATION OF CO-CONSPIRATOR—COMPETENCY.

Just after a robbery had been committed a woman, who was not shown to have been a party to a conspiracy with accused, had crossed the street from where the robbery had occurred, and in answer to a witness who asked her "what was the matter over there" replied that she guessed "a friend of hers was scaring somebody over there." *Held*, that the evidence of her statement was pure hearsay, and was not admissible as an admission of an associate in the commission of the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 973-983.]

12. SAME—RES GESTÆ.

The witness' statement was not a part of the res gestæ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 815, 821.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Irving Long was convicted of robbery, and appeals. Reversed and remanded.

F. H. Thompson, Clarence Melly, and Goldberg & Melly, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for respondent.

TAGGART, J. Appellant was informed against jointly with two other defendants upon a charge of robbery. He was given a separate trial, and convicted, and on May 8, 1905, the day set for pronouncing judgment, placed on a conditional probation for the term of two years. Imposition of sentence was suspended, as provided by subdivision 1 of section 1208 of the Penal Code, in accordance with the terms of the order admitting him to probation. On August 25, 1906, he was accused of violating his parole, brought before the court, and, after a hearing, adjudged to have violated the conditions of his probation and engaged in criminal practices, and his probation was thereupon revoked and terminated, and he was arraigned for sentence, and judgment of imprisonment in the state prison pronounced. Notice of appeal from this judgment was given August 29, 1906. On June 18, 1907, pursuant to notice, appellant moved the court for an order di-

recting the clerk to indorse upon a written motion for a new trial presented a certificate of its filing on the 8th day of May, 1906, and to make appropriate entries upon the register of criminal actions and other records of said court showing that said motion for a new trial had been filed as of the date named. The motion was made upon the records in the case, and affidavits filed. The district attorney filed counter affidavits at the hearing of the motion, and on said 18th day of June, 1907, the motion was denied, and on June 24, 1907, defendant appealed from the order of the court denying his motion.

Two bills of exception appear in the record, as filed July 9, 1907, one relating to the ruling of the court upon the motion last mentioned and settled July 9, 1907, and the other embodying exceptions to the admission of evidence upon the trial of said cause, which bill is dated August 29, 1906.

Disposing first of the appeal from the ruling on appellant's motion, we find that the counter affidavit of the deputy district attorney states that at the time the motion for a new trial is claimed to have been presented for filing, according to the affidavits of counsel for defendant, the attorney for defendant "did not present his motion for a new trial to the court, and did not state the grounds of said motion or any of them." All he did was to state that he desired to present such a motion, but upon the court's stating that he intended to put the defendant on probation, no further action was taken by defendant or his counsel in this connection. This, then, became a question of fact as to which the evidence was conflicting, and the implied finding of the court, necessary to sustain its ruling that no motion for a new trial was made or tendered for filing, is binding upon this court. If the showing made by appellant had not been contradicted, and his motion granted, it would have availed him nothing. The application for a new trial must be made before judgment, and the order granting or denying the same must be immediately entered by the clerk in the minutes. Section 1182, Pen. Code. While the motion may be filed, and thus relieve the mover from stating his grounds at length and the filed paper referred to for the grounds of the motion in detail, the motion must nevertheless be made orally. The attention of the court must be called to it, and the court moved to grant it. *Williams v. Hawley*, 144 Cal. 100, 77 Pac. 762; *Spencer v. Branham*, 109 Cal. 340, 41 Pac. 1095; *People v. Ah Sam*, 41 Cal. 650. To the extent that it attempted to add to what had been actually done, it would have been in the nature of an amendment of the motion for a new trial, and this was incompetent. *People v. Wessel*, 98 Cal. 352, 33 Pac. 216.

For the purpose of considering the assignments of error relating to the admission or rejection of testimony, it is of no practical consequence that a motion for a new trial

was not made and ruled upon in this case. While exceptions to the granting or refusal of a motion for a new trial (sections 1172, 1182) must be prepared and presented in a bill to the trial court within 10 days after the ruling complained of is made (section 1174), exceptions to erroneous rulings of the court in admitting or rejecting testimony may also be embodied in a bill which may be presented within 10 days after judgment. This bill of exceptions may be used upon an appeal from the judgment. *People v. Craig* (Cal.) 91 Pac. 997; *People v. Walker*, 142 Cal. 92, 75 Pac. 658; *Walker v. Superior Court*, 135 Cal. 372, 67 Pac. 336; *People v. Keyser*, 53 Cal. 184.

The Attorney General objects to the consideration of the first error assigned, which relates to the admission of testimony, on the ground that the objection of defendant to the testimony came too late. He contends that the objection being to the answer, as distinguished from the question, should have been presented in form of a motion to strike out. The rules relied upon by the Attorney General have often been declared by the courts, and are said to be so simple and well settled that no difficulty should arise in their application and no departure from them should be tolerated. As declared by the authorities cited, they cover in substance the following: If a question indicates upon its face that the response to it will be inadmissible, a party cannot take the chance of a favorable reply, and then, if the answer be unfavorable, object to the question, or move to strike out the answer, if the latter be responsive. If the question calls for an incompetent answer, it must be objected to, or the right to have the answer stricken out is waived. But when the question is unobjectionable, and the answer is incompetent or irrelevant, the answer may be stricken out without previous objection to the question. *People v. Williams*, 127 Cal. 216, 59 Pac. 581; *People v. Lawrence*, 143 Cal. 155, 76 Pac. 893; *People v. Scalaniro*, 143 Cal. 346, 76 Pac. 1098; *Johnston v. Beadle* (Cal. App.) 91 Pac. 1012; *People v. Smith* (Cal.) 91 Pac. 513. The objection here under consideration was not to the question, and the question did not indicate on its face that the response to it would be inadmissible. It was not unreasonable, because by its very terms it was addressed to a statement contained in the answer. Instead of being made in the form of a motion to strike out, it was in the form of an objection to the answer. On the direct examination of the complaining witness he was asked: "Q. Now there in the presence of Long, this defendant here, and in hearing of Long, did you say anything to Tyler? [Tyler was the arresting officer.] A. The only thing I said to Tyler was: 'That is the man that went through my pockets'—pointing to Long." To this appellant objected: "Object to that as being hearsay. No sufficient foundation laid for the statement. Has not been shown this defendant was within hearing of

that statement." The district attorney thereupon stated: "We are going to show that he replied to it." The objection was overruled, and an exception preserved. The witness then continued: "When I said, 'That is the man that went through my pockets' in the presence of Long, he said: 'No; he was not the man that done it.' He said he was not the man that took the money off of me." Thus we see it was the statement in the answer which was objected to upon the ground that the proper foundation had not been laid for its introduction. Before the ruling was made by the court the district attorney suggested to the court the foundation which he expected to lay to make the statement competent, and thereupon the objection of defendant was overruled, and the witness testified to the reply upon which the district attorney relied as establishing a foundation for the introduction of the statement which he, in effect, admitted to be improper testimony without it.

Whether we consider the objection and ruling as made after the statement of the district attorney or after the witness had testified, the evidence was hearsay and inadmissible. While the rule in this state compels a defendant to deny an accusation or have his silence construed as an admission of its truth, even where he is in the custody of the arresting officers (*People v. Dole*, 122 Cal. 490, 55 Pac. 581, 68 Am. St. Rep. 50), if he does so deny it, either in whole or in part, the accusation or statement is an admission and evidence only to the extent that it is admitted to be correct by the defendant. In other words, it is the admission and not the accusation which is evidence. *People v. Ah Yute*, 54 Cal. 91; *People v. Estrado*, 49 Cal. 171. The rule is clearly illustrated in the companion cases of *People v. Amaya*, 134 Cal. 536, 66 Pac. 794, and *People v. Teshara*, 134 Cal. 544, 66 Pac. 798. The objection to the admission of this line of evidence was seasonable, and should have been sustained upon the district attorney's offer, since this did not include a "reply" which would render the accusation admissible. This objection should have been followed, however, by a motion on defendant's part to strike out the accusation, as that was the prejudicial testimony which was improperly admitted. The objection was addressed to a line of incompetent evidence being introduced by the district attorney upon an improper theory, and its incompetency was pointed out by the objection of defendant. Both the court and the district attorney considered this objection on its merits, and it should have been sustained, independent of any motion to strike out. To refuse to consider it now as unseasonable because of its form would be to approve of the setting of a trap for the unwary attorney, a practice which would be scarcely less reprehensible than the practice of this kind toward the trial court, which appellate

courts are sometimes called upon to rebuke. There was no element of surprise upon the part of the court involved, and the defendant is entitled to the benefit of his exception preserved to the ruling of the court. *Blum v. Manhattan Ry. Co.*, 1 Misc. Rep. 119, 20 N. Y. S. 722; *Sneed v. Marysville Gas Co.*, 149 Cal. 709, 87 Pac. 376. Without the motion to strike out the accusation he would have obtained little benefit from a ruling in his favor, and so considered we would not regard this error alone sufficient to justify a reversal of the judgment.

The evidence of the officer Tyler in relation to this matter is substantially the same as that of Friary. The testimony of this witness is in a narrative form, and when the matter mentioned was reached, defendant's attorney interjected: "Object to that as being incompetent and irrelevant." No ruling of the court upon this objection appears in the record. This is a repetition of the objection of defendant to the same improper line of testimony, made in the same irregular way, without even being given a consideration by the trial court. Under such conditions, we are called upon to say that this testimony so "admitted without objection" cures any error complained of in the ruling admitting the testimony of the witness Friary. We cannot agree with this contention. The grounds of the objection, stated in connection with the same matter in the testimony of Friary, should have been considered when the same testimony was sought to be introduced through another witness, the attention of the court being called to the whole line of evidence as incompetent.

The admission of the statement made by the Boland woman to the witness Fletcher was error. There was no evidence of any conspiracy between defendant and the woman. Conspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense. Neither was her statement a part of the *res gestæ*. She had come across the street from where the trouble was going on between defendant and the complaining witness, and in response to a question from a stranger as to "what was the matter over there" replied that she guessed "a friend of hers was scaring somebody over there." This was pure hearsay. It is difficult to see how it could have been given much weight by the jury; but when it is treated as the admission of an associate in the commission of the offense, the theory upon which it was admitted as expressed in the ruling of the court, we are not prepared to say it was not prejudicial.

Judgment reversed, and cause remanded for new trial.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 55

KING v. SAMUEL et al. (Civ. 381.)

(Court of Appeal, Third District, California.
Nov. 22, 1907. On Rehearing,
Dec. 23, 1907.)

1. DEEDS — CONSTRUCTION — REPUGNANT CLAUSES.

A deed described land as "all the swamp and overflowed land in survey No. 593 embraced in sections 27 and 28, township 15 south, range 23 east M. D. B. & M., and more particularly described as follows" (setting out the land by metes and bounds), and closed with the words: "This conveyance intends to convey all the S. and O. land in sections 27 and 28 lying west of the K. river." The description by metes and bounds covered swamp and overflowed lands on both sides of the K. river, but the acreage stated in the deed was much less than that included within the boundaries given. *Held*, that the description and the closing clause are not so repugnant as to justify the rejection of the closing clause under Civ. Code, § 1070, providing that, "if several parts of a grant are irregular, the former part prevails.

2. SAME—EVIDENCE OF AID—CONSTRUCTION.

Where the description in a deed is uncertain, extrinsic evidence may be introduced to prove the intention of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 343.]

3. SAME—PROPERTY CONVEYED—EVIDENCE.

In an action to quiet title, where defendants' deed described the lands as "all the swamp and overflowed land in survey No. 593 embraced in sections 27 and 28, township 15 south, range 23 east M. D. B. & M., and more particularly described as follows" (setting out the land by metes and bounds), and closes with the words, "this conveyance intends to convey all the S. and O. land in sections 27 and 28 lying west of the river," evidence *held* to show that defendant did not take by the deed the land on the east side of the river.

4. TAXATION—REDEMPTION FROM TAX SALE—NOTICE TO REDEEM.

Pol. Code, § 3785, as amended by St. 1891, p. 133, c. 121, provides that the purchaser of property sold for delinquent taxes, or his assigns, must, 30 days previous to the expiration of the time for redemption, or 30 days before he applies for a deed, serve the owner of the property purchased, or the occupant of such property, a written notice that the property has been sold, the amount thereof, and the time when the right of redemption will expire, or when the purchaser will apply for a deed. *Held* that, where property was sold for taxes June 30, 1893, a conveyance to the purchaser, without such notice being given, is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1407-1409.]

5. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE.

Conceding that evidence offered by plaintiff to rebut recitals in a tax deed introduced by defendant was inadmissible, the error was harmless, where the deed itself was void for want of notice to the owner of the expiration of the time for redemption.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 605-637.]

6. EVIDENCE—SECONDARY EVIDENCE — PROOF OF LOSS OF AND SEARCH FOR PRIMARY EVIDENCE.

Under Code Civ. Proc. §§ 1855, 1937, providing that if a written instrument is lost, its contents may be proved by other evidence, an instrument will be regarded as lost for all practical purposes of the trial when it cannot be found after diligent search, and reasonable diligence in making the search does not require the

exploration of all possible places where the instrument might be.

7. SAME.

Evidence *held* sufficient to show the loss of a deed justifying admission of secondary evidence of its contents.

On Rehearing.

8. DEEDS — CONSTRUCTION — REPUGNANT CLAUSES.

Civ. Code, § 1069, providing that a grant between private parties is to be interpreted in favor of the grantee, must be read in connection with Civ. Code, § 1654, providing that, where there is uncertainty, the language of the instrument must be interpreted most strongly against the party who caused the uncertainty to exist, and hence, where the grantee draws a deed describing land as "all the swamp and overflowed land in survey No. 593 embraced in sections 27 and 28, township 15 south, range 23 east M. D. B. & M., and more particularly described as follows" (setting out the land by metes and bounds, which covers land on both sides of the river, though the acreage stated is much less than would be included by those bounds), and closes with the words "this conveyance intends to convey all the S. and O. land in sections 27 and 28 lying west of the K. river," the latter clause cannot be ignored.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 267-273.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by W. R. King against Moses Samuel and others. From a judgment for plaintiff, Moses Samuel appeals. *Affirmed*.

Stanton L. Carter, for appellant. George Cosgrove and W. D. Foot, for respondent.

CHIPMAN, P. J. Action to quiet title. The controversy concerns the title to certain swamp and overflowed land in sections 27 and 28, township 15 south, range 23 east, Mt. Diablo base and meridian, situated in Fresno county. The land in question is that portion of said sections embraced in survey No. 593 lying on the east side of Kings river. The survey is particularly described in the complaint by metes and bounds, "as described in patent of the state of California to W. T. Cole, recorded May 1, 1888, in Book of Patents, at page 41, records of Fresno county." Plaintiff alleged ownership in fee on and ever since April 13, 1901. A general demurrer to the complaint was overruled, and defendant Samuel alone answered. He denied plaintiff's alleged ownership, and alleged on his own behalf upon information and belief "that he is, and long prior to the commencement of this action (complaint filed May 25, 1904) was, and ever since has been, the owner in fee of all that portion of swamp and overflowed land survey numbered 593 lying east of the center of the channel of Kings river * * * and within sections 27 and 28, * * * which said land, as defendant is informed and believes, is the land attempted to be described in plaintiff's complaint." The court made the general findings: "(1) That all the allegations of plaintiff's complaint are true, and that the denials contained in the answer of defendant, Moses Samuel, are, and each of them is, untrue;" and (2) that on

April 13, 1901, plaintiff was and ever since has been and now is the owner in fee of all the land in said sections situated on the east side of Kings river, being a portion of the survey 593 as particularly described in the complaint and as set out in the finding, and that defendant Samuel's claim is without right. Judgment went accordingly, from which and from the order denying his motion for a new trial defendant Samuel appeals.

The evidence shows that survey 593 embraced parts of sections 21, 22, 27, and 28 of said township on both sides of Kings river, and was approved June 24, 1871, and recorded June 29, 1871. Patent issued to W. T. Cole April 18, 1888, and describes the land as in the survey "containing 189.20 acres, more or less." There was admitted in evidence a deed from Cole to S. M. King, C. W. King, and W. R. King (plaintiff), dated April 5, 1901, duly recorded, to that portion of sections 27 and 28, in survey 593, "which lies and is situated on the east side of Kings river," refers to the patent, and concludes: "This conveyance intends to convey, and does convey, to the grantees herein mentioned all of the swamp and overflowed land in sections 27 and 28, township 15 S., range 23 E. M. D. B. & M., which now lies, and is situated, on the east side of Kings river, in said section." A quitclaim deed from Bank of Selma to S. M., C. W., and W. R. King, dated March 20, 1901, duly recorded, was introduced in evidence, and it appeared from the judgment roll in an action by said bank against said Cole that a judgment of foreclosure was entered against him authorizing the sale of "all the right, title, and interest of said mortgagor (W. T. Cole) in and to overflowed land in said sections 27 and 28, in said township fifteen (15), (omitting north or south), of said range twenty-three (23) east of Mt. Diablo base and meridian." The judgment roll shows the decree of foreclosure and order of sale dated the 22d day of January, 1896, directing the sale of the mortgaged premises; also that a sale of said premises was made under said order to the plaintiff in the action, the said bank, and the commissioner's deed dated February 29, 1896. There was evidence also that S. M. and C. W. King, in May or June, 1894, conveyed their interest to plaintiff. At this point plaintiff rested his case, and there was a motion for a nonsuit, on the ground that the evidence does not show a conveyance of the property by Cole to the Kings, nor by S. M. and C. W. King to W. R. King, and that the conveyance from the bank under foreclosure proceedings is not sufficient to convey any title that Cole may have had, and that it does not appear that at the time he executed the mortgage to the bank, or at the time of the conveyance by Cole, he had any title to the property. This motion was overruled, and defendant Samuel excepted. The foregoing presents plaintiff's chain of title.

Defendant Samuel introduced in evidence a deed from Cole to Margaret R. Ross, executrix of the estate of Henry Ross, deceased, dated October 1, 1891, and duly recorded, by which Cole granted to said Margaret R. Ross the following land, to wit: "All the swamp and overflowed land in survey No. 593 embraced in sections 27 and 28, township 15 S., range 23 E. M. D. B. & M., and more particularly described as follows, to wit." (Then follows the description of the land by metes and bounds.) At the close of this description is the following clause: "This conveyance intends to convey all the S. and O. land in sections 27 and 28 lying west of the river." By mesne conveyances defendant derails title through the above grantee. On June 30, 1893, the property in controversy was sold to the state by the tax collector of Fresno county for delinquent state and county taxes for the year 1892. A deed was made to the state November 1, 1898, under said sale. On July 5, 1901, the state by the tax collector sold and conveyed the land to one Meyer, and defendant derails title through him. It was admitted that Margaret R. Ross intermarried with one Baird, and is the same person as Margaret R. Baird mentioned in the transcript. Two questions arise under the deed from Cole to Mrs. Ross as executrix of the will of Henry Ross, deceased: First, did it in absolute and uncertain terms convey the land in controversy? second, if not, was extrinsic evidence admissible to explain the intention of the parties? The deed first described all the land in sections 27 and 28 by metes and bounds, including by the description the land in question. The acreage is set down as 69.53, which is considerably less than the acreage in said sections embraced on both sides of the river. Following the description is this clause: "This conveyance intends to convey all the S. and O. lands in sections 27 and 28 lying west of the river."

Appellant contends: That if there is any conflict between the two parts of the description, the former must prevail, and the clause quoted must be ignored—citing section 1070 of the Civil Code. And that a general description in a deed of conveyance, which is certain, must prevail, if the particular description is uncertain—citing *Martin v. Lloyd*, 94 Cal. 195, 203, 29 Pac. 491, 493. The Code section cited reads as follows: "If several parts of a grant are absolutely irreconcilable, the former part prevails." There is no such repugnancy between the description given in the deed and the subsequent clause as would justify the rejection entirely of this clause. In speaking of a conflict between the granting clause of a deed and its habendum, the court said in *Barnett v. Barnett*, 104 Cal. 298, 300, 37 Pac. 1049, 1050: "The intention of the parties to the grant is to be gathered from the instrument itself, and determined by a proper construction of the language used therein; but for the purpose of ascertaining this intention the entire instrument, the

habendum as well as the premises, is to be considered, and, if it appear from such consideration that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause, the habendum will prevail over the granting clause."

Appellant says the intention was to make more certain that the description included the land on the west side of the river. But why introduce it at all when a complete description preceded it, including that land? It is quite as reasonable to suppose that it was introduced to make clear the intention not to embrace the land on the east side of the river. The case cited in 94 Cal. is not in point, because we cannot say that the clause in dispute is uncertain. It is as certain and definite in its meaning as any part of the deed; for it has the river as a controlling monument. It seems to us that we must either give effect to this clause, and limit the grant accordingly, or we must sustain the lower court in its ruling that there was sufficient doubt and uncertainty as to the intention of the grantor to warrant the introduction of extrinsic evidence to ascertain that intention by considering the situation of the parties, the subject-matter at the time of contracting, and the attendant and surrounding circumstances leading to the execution of the instrument. That such inquiry may be made where such doubt exists is well settled. *Martin v. Lloyd*, supra; *Walsh v. Abbott*, 145 Cal. 285, 289, 78 Pac. 715, 104 Am. St. Rep. 38, where the rule is spoken of as a familiar principle of construction.

It appeared from the evidence that on September 19, 1887, Cole sold to Henry Ross (Mrs. Ross' testator) "69.25 acres embraced by the land on the west side of Kings river in sections 27 and 28" for \$1,731.25, or \$25 per acre. Having lost his certificate of purchase, and having applied for a duplicate, he entered into a bond with Ross to convey the land upon obtaining a patent, agreeing to repay the money upon failure to obtain the patent. Ross was given "immediate possession of said land, and to use the same in such manner as he may see proper, and to cut and remove wood therefrom in such quantities as he may see fit." Before Ross died Cole made a deed to him, and received back his notes and bond given as security; but the deed was not satisfactory to Ross, and was not recorded, and after his death Mrs. Ross was unwilling to accept it. On October 1, 1891, after the death of Ross, Cole made the deed in question to her as executrix of her husband's will. This was at her request, and the deed was prepared by one McKenzie acting for her. In doing so McKenzie described the land on both sides of the river; but he gave the acreage as originally sold to Ross, and then inserted the clause, which has given rise to this controversy. No new consideration passed, and the purpose was to complete the sale of Cole to Ross in the lat-

ter's lifetime. Cole testified: "After I made the deed to Mrs. Ross, I told her: 'Why don't you buy the balance of this land, and have it all?' and she says: 'If William Shafer will advise me to buy this land, I will pay you your price for it and take it.' 'All right,' says I, 'you see him.' Mr. Shafer being a son-in-law of mine, I wouldn't approach him. By the balance of this land I meant the swamp land in 27 and 28 on the east side of the river. I can't remember how many acres there were. This old deed that was returned to me had been tampered with, and there was 80 acres down on that in a different handwrite altogether." He also testified: "Mrs. Baird (formerly Mrs. Ross) never did anything with the land on the east side of the river. She didn't claim it." Another witness, familiar with the land since 1884, testified: "I never knew her to do anything with the land on the east side of the river. Q. She did have possession of the land on the west side? A. Oh, yes; we all understand that she owned the land on the west side; used to go there often for picnics and the like; never knew her to have anything to do with the land there." Similar testimony was given by other witnesses. There is evidence in some degree conflicting with some of the above testimony, but the trial court alone is charged with the responsibility of reconciling the evidence adduced before it. There is evidence warranting the trial court in holding that the land originally sold by Cole to Ross did not include the land on the east side of the river, that in the subsequent transactions with Mrs. Ross she so understood it and acted upon that construction of her deed. In the light thrown upon the instrument by these extrinsic facts, which were admissible and relevant, we are clearly of the opinion that Mrs. Ross did not take by the deed in question the land on the east side of the river, and hence conveyed no title to her grantee through whom defendant claims. These extrinsic facts all relate to a time when Mrs. Ross held the title from Cole. Code Civ. Proc. § 1849; *Williams v. Harter*, 121 Cal. 47, 53 Pac. 405.

Respondent contends that the tax collector had no power to make the tax deed to Meyer, for the reason that there was no notice given by the purchaser, and also for the further reason that the deed contains no description of the land attempted to be conveyed. The law in force at the time was the act of March 19, 1891. St. 1891, p. 133. Section 2, which amended section 3785 of the Political Code, reads in part: "Provided, however, that the purchaser of property sold for delinquent taxes, or his assigns, must, thirty (30) days previous to the expiration of the time for the redemption, or thirty days before he applies for a deed, serve the owner of the property purchased, or upon the person occupying the property, if said property is occupied, a written notice." (Then follow certain things which must be embraced in the

notice.) The act requires a duplicate of this notice to be filed with the county recorder. It also provides for posting the notice upon the property, if unoccupied, and the owner cannot be found; "and no deed of property sold at a delinquent tax sale shall be issued by the tax collector, or any officer, to the purchaser of said property, until the notice herein provided for shall have been given, and each purchaser shall have filed with such tax collector, or other officer, an affidavit showing that the notice hereinbefore required to be given has been given as required," etc. This was the law in force when the deed was made, and must govern the sale. *Reed v. Lyon*, 96 Cal. 501, 31 Pac. 619; *Teralta v. Shaffer*, 116 Cal. 518, 48 Pac. 613, 58 Am. St. Rep. 194; *Walsh v. Burke*, 134 Cal. 594, 66 Pac. 866; *Collier v. Shaffer*, 137 Cal. 319, 70 Pac. 177. In the recent case of *Johnson v. Taylor* (Cal.) 88 Pac. 903, 10 L. R. A. (N. S.) 818, Mr. Justice Sloss deals at some length with a case similar to this and holds that, where property was sold for delinquent taxes in 1894, a conveyance to the purchaser, without any notice of the expiration of the period of redemption having been given, is void. Referring to the statute of 1891, *supra*, the learned justice said: "As the law then stood, a deed could not be issued to the purchaser without the giving of the notice required by section 3785 (*Hughes v. Cannedy*, 92 Cal. 382, 28 Pac. 573), and one relying on a tax deed was bound to establish the giving of such notice as a part of his proof of title (*Miller v. Miller*, 96 Cal. 576, 31 Pac. 247, 31 Am. St. Rep. 229; *Reed v. Lyon*, 96 Cal. 501, 31 Pac. 619; *Walsh v. Burke*, 134 Cal. 594, 66 Pac. 866). The opinion then proceeds to discuss the effect of subsequent statutes, and concludes: "Under the law as it existed at the time of the sale, the plaintiff's right of redemption was not limited by any fixed time. It lasted at least one year, and would last indefinitely thereafter until 30 days after the purchaser should give the notice required by the statute." It was also held that "the requirement of giving notice applied as well to the state as to a private purchaser." In the case at bar, as in *Johnson v. Taylor*, there was no proof of any such notice having been given, and as the law in force when the sale was made must govern, it follows that defendant has failed to establish that any title ever passed from Cole to him. The same view is expressed by this court in *Guptill v. Kelsey*, 5 Cal. App. 27, 91 Pac. 409. These cases were decided since appellant's brief was filed, and would seem to answer his contention. Conceding that the evidence offered by plaintiff in rebuttal of recitals in the deed of the state to Meyer was immaterial and irrelevant, it was without prejudice.

It remains to determine whether plaintiff proved title. Plaintiff offered in evidence a deed by Cole to S. M. King, C. W. King, and W. R. King of date April 15, 1901 (and, as

we have seen, Cole was then the owner), which accurately and definitely described the property in dispute. There was also admitted in evidence over defendant's objection a quitclaim deed of the Bank of Selma to the same persons, dated March 20, 1901. The bank assumed to convey by virtue of purchase at foreclosure sale under a mortgage executed to it by Cole. Plaintiff was permitted also to introduce, against the defendant's objection, parol testimony to prove that S. M. and C. W. King conveyed the land to plaintiff by deed dated March 20, 1901. The objection to the Bank of Selma deed is that it conveyed nothing, because the mortgage to the bank failed to state whether the township was north or south of the Mt. Diablo meridian. The title of plaintiff is established independently of this deed, as we think, and hence we need not consider the deed from the bank to the Kings.

S. M. King was plaintiff's father and C. W. King was plaintiff's brother. Plaintiff testified that he received a conveyance of the land in dispute, and left it in the care of his attorney, Mr. Cosgrove, and has not seen it since, but did not remember the date. Mr. Cosgrove testified that he himself prepared a deed from S. M. and C. W. King to plaintiff, that it was signed and acknowledged by C. W. King in his office, that it was sent to Selma to be executed by S. M. King, that it was returned to his office "signed by S. M. King and properly acknowledged." He testified: "Now that deed has been misplaced in my office with the original deed from Cole to King. I have evidently wrapped it up in some papers, and I have not been able to find them, although I have made diligent search at different times within the last three months. * * * I know, as a matter of fact, however, that the conveyance was actually made. It covered the swamp and overflowed land. I remember the contents of the document, and the names of the parties contained in it (naming them). There was a description of the land contained in the deed. I know what that description was (describing the land in controversy). The document contained a habendum clause. It contained the usual common clauses of printed forms of deeds. It was a grant deed (giving other particulars). * * * When it came back from Selma or somewhere S. M. King's name was appended, together with a certificate of acknowledgment by him. The certificate of acknowledgment was in due form, taken before a notary or a justice of the peace. I wouldn't be certain which. It was in due form." On cross-examination he testified that he could not state whether it came back through the mail, but thought it did; that he discovered he had lost it while he was preparing for the trial within the last three months; that he did not look among all the papers in his office, but did look among all of them that he "thought by any possibility it might become confused

with"; that he would not state positively it was not in his office, but that he had not destroyed it or intentionally given it away to any one; that he knows he has searched among all the papers that he thought by any possibility it could be among; that he did not look in all his books to see if it had not been folded in some one of them, but looked where it ought to be or might be, "but not in every place where it was possible for it to be"; that he had recently made a careful search in every place where he thought it likely was.

It is claimed by appellant that no sufficient foundation was laid for the admission of testimony as to the loss of the deed or its contents; that the testimony of the alleged grantors of the deed should have been taken, or the notary's, or its absence accounted for; that Mr. Cosgrove did not exhaust the search of all places in his office where by some possibility the deed might have been discovered; that plaintiff did not testify that he had not possession of the deed, and did not then know its whereabouts. But plaintiff did testify that he left it in care of Mr. Cosgrove, his attorney, and since that time he had not seen it. He could not truthfully say that he had not seen it if he had it in his possession. It would have strengthened plaintiff's case had he shown by the grantors that they signed the deed, or by the notary that he had taken their acknowledgment of its execution, but we cannot say that such proof was indispensable. The Code provides that the original writing must be produced and proved, except where it is lost or destroyed, in which case proof of loss or destruction must be first made. If it has been lost and proof of that fact made, evidence of its contents may be taken by the recollection of witnesses. Code Civ. Proc. §§ 1855, 1937. We think the term "loss" as used in the statute means something different from destruction, for in the latter case loss would necessarily follow, but not so in case of loss. The instrument may be lost for all practical purposes of the trial when it cannot be found after diligent search and yet it may exist. We do not think that reasonable diligence in making the search should require the exploration of all possible places where the instrument might be.

Whether a sufficient foundation was laid to justify secondary evidence is a question of law, and the evidence may be examined by the appellate court to determine its sufficiency. Still no arbitrary or hard and fast rule can be laid down by which to judge the evidence. The rule stated by Mr. Greenleaf is as follows: "If the instrument is lost, the party is required to give some evidence that such a paper once existed, though slight evidence is sufficient for this purpose, and that a bona fide and diligent search has been unsuccessfully made for it in the place where it is most likely to be found, if the nature of the case admits such proof; after which his own affidavit is admissible to the fact of its loss.

* * * What degree of diligence in the search is necessary, it is not easy to define, as each case depends much upon its peculiar circumstances; and the question whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents is to be determined by the court, and not by the jury. But it seems that in general the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. It should be recollected that the subject of the proof is merely to establish a reasonable presumption of the loss of the instrument, and that this is a preliminary inquiry addressed to the discretion of the judge. If the paper was supposed to be of little value, or is ancient, a less degree of diligence will be demanded, as it will be aided by the presumption of loss which these circumstances afford." 1 Greenleaf on Evidence (16th Ed.) § 5636. The surrounding circumstances and facts are to be taken into consideration; the presence or absence of pecuniary interest or other improper motive in seeking to substitute secondary for the best evidence; the probability that the instrument was materially different from that sought to be established by the oral proof; the effect such proof would have upon the rights of the person seeking to exclude it; the character of the witnesses, and their relation to the transaction as interested parties or otherwise. These and other matters that might be suggested are fair subjects for consideration, and the weight to be given them is largely within the discretion of the trial judge.

In the case here the title to the property passed to the Kings—father and his two sons—by Cole's deed. Plaintiff has a third interest by virtue of that deed. Proof that the father and the other son conveyed to plaintiff could not affect the title of defendant, for he has none, and as they are not parties to the action a judgment resting on such proof could not affect their interest. At most it would only meet the technical rule of law that plaintiff in the action must rely upon the strength of his own title and not upon the weakness or failure of his adversary's. No motive of self-interest can be imputed to Mr. Cosgrove, nor can a reasonable belief be entertained that he would falsify the contents of the deed drawn by him, or that he could have had any possible interest in concealing it; his testimony being that its sole purpose was to pass to plaintiff the interest held by his father and brother. Besides, his testimony was that the brother in fact executed and acknowledged the deed in his office, and, while this fact does not bear directly upon the fact that the deed was afterwards lost, it is a fact not to be ignored in considering the weight to be given Mr. Cosgrove's testimony as to the loss or disappearance of the deed. Most of the cases cited by

appellant were cases where the secondary evidence was vital in determining in whom the title was vested—plaintiff or defendant. But here the result must be to quiet plaintiff's title to one-third interest in the property, leaving the other two-thirds to be determined possibly in another action, but in no event to belong to defendant. In our opinion there was a sufficient foundation laid to admit the secondary evidence offered.

Most of the rulings upon the evidence complained of depend upon the view of the law taken by defendant as to which we have expressed our disagreement with him and have thus disposed of them. Some of these rulings have been noticed in the course of the opinion, and others will at once be seen to be either free from error or not prejudicial from our standpoint of the main question to which the rulings related. We have examined the other rulings to which exception was taken, and fail to discover such prejudicial error as would, under the view we have taken of the case, warrant a reversal. This view also makes it unnecessary to consider the motion for a nonsuit.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

On Rehearing.

CHIPMAN, P. J. We do not feel called upon to write opinions in all cases where rehearings are denied or granted, and where we fail to do so it is through no indifference to the views of counsel, but because our attention is invited to no question, necessary to the decision, which has not in our judgment been sufficiently noticed. Where some more or less vital question has been overlooked or insufficiently treated, it would seem but just that further consideration to it should be given. The court invites careful scrutiny of its decisions, and deems it a favor to be given an opportunity to correct errors which it may have committed. Our attention is now invited to two points which counsel urges were either overlooked or not given due consideration. It is said that we "overlooked, as did the court below, the provisions of section 1069 of the Civil Code, which provides that a grant between private parties is to be interpreted in favor of the grantee"; and it is urged that, if the several parts of a grant are absolutely irreconcilable, the former prevails. Section 1070, Civ. Code. Where the question is simply one of construction, the Code rule should be followed. But the general rule that the earlier clause prevails is not imperative where the inconsistency or irreconcilability is so great as to justify extrinsic evidence to explain it. The Code rule that a grant is to be interpreted in favor of the grantee must be read in connection with another Code rule (section 1654, Civ. Code), which provides that, where there is uncertainty, the language of the instrument must be interpreted most

strongly against the party who caused the uncertainty to exist. In the present case the deed under examination was prepared by McKenzie, the attorney or agent of Mrs. Ross, and was executed at her request as thus prepared. We still think that the latter clause of the deed cannot be wholly ignored, but that extrinsic evidence was admissible to aid the court in arriving at the intention of the parties.

Upon the evidence it may be admitted that the trial court would have been justified in reaching a different conclusion as to the intention of the parties. Mrs. Ross testified that her intention in having the disputed clause inserted in the deed was to make sure that she would get the land west of the river. Her testimony is, in some respects, corroborated. On the other hand, the testimony of Cole leads to a different conclusion, certainly as to his intention in executing the deed, and what he understood to be its purpose, and the conduct of Mrs. Ross in some degree weakened her statement. The testimony and also the documentary evidence on the point are in open conflict. It was the province of the trial judge to reconcile conflicting evidence and inferences derivable therefrom. If we are correct in our view that resort to extrinsic evidence was justified, the rule that, where there is a substantial conflict, this court will not interfere with the conclusions of the trial court, leaves us without power to look farther. The manifestly firm and honest conviction of counsel for appellant that we are in error in holding that extrinsic evidence was admissible has led us to re-examine the question; but, with our present lights, we are still of the opinion that such evidence was properly taken. Indeed, this to our minds is the principal question in the case, and, fortunately for appellant, if we are wrong, he has an adequate and speedy method to correct our error.

Rehearing is denied.

We concur: HART, J.; BURNETT, J.

7 Cal. App. 43

KNIGHT v. COHEN et al. (Civ. 421.)

(Court of Appeal, Second District, California.
Nov. 22, 1907. Rehearing Denied by Supreme Court Jan. 21, 1908.)

1. TRIAL — AGREED STATEMENT OF FACTS — FINDINGS OF FACT—NECESSITY.

Where a case is submitted on an agreed statement of facts, the only question for consideration is the law applicable thereto, and no findings of fact need be made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 908-911.]

2. ADVERSE POSSESSION—HOSTILE CHARACTER—CLAIM OF RIGHT.

The occupancy of land, to constitute adverse user, must be based on a claim of right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 387-389.]

3. SAME—NATURE AND GROUNDS.

Possession and user as owners usually hold and use land, without recognizing title in an-

other, or disavowing title in himself, will, if unexplained, establish a claim of title by the occupant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 394, 395.]

4. WATERS AND WATER COURSES—IRRIGATION LINES—EASEMENT IN LAND—ADVERSE POSSESSION—BURDEN OF PROOF.

Where plaintiff's grantors entered upon land under an invalid deed, and maintained a water course over a part thereof openly, continuously, and with defendant's knowledge for more than five years, the burden is on defendant, in order to establish her exclusive title thereto, to show that plaintiff's user was by permission, or otherwise explain it.

5. ADVERSE POSSESSION—HOSTILE CHARACTER—PURCHASER UNDER INVALID DEED.

Where plaintiff's grantors entered under an invalid deed upon land, which defendant subsequently purchased upon foreclosure of a deed of trust executed before such entry, they did not become tenants by sufferance of defendant upon the execution of the trust and purchase by her, and their subsequent possession, in the absence of agreement, was as owner and claimant, which might ripen into a prescriptive title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 415-417.]

6. SAME—COLOR OF TITLE.

Code Civ. Proc. § 322, provides that the possession of property under exclusive claim of title under a written instrument for five years is deemed to be held adversely. Plaintiff's grantors entered upon land under a deed conveying no title, and maintained a water course thereon openly and continuously for five years, using the land as their own, and expressly claiming title thereto by virtue of the deed, and defending suits by defendant to oust them. *Held*, that the possession of plaintiff and his grantors was under color of title and adverse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 394, 409, 415-417.]

7. SAME—EXTENT OF POSSESSION.

The extent of the right obtained by an adverse holding under an invalid deed is not determined by the terms of the grant therein, but by actual occupation and use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 547-594.]

8. WATERS AND WATER COURSES—IRRIGATION LINES—RIGHTS OF WAY—ESTOPPEL TO CLAIM.

Condemnation proceedings brought by plaintiff to secure a right of way for an enlarged pipe line, and for several tunnels, would not estop him from asserting a prescriptive right to the land upon which the original line was maintained, since the proceedings were not to acquire the right then in use, but to enlarge it.

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Jesse Knight, trustee, against Emily G. Cohen and William Cohen. From a judgment in plaintiff's favor, defendants appeal. *Affirmed*.

See 90 Pac. 145.

J. J. Scrivner, Alfred H. Cohen, and Lawyer, Allen & Van Dyke, for appellants. Anderson & Anderson and Munson & Barclay, for respondent.

SHAW, J. This is an action brought to obtain an injunction against defendants restraining them from cutting or otherwise interfering with a pipe line of plaintiff's extending across the land of appellant Emily

G. Cohen, and by means whereof plaintiff conducts certain waters developed upon contiguous lands to the consumers thereof.

The case was submitted upon an agreed statement of facts, it being stipulated that the court might base its conclusions of law thereupon and render judgment accordingly. The court adopted the statement of facts as its findings, and, in addition thereto, found that all the allegations of the complaint were true, and that all of the denials of the answer to the complaint were untrue. These two findings should, if findings be necessary in such a case, dispose of the contention of appellant. It has been held, however, that, where a case is submitted upon an agreed statement of facts, no findings are necessary, the only question being as to what is the law applicable to those facts. *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364; *McMenomy v. White*, 115 Cal. 339, 47 Pac. 109. This being true, it is necessary to call attention to such parts of this lengthy narrative as may be pertinent to a proper consideration of the question presented.

From this statement it appears that in 1893 May I. Gould, who was the owner of the land across which said pipe line extends, executed a deed of trust whereby she conveyed said lands to a trustee as security for the payment of a loan obtained from the appellant Emily G. Cohen. Default was made in the payment of this loan, and on February 20, 1899, the trust was executed by sale of the property to said Cohen, who immediately entered into possession thereof. On April 30, 1898, said Gould, then occupant and owner of said land subject to said deed of trust, executed to one Dunham, the grantor of plaintiff, a deed whereby she granted to said Dunham a right of way across the lands in question for the construction of said pipe line, which he immediately constructed over and across said lands, since which time he and his successors in interest have continuously used said pipe line for the purposes for which it was intended. This deed to Dunham was not recorded, and defendants had no knowledge of its existence at the time Emily G. Cohen acquired title to and possession of the land. On May 25, 1899 (after Cohen had acquired title and possession of said land), Dunham joined with others in the execution of a deed whereby they conveyed said pipe line, with certain water rights and water-bearing land, to plaintiff. This deed was recorded May 31, 1899. Plaintiff and his predecessors in interest had for more than six years prior to the acts complained of maintained said pipe line across said lands of appellant Emily G. Cohen, and had been in the continuous, open, visible, and exclusive use and possession of said pipe line during all of said time under and by virtue of said grants from May I. Gould and said Dunham and others, and during all of said time had openly, visibly, notoriously, and continuously conducted waters over the said lands of said

Cohen through said pipe line without interruption in the use of said pipe line so granted to him and his predecessors by the aforesaid grants. It appears that since November 22, 1899, appellant Emily G. Cohen has been continuously engaged in litigation with plaintiff and others over the question of ownership of the waters carried through said pipe line by plaintiff and the right to the use thereof, in which litigation said defendant Emily G. Cohen has denied plaintiff's right to use or carry away any of said waters by means of said pipe line or otherwise. When said Cohen acquired title to said lands and took possession thereof on February 20, 1899, appellant learned that respondent was using said pipe line and operating the same over her land, but she had not learned that plaintiff claimed to have constructed said pipe line over said lands under and by virtue of the unrecorded deed from May I. Gould. On November 22, 1899, Emily G. Cohen commenced an action against the plaintiff, who, on February 6, 1900, in an amended answer filed therein, alleged that they (plaintiff herein and others) "admit that they conducted by means of pipes the waters of said springs and the said developed waters across certain lands described in the complaint, but allege that the same was under grant of right of way from May I. Gould of date April 30, 1898, to Edward Dunham, and under grant from William Hefferman to Edward Dunham, conveying said land to said Edward Dunham, of date April, 1898, and at date of said deeds May I. Gould was in possession of said land claiming the same, and said William Hefferman held the record legal title thereto." Hefferman held a sheriff's deed to said lands under a sale made upon execution issued upon a judgment rendered against said Gould. During all of the times in question plaintiff and his predecessors in interest maintained and operated said pipe line over and across said lands, and conducted water through the same with the knowledge of the appellant Emily G. Cohen, and without any objection or interference therewith from her, except as hereinafter stated, and without rendering any compensation for the use of said pipe line; but he never at any time informed her in words that he claimed a legal right so to do. On April 15, 1905, asserting her right so to do, defendant Emily G. Cohen broke and cut said pipe line, thereby preventing the use of the same by plaintiff, who immediately entered upon said lands along the line of said pipe line, and, after making the repairs necessary to restore it to a condition of usefulness, instituted this action, alleging in his complaint that defendants threatened to and would, unless restrained by an order of court, again destroy the pipe line and render it impossible to conduct the water through the same, all of which was admitted.

While freely admitting plaintiff's possession and use of the pipe line for a period of

more than five years, and that such use and occupation was open, notorious, continuous, and uninterrupted, and with the knowledge and acquiescence of appellant Emily G. Cohen, it is nevertheless contended that these facts are insufficient to establish a prescriptive right in plaintiff, for the reason that it is not shown that such use and possession was under a claim of right, and hence the possession is lacking in one of the essential elements necessary to constitute an adverse holding, without which possession could not ripen into a prescriptive right. It is also insisted that as the sale under the deed of trust canceled all rights acquired by Dunham by virtue of the unrecorded deed from May I. Gould, such deed could not constitute color of title, and plaintiff's possession was therefore that of a tenant at will of appellant Emily G. Cohen. In *Thomas v. England*, 71 Cal. 460, 12 Pac. 493, it is said: "To perfect an easement by occupancy for five years, the enjoyment must be adverse, continuous, open, peaceable. It must be adverse, and under claim of a legal right so to do, and not by the consent, permission, or indulgence merely of the owner of the alleged servient estate." Adverse use is inconsistent with a license or permissive use. The occupation in order to constitute an adverse user must be based upon a claim of right. This claim may be made by acts alone quite as effectively as by the use of words either oral or written. *Barnes v. Light*, 116 N. Y. 34, 22 N. E. 441. Possession and user as owners are accustomed to hold and use such property without recognition of title in another, or disavowal of title in himself, will, if unexplained, raise a presumption of title in the occupant, and in the absence of evidence in rebuttal will establish the fact of a claim of title. *La Frombols v. Smith*, 8 Cow. 589, 18 Am. Dec. 463. "If there has been the use of an easement for 20 years unexplained, it will be presumed to be under a claim of right and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant, unless contradicted or explained." *Washburn on Easements and Servitudes*, p. 156. In *Cox v. Forrest*, 60 Md. 74, it is said: "Where one, however, has used a right of way for 20 years unexplained, it is but fair to presume the user is under a claim of right, unless it appears to have been by permission."

Under the admitted facts, it devolves upon appellant to show that the user was by permission, or otherwise explain it. The only contention upon this point urged by appellant is that, respondent having entered under the deed from May I. Gould, executed subsequently to the deed of trust, under which appellant Emily G. Cohen acquired title, became a tenant of said Cohen by sufferance in subordination to the title of appellant, which relation would continue until a disavowal on his part, with notice of such disavowal brought home to appellant. In support of this position counsel cites, among other cases,

Graydon v. Hurd, 53 Fed. 724, 5 C. C. A. 258. This was a sale under a decree foreclosing a mortgage, and the decree directed that persons in possession of the land should deliver possession to the purchaser "on production of the deed to the premises and a certified copy of the order confirming the report of such sale after such order has become absolute." The court held that this order was a recognition of the relation of landlord and tenant by sufferance between the purchaser and occupant of the land. In its opinion the court says: "There is some conflict in the decisions of the state courts upon the question," thus apparently recognizing the fact that the Supreme Court of this state has held contrary to the rule there laid down. In *McDermott v. Burke*, 16 Cal. 580, the Supreme Court, in considering the questions says: "The relation between the purchaser and tenant is that of owner and trespasser until some agreement, express or implied, is made between them with reference to the occupation." No such agreement was ever made. Plaintiff never acknowledged any one as lessor, nor recognized the title of any one as being paramount to his own. He did not enter or occupy the land by virtue of any license or permissive right, but entered, as alleged in the answer filed on February 6, 1900, in the action brought by Emily G. Cohen against the La Canada Land & Water Company, under a grant of right of way from Gould and Heferman, the latter alleged to be the holder of the legal title to the right so granted. That the legal title was vested in the trustee and the deed in fact conveyed no title is immaterial. It nevertheless constituted color of title (*Wilson v. Atkinson*, 77 Cal. 485, 20 Pac. 66, 11 Am. St. Rep. 299; *Packard v. Moss*, 68 Cal. 123, 8 Pac. 818; *Cameron v. United States*, 148 U. S. 308, 13 Sup. Ct. 595, 37 L. Ed. 459; *Wood on Limitation of Actions*, § 259); and whether sufficient or not, this allegation in the answer gave Emily G. Cohen notice (if notice were necessary) that plaintiff's occupancy was under a claim of right, and, under the provisions of section 322 of the Code of Civil Procedure, possession must be deemed to be held adversely.

The deed is of no consequence so far as defining the extent of the right; its only function being to furnish a basis for the claim, the extent of which is measured by actual occupation and use. "Where location and duration of a way are not defined, they may be fixed by use and acts of acquiescence." *Washburn on Easements*, § 239. The facts clearly show that the general attitude of the parties was from the first one of hostility towards each other, and that from November 22, 1899, they were continuously engaged in litigation. "The relations of the parties, their conduct, the situation of the property, and all the surrounding circumstances" (*Clarke v. Clarke*, 133 Cal. 667, 66 Pac. 10), evidence the fact that the use was under a claim of

right, rather than by reason of a mere matter of neighborly accommodation.

We attach no weight to appellants' contention that the condemnation suit brought by plaintiff should constitute an estoppel against his plea of a prescriptive right. It clearly appears that the purpose sought was not to acquire by condemnation the right then in use, but a right of way for a pipe line of increased capacity, as well as certain tunnel rights.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

7 Cal. App. 76

NELSON v. NELSON. (Civ. 448.)

(Court of Appeal, Second District, California. Nov. 25, 1907. Rehearing Denied by Supreme Court Jan. 23, 1908.)

1. DIVORCE—DISPOSITION OF PROPERTY—COMMUNITY PROPERTY UNDER STATUTE.

Under Civ. Code, § 146, subd. 1, providing that upon granting a divorce for extreme cruelty the court may assign the community property to the parties in such proportions as it may deem just, plaintiff, on obtaining a divorce for extreme cruelty, cannot, because of that fact alone, claim as a matter of right more than half as the community property, the apportionment resting in the discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 714, 715.]

2. SAME—REVISION ON APPEAL—QUESTIONS PRESENTED BY RECORD.

Under Civ. Code, § 148, permitting revision of the trial court's disposition of community property in all cases, its award will not be disturbed where the facts and conditions upon which it was based do not appear from the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 768.]

3. SAME—PRESUMPTIONS—SALE OF COMMUNITY PROPERTY—NECESSITY.

Where property is ordered sold and the proceeds divided under Civ. Code, § 147, permitting the court, whenever necessary, to order the community property sold upon divorce and the proceeds divided between the parties, it will be presumed, nothing appearing to the contrary in the record, that the court upon sufficient facts deemed the sale necessary.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action for divorce by Emma Nelson against Carl I. Nelson. From that part of the judgment disposing of the community property, plaintiff appeals. Affirmed.

Paul E. Ussher and H. A. Massey, for appellant. Munson & Barclay, for respondent.

SHAW, J. Action for divorce upon the ground of extreme cruelty. The divorce was granted plaintiff upon the ground prayed for, and the community property, consisting of a lot and residence valued at \$2,500, besides household furniture, was awarded in equal shares to the parties. The court adjudged that the real estate be at once sold for the sum of \$2,500 cash, and ordered a commission issued to one Lacey to sell the same for said

sum and divide the proceeds between the parties. Findings were waived. Plaintiff appeals on the judgment roll from that part of the decree awarding her one-half of the community property, and also from that part of the said decree ordering the real estate to be sold for \$2,500 cash.

1. Appellant insists that, under the provisions of section 146 of the Civil Code, she was entitled to more than one-half of the community property. Subdivision 1 of said section provides: "If the decree be rendered on the ground of adultery, or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just." Section 148 of the Civil Code provides that the disposition of the community property and the discretion of the trial court in respect thereto are subject to revision on appeal.

Appellant's contention is that in all cases a party granted a divorce upon the ground of extreme cruelty is, by virtue of that fact alone, entitled to an award of more than one-half of the community property. We do not so interpret subdivision 1 of section 146 of the Civil Code. A wise exercise of discretion in considering all the facts of the case and condition of the parties may justify an equal division of the community property. When such an award is made, this court, in the absence of anything in the record disclosing the facts of the case and conditions upon which the court based such award, should not interfere with an order making such division. "Where the evidence is not in the record, and this court has not all the facts of the case and the condition of the parties before it, and cannot say that the division was not just, the action of the superior court in dividing the property will not be disturbed upon appeal." *Gorman v. Gorman*, 134 Cal. 378, 66 Pac. 313.

2. Section 147, Civ. Code, provides that, whenever necessary, in disposing of the community property, the court "may order a partition or sale of the property and a division or other disposition of the proceeds." *Reid v. Reid*, 112 Cal. 274, 44 Pac. 564. We must presume, in the absence of anything to the contrary in the record, that the court upon sufficient facts before it deemed it necessary, in making a division of the community property, to order it sold and the proceeds divided. Judgment affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

7 Cal. App. 49

HARLAN v. GLADDING, McBEAN & CO.
et al. (Civ. 361.)

(Court of Appeal, Third District, California.
Nov. 22, 1907.)

1. ASSIGNMENTS—ORDER.

An instrument by which the drawees were directed to pay plaintiff \$220 from the proceeds

of a lot of hay in the course of shipment by the drawer to the drawees was a mere order and not an equitable assignment of the fund, and was therefore revocable by the drawer before acceptance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 99-105.]

2. SAME—ACTION.

No action can be maintained on an order for the payment of money drawn on a third person and revoked by the drawer before acceptance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 39.]

3. JUSTICES OF THE PEACE—JURISDICTION—PRESUMPTION.

The law presumes nothing in favor of the jurisdiction of a justice of the peace, a party asserting such jurisdiction being required to show affirmatively every fact necessary to create it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 216.]

4. SAME—EXCHANGE OF JUSTICES—WRITTEN REQUEST.

A justice of the peace of another township had no jurisdiction to sit in place of another justice in the absence of a written request from the latter, required by Code Civ. Proc. § 105.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 147, 206.]

5. BILLS AND NOTES—ORDERS—"DURESS."

Civ. Code, § 1567, provides that an apparent consent is not real or free when obtained through duress, and section 1569 declares that any unlawful detention of the property of any person constitutes duress. *Held* that, where plaintiff held possession of the property of the drawer of an order sued on under an attachment issued by a justice without jurisdiction, an order executed by the drawer to relieve his property from such writ was subject to rescission for duress under section 1566, providing that a consent which is not free is nevertheless not absolutely void, but may be rescinded, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 242-247.

For other definitions, see Words and Phrases, vol. 3, pp. 2268-2276; vol. 8, pp. 7645-7648.]

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Action by Paul C. Harlan against Gladding, McBean & Co. and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Paul C. Harlan, for appellant. T. T. Gregory, for respondents.

BURNETT, J. The nature of the action is shown by the following allegation of the complaint: "On January 6, 1904, * * * defendant herein, Jacob Kunzler, for a valuable consideration, duly assigned, by means of a written assignment and order to plaintiff herein, the claim of said defendant Jacob Kunzler against said defendant Gladding, McBean & Co. (a corporation) for \$220 of the sum to be thereafter paid by said defendant Gladding, McBean & Co. to said defendant Jacob Kunzler for a certain lot of tule hay on said January 6, 1904, in course of shipment by said defendant Jacob Kunzler to said defendant Gladding, McBean & Co.; that said written assignment and order was, upon said January 6, 1904, and at and in the said county of Solano, executed and delivered to plain-

tiff herein by said defendant Jacob Kunzler; and that said written assignment and order was and is in the words and figures following, to wit: 'Sulsun, Cal., Jan. 6, 1904. To Gladding, McBean & Co.: You are hereby directed to pay to Paul C. Harlan, Esq., two hundred and twenty dollars from the proceeds of the lot of tule hay now in course of shipment to your firm from this place. [Signed] Jacob Kunzler.' Judgment was for defendants, from which plaintiff brings the appeal on a bill of exceptions.

The court finds that the instrument in writing set out in the complaint was "made, executed, and delivered by said defendant Kunzler to plaintiff; that thereafter the plaintiff presented said instrument to said Gladding, McBean & Co. and demanded payment thereof; that prior thereto said Kunzler notified, directed, and ordered said Gladding, McBean & Co. not to pay said plaintiff anything upon said written instrument, if the same were presented, and that he had revoked it; that thereupon said Gladding, McBean & Co. refused to pay to plaintiff any money upon said order; that at the time of such presentment of said order said Gladding, McBean & Co. had in its possession to the credit of said Kunzler as the proceeds and price of said lot of tule hay more than sufficient money to pay said order; that there is another action pending between plaintiff's assignee and the defendants involving the same cause of action; and that said order was made "under duress, and is without consideration, void, and of no effect." All the adverse findings are challenged by appellant as not supported by the evidence.

There is also a controversy between the parties as to the effect of the said written instrument; the appellant contending that it amounted to an equitable assignment to him pro tanto of the fund in the hands of the corporation due Kunzler, while respondents maintain that it was a mere order revocable by the drawer before acceptance by the drawee, and resulting in an equitable assignment only in case of said acceptance. It will be observed that there is nothing in the form of the instrument to indicate an assignment. It is simply an order upon Gladding, McBean & Co., given to plaintiff by Kunzler for the payment of a part of the fund in the hands of said company belonging to said Kunzler. There is nothing in the evidence to indicate that the instrument was intended as other than what its language imports. There seems no difference in principle between an order like this and the case of a check or bill of exchange. In Pullen v. Placer County Bank, 138 Cal. 172, 86 Pac. 740, 71 Pac. 84, in reference to checks, it is said: "A check is only a direction to the bank to pay a certain sum of money to the person therein named. The money does not thereby become the property of the payee, nor is it placed beyond the control of the depositor. Until it is presented to the bank, the drawer may countermand its

payment, or he may direct a different disposition of the moneys to his credit." In Donohoe-Kelly Banking Co. v. S. P. Co., 138 Cal. 190, 71 Pac. 96, 84 Am. St. Rep. 28, it is said: "Turning to the view of the question presented by appellants, we find the cases quite numerous holding that an order, check, or bill of exchange, drawn for a part of a fund, does not operate as an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft." In the last-cited opinion a large number of cases is reviewed, among them Harrison v. Wright, 100 Ind. 515, 58 Am. Rep. 805, wherein it is declared: "In the absence of evidence to the contrary, or of a showing of an intention to assign a part of a fund in the hands of a drawee, * * * it should be presumed that the payee or holder of a check takes it upon the credit of the drawer, of whom he may collect if payment be refused by the drawee."

Here the evidence shows without conflict that Kunzler notified Gladding, McBean & Co. that he had revoked said order, and said company thereupon refused and declined to accept it and notified plaintiff of the revocation. Under such circumstances an action upon said order would not lie against either of the defendants.

Again, assuming that the instrument in question constituted an assignment, the court found that it "was made under duress." In this connection respondents contend that the action of the plaintiff in securing the order constitutes "coercion of the most pronounced degree." To understand respondents' position it will be necessary to bear in mind that the justice of the peace in Sulsun township, A. F. Hitchcock, was ill, and he requested plaintiff to get Justice Klahn of Green Valley township, in the same county, to sit for him in the case. Plaintiff accordingly secured Justice Klahn, and after the proper preliminary proceedings were taken he issued the writ of attachment, which was levied upon Kunzler's hay. Section 105 of the Code of Civil Procedure provides a certain course to be taken to give authority or jurisdiction to a justice of the peace to try a cause in another township. There must be a written request of the other justice, "and while so acting he shall be vested with all the powers of the justice for whom he so holds court." No such course was pursued in this case, and hence it must be held that Justice Klahn was without jurisdiction. It is well settled that the law presumes nothing in favor of the jurisdiction of justices' courts, and a party who asserts a right under the judgment of a justice must affirmatively show every fact necessary to confer such jurisdiction. Swain v. Chase, 12 Cal. 283; Jolley v. Foltz, 84 Cal. 321; Kane v. Desmond, 63 Cal. 464; Elitzroth v. Ryan, 89 Cal. 140, 26 Pac. 647. As one of the steps necessary to confer jurisdiction upon Justice Klahn was lacking, the property of Kunzler was illegally detained by virtue of the writ of

attachment. Section 1567 of the Civil Code provides that "an apparent consent is not real or free when obtained through (1) duress," and section 1569 provides that "duress consists in * * * (2) unlawful detention of the property of any such person."

In *Brumagim v. Tillinghast*, 18 Cal. 271, 79 Am. Dec. 176, it is said by the court, through Chief Justice Field: "What shall constitute the compulsion or coercion which the law will recognize as sufficient to render payments involuntary may often be a question of difficulty. It may be said in general that there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money."

Quotation is made with approval from *Forbes v. Appleton*, 5 Cush. (Mass.) 117, wherein it is said: "In general, the cases that have been treated as exceptions are cases where the possession of the property upon which the lien was claimed was already in the party demanding the money, or cases in which the party had no other means to save himself from imprisonment or his property from sale on execution or warrant of distress but by paying the money demanded."

Among other cases is also *Mays v. Cincinnati*, 1 Ohio St. 268, wherein it is stated that: "This unbroken chain of authority seems to warrant the conclusion that a payment of money upon an illegal or unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it."

Duress means a condition of mind produced by improper external pressure or influence that practically destroys the free agency of the party and causes him to do an act or make a contract not of his own volition, but under such wrongful external pressure, and it is to be determined by all the attendant facts and circumstances. *Pride v. Baker* (Tenn. Ch. App.) 64 S. W. 329; *Collins v. Westbury*, 2 Bay (S. C.) 211, 1 Am. Dec. 643. Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them but refuses to surrender them unless the exaction is endured. *Fuller v. Roberts*, 35 Fla. 110, 17 South. 359; *Loneragan v. Buford*, 148 U. S. 581, 13 Sup. Ct. 684, 37 L. Ed. 569.

In the case at bar plaintiff testified: "I think I may have stated to him, 'If you give me the order for this amount, I will let the hay go.' He wanted his hay. It was then being moved from the vessel over to the train. * * * I don't remember exactly how it happened; but the understanding was

that as soon as he had entered into that agreement, and we had accepted that order, we were to release that hay, because that was the only object he had in giving the order." The foregoing would seem to establish the conclusion that the detention of the hay by plaintiff was unlawful; that its release was the moving influence, the external pressure that induced Kunzler to execute the order or assignment; and that his act was therefore, in contemplation of our statute, involuntary, and was lacking in the element of consent which is required for a valid agreement. However, it does not follow that the contract was void, as section 1566 of the Civil Code provides that "a consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on rescission."

Kunzler rescinded promptly by notifying Gladding, McBean & Co. and also plaintiff through said firm of his revocation of said instrument, and as there was nothing for him to restore he seems to have done all that is required by the statute to constitute rescission.

The finding as to revocation is not as explicit as it should be, but in view of the evidence it could not be in favor of appellant. It is at least doubtful whether the court had any jurisdiction of the cause, but at any rate the judgment for the reasons stated is correct.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; Hart, J.

7 Cal. App. 8

ALPER et al. v. TORMEY et al. (Civ. 377.)
(Court of Appeal, Third District, California.
Nov. 16, 1907. On Rehearing, Dec. 16, 1907.
Rehearing Denied by Supreme Court Jan.
14, 1908.)

1. ADVERSE POSSESSION—HOSTILE CHARACTER OF POSSESSION—PERMISSIVE USE.

By "permissive" use is meant a license exercised in subordination to another's claim and ownership.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 283.]

2. APPEAL—QUESTIONS OF FACT—FINDINGS OF COURT—CONCLUSIVENESS.

Whether the use of an easement of a right of way was under a claim of right or in subordination to and recognition of another's title is a question of fact for the trial court, and its finding is binding on review if it finds any substantial basis in the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

3. EASEMENTS—PRESCRIPTION—PRESUMPTION OF GRANT.

A grant of an easement will be presumed on proof of use and enjoyment for a time corresponding with the period of limitation for quieting title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 89.]

4. SAME—EVIDENCE—SUFFICIENCY.

The presumption of a grant of an easement on proof of use and enjoyment for a time corresponding with the period of limitation for

quieting title is itself evidence sufficient to support the finding that the use was under a claim of right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 89, 93.]

5. SAME—ESTOPPEL.

That defendant, as president of a corporation, recognized in leases and a mortgage executed on behalf of the corporation that it owned an easement of a right of way for a spur track as appurtenant to its plant, and that he had a map made of the corporation's property, and added the spur track because it did not appear on the official map, and caused blue prints to be made and circulated for the purpose of securing purchasers for the property at a sale thereof, while probably insufficient to create an estoppel to deny that the corporation owned the easement, is a potential circumstance in the determination of the character of the use of the easement.

6. EVIDENCE—WEIGHT OF TESTIMONY—HOSTILE WITNESS.

Where a witness, from his interest in the outcome of the suit, is naturally hostile, his testimony may be viewed in the light most favorable to the adverse party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2439.]

7. EASEMENTS—CREATION—EVIDENCE—SUFFICIENCY.

In an action to restrain interference with the use of an easement, the evidence of defendant himself held to support a finding that the use of the easement was adverse and under a claim of right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 93.]

Appeal from Superior Court, Contra Costa County; W. S. Wells, Judge.

Action by A. Alper and others against Patrick Tormey and others. From a judgment for plaintiffs, and an order denying a new trial, Patrick Tormey appeals. Affirmed.

R. H. Latimer and L. F. Tormey, for appellants. Heller & Powers and L. H. Brownstone, for respondents.

BURNETT, J. This action was brought to restrain defendants from interfering with plaintiffs' use and enjoyment of certain railroad spur tracks. These spur tracks were connected with and constituted an important part of a large meat-packing plant owned and operated by the Union Stockyard Company, situated at Rodeo, Contra Costa county. Two tracks were built, both running—one easterly and the other westerly—from the buildings of the stockyard company to the main lines of the Southern Pacific Railroad Company. The east track, the only one in controversy here, was constructed some time prior to the other. The land upon which said buildings were located was originally bought by one Wheeler, and there is evidence justifying the inference that Tormey sold to him the right of way for the east spur track. Subsequently Wheeler conveyed all his rights to the said Union Stockyard Company, which was incorporated in 1890, and of the corporation Tormey became president. As such president, on behalf of said corporation, he executed leases and a mortgage of the corporation's property, including "all the build-

ings * * * and appurtenances now erected or in the process of erection upon said blocks, * * * and all and every railroad tracks and railroad superstructures which have heretofore and may hereafter be built by the party of the first part, leading from the line of the track of the Northern Railway Company now operated by the Southern Pacific Company, and used and intended to be used in connection with the improvements and machinery in said blocks, or any or either of them." In the year 1895 the corporation was adjudged an insolvent. Tormey, who was the largest creditor, was naturally interested in getting as much as possible for the property, and for that purpose he had a map made of it, and he added the east spur track, because it did not appear on the official map. He caused blue prints of this map to be made and circulated for the purpose of securing purchasers for the property. Judgment was rendered for plaintiffs against the defendants. The defendant Tormey appealed from said judgment, and from the order denying his motion for a new trial.

It is not disputed that plaintiffs acquired whatever rights the said corporation had in and to the said east spur track. The main controversy, however, is as to the sufficiency of the evidence to support the finding "that said defendant Tormey granted to said Union Stockyard Company, plaintiffs' predecessor in title, before or at the time said spur tracks were constructed, the right of way over the said property owned by him on which said spur tracks are now situated for said spur tracks and for the uninterrupted use of the same, and plaintiffs and their predecessors in title have been in the continuous, open, and peaceable possession of said right of way and said spur tracks for more than nine years last past, and said possession has been under a claim of title and adverse to these defendants and to all the world, and defendants have had knowledge thereof." It will not be controverted that if the evidence shows a title by prescription this is sufficient to uphold the judgment regardless of whether a grant was actually proved. The elements of title by prescription are so familiar as not to require restatement. We simply refer to a few of the many cases where the subject is discussed. *Barbour v. Pierce*, 42 Cal. 662; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Alta Land Co. v. Hancock*, 85 Cal. 226, 24 Pac. 645, 20 Am. St. Rep. 217; *Franz v. Mendonca*, 131 Cal. 205, 63 Pac. 361; *Clarke v. Clarke*, 133 Cal. 667, 66 Pac. 10; *Franz v. Mendonca*, 146 Cal. 640, 80 Pac. 1078; also *Am. & Eng. Ency. of Law*, vol. 22, p. 1183, and notes. There is no question here that the use of the easement was open, notorious, peaceable, continuous for the statutory period, and with the knowledge and acquiescence of the defendants.

There is only one proposition concerning which there can be any difference of opinion, and that is whether said use was under a

claim of right, or in subordination to and recognition of Tormey's title. Appellant claims that the evidence shows that the use was only "permissive" and not "adverse." There is some confusion in many of the cases in the use of the term "permissive," as an adverse possession in a sense must be by permission or acquiescence of the one against whom it is invoked. But, imputing to the term the meaning clearly intended of a license exercised in subordination to appellant's claim and ownership, still it is a question of fact to be determined by the trial court, and under the well-established rule its determination against appellant's contention is binding upon us, if it finds any substantial basis in the evidence. Appellant insists that the burden is upon plaintiffs to prove the easement citing *American Co. v. Bradford*, 27 Cal. 361; *De Frieze v. Quint*, 94 Cal. 663, 30 Pac. 1, 28 Am. St. Rep. 151; *Ball v. Kehl*, 95 Cal. 613, 30 Pac. 780; *San Francisco & S. J. V. Ry. Co. v. Leviston*, 134 Cal. 412, 66 Pac. 473. But he seems to lose sight of the fact that it is not a question here of who has the burden of proof, or whether the issue has been established by a preponderance of the evidence, but that the only consideration concerning us is whether there is any evidence to support the finding of the trial court.

In reviewing the action of the lower court the following obvious reflections must be taken into account: A grant of an easement will be presumed on proof of use and enjoyment for a time corresponding with the local period of limitation for quieting titles to land. *Am. & Eng. Ency. of Law*, supra. This, of course, is equivalent to the presumption that the use was under a claim of right, as the grantee holds adversely to the grantor, and not in subordination to the latter's title. This presumption is itself evidence which is sufficient to support the finding. Again, the conduct of appellant is consistent only with the position that it was understood that the corporation owned the easement as appurtenant to its manufacturing plant. Appellant so recognized it in the execution of the instruments to which we have referred, and in the blue prints which he made and circulated. This is probably insufficient to create an estoppel, but it is a potential circumstance in the determination of the character of the use of the easement. Even if appellant had testified positively that there was no such grant, and that the use was only "permissive" and not under a claim of right, we cannot say that the trial court would have been bound to so find in opposition to the adverse inferences suggested by his conduct and the said presumption. Again, plaintiffs, to establish their case, relied largely, as far as the testimony of witnesses is concerned, upon that of appellant himself. The court had a right to consider the fact that from his interest in the outcome he was naturally a hostile witness, and there is justification for viewing his testimony in the light most favorable to

respondents' contention. In that testimony we think there is positive support for the conclusion that the use of the easement was adverse and under a claim of right. Appellant, among other things, testified: "It was always understood by everybody that those tracks were to be used in conjunction with the slaughter house. The tracks were put down for the use of the packing houses. There wasn't any question about the spur tracks being used for the benefit of the packing houses, except a part of the spur tracks were on my land, and it was understood that the Union Stockyard Company should buy a piece of land from me and have it surveyed, and they never paid me for it, and I never gave them a deed. * * * I never heard any question as to the title of the stockyard company to any of the property that they had. It was always assessed to them. * * * The stockyard company never had any trouble with anybody about the tracks. Whenever they wanted to use it they used it without anybody's objecting. * * * I never made any opposition to them building the switch, because they asked my consent about it, and I gave them my consent. * * * I didn't inform anybody that I claimed the land east of the town free from any easement. The time I tore up the tracks and made a demand for the box shucks was the first time I ever claimed to have the right to forbid anybody using the spur tracks. That was in July, 1901. * * * Mr. Wheeler bought 700 acres down towards the powder works. He said, 'I want to buy 800 or 900 acres from you.' I said, 'Mr. Wheeler, you come down on the ground, and whatever you take off the front you take right back to the county road parallel to that line of fence and lay this track down, and, of course, this tract outside of this land was sold,' and Mr. Wheeler said then, 'When we get this thing fixed up we will pay you for that.'"

It would seem to be a fair inference from the foregoing that it was the intention of the parties that at the time of said conversation the title should pass from appellant to Wheeler. It was an attempt to sell, and not simply an agreement to sell in the future. The subsequent conduct of the parties shows that they considered the transaction a sale, at least to the extent of the easement, and even of the small strip of land over which the spur track was laid. It does not affect the case that the price was not paid. It is unfortunate that the corporation became involved, and presumably was not able to pay its debts in full; but this does not change the rule that "a parol gift or grant of the right of way or easement followed by possession, use, and enjoyment of it, with the knowledge of the grantor or donor for over five years, invests the grantee or donee with an absolute title to the right of way or easement." *Ashley v. Ashley*, 4 Gray, 197; *Sumner v. Stevens*, 6 Metc. 337; *Arbuckle v. Ward*, 29 Vt. 43. Of course, it is technically inaccurate under our

practice to characterize the agreement of sale as a "parol grant"; but the transaction furnished Wheeler a "color of title," and afforded convincing evidence that his possession of the easement was begun and continued under claim of right.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Petition for Rehearing.

BURNETT, J. After a careful examination of appellants' petition herein for a rehearing of the cause before this court, we see no reason for a modification of the views expressed in the main opinion rendered in said cause.

A rehearing is therefore denied.

We concur: CHIPMAN, P. J.; HART, J.

NASH et al. v. McNAMARA et al. (No. 1,731.)
(Supreme Court of Nevada. Jan. 23, 1908.)

1. COURTS—DECISIONS OF FEDERAL COURTS AS AUTHORITY.

It is the special prerogative of the federal Supreme Court to finally construe federal statutes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 332.]

2. MINES AND MINERALS — LOCATION OF CLAIMS—ABANDONMENT.

Under Comp. Laws, § 208, and section 209 as amended by St. 1901, p. 97, c. 93, § 2, authorizing a discoverer to locate a mining claim and requiring the sinking of a discovery shaft on a claim before the expiration of 90 days from the posting of notice of location, and Rev. St. U. S. §§ 2319, 2322, 2324 [U. S. Comp. St. 1901, pp. 1424-1426], providing that locators of mining claims complying with the laws shall have the exclusive right of possession and enjoyment of all the surface included within their lines of location, and of all veins, etc., and that the location must be distinctly marked on the ground, so that its boundaries can be readily traced, and that until a patent has been issued not less than a specified amount of work shall be performed during each year, or the claim shall be open to relocation, etc., a junior location made on ground covered by a valid existing senior location will not prevail over a relocation on the same ground, made after a failure to do the work on the senior location, notwithstanding Rev. St. U. S. § 2326 [U. S. Comp. St. 1901, p. 1430], under which a claimant, by failure to assert his rights acquired, may lose them.

3. CONSTITUTIONAL LAW — STATUTES—VALIDITY.

Though it is the duty of courts to construe laws, they should be careful not to encroach on the legislative department, or set aside statutes, federal or state, except where they are clearly in conflict with the Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 36, 46.]

4. MINES AND MINERALS — LOCATION OF CLAIMS.

Where mining claims were located on a designated date, by posting the requisite notice and by the proper marking of their boundaries within 90 days thereafter, the right to the ground covered by them related back to the time of the posting of the notice and segregated the land from the public domain, so that a subsequent

location was invalid until after there had been a failure to do the work required by the statutes to be done within 90 days from the posting of the notice; but where the notices were posted, and the claims were not staked within 90 days thereafter, the locations were not completed, and they were not segregated from the public domain, though such posting carried the right to define the boundaries within 90 days.

5. SAME.

Where a senior location of mining claims was not a valid and existing location at the time of a junior location, the junior locator became entitled to hold the claims for 90 days, and by instituting his suit to recover the claims before the expiration of the 90 days he could recover judgment for possession and damages to the end of that period, and if he should fail to do the required work within 90 days the claims would become subject to relocation by others.

6. WITNESSES — CROSS-EXAMINATION — LIMIT OF RIGHT.

The rule that the cross-examination of witnesses is limited to the matters brought out on direct examination does not prevent the cross-examining party from making the witnesses his own after the adverse party has closed his case in chief, and does not prevent the court from allowing, in its discretion, a rigid examination of the witnesses where they are hostile.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 949-954.]

Appeal from District Court, Nye County.

Action by A. D. Nash and others against Dan McNamara and others. From a judgment for plaintiffs, defendants appeal. Reversed, and remanded for new trial.

L. A. Gibbons and Wm. Forman, for appellants. Key Pettman, Campbell, Metson & Brown, and Geo. A. Bartlett, for respondents.

TALBOT, C. J. The respondents, who were plaintiffs in the district court, brought this action to recover certain claims called the "Unions," with designated numbers, situated in the Manhattan mining district, and which had been located on the 24th and 25th days of July, 1905. It was also stated in the complaint that the defendants were breaking down and removing large quantities of ore from the premises, and the prayer was for the recovery of possession, for an injunction, and for \$10,000 damages. The defendants, who are the appellants here, set up ownership and possession of the ground in themselves under the Liberty and Justice mining claims, located September 29, 1905. The contending parties alleged that the respective locations on which they relied had been made on the unappropriated mineral lands of the United States. This allegation in the complaint was denied by the answer. Upon the trial, after evidence had been introduced regarding the location of these claims, the defendants offered to prove that on July 1, 1905, 24 days prior to the location of the Unions and 91 days before the location of the Liberty and Justice, three men, Kopenhaver, Melssner, and Lawson, had made valid locations on the unappropriated mineral lands of the United States of claims called the "Portlands," and numbered, and which covered the ground in dispute, and that these were valid, existing claims at the time the Unions, upon which

respondents rely, were located. After argument and consideration the learned district judge sustained an objection to this offer, and, although he did not allow the defendants to prove that at the time the Union claims were located the ground was covered by prior and existing valid locations, he made a finding that the Unions were located upon the unappropriated public domain of the United States and entered judgment in favor of respondents. Of the 42 specifications of error, a number relate directly or indirectly to the rejection of this offer and to the making of this finding, and the controlling question involved is whether a junior location made upon ground covered by a valid existing senior location will prevail over one made after a failure to do the required work on the senior location, when the statute of limitations has not run in favor of either.

Upon the trial, and also upon the hearing in this court, respondents relied upon the case of *Lavagnino v. Uhlig*, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119, contending that the facts there are similar to those in the present case, and that the law applicable to them has been settled by the latest expression of the highest tribunal. It is admitted by counsel for appellants that the language in the decision in that case is in conflict with *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735, and other decisions of that and other courts favorable to appellants; but it is claimed that it is overruled by a later decision of that court in *Brown v. Gurney*, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717. Recognizing that it is the special prerogative of the Supreme Court of the United States to finally construe federal statutes, and that its opinions relating to other matters are entitled to special consideration as coming from the highest and ablest tribunal, it becomes important to examine and analyze the conflicting decisions of that court bearing on the issue before us, and to determine which are most in consonance with reason, justice, legal principles, and the statutes relating to the location of mining claims.

Congress, in the proper exercise of its control over the public domain, by Act May 10, 1872, c. 152, § 2 (section 2319 of the Revised Statutes [U. S. Comp. St. 1901, p. 1424]), provided "that all valuable mineral deposits in lands belonging to the United States are free and open to exploration, occupation and purchase by citizens and those who have declared their intention to become such, under regulations prescribed by law." Section 2322 [page 1425] provides that "the locators of all mining claims, so long as they comply with the laws of the United States and with state and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right and enjoyment of all the surface included within their lines of location and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of

such surface lines extended downward vertically" within planes drawn through parallel end lines. Section 2324 [page 1426] provides that "the location must be distinctly marked on the ground so that its boundaries can be readily traced; * * * that on each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars worth of work shall be performed or improvements made during each year; * * * and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location had ever been made: Provided that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim after failure and before such location."

Section 208 of the Compiled Laws of Nevada directs that any person, a citizen of the United States, or one who has declared his intention to become such, who discovers a vein or lode, may locate a claim by defining the boundaries thereof in the manner prescribed and by posting at the point of discovery a notice containing the name of the lode or claim, the name of the locator or locators, the date of the location, the number of linear feet claimed in length along the course of the vein, with the width on each side of the center, and the general course of the vein or lode. Section 209 as amended by St. 1901, p. 97, c. 93, § 2, requires that before the expiration of 90 days from the posting of notice of location the locator shall sink a discovery shaft upon the claim of the depth of at least 10 feet or its equivalent.

It is the contention of the appellants that the Portland locations, if made on the 1st day of July, as they offered to prove, withdrew the land from location for 90 days, during which time the respondents could initiate no rights upon it; that as the 10 feet of work required by the state statute was not done upon these claims within 90 days after they were located, upon the expiration of that period they became, similarly as upon a failure to do the annual work required by the federal statute, subject to relocation by the appellants at the time they made their locations. As the language of the opinion in the *Uhlig* Case stands opposed, not only to the law as established by *Belk v. Meagher* and as held by lawyers and miners for a quarter of a century, but to numerous decisions of the court, state and federal, in the mining states, and to others of the Supreme Court of the United States, it will be advantageous to consider the *Belk* Case as the leading one, representative of numerous others, and compare the two.

The facts in both are similar to the one before the court, in that the contest here is between a claim alleged to have been located upon ground covered by a prior, valid, existing location, and a relocation made upon the same ground after the expiration of the time

for doing the required work on the senior claim. In regard to the periods of time between the making of the locations of the contestants, the Belk Case is more like the one before the court than *Lavagnino v. Uhlig*. In the Belk Case it was conceded by both parties that the original or senior claims lapsed on the 1st day of January, 1877, because of failure to perform the annual work. Belk made the location under which he claimed on the 19th day of December, 1876, and did all that was necessary to perfect his rights, if the premises were open to location at that time. His entry on the property was peaceful. On February 21, 1877, Meagher made his location, doing all that was necessary to perfect his rights, if the premises were then open to location. Here the difference in the respective dates of location of the contending claims is about 70 days, as in the Belk Case. The two Uhligs, evidently at an expense of not less than \$1,600 for the annual work, had been located and maintained for 9 years previous to the location of the claims upon which Lavagnino relied. The statute of limitations applicable to such cases in Utah is 7 years. In Nevada it is 5 years for real estate and 2 years for mining claims. Comp. Laws, § 3706. This difference of time, amounting to nearly 9 years, a period longer than the one specified in the statute, and 70 days, is sufficient to distinguish the Uhlig Case from the present one, and also from the Belk Case, which is more nearly in point. State statutes of limitation relating to mining claims are recognized by section 13 of the act of Congress of July 9, 1870. Properly Uhlig was given his claims by the Supreme Court of Utah, and that judgment was affirmed by the Supreme Court of the United States; but, should force be given to all the language used in that case by the highest tribunal, it conflicts with the Belk Case and other cases.

The following extracts from the unanimous opinion of the court, written by the Chief Justice, in *Belk v. Meagher*, are appropriate: "Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocater seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress; but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this, not only against the prior locator, but all the world, because the law allows no such thing to be done. It follows that the relocation of Belk was invalid. * * * The next inquiry is whether the attempted location in December became opera-

tive on the 1st of January, so as to give Belk the exclusive right to the possession and enjoyment of the claim after that. We think it did not. The right to possession comes only from a valid location. * * * A location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. As in this case all these things were done when the law did not allow it, they are as if they had never been done. On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or pre-emption entry. As the United States could not at the time give Belk the right to take possession of the property for the purpose of making his location, because there was an existing outstanding grant of the exclusive right of possession and enjoyment, it would seem necessarily to follow that any tortious entry he might make must be unavailing for the purposes of a valid location of a claim under the act of Congress. A location, to be effectual, must be good at the time it is made. When perfected, it has the effect of a grant by the United States of the right of present and exclusive possession. * * * Here Congress has said in unmistakable language that what has been once located under the law shall not be relocated until the first location has expired."

In the Uhlig Case, which was by a divided court, no intention of overruling any conflicting decision is expressed; but, in referring to certain text-books, it was said: "Statements are found which seemingly indicate that in the opinion of the writers, on the forfeiture of a senior mining location, quoad a junior and conflicting location, the area of conflict becomes in an unqualified sense unoccupied mineral lands of the United States without inuring in any way to the benefit of the junior location. But in the treatises referred to no account is taken of the effect of the express provisions of Rev. St. § 2326 [U. S. Comp. St. 1901, p. 1430]. Moreover, when the cases to which the text-writers referred as sustaining the statements made are examined, it will be seen that they were decided either before the passage of the adverse claim statutes of 1872, or concerned controversies between the senior and junior locators, or depended upon the provisions of state statutes." As *Belk v. Meagher* does not come within any of these classes, it may be inferred that by inadvertence the writer of the opinion did not have that case in mind and that the court did not intentionally overrule the principles laid down in that and followed in other cases.

This inference finds further support in the language of that tribunal in *Mining Co. v. Tunnel Co.*, 196 U. S. 342-3, 25 Sup. Ct. 266, 49 L. Ed. 501, submitted at the same term, in

Brown v. Gurney, 201 U. S. 191, 26 Sup. Ct. 509, 50 L. Ed. 717, determined a year later, and in *Clipper Mining Co. v. Ell Mining Co.*, 194 U. S. 226, 24 Sup. Ct. 634, 48 L. Ed. 944, decided one year previously, in which the court said: "It will be seen that section 2322, Rev. St. [U. S. Comp. St. 1901, p. 1425], gives to the owner of a valid lode location the exclusive right of possession and enjoyment of all the surface included within the lines of the location. That exclusive right of possession forbids any trespass. No one without his consent, or at least his acquiescence, can rightfully enter upon the premises or disturb its surface by sinking shafts or otherwise. It was the judgment of Congress that, in order to secure the fullest working of the mines and the complete development of the mineral property, the owner thereof should have the undisturbed possession of not less than a specified amount of surface. That exclusive right of possession is as much the property of the locator as the vein or lode by him discovered and located. In *Belk v. Meagher*, 104 U. S. 279, 283, 26 L. Ed. 735, it was said by Chief Justice Waite that 'a mining claim perfected under the law is property in the highest sense of that term'; and in a later case (*Gwillim v. Donnellan*, 115 U. S. 45, 49, 5 Sup. Ct. 1112, 29 L. Ed. 348) he adds: 'A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second.'

"In *St. Louis Mining Co. v. Montana Mining Co.*, 171 U. S. 650, 655, 19 Sup. Ct. 63, 43 L. Ed. 320, the present Chief Justice declared that, 'Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator.' Nor is this 'exclusive right of possession and enjoyment' limited to the surface, nor even to the single vein whose discovery antedates and is the basis of the location. It extends (so reads the section) to 'all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically.' In other words, the entire body of ground, together with all veins and lodes whose apexes are within that body of ground, become subject to an exclusive right of possession and enjoyment by the locator. And this exclusive right of possession and enjoyment continues during the entire life of the location, or, in the words of Chief Justice Waite, just quoted, while there is a 'valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States.' There is no provision for, no sugges-

tion of, a prior termination thereof. * * * And, if the surface is open to the entry of whoever seeks to explore for veins, his possession can be entirely destroyed. In this connection it may be well to notice the last sentence in section 2322, * * * which is a limitation on such right, and reads: 'And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.' * * * The difficulty with the case presented by the plaintiff in error is that under the findings of fact we must take it that the entries of the locators of these several lode claims upon the placer grounds were trespassers, and as a general rule no one can initiate a right by means of a trespass. *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732; *Trenouth v. San Francisco*, 100 U. S. 251, 25 L. Ed. 626; *Haws v. Victoria Copper Mining Company*, 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436. See, also, *Cosmos Exploration Company v. Gray Eagle Company*, 112 Fed. 4, 17, 50 C. C. A. 79, 93, 61 L. R. A. 230, in which the court said: 'No right can be initiated on government land which is in the actual possession of another by a forcible, fraudulent, or clandestine entry thereon. *Cowell v. Lammers* (C. C.) 21 Fed. 200, 202; *Nevada Sierra Oil Co. v. Home Oil Co.* (C. C.) 98 Fed. 674, 680; *Hosmer v. Wallace*, 97 U. S. 575, 579, 24 L. Ed. 1130; *Trenouth v. San Francisco*, 100 U. S. 251, 25 L. Ed. 626; *Mower v. Fletcher* 116 U. S. 380, 385, 386, 6 Sup. Ct. 499, 29 L. Ed. 593; *Haws v. Mining Company*, 160 U. S. 303, 317, 16 Sup. Ct. 282, 40 L. Ed. 436; *Nickals v. Winn*, 17 Nev. 188, 193, 30 Pac. 435; *McBrown v. Morris*, 59 Cal. 64, 72; *Goodwin v. McCabe*, 75 Cal. 584, 588, 17 Pac. 705; *Rourke v. McNally*, 98 Cal. 291, 33 Pac. 62.'"

Cases supporting this legal principle, including *Brown v. Killabrew*, 21 Nev. 438, 33 Pac. 865, are cited in the decision of the district court of Nye county rendered last year in *Ford v. Brown*.

The opinion in the *Uhlilg Case* quotes at length and relies upon section 2326 of the Revised Statutes, Act Cong. May 10, 1872, c. 152, § 7, 17 Stat. 93 [U. S. Comp. St. 1901, p. 1430]. This section relates to the procedure where an adverse claim is filed upon an application being made for patent. There is nothing in its language as to whether a second location, made before, may prevail over a third location, made after, failure to do the required work, and nothing is stated in regard to the time when claims become subject to relocation, and it does not in any way designate how or when the rights of parties by location or relocation may be acquired, and consequently has no bearing upon the question which was before the court, and lends no support to the conclusion reached. The part of this section upon which the opinion seems to be based enacts that "If

shall be the duty of the adverse claimant within thirty days after filing his claim to commence proceedings in a court of competent jurisdiction to determine the question of right of possession and prosecute the same with reasonable diligence to final judgment and a failure to so do shall be a waiver of his adverse claim." This simply provides that by failure to assert them a claimant may lose any rights which he has in the same way that a defendant in any action may lose his by default and failure to answer, and neither litigant in that case had made any such default or failure. It relates to how rights already obtained may be defended, determined, preserved, and forfeited, but not as to how those rights may be acquired by location or otherwise. This was not passed later than the other sections of the Revised Statutes mentioned, but at the same time as a part of the same act of May 10, 1872. As there is nothing in its language relating to the time or method of locating claims, we are unable to perceive how it can in any way amend, modify, repeal, or affect the language in section 2322, providing "that the locators of all mining locations, so long as they comply with the laws of the United States and with state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside their surface lines extended downward vertically" and within planes running through parallel end lines, or the language in section 2324 that "the location must be distinctly marked on the ground so that its boundaries can be readily traced; that on each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year; * * * and that upon the failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made."

For the purpose of making the time uniform for doing the annual work, and for the relocation of claims on which such work is not performed, section 2324 was amended eight years later by Act Jan. 22, 1880, c. 9, § 2, 21 Stat. 61 [U. S. Comp. St. 1901, p. 1426], so as to provide that the period within which the work is required to be done annually on all unpatented mining claims shall commence on the 1st day of January succeeding the date of location. In the Uhlig opinion the court said: "It cannot be denied that under section 2326, if before abandonment or forfeiture of the Levi P. claim, the owners of the Uhlig locations had applied

for a patent, and the owners of the Levi P. had not adverse the application, upon an establishment of a *prima facie* right in the owners of the Uhlig claims, an indisputable presumption would have arisen that no conflict claims existed to the premises described in the location notice. *Gwillim v. Donnellan*, 115 U. S. 45, 51, 5 Sup. Ct. 1110, 29 L. Ed. 348. And the same result would have arisen had the owner of the Levi P. adverse the application for a patent based upon the Uhlig locations and failed to prosecute and waived such adverse claim. In both of the supposed instances the necessary consequence would have been to conclusively determine in favor of the applicant, so far as the rights of third persons were concerned, that the land was not unoccupied public land of the United States, but, on the contrary, as to such persons, from the time of the location by the applicant for the patent, was land embraced within such location and not subject to be acquired by another person. And this result, flowing from the failure of the owner of a subsisting senior location to adverse an application for patent by the owner of an opposing location, or his waiver if an adverse claim is made, must, as the greater includes the lesser, also arise from the forfeiture of the claim of the senior locator before an application for patent is made by the conflicting locator, and the consequent impossibility of the senior locator to successfully adverse after the forfeiture is complete. Of course, the effect of the construction which we have thus given to section 2326 of the Revised Statutes [U. S. Comp. St. 1901, p. 1430] is to cause the provisions of that section to qualify sections 2319 and 2324 [pages 1424, 1430], thereby preventing mineral lands of the United States, which have been the subject of conflicting locations, from becoming, *quoad* the claims of third parties, unoccupied mineral lands by the mere forfeiture of one of such locations."

By this language it is correctly stated at the beginning that where there are two claimants, and one applies for patent, the other may lose his rights under section 2326 by failing to adverse. Under the peculiar and unusual circumstances, the result in the Uhlig Case was correct, and could have been justified on another ground; but we are unable to perceive the force and correctness of the conclusion, on which the opinion was based, that because a claimant may waive his rights in proceedings for patent under section 2326, and because a senior locator may forfeit his, that therefore a mining claim is subject to relocation, or, what is the same thing, a junior or second location may be initiated on the ground as soon as the first location has been made, instead of upon the failure of the first locator to perform the required work as enacted by the statute. By a literal construction what is called a modification, we think, in effect would be a judicial repeal of a plain enactment, supported only by reference to an-

other section which has no application. The language used is equivalent to saying that because a claimant may waive his right under section 2326 by failing to adverse, and a senior locator may forfeit his, therefore mining locations do not become subject to relocation upon the failure to do the required work as provided by section 2324, but that they may be relocated and rights initiated at any prior time.

The sections relating to proceedings upon application for patent are for the purpose of enabling claimants to obtain a final grant of the legal title from the government for ground previously acquired and to avoid any necessity of doing the annual work. So long as \$100 is expended each year upon the claim, as required by the act of Congress, the owner's right to exclusive possession and to extract and exhaust the ore is as complete as if he held a patent, for which he may never apply unless he desires. Not infrequently ore worth millions of dollars is taken from mines which are finally abandoned as worthless and no application to patent them is ever made. The right to obtain patent depends upon the making of a location or upon having held possession during the period of the statute of limitations; but the making of the location and the time for making it do not depend upon the section regulating the proceedings upon application for patent which the claimant may never institute.

Surely it will not be contended that Congress has not the power to regulate the disposition of the unappropriated public mineral lands. The statute having clearly provided that these are open to location by citizens of the United States and those who have declared their intention to become such, and that the locators of mining claims, upon complying with the laws, shall have the exclusive right of possession and enjoyment of the surface included within the lines of their locations, and that claims shall be subject to relocation upon the failure to do the required work, these provisions ought not to be nullified or repealed by the courts because there is another section providing that a claimant may waive his right by a failure to adverse when application has been made for a patent, or because a senior locator or others who are not parties to the litigation may forfeit their rights by failing to do the required work. It is the duty of courts to construe and interpret the laws; but they should be careful not to encroach upon the legislative department, or set aside statutes, federal or state, except when they are clearly in conflict with the Constitution. As the Uhlig Case was one on adverse proceedings against an application for patent, the decision being based on the statute regulating these, anything the court said regarding the rights or forfeiture of an applicant in such proceedings may be considered as dictum in the present case, which is not on such proceedings. To

enforce all the statements in that opinion in cases generally, like the one at bar, would necessitate the setting aside of the provisions in other sections of the act of May 10, 1872, to which reference has been made, and which were plainly followed and enforced by the Belk Case and other cases. The senior locator in the Uhlig Case waived his interests by failing to appear, and was not in court or trying to assert them, and anything said regarding the forfeiture of his rights was incidental.

If the plain provisions of the statute are to be overthrown, after having been enforced by numerous courts and universally accepted for a generation, not only will vested rights be endangered, but, as said in that case: "To hold that, before the former location has expired, an entry may be made and the several acts done necessary to perfect a relocation, will be to encourage unseemly contests about the possession of the public mineral-bearing lands, which would almost necessarily be followed by breaches of the peace." Then, instead of claims becoming subject to relocation upon the 1st day of January and after failure to do the annual assessment, the ground might be relocated before there was any such failure, and a day, a month, or a year previously. If the junior locator may acquire rights by entering the ground before there is any failure to do the required work, and while the statute gives the exclusive possession to the senior locator, any number of locations may be made and rights initiated at any time prior to the one at which the statute states that the claim shall be subject to relocation, and the person who follows the statute and makes the relocation on the 1st day of January will be too late, and may find that the right to locate after failure to do the work has been acquired by one of several others in the order of their locations previously made and before the work was required to be done by the original locator. The one who located 6 or 11 months before the time in which the work was required to be done had expired would have a better right than the one who had located 1 or 5 months in advance of such time; but, if the former failed to do the required work on his part, the right would become initiated in the latter, which would prevail over any one who relocated the ground on the 1st day of January, the time in which it is made relocatable by statute if the annual work is not done. Fraud would be encouraged, and the door opened for the evasion of the annual work, the purpose of which is to require the owner to develop the claim at least to that extent, or render his right subject to forfeiture and the claim to relocation. If others could initiate relocations on valid and existing claims, the question would arise whether the owner could relocate before they had lapsed, and if he could not, as an exception to the rule that others could, he would be tempted to have some one relocate for him

in order to avoid doing the work. For the reasons stated, and as the Uhlrig opinion does not mention *Belk v. Meagher*, and does not express an intention to overrule the principle therein announced, and affirmed in other decisions rendered about the same time, we do not think a result so revolutionary was intended to apply in cases generally, and that the Uhlrig decision is applicable only to its own particular circumstances. It has already been so held, or that at most it is not controlling further than in actions in connection with proceedings for obtaining patents, by a number of courts and text-writers, and, so far as we are aware, by all who have determined that question.

In *Montagne v. Labay*, 2 Alaska, 575, the Uhlrig Case was examined, and it was held that it applies only in adverse proceedings, and only within its own limited sphere of exceptional facts, and *Belk v. Meagher* was followed, and held not to be overruled. In *Hoban v. Boyer*, 37 Colo. 185, 85 Pac. 837, decided more than a year after the Uhlrig Case, the Supreme Court of Colorado continued to adhere to the rule in *Belk v. Meagher*. In *Lockhart v. Farrell* (Utah) 86 Pac. 1081, the Supreme Court of Utah, the one by which *Lavagnino v. Uhlrig* had been determined, said regarding the decision by the Supreme Court of the United States in that case: "Giving the *Lavagnino* Case the construction contended for by the respondent is, in effect, to make it overrule *Belk v. Meagher* and *Gwillim v. Donnellan*, and to render it in conflict with the decisions of both federal and state courts on the question. We do not believe any such result was intended by that decision. Likewise, to give it the meaning contended for renders it in conflict with the more recent decision of *Brown v. Gurney*." In a note in 68 L. R. A. 842-845, the *Belk*, *Uhlrig*, and other cases are considered, and at page 837 appears the statement that "it is difficult to reconcile the decisions holding that one who relocates the claim after the original locator is in default in his assessment work will prevail over one who attempted to relocate the claim before the time for the performance of the assessment work had expired with the principle of the decision of the Supreme Court of the United States in the recent case of *Lavagnino v. Uhlrig*, although it is not probable that the doctrine of these cases will be disturbed in consequence of that decision." Numerous decisions in the state and federal courts in the mining states and territories from the Mexican border to the Canadian line, apparently without exception, support *Belk v. Meagher* and *Clipper Mining Co. v. Eli Mining Company*, supra, and *Gwillim v. Donnellan*, 115 U. S. 49, 5 Sup. Ct. 1112, 29 L. Ed. 348, in which it was said: "If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second." Quot-

ing with approval from the opinion in the *Belk* Case, Justice Hawley, speaking for this court, in *Rose v. Richmond*, 17 Nev. 57, 27 Pac. 1105, 1110, said: "A relocation on lands actually covered at the time by another valid and subsisting location is void; and this, not only against the prior locator, but all the world, because the law allows no such thing to be done." In one end of the balance we have only the Uhlrig Case, based on a section of the Revised Statutes which has no bearing on the question involved; and against this we have the numerous decisions, cited and uncited, supporting *Belk v. Meagher*, including our own in *Rose v. Richmond Mining Co.*, and the statutes which are clearly and directly applicable, and which would have to be overruled in order to maintain the judgment.

After the court had sustained an objection to the offer of appellants to prove that the notices of location were posted on the Portlands, and that they were valid, existing claims, covering the ground at the time the Unions were located, they asked the court to admit the evidence subject to objection and to a motion to strike it out, so that its admissibility could be considered more carefully later; but the court refused to receive it, and consequently there is nothing in the record to show what acts were performed toward locating the Portlands. If they were located by posting the requisite notices on July 1, 1905, and by the proper marking of their boundaries within 90 days thereafter, the right to the ground covered by them would relate back to the time of the posting of the notices, and would in effect have been a segregation of the land from the public domain, so that the Unions could not have been validly located or initiated upon it on the 24th and 25th days of July, nor until after there was a failure to do the work required by the state statute to be done within 90 days from the posting of the notices. But if the Portland notices were so posted, and the claims were not staked or monumented within 90 days thereafter, then we think the locations were not completed under the act of Congress and the state statute, and, the land not having been marked within that period, so that its boundaries could be traced, it was not segregated from the public domain, although such posting carried the right to define the boundaries within 90 days. The period for this purpose has since been shortened by an act of the Legislature to 20 days. St. 1907, p. 419, c. 194.

Erhardt v. Boaro, 113 U. S. 530, 5 Sup. Ct. 561, 28 L. Ed. 1113, cited by appellants, is distinguishable; for it was said in the statement of facts there that "the evidence tended to show that, within 90 days from the discovery of the lode by Carroll, one French, on behalf of the plaintiff and Carroll, secretly caused the boundaries of the claim to be marked." It was correctly held there that the forcible eviction of the discoverer and locator from the vein or lode before

the sinking of the shaft required by the Colorado statute and the prevention of his re-entry by threats of violence excuse him, as against the party keeping him out of possession, so long as he is kept out of it, from sinking the shaft required. There is no doubt that, if the locator discovered a vein and filed proper notices on the Portlands on the unappropriated public domain, he was entitled to go on the ground and mark the boundaries, and in doing so float the locations and do the required work; but, if he never did anything but post the notices, it would seem that no piece of ground was ever defined for segregation from the public domain, so as to notify or warn off others, or prevent the initiation of locations which would be good against a later one.

We find no errors in the record, except those resulting in different ways from the conclusion of the district court to adhere to the opinion in *Lavagnino v. Uhlig*. Upon the trial objection was sustained to evidence regarding the sinking of a shaft 10 feet deep, or its equivalent, on the Unions, and the filing of certificates of location was objected to and withdrawn, because the work was not done and the certificates were not filed before this action was begun; and it is contended that proof of this work and the filing of those certificates was essential to plaintiffs' recovery. There was no supplemental complaint or pleading alleging that the work was done or completed or that the certificates were filed after the commencement of the suit to warrant its admission. We have recently held in the case of *Ford v. Campbell*, 29 Nev. —, 82 Pac. 206, that the filing of a certificate of location is not essential to the validity of the claim but relates to matters of proof. If the Portlands were not valid and existing locations at the time the Unions were located, and the Unions were located on the unappropriated public domain by posting notices and marking their boundaries in accordance with law, respondents would have become entitled to hold them for the 90 days allowed for doing the work, and by instituting this suit prior to that time could recover a judgment for possession and damages to the end of that period. If, under these circumstances, respondents failed to do the required work within 90 days, the claims would become subject to relocation by the appellants or others.

The court sustained objections to a series of questions by which it may be surmised that defendants sought to prove, upon the cross-examination of plaintiffs' witnesses, that the Portland notices were posted on the ground at the time the Unions were located. The court properly limited the cross-examination to the matters brought out in the direct examination. This did not prevent defendants from making the witnesses their own after plaintiffs had closed their case in chief, nor the court from then allowing, in its dis-

cretion, a rigid examination if they were hostile.

The judgment is set aside, and the cause is remanded for a new trial, upon which defendants will be allowed to introduce evidence to show that at the time the Unions were located the ground was covered by the Portlands as valid and existing locations made by posting the requisite notices and by the defining of their boundaries within 90 days thereafter, and that by failure to do the work required by the state statutes the Portlands had lapsed at the time the Liberty and Justice claims were located.

NORCROSS, J. I concur in the opinion of the Chief Justice, and express the following additional views, based upon my conception of the statutes and the decisions of the highest courts:

The right of respondents to offer proof that the Portland claims were valid and subsisting locations at the time the Union locations were made does not depend, as contended, upon any relations of privity between the locators of the Portland claims and themselves. They have the right to offer such proof, in order to establish the fact, if they can, that they have complied with the federal and state law as relocators of a prior existing claim which had become, under the law, subject to relocation. Both the state and federal statutes have provided for the relocation of claims which have become subject to such relocation by reason of the failure to do the location work or annual assessment work provided for by law. A distinction is thus recognized, both by the federal and state laws, between a location and a relocation. If persons are claiming rights to the public domain as relocators, necessarily their rights depend upon the fact that a prior existing claim had become subject to forfeiture, and that by entering upon the ground and relocating it they had effected such forfeiture of the rights of the prior locators and established rights in themselves. They can only establish their rights as relocators by proving the prior location, that it had become subject to forfeiture, and that they had made such forfeiture effectual by complying with acts necessary to make a valid relocation. Where the right to make a location is initiated by the making of a discovery and the posting of a proper notice, but no further act is done to perfect the location, and thus segregate the same from the public domain, the ground is not subject strictly to relocation, for no prior valid location had been perfected. In such a case the land does not cease to be a part of the public domain, never having been segregated therefrom, and thus it remains open to location. It frequently happens that a person upon making a discovery posts a location notice, and in common parlance this is called a "location"; but legally it is not a location, and may never become such. The first discoverer, who posts a valid

notice, initiates a right which he is protected in and which he can follow up by doing the other acts necessary to perfect a valid location; but until he has done those other acts he has not acquired the right of exclusive possession given him by the statute upon a perfected location, which will have the effect of cutting off any inchoate right in another initiated in the meantime.

SWEENEY, J., being interested in the result of the litigation, not participating.

BALDWIN v. BROWN.

(Supreme Court of Washington. Jan. 17, 1908.)

1. SPECIFIC PERFORMANCE — SHORTAGE IN LAND—ENFORCING PARTIAL PERFORMANCE.

Defendant contracted to convey to plaintiff a government subdivision of land, by special warranty deed, on certain payment. Prior to the time for conveyance defendant's title to five acres of the land was devested by a judgment quieting title thereto in a third party. *Held*, that the fact that a special warranty deed only warrants against defects of title caused by the acts of the grantor, and that the title to the five acres was lost because of matters prior to defendant's obtaining title, did not entitle defendant to refuse to convey the remaining land on tender of the contract price less a proportionate reduction for the land lost, since the question was not as to the effect of a special warranty deed, but whether he could "convey" the five acres by any form of deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 23, 31.]

2. VENDOR AND PURCHASER—TITLE OF VENDOR—ABATEMENT FOR DEFICIENCY.

In an action to compel a conveyance of land, where title failed as to part of the tract, the amount deducted would be such proportion of the whole purchase price as the value of said portion bears to the value of the whole tract at the time of purchase.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Vendor and Purchaser, §§ 333-340.]

3. APPEAL — REVERSAL — TRIVIAL ERRORS — AMOUNT OF JUDGMENT.

Reversal will not be ordered because of an error of a few dollars in the computation of the judgment, since it can be credited in adjusting the costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4546-4554.]

Crow and Dunbar, JJ., dissenting.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Bill by M. L. Baldwin against J. W. Brown. From a decree for plaintiff, defendant appeals. *Affirmed*.

Steele & Brown, for appellant. Buck & Boddy, for respondent.

ROOT, J. This is an action in equity by respondent to compel appellant to make a conveyance of certain land. From a decree in plaintiff's favor, defendant appeals.

Appellant and one David Farmer on the 18th of May, 1904, entered into a written agreement of which the following is the material portion: "That in consideration of eleven hundred dollars (\$1100.00) paid, and

to be paid, by said David Farmer, his heirs and assigns, to J. W. Brown, his heirs and assigns, as hereinafter stated, the said J. W. Brown agrees to convey to the said David Farmer the north half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of section one (1), township twenty-two (22), range two (2) east, King county, Washington, by special warranty deed at the time the same is fully paid for as per this agreement. That one hundred dollars (\$100.00) of said sum is in hand paid and one hundred sixty dollars (\$160.00) of the same is due and payable November 1, 1904, and the balance, eight hundred and forty (\$840.00) dollars, is due and payable November 1, 1905, as per the two promissory notes of even date herewith, bearing seven (7) per cent. interest from date. The said David Farmer is to keep all taxes assessed against said real estate paid before the same become delinquent. That the said J. W. Brown reserves the right and title to said land until the same is paid for in full." The property described in said contract had been obtained by King county in 1902 by general foreclosure for taxes for 1895 and prior years. The appellant received a deed to the same from the county July 15, 1903. Some time after making the contract above referred to, David Farmer died, and his interests therein became vested in this respondent, who is his mother. Before the final payment became due one William Cross brought an action in equity to quiet title to five acres of the land described in said contract, and made this appellant and respondent parties. Said action was prosecuted to final judgment, resulting in a decree to the effect that this appellant had no right, title, or interest in or to said five acres of land, but that the same was the property of said William Cross. When the time for making final payment under the terms of the above contract arrived, respondent requested a reduction in the amount of the purchase price on account of not getting said five acres. Appellant declined to make such reduction, but insisted upon respondent paying the full amount called for by the contract. Thereupon this action was instituted to compel appellant to convey the balance of the land without respondent paying the proportion of the purchase price represented by said five acres.

Appellant contends, first, that the trial court was wrong in the construction placed upon the contract; and, second, that the amount of reduction directed to be allowed, if any was allowable, was too great. As to the first point, appellant urges that, as a special warranty deed warrants only against defects of title occasioned by the act of the grantor himself, and as Cross recovered this property, not by reason of anything done or omitted by appellant, but by reason of matters occurring before he obtained the property from the county, he (appellant) was entitled to receive from respondent the full amount of the purchase price as called for

by the contract for the entire tract. As the controversy is not as to the effect of a special warranty deed, but as to a contract to "convey" by special warranty deed, and as the contract contains the expression "that the said J. W. Brown reserves the right and title to said land until the same is paid for in full," the respondent claims, and apparently the trial court was of the opinion, that appellant by said contract purported to have "right and title" to said land, and agreed to "convey" the same, and that the contract contemplated this, and that, as a court of competent jurisdiction prior to the final payment on this contract had decided that appellant had no right or title whatever to said five acres, he was therefore unable to "convey" by a special warranty deed, or by any other form of conveyance. The court, therefore, held that the appellant was not in a position to require respondent to pay for that which the former had agreed to, but could not, convey. We think this position must be maintained. In *Aukeny v. Clark*, 1 Wash. St. 549, 20 Pac. 583, the territorial Supreme Court, speaking through Chief Justice Burke, said: "No form of deed is sufficient to convey a title where the grantor has none." It is not a question here of the effect of a special warranty deed heretofore delivered, but it is a question of whether or not a party is able to carry out the terms of a contract to be performed by him. As to the second point, it appears that the five acres to which the title failed was of greater value per acre than the remaining portion of the tract. The court found the value of this five-acre tract was \$250, and directed that an allowance of that amount should be made to respondent. Appellant claims that this is excessive and disproportionate. Where one is unable to convey an aliquot part of the land agreed to be conveyed, the rule seems to be that such a proportion of the total purchase price shall be deducted as the value of such portion bore to the value of the entire tract at the time of the purchase. Appellant urges that this was not done in this case; but in this we think he is in error, at least, it does not appear that any other rule of ascertainment was adopted.

It is urged that an error to the extent of a few dollars was made in the computation. If so, it can be credited in adjusting the costs. Certain other errors are assigned, but become immaterial under our view of the two questions hereinbefore considered.

The judgment of the trial court is affirmed.

HADLEY, C. J., and FULLERTON and MOUNT, JJ., concur.

CROW, J. (dissenting). The substantial effect of the majority opinion is to compel appellant to perform his contract in the identical manner which would have been required of him had he agreed to warrant a title

previously acquired, and convey the same by a general warranty deed. He made no such agreement. His contract calls for a special warranty deed only. Both he and respondent's predecessor knew that his sole title, which appellant was selling, rested on a tax foreclosure. Appellant acquired such title without warranty, and his evident purpose, known to respondent's predecessor, was to convey the same as it came to him; that is, to sell whatever had come to him by the tax title, and to enter into no covenant to hold him liable beyond that. He has fully performed his agreement, but the majority opinion now makes a new contract for him and orders its specific performance.

The judgment should be reversed, and I therefore dissent.

DUNBAR, J. I concur in what is said by Judge CROW.

STATE v. McFADDEN.

(Supreme Court of Washington. Jan. 15, 1908.)

1. CRIMINAL LAW—PARTIES TO OFFENSES—PRINCIPALS.

Under Ballinger's Ann. Codes & St. § 6782, abolishing distinctions between an accessory before the fact and a principal, and providing that all persons concerned in an offense shall be tried as principals, one advising a mother to withhold food from her child may, on the resulting death of the child from starvation, be prosecuted as a principal for the death of the child.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 71-75.]

2. HOMICIDE—MANSLAUGHTER—INFORMATION.

Under Ballinger's Ann. Codes & St. § 6840, providing that an information shall contain a statement of the acts constituting the offense so as to enable a person of common understanding to know what is intended, an information charging that accused, representing himself as a physician, advised a mother employing him to give the child no food except water and the juices of fruit, and such other nourishment as he might direct, and that acting under such instruction the mother withheld all food and nourishment, except as directed by accused, and that the child died as a result of starvation, does not charge manslaughter, defined by section 7042 punishing one who shall kill another without malice in the commission of some unlawful act, because it fails to show a connected chain of facts showing starvation as the necessary result of the directions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 213-228.]

Appeal from Superior Court, Asotin County; Chester F. Miller, Judge.

Charles McFadden was convicted of manslaughter, and he appeals. Reversed and remanded.

S. G. & H. G. Cosgrove and Sturdevant & Bailey, for appellant. Geo. H. Rummens, for the State.

HADLEY, C. J. The defendant was charged with the crime of manslaughter. The information is very long and circumstantial in its allegations; but in substance it charges that the defendant represented to one Ida

Robison that he was a physician; that the representations were made for the purpose of inducing her to believe that he was a skillful and qualified physician; that, believing said representations and relying thereon, she employed him to treat her minor child, a daughter, of the age of about nine months; that she placed the child under the direction and supervision of the defendant to be treated by him as such physician; that he at once assumed the relation of physician toward the child, and that while so acting he prescribed and directed that the child should be given no food or nourishment save water and the juices of fruit, and such other nourishment as he might direct; that acting under such instruction she thereafter withheld from the child all food and nourishment, except as directed by the defendant, for a number of days; that the food which was given under the defendant's direction was insufficient to sustain the life of the child, and she thereupon became weak and emaciated; that the mother became convinced that said treatment was not proper for the child, and she thereupon gave the child a small quantity of wholesome food, which was beneficial and not detrimental to her health; that she informed the defendant she had so given the food, and he thereupon remonstrated with her, and assured her and led her to believe that the treatment he directed was necessary for the cure and relief of the child; that thereupon the mother again kept all food from the child, except as directed by the defendant, for a great number of days, and during all of said times she faithfully complied with all requests and instructions of the defendant in relation to the treatment of the child, but by reason of such treatment, so directed by the defendant, the child became weak, emaciated, and starved; that the defendant was at all times grossly ignorant and unlearned in the proper and necessary treatment of diseases, and the treatment which he prescribed and directed for the child was grossly improper and dangerous to its life; that the child was during all said times under the care and direction of the defendant as aforesaid; and that on account of the treatment so administered and the withholding of food, as alleged, the child died. A demurrer to the information was overruled, after which the defendant pleaded not guilty, and he was tried and convicted. He has appealed.

It is assigned that the court erred in overruling the demurrer to the information. It is urged that the facts alleged against appellant do not amount to a charge of manslaughter, for the reason that it was not appellant but the mother who withheld the food from the child. It is contended that the information shows that appellant did not assume to administer the food, but that the mother at all times did so, and that the real physical act which it is alleged caused death was that of the mother, the appellant being at the time not personally present, but having advised the mother to do the act. It is argued that such

facts can in no event amount to other than a charge that appellant was an accessory before the fact, whereas the authorities hold that there cannot be such an accessory to the crime of manslaughter. This court so held in *State v. Robinson*, 12 Wash. 349, 41 Pac. 51, 902. Our statute (section 6782, Ballinger's Ann. Codes & St.), however, abolishes all distinctions between an accessory before the fact and a principal, and provides that "all persons concerned in the commission of an offense, whether they directly counsel the act constituting the offense, or counsel, aid and abet in its commission though not present, shall hereafter be indicted, tried and punished as principals." Under the said statute appellant may be and is charged here as a principal and not as an accessory. Manslaughter is defined by our statute (section 7042, Ballinger's Ann. Codes & St.) as follows: "Every person who shall unlawfully kill any human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, shall be deemed guilty of manslaughter." The charge does not amount to that of killing "voluntarily upon a sudden heat," and if manslaughter is charged it is that of involuntarily causing death "in the commission of some unlawful act." The unlawful act charged is that of withholding food, not by his personal, physical act, but by counselling the mother to do it. His share in the offense was therefore that of counseling and advising the mother what to do. It then becomes vitally important in order to put him upon trial for a felony that just what he did advise must be charged. It is charged that he advised the giving of no food save water and the juices of fruit, "and such other nourishment as he, the said Charles McFadden, might direct." There is no allegation as to what other nourishment he directed given, although it must be reasonably understood from the language that he did give other directions. It is alleged that the mother followed his directions, and that the food given was insufficient to sustain life. But under such peculiar circumstances that is the statement of a single, extreme fact in the nature of a mere conclusion. In so important a matter where he is charged with involuntarily causing the death of a human being, he is entitled to a full and specific statement of what the state claims were all of his directions as to the giving or withholding of food from time to time, including a statement as to every kind of nourishment directed, the quantity thereof, and when it was to be given. In short, such a connected chain of facts should be alleged as show starvation as the necessary and certain result of appellant's directions. Under the terms of section 6840, Ballinger's Ann. Codes & St., he is entitled to "a statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."

From the terms of the information it cannot be determined what food appellant ordered given, or withheld, or in what quantities. The information epitomized says that the child was starved by the withholding of food through appellant's advice, not all food, but merely some kinds of food, without specifying what kinds or what quantities were directed or given. Such a statement of facts is not sufficient to show that appellant's directions caused the death of the child. We, therefore, think the demurrer to the information should have been sustained, and, in as much as the judgment must be reversed for that error, it is unnecessary to discuss other questions mentioned in the briefs.

The judgment is reversed, and the cause remanded, with instructions to sustain the demurrer to the information.

CROW, ROOT, and RUDKIN, JJ., concur. MOUNT and FULLERTON, JJ., did not sit.

RIDPATH v. SPOKANE STAMP WORKS.
(Supreme Court of Washington. Jan. 17, 1908.)
LANDLORD AND TENANT — NUISANCE — QUESTION FOR JURY.

Whether the operation of machinery by a lessee on the ground floor of a building, the other floors of which were used as a hotel, constituted a nuisance, *held* for the jury.

Appeal from Superior Court, Spokane County; John B. Yahey, Judge.

Action by William M. Ridpath against the Spokane Stamp Works. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Henley & Kellam, for appellant. John C. Kleber, for respondent.

PER CURIAM. The appellant is, and was at the time of the making of the lease hereinafter mentioned, the owner of a four-story brick block in the city of Spokane. The lower or ground floor rooms were designed and used for storerooms, and the other floors were designed for and used as a hotel. It is conceded that the hotel is elegantly and expensively furnished, and has at all times been conducted as a first-class hotel. On the 1st day of July, 1906, appellant leased to the respondent one of the storerooms on the first floor of the hotel, and respondent went into possession thereunder. The lease is not introduced in evidence, but it is admitted that it was executed, and its terms are undisputed. The complaint alleged that the lease contained no express restrictions or provisions as to noise, confusion, shaking, or jarring of the building, and that at the time of and prior to the making of the lease it was represented by respondent to appellant that the storeroom was to be used only as a display and salesroom for its manufactured products, and that there would be created no noise, nor would there be anything about the conduct of its business to disturb in any man-

ner the guests or patrons of said hotel. This allegation was denied by the answer, and it was claimed that the appellant knew that the respondent intended to operate a stampmill in said building, and consented to its operation. On this question the appellant, Ridpath, testified that it was stipulated and agreed that there should be no machinery placed in the room that would in any manner be offensive or create a noisy disturbance. It was shown that shortly after the execution of the lease the respondent did install in the leased room a system of machinery propelled by electric power, and that the operation of such machinery created excessive noise, and the jarring, shaking, and vibration of said building. The appellant, after complaining to respondent of the discomfort and injury the operation of said machinery was causing him, gave respondent the notice required by law, and brought this action under the unlawful detainer statute. On the conclusion of the plaintiff's testimony, the court sustained defendant's motion for a nonsuit, holding that there was not sufficient testimony to go to the jury upon the question of nuisance. Judgment was rendered against plaintiff, dismissing the action, and from this judgment plaintiff appeals.

Many assignments of error are made in relation to the ruling of the court in sustaining objection to the testimony offered by the appellant. But without entering upon a discussion of these alleged errors, and saying merely in passing that the court seemed to have adopted a very strict rule in relation to the proof offered by the appellant to sustain the allegations of the complaint, we think on the merits of the case that the court erred in taking the case from the jury and granting the nonsuit, and that there was sufficient testimony to have been submitted to the jury on the question of whether or not the operations of the respondent constituted a nuisance within the meaning of the law. For the purposes of this case it must be conceded that there was no permission given to the lessee to operate the machinery in the manner in which it was operated, there being no testimony offered by the respondent on that subject. There was testimony by about a dozen witnesses, some of the guests in the hotel, others employes therein, by tradesmen in the neighborhood, and by the owner of the hotel, that the machinery created such a noise and quivering in the rooms of the hotel, including the parlor, that it was very annoying to the guests and occupants. Mr. Herman Cominsky testified that the stamp when dropping created a very heavy noise—as he described it, like a large hammer dropping on a piece of iron—and that the vibrations were very strong, so much so that they shook the building. Mr. Lockheart's description of the noise made by the machinery was as follows: "It makes quite a buzzing and roaring noise. Reminds one to some extent of being on the street cars when air brakes are running." He also tes-

tified that the noise of the hammer dropping was like the hammer dropping on metal; that the hotel outside of this was a very quiet hotel, and desirable for roomers; and that the machinery made a buzzing and disagreeable noise for guests to endure. Mr. Bernheart, who lived in the hotel, also testified that the machinery made a great racket and noise and disturbed the guests. He was a clerk in the office of the hotel, and testified: That it disturbed him in the office in the performance of his work. That the rumbling of the noise and vibration and the hammer was very loud, and he could not do his work as effectively in the office while the machinery was in operation as when it was not. That it could be heard all over the house and in all the rooms in the house. That he had had complaints from all the guests, and on several occasions had to move people out of certain rooms where the noise was so loud that it could not be endured; and that they had lost the leasing of the rooms on that account. That it was worse on the second floor and in the parlor, but that the vibrations reached throughout the hotel; the witness saying: "It does vibrate the building. In fact, you cannot stay in the rooms on the second floor where this is without getting the jars, not only from the beds and chairs, but all over the rooms, and even standing on the floor." That he could not use the parlor while the machinery was going on. People could not sit there, and that it was not fit for use at all, and that he had had to let people go out of it on account of this noise. One witness testified that the vibration was of such force that it affected everything in the room, and that as you stood on the floors you could feel it go through you. The testimony of the appellant, Ridpath, was in part as follows: "Q. State what occurred after these people took possession of this room in your building. A. Some time—I think it was in August—I went around to the hotel office, and I heard a terrible noise in the building, and I went to see what it was, and discovered it was machinery running under the floor of the parlor. Mr. Bernheart was with me at the time and we rushed down to the street, and went into the store, and Mr. Bernard was there, and I said: 'You must stop that. It will not do at all, and it will drive everybody out of the hotel.' And he said he would take it down, and I went out." He also testified that on Sprague street he had heard the falling of the hammer distinctly, and described the noise as being like that made by a separator of a threshing machine; testified that it shook the glassware on the chandeliers, that you could feel the vibrations of it on your body anywhere in the hotel, that it created an unnatural and unpleasant condition, that it sometimes ran for several hours in the day and sometimes for a few minutes, and that it jarred the building and was so severe that the floors quivered so that no one would want to stand on them. Mrs. Green, a

roomer in the hotel, stated that the noise produced by the machinery was loud enough to annoy any one, and she was annoyed to such an extent that she had complained about it to the clerk in the building. She stated that it was severe enough to annoy one "dreadfully," and that it annoyed her to such an extent that several times she had dressed and gone out of her room to get rid of it; also stated that she was a woman in good health and not nervous. When asked to describe the noise, she said that it reminded her very much of the first shock of the earthquake in San Francisco; that people were not able to engage in conversation in the parlor, nor carry on conversation during the time the machinery was running; that it would be impossible to do so; and, without specially reviewing the testimony, there is testimony of several other witnesses to the same effect. If this testimony is true, and it stands now uncontradicted, not being shaken in any way by the cross-examination, the operation of the machinery unquestionably under all authority constituted a nuisance which the owner of the building would have a right to have abated.

The judgment of the lower court is therefore reversed, with instructions to overrule the motion for a nonsuit, and to proceed with the trial of the cause.

FORD v. HEFFERNAN ENGINE WORKS et al.

(Supreme Court of Washington. Jan. 17, 1908.)

MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURIES TO SERVANT—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action by plaintiff to recover damages suffered through the death of her husband while in the employ of defendant, caused by stepping in a hole in the floor, evidence examined, and held to show that decedent knew of the conditions at the place where he was working, and of the danger, precluding recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 989.]

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Mary Ford, individually, and as guardian ad litem of Martin and Reuben Ford against the Heffernan Engine Works and another. From a judgment for plaintiff, defendants appeal. Reversed, with instructions to dismiss the action.

Ira Bronson, D. B. Trefethen, R. S. Eskridge, and Philip Tindall, for appellants. Walter S. Fulton, for respondent.

DUNBAR, J. This action was brought by the respondent to recover from the appellants damages alleged to have been suffered by the respondent through the death of her husband while in the employment of appellant, the Heffernan Engine Works, on the 16th day of June, 1906. Said appellant was engaged in operating machine shops. The deceased at the time of the accident had been

In the employment of the appellant as a helper for about three weeks. Most of this time he had been employed in outside work, and had been at the shops of the appellant but a few days previous to his injuries. The shops maintained by the appellant were two in number, an inner and an outer one, and the deceased's duties had kept him most of the time in the outer shop. On the 16th day of June one John Curry, a machinist and an employé of the appellant, was at work upon a drill press situated in the rear of the inner shop. He made application to the foreman for a helper, and was directed by the foreman to obtain as such helper the deceased. Curry called the deceased from his work in the outer shop, and asked him to assist him in putting a wheel upon parallel bars maintained in connection with the drill press. At the south side of the drill press was a pit or hole about 3 feet square and 10 feet deep. All the guard there was to this hole, after the door which covered it had been taken off for the purpose of doing the work then in progress, was a plank 3 inches by 12 and about 4 feet long, so that it will be seen that the entire hole was not covered by the plank. While assisting Curry to carry the wheel, weighing between 50 and 60 pounds, to the parallel bars projecting from the south side of the drill press, the deceased stepped upon the plank, and in some manner missed his footing, stepped forward, presumably into the hole, and was precipitated upon one of the parallel bars, receiving an injury from which he died in a few days. The acts of negligence relied on by the respondent were the maintenance by appellants without notice to the deceased of the hole heretofore described, and requiring the work in the immediate vicinity of this hole without notice or warning of its existence, and the failure to guard or protect the said hole. Upon the trial a verdict in favor of the respondent was returned in the sum of \$10,448. Appellants moved for judgment non obstante verdicto upon two grounds, (1) the insufficiency of the evidence to sustain the verdict, (2) that the special finding of the jury establishes freedom of appellants from liability. This motion was denied, and judgment entered upon the verdict. From this judgment, the appeal was taken.

We think all the circumstances surrounding this case show conclusively that the deceased, if he was an ordinarily prudent man, knew or ought to have known of the existence of this hole, and if that be true, respondent cannot recover, for if it was a dangerous place the danger was apparent to deceased. Respondent relies largely upon the case of *Bailey v. Mukilteo Lumber Company*, 87 Pac. 819, where it was said by this court that the servant, when directed by the master to work in a certain place, has a right to assume that he will not be exposed to unnecessary perils, or, in other words, that such a direction or order implies an assur-

ance of reasonable safety. This has been the uniform announcement of this court, and we have no desire to retreat from that position now. But it has been just as well established by this and all other courts that, where the danger which beset the servant was apparent, it was equivalent to notice from the master of the existing danger. Respondent also relies upon the case of *Johnson v. Tacoma Mill Company*, 22 Wash. 88, 60 Pac. 53, where a carpenter who was making repairs on a mill was injured by stepping backward into a barrel of hot water, the barrel being used to receive the water and steam from an exhaust pipe from an engine in the mill; the presence of the barrel being unnoticeable, by reason of the water in the barrel having pieces of bark floating on it, and by reason of no steam arising from the barrel at the time. It was said by this court that it was not the duty of the respondent to look for the barrel of water, notwithstanding he could have seen it if he had looked, for the reason that he naturally would not look for it, not knowing of its existence, and for the further reason that it did not appear that it was a necessary or common attachment to the mill, or, if it was, that it was the custom to leave it uncovered. In that case it was said that the barrel was not an incident to the business of putting up a pipe, and under the testimony was not so conspicuous as to challenge attention. Distinguishing that case from that which it seems to us is the case at bar, the court said: "The plaintiff was not injured by anything he was working with or upon." While in this case the cause of the injury was the hole which was connected with the machinery upon which the deceased was working, and he would therefore be required to take notice of the condition of things surrounding the place where he was working.

There is very little testimony which is material to the issues in this case. The only eyewitness to the accident was Curry, who was the agent of the company in the performance of this business. He testified that he asked deceased to help him carry this spur wheel, which is a metal wheel about 20 inches in diameter and 3 inches thick, and place it upon these parallel bars; that he took hold of one side of the wheel and deceased the other; and that they moved along until they reached the platform. When they stepped upon the plank, which we have before described, and while attempting to adjust or place the wheel upon the parallels, the deceased in some manner fell and fell astride of the parallel bar. In his direct examination Curry testified that deceased stepped off into the hole, but upon his cross-examination he admitted that he did not see deceased step, could not see him because the wheel intercepted his vision, and finally admitted that the facts which he had rehearsed in relation to his stepping off were not facts at all which he had observed, but were only

inferences which he had drawn from the fact that the deceased was upon the plank and that he had fallen off. So that the cause of his falling off is somewhat problematical. But, conceding that he actually did step off, and conceding also that he had not had any verbal notice from Curry or any one else as to the existence of this hole, the testimony shows that, notwithstanding it was a somewhat cloudy day, as shown by the minutes of the weather bureau, it was one of the longest days of the year, and near the middle of the day, that the front of the shop was made of glass, and that there was sufficient light in the shop to do ordinary work. We think it shows conclusively that there was sufficient light to have enabled the decedent to observe the hole. This must have been true, for Curry testifies that it was light enough for him, after the decedent was hurt, to finish the work alone, and light enough for him to see the small hole in the spur wheel to put the spindle in and turn it around so the key would fit in the key slot. It must have been light enough to do this with comfort and safety, and light enough to easily observe everything around the work, or Curry would have resorted to the lights which hung in reach of him and which were placed there to be turned on when the light was not sufficient. In addition to this, it appears from Curry's testimony that they passed near by this hole when deceased came into the shop with him, and that before they brought the wheel they brought a shaft and laid it down within a few feet of the hole. This shaft was to be placed in the hole, and it is but reasonable to suppose that, when the deceased helped to bring this shaft, placing it near the hole, leaving it there and going off to get the wheel in which the shaft was to be adjusted, he must have taken notice of the conditions existing at the place at which he was called upon to work. He must also have noticed when he stepped upon the board—the board being about 3 inches thick—which raised him up to a plane about 8 inches below the top of the parallel bars.

Considering alone the testimony of the respondent in the case, we are forced to the conviction that the decedent knew of the conditions at the place where he was hurt, and that his death occurred through one of those unfortunate accidents for which no one can be held responsible.

The judgment is reversed, with instructions to dismiss the action.

HADLEY, C. J., and ROOT, MOUNT, CROW, and RUDKIN, JJ., concur.

WALTERS v. SEATTLE, R. & S. RY. CO. (Supreme Court of Washington. Jan. 15, 1908.)

1. CARRIERS — INJURY TO PASSENGERS — OBSTRUCTION ON TRACK—LIABILITY.

A railway company may not escape liability for injury to a passenger in a collision, caus-

ed by an obstruction on the track, merely because the obstruction was caused by an agency over which it had no control. In addition it must show that it could not, by the highest degree of care and diligence, consistent with the practical operation of the road, have discovered and removed the obstruction prior to the collision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1211.]

2. SAME—RES IPSA LOQUITUR—SPECIFIC ALLEGATIONS—EFFECT.

In an action against an electric railway company for injury to passenger in a collision, caused by an obstruction on a track, she did not waive her right to rely upon a presumption of negligence arising from the fact of the injury by particularly alleging the cause of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1283.]

3. WITNESS — CROSS-EXAMINATION — QUESTIONS TENDING TO DEGRADE WITNESS.

In an action for personal injury received in a street car accident, a former motorman, who testified as to the proper method of stopping a car on a grade such as where the accident happened, and on cross-examination stated that since ceasing to be a motorman he had been discharged as a policeman because of charges preferred against him, could not be compelled to state what the charges were, since the matter could not affect his credibility as a witness to the particular fact under consideration, and in such circumstances a witness may decline to answer questions whose only purpose is to degrade him or expose him to disgrace or infamy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1021-1025.]

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Personal injury action by Inez Walters, by Leona Walters, her guardian ad litem, against the Seattle, Renton & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Sachs & Hale, for appellant. Geo. P. Rossman and Jackson Silbaugh, for respondent.

FULLERTON, J. The appellant owns and operates an electric railway extending from the city of Seattle to the town of Renton, in King county. On August 13, 1906, the respondent was a passenger on one of the appellant's cars, and was injured by a collision which occurred between the car on which she was riding and a car coming from the opposite direction. This action was brought to recover damages for the injuries received. At the trial the jury returned a verdict in favor of respondent for the sum of \$5,000. The trial judge deemed the recovery excessive, and reduced it to \$3,000, offering the respondent the alternative of accepting it, as reduced, or submitting to a new trial. The respondent accepted the modified verdict, and the judgment from which this appeal is taken was entered thereon.

The appellant requested an instruction to the effect that if the car which collided with the car on which the respondent was riding came in contact with some clay which had been deposited upon the track "by some agency not under the control of the defendant," and that when the car wheels struck

such clay the car by reason of coming in contact therewith shot forward, and that the motorman thereon did all in his power to stop the car before it came into collision with the car on which the appellant was a passenger, but could not with the highest degree of care have prevented the collision, and the motorman on the other car was guilty of no negligence, then the appellant would not be liable for the collision, or liable in damages to the respondent for her injuries. This instruction the court properly refused. It does not correctly measure the appellant's duties. For a railway company carrying passengers to show merely that a collision was caused by some obstruction of the track, caused by an agency over which it had no control, is not enough to excuse it from responsibility for a collision. It must go further, and show that it could not, by the highest degree of care and diligence consistent with the practical operation of its railway, have discovered and removed the obstruction prior to the time it operated its cars over the track. The instruction requested omitted this qualification, and was therefore incorrect as a statement of the law.

The court charged the jury, in substance, that the happening of the collision raised a presumption of negligence on the part of the railway company, and that the respondent was entitled to recover thereon, unless they were convinced that the evidence on the part of the railway company overcame this presumption. The appellant admits the correctness of the rule as applied in this jurisdiction, but contends that there was here no room for its application, as the respondent did not content herself with alleging generally that she was a passenger on the car, that a collision occurred, and that she was injured thereby, but went farther and alleged particularly the cause of the accident, and that since she alleged the cause of the accident she must prove it, as alleged, or subject herself to a nonsuit. This contention is not tenable. The plaintiff was not deprived of the case proved by a failure to prove all that was alleged. She was only obligated to prove the substance of the issue, and by the substance of the issue is meant the facts essential to a recovery. "The rule is, that whatever cannot be stricken out without getting rid of a part essential to a cause of action must be retained, and, of course, proved even if it be described with unnecessary particularity." In this case all that pertained to the particular cause of the accident could have been stricken out and still enough remain to warrant a recovery. The particular cause of the accident was not therefore of the substance of the issue, and it was not necessary for the appellant to prove it in order to recover, even though it was alleged. Doubtless in many cases it is desirable to plead and prove the exact cause of an accident in order that the question of the defendant's negligence may be put beyond the

peradventure of a doubt, and thus insure a recovery, where otherwise recovery might be doubtful if the presumption alone were relied upon. Such was perhaps the purpose of the plaintiff in this instance. But the plaintiff is not to be deprived of the case her pleadings and proofs made merely because she alleged a stronger case than she was able to prove. *Cassady v. Old Colony St. Ry. Co.*, 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285; *Chicago City Ry. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087; *North Chicago St. Ry. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Wood v. Roxborough, etc.*, Pass. N. Co. (Pa.) 12 Montg. Co. Law Rep'r, 155.

A Mr. Johnson, who had formerly been a motorman in the employ of the Seattle Electric Company, was called as a witness on part of the respondent, and testified as to the proper method of stopping a car when on a grade such as the one on which the accident in question happened. On cross-examination he testified that he had been on the police force of the city of Seattle since he quit work for the Seattle Electric Company, but was dismissed therefrom because of certain charges which were preferred against him. He was asked what the charges were, and declined to answer. The question was repeated, when an objection was interposed, which the court sustained. It is claimed that this was error, but we think the ruling proper. The witness was being questioned on a collateral matter, which could affect only his credibility generally, not his credibility as a witness to the particular fact under consideration, or as a witness in the particular case. When such is the fact, a witness may decline to answer questions whose only purpose is to degrade him, or expose him to disgrace or infamy. That such was the purpose of this question cannot, of course, be gainsaid.

It is finally insisted that the amount of recovery is excessive, notwithstanding the reduction made by the trial judge. But we have examined the evidence on this question, and see no sufficient reason for a further reduction.

The judgment is affirmed.

HADLEY, C. J., and CROW, RUDKIN, and DUNBAR, JJ., concur. MOUNT and ROOT, JJ., took no part.

LOBB et ux. v. SEATTLE, R. & S. RY. CO.
(Supreme Court of Washington. Jan. 15, 1908.)

1. PLEADING—AMENDMENT—DAMAGES.

Where, in a personal injury action, general damages were claimed, both in the complaint and on the hearing, in addition to special damages, though no designated amount was claimed as general damages other than that the demand for relief stated a sum larger than the total set out as special damages, it was proper to allow plaintiffs to amend, after both sides had rested, by specifying the particular amount demanded, where plaintiffs offered evidence of gen-

eral damages without objection, and where the cause was tried as if upon sufficient pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Pleading, §§ 642-664.]

2. CARRIERS — INJURY TO PASSENGER — RES IPSA LOQUITUR — SPECIFIC ALLEGATIONS — EFFECT.

In an action against an electric railway company for injury to a passenger in a collision, plaintiffs did not waive their right to rely upon the presumption of negligence arising from the fact of the accident by particularly alleging the cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1283.]

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Personal injury action by W. S. Lobb and wife against the Seattle, Renton & Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Sachs & Hale, for appellant. Aust & Terhune, for respondents.

FULLERTON, J. The appellant owns and operates an electric railway between the city of Seattle and the town of Renton, in King county. On November 2, 1906, the respondent Annie Lobb took passage on one of the appellant's cars at Renton, intending to ride to the city of Seattle. On the way the car for some cause left the track and turned partially over, throwing the respondent with considerable violence across the car, causing injuries for which she sued in this action. The jury returned a verdict in her favor, and from the judgment entered thereon, the railway company appeals.

It is first assigned that the court erred in allowing the respondents to amend their complaint at the close of the evidence after each side had rested. In their complaint the appellants alleged both general and special damages. The claims for special damage were itemized, and the amount of each item specially stated. There was no designated amount claimed as general damages other than that the demand for relief stated a sum considerably in excess of the total set out in the complaint as special damages. The amendment sought and allowed was to add to that paragraph of the complaint describing the injuries received and their effect the words, "and plaintiffs have been damaged thereby in the sum of \$1,547.75," a sum which, when taken with the special damages alleged, equaled the amount demanded in the complaint. When the amendment was tendered, the appellant objected, and, on its objection being overruled, it claimed to be surprised by the amendment, and stated that it was not prepared at that time to meet it with further evidence, but did not move for a continuance or time to produce further evidence. It is urged here that the prayer of the complaint is no part of the allegations of fact, and that all the appellant was entitled to recover under the complaint as it stood prior to the amendment was the amount of the special damages alleged, and that it was

error on the part of the court to allow at that stage of the proceeding an amendment which would so materially increase the amount of permissible recovery. But we think this contention not well taken, even if it be assumed that the complaint as it originally stood only permitted a recovery of special damages. There was no objection interposed when the respondents offered evidence to sustain their claim of general damages, and as far as the record discloses the case would not have been tried differently had this clause put in by the amendment been in the original complaint; or, to state the fact in another way, the cause was tried as if upon sufficient pleadings. Where such is the case, amendments may be allowed to the pleadings at any stage of the proceedings; and, even this court in such cases, where no amendments have been offered or made, is obligated by statute to treat all amendments which could have been made as made, and try the cause upon its merits. Ballinger's Ann. Codes & St. § 6535. The case of *Howells v. North American T. & T. Co.*, 24 Wash. 692, 64 Pac. 786, is not in point here. In that case the court instructed the jury that the plaintiff could recover for a specific item, although no damages were claimed on account thereof in the bill of particulars furnished the defendant by the plaintiff on the defendant's demand. That is not the case before us. Here general damages for the injury were at all times claimed, both in the complaint and on the hearing, the defect being that the complaint did not specify the particular amount demanded. The amendment was properly made, and the appellant suffered no prejudice thereby.

The question whether the respondent waived her right to rely on the presumption of negligence, arising from the fact that the car was derailed, by pleading and undertaking to prove the specific cause of the accident, is discussed and decided contrary to the appellant's contention in *Walters v. Seattle, Renton & Southern Railway Co.* (Wash.) 93 Pac. 419. We find no merit in the claim that the evidence does not justify the amount of the recovery.

The judgment is affirmed.

HADLEY, C. J., and CROW, MOUNT, RUDKIN, and DUNBAR, JJ., concur. ROOT, J., took no part.

GENNELLE v. BOULAIS et al.

(Supreme Court of Washington. Jan. 17, 1908.)

SALES—CONDITIONAL SALE—DEFAULT IN PAYMENT—RECOVERY OF PROPERTY—DEFAULT OF SELLER.

The seller of personalty under a conditional sale may not recover the property for default of the buyer in making a payment, caused directly and primarily by default of the seller in refusing to give a title free of lien, the purchaser having at all times been ready and willing to pay on the giving of a good title.

Appeal from Superior Court, Ferry County; D. C. Carey, Judge.

Action by Peter Gennelle against Alphonse Boulais and another. Judgment for defendants. Plaintiff appeals. Affirmed.

W. T. Beck and Alfred M. Craven, for appellant. G. V. Alexander and C. P. Bennett, for respondents.

RUDKIN, J. On the 19th day of April, 1905, a conditional sale agreement of the personal property now in controversy was entered into between one Lucile Ries and the defendant Boulais. The memorandum of sale recited: That the property should remain the absolute property of the vendor until after the full and complete payment of the purchase price of \$2,500. That the purchase price should be paid as follows: \$200 in cash, the receipt of which was acknowledged; \$300 on June 15, 1905; \$500 on August 15, 1905; \$500 on October 15, 1905; \$500 on December 15, 1905, and \$500 on February 15, 1906. That the deferred payments were evidenced by promissory notes of even date, bearing interest at the rate of 6 per cent. per annum from date until paid. That the property should be at the risk of the vendee while in his possession, and that loss thereof or damage thereto should not extinguish or diminish liability on the notes given for the purchase price. That the property should be kept insured in a sufficient sum to save the vendor harmless, if possible. That possession was given on the date of sale. That in case default was made in the payment of the purchase-money notes, or either of them, principal or interest, as the same became due, the vendor was empowered to take possession of the property, with or without process of law, and that the contract should be forfeited and determined at the election of the vendor, and all sums theretofore paid by the vendee should be retained by the vendor as rental for the use of the property. On the 30th day of April, 1904, one William Graham filed a lien against the mill property described in the above memorandum of conditional sale for the sum of \$385.13, and on the 31st day of May, 1904, an action was commenced in the superior court of Ferry county against the vendor Lucile Ries, and one F. A. Gardner to foreclose said lien, which action was still pending at the time of the commencement of this action. The purchaser Boulais had no actual notice of the lien claim or of the pendency of the foreclosure action until after the conditional sale contract was entered into. The purchase-money notes were all paid except the two notes for \$500, each maturing on the 15th day of December, 1905, and the 15th day of February, 1906, respectively. On the 3d day of May, 1906, demand was made for payment of these two notes, but payment was refused, except conditionally. On the same day Ries transferred the property by bill of sale to the plaintiff, Gennelle, and the present

action was instituted to recover possession of the property.

The only controverted fact in the case is whether an extension of time was given within which to make payment of the last two notes to mature; the respondent contending that the time for the payment of the note maturing December 15, 1905, was extended until February 15, 1906, and that the time for payment of the note maturing February 15, 1906, was extended until May, 1906, the appellant contending that no such extension was granted. For reasons to be presently stated the question of extension is not very material. In April, 1905, all the purchase-money notes were left with the British-American Trust Company of Grand Forks for collection. During the month of February, 1906, the respondent Boulais paid the amount of the note maturing December 15, 1905, to the trust company, with instructions to pay the same over to the payee upon receiving a deposit of a transfer of a clear title to the mill property, which would include a release or satisfaction of the Graham lien. On the 11th day of May, 1906, the amount of the last note was paid to the clerk of the superior court of Ferry county under like conditions and stipulations. It clearly appears from all the testimony that the respondents were ready and willing to make full payment of the purchase price long prior to the commencement of this action, provided the vendor would convey a clear title and procure a release or satisfaction of the Graham lien, but not otherwise. If, therefore, the respondents had a right to insist upon a release or satisfaction of this lien before making final payment, they were not in default at the time of the commencement of this action. But if they had no such right, they manifestly were in default, whether an extension of time for payment had been granted or not; for the first note was more than two months overdue, and no payment had been made or tendered, except conditionally. The question to be decided, therefore, resolves itself into this: Can a purchaser under a conditional contract of sale retain possession of the property and defend an action for possession on the ground that the title of his vendor is defective or encumbered? The appellant rests his case on the broad principle that a bailee, a tenant, or a purchaser will not be permitted to deny the title of his bailor, landlord, or vendor in an action to recover possession of the property bailed, leased, or sold. Within certain limits this rule is well established, but we do not think that it is applicable or controlling here. It fairly appears from the record that the appellant's vendor did not have what is termed a "marketable title" at the time a demand for the purchase price was made, or at the time of the commencement of this action, and this fact does not seem to be controverted; and we cannot lend our sanction to a rule of law which will permit

a vendor to maintain an action of this kind, while himself in default, and when his default is the direct and proximate cause of the default on the part of the purchaser. A purchaser of personal property may maintain an action against his vendor for breach of warranty of title without returning or offering to return the property, or he may recoup his damages in an action for the purchase price. A purchaser of real property in possession may recoup his damages in the same manner in an action for the purchase price, or he may maintain an action for specific performance and obtain a reduction or abatement of the purchase price commensurate with any encumbrance on the property. We do not think that a vendee in possession of personal property should be deprived of these rights by a mere change in the form of action. In other words, we do not think that a vendor can tender an encumbered or doubtful title and demand full payment of the purchase price, thus driving the purchaser to his action to recover the purchase money paid, or to an action for damages for breach of warranty. The appellant concedes that the same rule applies to both real and personal property, and in *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184, this court held that a vendor in default could not maintain an action for the rescission of a contract for the sale of real property. The rule there announced is fully sustained by the authorities. *Dennis v. Strassburger*, 89 Cal. 583, 26 Pac. 1070. Whatever other remedy the appellant might have, the court below correctly ruled that he could not recover possession of the property for a default on the part of the purchaser, caused directly and primarily by the default of his own vendor.

The judgment of the court below is therefore affirmed.

HADLEY, C. J., and FULLERTON, CROW, ROOT, and DUNBAR, JJ., concur.

STATE ex rel. BURROWS et ux. v. SUPERIOR COURT FOR CHEHALIS COUNTY et al.

(Supreme Court of Washington. Jan. 15, 1908.)

1. EMINENT DOMAIN—PETITION—DESCRIPTION OF PROPERTY—SUFFICIENCY.

A petition in a proceeding by a logging boom company to condemn private riparian rights sufficiently complied with Ballinger's Ann. Codes & St. § 5637, requiring petitions in condemnation proceedings to describe with reasonable certainty the property to be taken, where it alleged the facts, as to the existing and proposed construction of a boom, that the lands affected are contiguous to the river, and described them by reference to government surveys and recorded plats, and alleged that it would be necessary to occupy the river and interfere with defendants' rights of navigation and access to and from their lands and their appurtenant shore rights and privileges, by occupying with saw logs, etc., the part of the river in front of their lands, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 509-518.]

2. SAME — CONDEMNATION OF INSUFFICIENT PROPERTY—EFFECT.

Where enforcement of decrees enjoining a logging boom company from interfering with private riparian rights has been stayed, pending the prosecution of proceedings to condemn such rights, the owners may not complain of decrees in such proceedings adjudging a public use because the company is not condemning sufficient property to enable it to transact business without using additional property of such owners not sought to be taken, since they may enforce their rights adjudicated in the injunction suits, if invaded without compensation.

3. SAME.

A riparian owner's shore rights and rights to access to and from his land and to navigation of the part of the river adjoining his land are property rights, and subject as such to condemnation for public use, without appropriation of the land itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 94-96.]

4. SAME—LOGGING RIGHTS.

Ballinger's Ann. Codes & St. § 4379, requires a logging boom company to file with the state a plat or survey of so much of the shore lines of the waters of the state and lands contiguous thereto as are proposed to be appropriated, such plat to be made from United States records, etc. Held that, though a slough connecting with a river is not a part of the river as meandered by the governmental survey, from which such a company made its plat, it is subject to condemnation by the company, where it appears to be within contiguous lands included in the plat.

5. SAME—PRIOR ATTEMPT TO PURCHASE—NECESSITY FOR.

A logging boom company is not prevented from condemning riparian rights for failing to first attempt to purchase such rights, where the owners denied the company's right to take them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 462.]

6. SAME—LOGGING—PUBLIC USE.

That no logging is done on a river except by a company in which the stockholders are identified with those of a boom company does not show, in proceedings by the boom company to condemn riparian rights, that condemnation is not sought for a public use, but for a private purpose.

Certiorari, on the relation of O. P. Burrows and others, to review preliminary decrees of the superior court of Chehalis county adjudging a public use in condemnation proceedings by Grays Harbor Boom Company against the relators. Affirmed.

J. C. Cross, A. Emerson Cross, Bogle & Spooner, and J. W. Robinson, for relators. Ben Sheeks and J. B. Bridges, for respondents.

CROW, J. On March 28, 1907, the Grays Harbor Boom Company, a corporation, instituted in the superior court of Chehalis county three separate proceedings to condemn certain property rights, the first being against O. P. Burrows and wife, the second against J. O. P. Lownsdale and wife and Ladd & Tilton, and the third against F. K. Hiscock. After preliminary decrees were entered adjudging a public use, all of the defendants, upon stipulation, applied to this court in this one proceeding for a writ of certiorari, and

the writ having been issued, the decrees are now before us for final review.

The respondent, the Grays Harbor Boom Company, was incorporated under the laws of Washington in 1893, with authority to conduct a booming business in the Humptulips river and elsewhere. Within the statutory time it filed in the office of the Secretary of State a plat or survey of so much of the shore lines of the waters of the Humptulips river and lands contiguous thereto as it proposed to appropriate, and without unreasonable delay proceeded to construct and operate a boom. Thereafter the relators, claiming it was interfering with certain of their private property rights as riparian owners, instituted equitable actions to enjoin such interference. Decrees in their favor were affirmed in *Burrows v. Grays Harbor Boom Company* (Wash.) 87 Pac. 937, *Lownsdale v. Grays Harbor Boom Company* (Wash.) 87 Pac. 943, and *Hiscock v. Grays Harbor Boom Company* (Wash.) 87 Pac. 943. Later this court, upon motion, entered orders staying enforcement of the several decrees until the respondent could institute and prosecute condemnation proceedings. The Humptulips river, which empties into Grays Harbor, is, for a distance of three miles above its mouth, subject to a tidal flow, which reaches and passes the lands of relators. Within the Lownsdale lands is a navigable tide-water slough, known as "Jessie's slough," connecting with the river, which the respondent has used, and is now using, in its booming operations. It alleges that its boom commences about the middle of the river near the southern boundary of Lownsdale's land, and extends northerly, occupying that portion of the stream lying between its center and the west bank; that the Jessie slough, which is not meandered, connects with the west side of the river, and is practically included in the boom; that the occupancy and use of the slough is necessary for receiving, storing, and sorting logs, which will interfere with its navigation; that in so using the slough it will be necessary for servants of the boom company to also use 10 feet of its westerly bank by walking thereon when handling, driving, booming, and sorting logs, such use of the west bank not to be exclusive, but concurrent with that of the owners of the land.

The evidence shows that at the time of the hearing the upper end of the boom as then constructed was immediately below the land of the relators Burrows and wife; that the United States government had granted the respondent permission to extend its boom further up the river past the Burrows land, leaving for navigation an open channel of 50 feet in width on the Hiscock or easterly side of the river; that the respondent was at the time perfecting arrangements to so extend its boom; that the purpose of such extension is to aid navigation; that heretofore logs coming down the river on freshets, in great quantities, not controlled by the respondent, would first fill the boom, and then back up and fill

the upper channel of the river opposite the lands of Burrows on the west and Hiscock on the east, and that the boom, when extended and enlarged, will avoid this difficulty, by receiving all logs and timber products, and permitting the eastern channel of the river to remain open for navigation to the width of 50 feet. By these proposed extensions and improvements respondent is endeavoring to avoid any continuance of the acts enjoined in *Burrows v. Grays Harbor Boom Company*, and the other cases above mentioned, and it contends that such riparian and property rights of the relators as it will hereafter need it is now seeking to condemn.

As against the relators Lownsdale and wife and Ladd & Tilton respondent asks that it be permitted to condemn and appropriate the right to occupy with saw logs and other timber products that portion of the river which is between its westerly bank and the boom, also to interfere with the relator's shore rights and right of access to and from their lands, and to appropriate the right to occupy the whole of the waters of the slough within their lands, together with a right of way along its westerly bank as above mentioned. As against the relators Burrows and wife, respondent asks that it be permitted to appropriate and condemn the right to occupy with saw logs and other timber products that portion of the Humptulips river opposite their lands, and the right to interfere by so doing with their right of navigation of that portion of the river so occupied, with their right of access to and from their lands, and with their appurtenant shore rights and privileges. As against the relator Hiscock it asks that it be permitted to appropriate and condemn the right to occupy the waters of the river with logs and other timber products consigned to it where the river borders upon his land, and the right to interfere with his right of navigation and access to and from his lands, and his appurtenant shore rights and privileges.

The relators' first contention is that the preliminary decrees are void, or at least erroneous, for the reason that the descriptions of the property sought to be taken are too indefinite within the requirements of the eminent domain statute. Section 5637, Ballinger's Ann. Codes & St. The petitions, after alleging the facts as to the present and proposed construction of the boom, further allege that the lands of the several relators are contiguous to the river. They describe the lands by reference to government surveys and public plats now of record, and then allege that it will be necessary for respondent to occupy the river and interfere with shore rights and privileges of the several relators appurtenant to said lands, as above mentioned. Respondent thus seeks to condemn certain definite rights with which it must necessarily interfere, but asks no other property of the relators Burrows and Hiscock. In other words, it does not seek to take any of their lands by metes and bounds, but only certain private

shore rights and privileges appurtenant thereto. As against the Lownsdales it further seeks to condemn certain rights in the Jessie slough and upon its west bank, which are set forth in the petition and decree. The descriptions are sufficient to identify the property rights sought to be taken and to meet the requirements of the statute.

The relators further contend that the respondent is seeking to condemn limited rights and easements which when taken will be insufficient to enable it to transact its business as a public service corporation without using additional property of the relators not sought to be appropriated. We fail to understand how the respondents' alleged failure to condemn sufficient property for its public needs can afford the relators any ground of complaint. The record shows that the respondent is endeavoring to appropriate such property rights as it thinks it will need in its corporate business, so that it may use the same without disobeying the injunction decrees. That it might do so the enforcement of those decrees was temporarily suspended by orders of this court, which orders of suspension will become inoperative upon the final determination of these condemnation proceedings. Respondent will then act at its peril if it interferes with any property or rights of the relators, protected by the injunctions, but not appropriated. The relators' rights have been heretofore adjudicated in their equitable actions, and upon the final determination of these condemnation proceedings they will be at liberty to immediately enforce and protect such of their property rights as may be thereafter illegally invaded by the respondent. The condemnation will only authorize it to use property legally appropriated. The injunctions were granted in the equitable actions, because it appeared that the respondent was taking and damaging certain private property rights of the relators without just compensation, in direct violation of section 16, article 1, of the state Constitution. The respondent contends that it is now endeavoring to proceed in strict compliance with the Constitution, the eminent domain statute, and the injunctive decrees, and it should be permitted to do so without being required to condemn, at the relators' instance, lands which it insists it will neither need nor use. If respondent is not proceeding in good faith (a condition not yet appearing), the relators will be afforded ample protection when its bad faith or wrongful acts shall assume substantial form. The relators' riparian rights and interests here involved have been adjudicated to be property rights, which we now hold to be subject to condemnation for public use. This holding is in harmony with principles announced in the following cases pertaining to rights of a somewhat kindred nature: *Hatch v. Tacoma*, *Olympia & Grays Harbor R. Co.*, 6 Wash. 1, 32 Pac. 1063; *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac.

735, 54 L. R. A. 190; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Seattle Transfer Co. v. Seattle*, 27 Wash. 521, 68 Pac. 90; *State ex rel. Smith v. Superior Court*, 30 Wash. 219, 70 Pac. 481. Mr. Lewis, in the second edition of his work on *Eminent Domain*, at section 56, says: "If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of property itself, that, whenever the lawful rights of an individual to the possession, use, or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is *pro tanto*, taken, and he is entitled to compensation." If riparian rights, right of access, right of light and air, and other kindred, intangible rights appurtenant to real estate, are property, they are certainly such property, and such an interest in real estate, as an owner would be entitled to alienate, thereby conveying an easement. If such rights may be conveyed, we see no reason why they may not, under the right of eminent domain, be condemned, when necessary, for public use, without an appropriation of the actual land itself.

The relators further contend that the respondent is not seeking to condemn the westerly bank of the river, although it will necessarily be used as a retaining wall for the boom, and that for this reason it should not be permitted to proceed, unless it seeks to appropriate the bank and a portion of their lands also. The respondent insists that it does not intend to use any private property of relators in the banks of the river; that although the banks may at times hold logs in the boom, they also hold the water in the river which floats the logs; that such use of the banks and the water is a necessary incident to the public rights of navigation to which respondent is entitled under the statutes of this state; and that it will only use the banks in the same manner that any other person will use them in navigation. As heretofore suggested, the relators will sustain no loss if the respondent fails to condemn sufficient property rights for its public use. As to the relators Lownsdale and wife and Ladd & Tilton it is contended that the map of location, filed by the respondent with the Secretary of State does not show the Jessie slough as being within the property which it then intended to appropriate, and that it cannot now condemn the same, or any rights therein. The map was made from the government field notes taken from the office of the Surveyor General. These field notes do not, nor does the government

survey, show the existence of the slough. The evidence shows that the slough was not meandered, and that the present physical location of the river itself does not exactly correspond with the government field notes and survey which have been made for more than 50 years. Section 4379, Ballinger's Ann. Codes & St., requires a boom company, within 90 days after its articles of incorporation have been filed, to file in the office of the Secretary of State a plat or survey of so much of the shore lines of the waters of the state and lands contiguous thereto as are proposed to be appropriated; such plat to be made from the records in the United States Surveyor General's office of this state, or by a competent surveyor subsequent to an actual survey. This plat was made from the records in the Surveyor General's office. It not only shows the stream as meandered by the original field notes, but also shows the relators' and other lands contiguous thereto. If it be conceded that the slough is not a part of the river as meandered, and shown by the original government survey and field notes, it is as shown by the evidence actually within the lands of Lownsdale and wife, which are included in the plat and are therefore subject to condemnation. The relators contend that, by these condemnation proceedings, as prosecuted, the respondent is endeavoring to entirely close the river from navigation, in violation of the statutes of the United States and the permit granted to respondent by the United States government that the appropriation thus attempted should not be decreed by the courts of this state, and that any such judicial action would constitute an attempted grant of judicial authority to respondent, permitting it to maintain a public nuisance in the navigable waters of the state. The evidence does not sustain this contention. It has been shown that the respondent, by the extension of its boom now being made under permission of the United States government, will be enabled to, and will, keep open for navigation a channel of 50 feet in width on the easterly side of the river, and that it is now seeking to appropriate property rights of the relators as above mentioned to aid it in carrying out that purpose. There is no merit in another suggestion made by the relators that the respondent cannot condemn because it did not, prior to the commencement of these proceedings, endeavor to obtain by purchase the rights and privileges it now seeks to appropriate. The evidence shows that such endeavors were made by respondent; but, even though the contrary appeared, yet the position of the relators in this proceeding will not permit them to now present any such objection. State ex rel. Skamanla Boom Co. v. Superior Court (Wash.) 91 Pac. 637.

Relators further contend that the respondent is not seeking to condemn for a public use, but for a private purpose. They base this contention on the proposition that no

logging is being done upon the stream except by a certain other corporation in which the stockholders are identical with those of the respondent corporation. The evidence does not sustain this contention, which in any event is without merit, as shown by the opinion in State ex rel. Wilson v. Superior Court (Wash.) 92 Pac. 269, recently rendered by this court.

The relators further contend that no public necessity for the condemnation has been shown. Without discussing the evidence in detail, all of which we have carefully read and considered, we will state that it is amply sufficient to sustain the finding of the trial court that such public necessity does exist. The foregoing discussion substantially covers all controlling points presented by the relators. We will, however, state that, having examined the entire record, together with all the assignments of error made and discussed in the briefs, we are unable to find that the trial court has committed any prejudicial error.

The judgments are affirmed.

HADLEY, C. J., and MOUNT, ROOT, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

STATE ex rel. BURROWS et ux. v. SUPERIOR COURT FOR CHEHALIS COUNTY et al.

(Supreme Court of Washington. Jan. 15, 1908.)
 EMINENT DOMAIN—RIPARIAN RIGHTS—STATUTES CONSTRUED.

Ballinger's Ann. Codes & St. § 4388, authorizes log driving companies to condemn "shore rights or other property" upon rivers. Section 4390 provides that when remonstrances are legally made and filed such a company may not take "lands or sloughs" within territory owned by the remonstrators. Held that, though lands or sloughs may not be condemned as against sufficient remonstrances, such companies may condemn the right to create and use artificial freshets past lands, without regard to remonstrances.

Certiorari on the relation of O. P. Burrows and wife, to review a preliminary decree of the superior court for Chehalis county adjudging a public use in a condemnation proceeding by the Humpulps Driving Company against relators. Affirmed.

J. W. Robinson, for relators. Ben Sheeks and J. B. Bridges, for respondents.

CROW, J. On March 28, 1907, the Humpulps Driving Company, a corporation, instituted in the superior court of Chehalis county proceedings to condemn certain property rights of O. P. Burrows and Alice Burrows, his wife. After the entry of a preliminary decree adjudging a public use, the defendants applied to this court for a writ of certiorari, and the writ having been issued, the decree is now before us for review.

The application herein was made to this court at the same time a like application was

made in *State ex rel. O. P. Burrows v. Superior Court of Chehalis County* (No. 6,853) 93 Pac. 423, in which we have this day affirmed decrees of the superior court. Practically all assignments of error made in that proceeding are repeated here, and we will in this opinion only consider one point not then presented. The respondent, the Humptulips Driving Company, was organized under "An act to provide for the organization and incorporation of companies for clearing out and improving rivers and streams in this state, and for the purpose of driving, sorting, holding, and delivering logs and other timber products thereon," etc. Chapter 72, p. 128, Sess. Laws 1895; sections 4386-4394, Ballinger's Ann. Codes & St. In its petition the respondent alleged that within the statutory time it filed its plat as required by section 4387, Ballinger's Ann. Codes & St., showing shore lines of waters of the Humptulips river in Chehalis county, and lands contiguous thereto, proposed to be appropriated; that it has erected, maintained, and is now operating in the Humptulips river and its tributaries, many miles above the lands of the relators, certain splash dams for creating artificial freshets to aid it in driving saw logs and other timber products into a boom near the mouth of the river; that the relators own certain described tracts of land contiguous to and bordering upon the west banks of the Humptulips river; that it is at times necessary for respondent to create artificial freshets by means of its splash dams; and that it is also necessary for it to condemn and appropriate as against the relators the right to create such artificial freshets in so far as their private riparian rights may be affected, and also the right to drive saw logs down the river by means of such artificial freshets. The respondent had been operating upon the river for a number of years, when the relators instituted an equitable action against it and the Grays Harbor Boom Company to enjoin them from interfering with the relators' riparian rights, and secured an injunction decree, which was affirmed by this court in *Burrows v. Grays Harbor Boom Company* (Wash.) 87 Pac. 937. Thereupon the respondent, the Humptulips Driving Company, instituted condemnation proceedings in which it now seeks to appropriate the right to create artificial freshets past the lands of the relators to the extent that such freshets may interfere with their riparian rights and to drive saw logs on such freshets, contending, however, that it does not intend to take or flood any of their contiguous lands.

The relators answered, alleging that the Humptulips river was and is affected by the tide for a distance of about three miles above its mouth, and past their lands; that within the time fixed by section 4390, Ballinger's Ann. Codes & St., the relators and others being then owners of more than one-half of the lands lying alongside and abutting that portion of the Humptulips river affected by

the tide, filed in the office of the auditor of Chehalis county their written remonstrances against the respondent's contemplated improvement of that portion of the river affected by the tide; and that the respondent is therefore estopped from making the appropriation it now asks. The evidence shows that this remonstrance was signed by owners of more than one-half of the lands contiguous to that portion of the river affected by the tide but that it was not signed by owners of one-half of the lands contiguous to the entire river, or to that portion of the river used by the respondent, and which it has improved or now seeks to improve. The contention of the relators for an estoppel is based upon section 4390, Ballinger's Ann. Codes & St., reading as follows: "Such corporation shall have power and is hereby authorized, in any of the rivers and streams of this state, or the dividing waters thereof, to remove jams, roots, snags and rocks, improve and straighten the channel, build wing dams and sheer booms, construct dams with gates or otherwise for the purpose of storing water with which to produce artificial freshets, and in all ways to improve such streams and rivers for the purposes herein mentioned and contemplated: * * * Provided, however, that whenever the owners of more than one-half the land lying alongside or abutting on any stream affected by the tide, proposed to be improved according to this act, shall file with the board of county commissioners of the county in which said river is situated a remonstrance against any improvements of so much of the stream as is affected by the tide, it shall then be unlawful for any corporation to take the land or any slough within the territory owned by any such remonstrances: Provided, That such remonstrance shall be filed with said board within fifteen days from the filing of said plat."

The evidence shows that portions of the Humptulips river are about 250 feet in width; that the respondent's splash dams are respectively 14, 25, and 30 miles above the relators' lands; that the stream is floatable for logs during certain seasons of the year at times of natural freshets, and with the aid of artificial freshets at other times; and that there is a vast amount of tributary timber dependent upon its use for being carried to market. What effect do the remonstrances filed and pleaded have in this case? Must the statute be so construed as to hold that such remonstrances will prevent any condemnation of the right to create and use artificial freshets in the stream past relators' lands? Section 4388, Ballinger's Ann. Codes & St., confers upon the respondent the right to acquire by condemnation, if necessary, land, shore rights or other property upon the river. Section 4390, above quoted, provides that, when the remonstrances are legally made and filed, it shall be unlawful for the driving company to take lands or sloughs within territory owned by the remonstrancers. Con-

struing these two sections of the same act together, it is evident that the Legislature intended to distinguish lands and sloughs from shore rights and other property, and that, while lands or sloughs may not be taken as against the remonstrances, the statute does not make it unlawful to take shore rights or other property subject to appropriation. The respondent is not attempting to appropriate any land, but seeks only to interfere with the relators' riparian rights by creating artificial freshets in the river, thus interfering with the natural flow of the water, without flooding or taking their contiguous lands. The respondent contends that under the statute it is necessary for the remonstrances to be signed by the owners of more than one-half of all lands abutting the river above, as well as along that portion affected by the tide. While there is merit in this contention, we do not find it necessary to pass upon the same; for, assuming without deciding that the remonstrances are sufficient, and that they need only be signed by the owners of one-half of the land abutting that portion of the river affected by the tide, yet the relators' plea of estoppel must fail, as the respondent is not appropriating any land or slough owned by them. The statutory authority to appropriate shore rights and other property of the relators is not affected by the remonstrances, and under that authority respondent now seeks and is entitled to condemn the right to create artificial freshets. No part of relators' lands will be taken, and it is not contended that the driving company is attempting to violate the statute by taking any slough.

The judgment is affirmed.

HADLEY, C. J., and MOUNT, ROOT, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

TERGESON v. ROBINSON MFG. CO.

(Supreme Court of Washington. Jan. 15, 1908.)

1. MASTER AND SERVANT—DEFECTIVE APPLIANCES—NEGLIGENCE—QUESTIONS FOR JURY.

Whether a guard on a machine had become defective and out of repair, and whether its want of repair was the proximate cause of injuries to an employé operating the machine, and whether the employer was negligent in permitting the guard to remain out of repair, *held*, the evidence being conflicting, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1001-1030.]

2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether an employé injured while operating a machine was guilty of contributory negligence, *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

3. SAME—FAILURE OF EMPLOYER TO WARN AND INSTRUCT EMPLOYÉ—NEGLIGENCE.

One who employs a youth, without experience, to operate a planing machine provided with top, bottom, and side heads, equipped with

knives, must instruct and warn the employé, and a failure so to do is negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 314-316.]

4. SAME—QUESTION FOR JURY.

Where, in an action for injuries to an employé while operating a planing machine, the evidence was conflicting whether the employer had instructed and warned the employé, the issue was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1044-1050.]

5. APPEAL—INSTRUCTIONS—REVIEW.

Where the transcript on appeal shows that a written request setting forth the instructions desired was made and filed with the clerk, and the statement of facts shows the instructions given and exceptions to those given and refused, an instruction formally requested in writing, and filed with the clerk, is under 2 Ballinger's Ann. Codes & St. § 5064, a part of the record, and the refusal to give it is reviewable, though it is not included in the statement of facts.

6. TRIAL—QUESTIONS FOR JURY—WITHDRAWAL OF ISSUE.

Where, in an action for injuries to an employé while operating a machine, the complaint charged that the employer was negligent in failing to provide a proper belt shifter, in permitting a guard to become and remain out of repair, and in failing to instruct and warn the employé, and there was no evidence that the insufficiency of the belt shifter had anything to do with the accident, the refusal to charge that it was immaterial, whether the belt shifter was or was not a proper shifter, was erroneous.

7. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action for injuries to an employé operating a machine, there was no evidence that the insufficiency of a belt shifter had anything to do with the accident, the error in refusing to charge that it was immaterial whether the belt shifter was or was not a proper appliance for its intended purpose was not cured by a charge that if the employer did not provide a proper belt shifter, and the failure so to do caused the injuries complained of, the employer was negligent, as it submitted an issue not authorized by the evidence tending to confuse the jury.

Appeal from Superior Court, Snohomish County; J. A. Coleman, Judge, pro tem.

Action by Pearl Terjeson, by Soren Terjeson, his guardian ad litem, against the Robinson Manufacturing Company. From a judgment for plaintiff, defendant appeals. Reversed, and remanded for new trial.

Cooley & Horan, for appellant. Frank C. Park and Wilshire & Kenaga, for respondent.

CROW, J. This action, which has heretofore been in this court (43 Wash. 208, 86 Pac. 578), was commenced by Pearl Terjeson, by Soren Terjeson, his guardian ad litem, against Robinson Manufacturing Company, a corporation, to recover damages for personal injuries. From a judgment in plaintiff's favor, the defendant has appealed.

The respondent, an employé of appellant, was injured on March 2, 1905, while running lattice through a sticker or planing machine, which machine was provided with top, bottom, and side heads, equipped with knives. The lattice material was passed through feed rolls to the lower and upper knives, and thence out of the machine to the rear. A

long pole was provided as a belt shifter. It was placed on top of the machine, one end being within easy reach of the operator, and the other end resting in a notch to the rear of the belt and countershaft. In this position it served to retain the belt on the fixed pulley. Near the center of the machine the pole rested between a set screw and an iron casting, which served as a fulcrum when shifting the belt. To stop the machine the operator pulled down the front end of the pole to raise the further end from the notch, drew the pole towards him, pushed it back on the opposite side of the belt, and then, by using the pole as a lever, shifted the belt on to a movable pulley. To start the machine this method was reversed. The heads and knives were located near the center of the machine to the rear of the feed rolls. An iron hood, which could be raised and lowered, was located immediately over the upper head to safeguard the knives. The respondent had on previous occasions fed larger material into this same machine, but his regular employment was to feed moulding into a smaller machine. About closing time on the evening preceding the accident appellant's foreman ordered the respondent to feed lattice material into the larger machine. He did so, and continued the same work about one hour the next morning. The lattice material was crossgrained, which caused one place to break. This broken piece passed the feed rolls and lower head, but clogged the top head, and extended about 10 inches to the rear above a pressure bar. Respondent stopped the feed rolls, and, without shutting down the machine, attempted to remove the broken lattice by pulling it towards the rear, when it was caught by the top head and drawn back so forcibly and quickly as to carry his hand against the knives. The respondent alleged that the appellant was guilty of negligence, (1) in failing to provide a proper belt shifter; (2) in permitting the hood to become old, battered, and out of repair, so that it did not properly perform the functions of a guard; and (3) in failing to properly instruct respondent, an inexperienced minor, as to the duties and dangers incident to his work. The appellant pleaded assumption of risk and contributory negligence.

Appellant by its several assignments in substance contends that the trial court erred (1) in denying its motion for judgment non obstante veredicto, and (2) in refusing to give instructions requested. In support of the first contention it insists that no failure to instruct respondent or warn him of dangers was shown, sufficient to constitute negligence. We have read the entire record, and conclude that the evidence on this issue was so conflicting as to necessitate its submission to the jury. Appellant further contends that no liability on its part was shown, arising out of any alleged defect in the hood, and that it affirmatively appears that such pretended

defect was not a proximate cause of the accident. While it was conceded by the respondent that the hood as originally constructed was a proper safeguard, it was contended by him, and he produced evidence tending to show, that it had been permitted to become out of repair, that it was battered and worn to such an extent that instead of remaining in a firm and fixed position when lowered over the top head it would on being struck move against the knives, that when struck by appellant's hand it did so move, that instead of being a guard it permitted his hand to be carried against the knives, and that no such result would have occurred had it been in good repair. The evidence on this issue was in such direct conflict that it was for the jury to determine whether the hood had become an insufficient guard, whether it was by reason of want of repair a proximate cause of the accident, and whether the appellant was guilty of negligence in permitting it to remain and be used in such condition. Appellant further contends that the evidence conclusively shows the respondent was guilty of contributory negligence in attempting to remove the broken piece of lattice without stopping the knives. There was evidence tending to show that respondent, although a minor, had a limited experience on this and other machines, and he testified that he knew he could not have been hurt had he stopped the machine. Yet there was evidence tending to show that he did not realize the danger of removing the lattice without stopping the machine, that he did not know it would run back into the knives instead of passing on towards the rear, that such knowledge would only come with experience, that lattice material when crossgrained was more liable to break than heavier material such as flooring or ceiling, that he had not previously run any lattice into this or any other machine, and that he had not been instructed by the appellant or any other person as to the danger to which he subjected himself in attempting to remove the lattice without stopping the machine. If respondent had been an experienced employé of mature years, he might possibly, under the evidence before us, be held guilty of contributory negligence as a matter of law; but, in view of his youth, the surrounding circumstances, and the conflicting evidence, it became in this case a question of fact for the jury to determine whether he did realize or ought to have realized the danger to which he was subjected, and was guilty of contributory negligence. Upon the evidence before us we cannot hold him guilty of contributory negligence as a matter of law. *Kirby v. Wheeler-Osgood Co.*, 42 Wash. 610, 85 Pac. 62. It was appellant's duty to properly instruct and warn respondent. This it contends was done, not only by its foreman, but also by respondent's father. Appellant's alleged failure to perform this duty would be negligence. The evidence on this issue was

conflicting, and properly submitted to the jury.

The appellant in writing requested an instruction withdrawing from the jury all evidence as to the defective condition of the hood, contending that such alleged defective condition had nothing whatever to do with the accident, and was not a proximate cause thereof. Under the issues and the evidence above discussed this instruction was properly refused, and the assignment of error which appellant has predicated on such refusal cannot be sustained.

Appellant in writing requested the trial court to instruct the jury as follows: "You are instructed that one of the grounds of negligence charged by the plaintiff herein against the defendant is that said defendant maintained a machine upon which plaintiff was injured without any proper belt shifter for starting and stopping such machine. Upon this branch of the case you are instructed that there is no evidence showing or tending to show that plaintiff received his injury as the proximate result of a failure on the part of defendant to maintain a proper belt shifter. You are therefore instructed that it is immaterial in determining this case whether the belt shifter maintained upon this machine was or was not a proper shifter, and you will not take that matter into consideration in arriving at your verdict." Appellant now contends that the trial court erred in refusing this instruction. The respondent has moved to strike appellant's requested instructions from the transcript, for the reason that they have not been made a part of the record by being included in any statement of facts. He contends that instructions, whether requested or given, must for the purpose of predicated error thereon be brought to this court in a statement of facts, and not in any other manner. The transcript shows that a written request setting forth the instructions desired was made by appellant and filed with the clerk. The statement of facts shows the instructions actually given, and appellant's exceptions to those given and refused. An instruction formally requested in writing and filed with the clerk is a part of the record. 2 Ballinger's Ann. Codes & St. § 5064. The motion to strike is denied. The refusal of the trial court to give the requested instruction last mentioned constituted prejudicial error. There is an utter absence of evidence showing or tending to show that the alleged insufficiency of the belt shifter was a proximate cause of the accident, or that it had anything whatever to do with it. If respondent had been injured while attempting to use the appliance provided, then the question of its sufficiency or insufficiency would have been an issue in this case to be submitted to the jury. We are utterly unable to understand how the character of the appliance became material. The respondent testified that he had repeatedly used it as a belt shifter, with

complete success. True he said that by reason of certain conditions the pole sometimes had a tendency to strike him on the breast, but he further testified that he received no injury, and substantially admitted that it was not at all dangerous. It affirmatively appeared that neither he nor any other appellant's employees complained of its insufficiency. He made no attempt to use the belt shifter at the time of the accident, although he could have successfully stopped the machine by its use had he desired to do so. At respondent's request the trial court did in substance instruct the jury that, if they should find from the evidence that the appellant did not provide and maintain in use proper belt shifters or other mechanical contrivances for throwing the belts on and off the pulleys which operated the machine, and that the failure so to do caused the injury complained of, such failure constituted negligence upon the part of appellant. This instruction does not cure the error above mentioned, as it submits an issue not authorized by the evidence, tending to confuse the jury. Had the jury, in answer to special interrogatories, found (1) that the appellant had not failed to properly instruct or warn the respondent, (2) that it had performed its duty in furnishing a proper safeguard for the top head of the machine, but (3) that the belt shifter was not a proper appliance for the purpose for which it was intended, a general verdict for respondent upon the evidence before us would not be permitted to stand. Yet we are unable to say that the jury did not reach its verdict in this manner. For aught that appears the general verdict may have been based solely upon the alleged defective character of the belt shifter, notwithstanding the fact that it had absolutely nothing to do with the accident, and was not the proximate cause of the injury sustained.

Having carefully considered all the contentions made by the appellant, we conclude that no prejudicial error was committed by the trial court in any instance other than the one above mentioned, in refusing appellant's requested instruction as to the belt shifter, for which error the judgment is reversed, and the cause remanded for a new trial.

HADLEY, C. J., and FULLERTON, RUDKIN, and DUNBAR, JJ., concur. MOUNT and ROOT, JJ., took no part.

(48 Wash. 241)

BARCLAY v. PUGET SOUND LUMBER CO. (Supreme Court of Washington. Jan. 15, 1908.)

1. MASTER AND SERVANT—EXISTENCE OF RELATION—INDEPENDENT CONTRACTOR.

Where defendant operated a lathmill through a contract with T., by which T. was to receive 75 cents per 1,000 lath produced, and was to employ other men, whom defendant was to pay out of the 75 cents per 1,000, T. to receive the balance, if any, and plaintiff was employed by T. to work in the mill, T. was not an independent contractor, but an agent of defend-

ant acting in its behalf, and the relation of master and servant existed between plaintiff and defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 5.]

2. SAME—ACTIONS FOR INJURIES—ADMISSION OF EVIDENCE—GUARDING MACHINERY—PRACTICABILITY.

In an action by a servant for personal injuries received from a saw of a lath trimmer, evidence that the saw could have been effectively and practicably guarded by the use of a certain attachment is proper, in view of the factory act requiring the maintenance of reasonable safe guards for saws if they can be practicably guarded, irrespective of whether such attachment was in general use, or generally known to millmen.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 920, 921.]

3. SAME—QUESTIONS FOR JURY.

Whether a master has exercised reasonable care and prudence in protecting dangerous machinery, as required by the factory act, is ordinarily a question for the jury, and in an action for injuries to a servant from a saw of a lath trimmer, where there is a substantial conflict in the evidence as to whether the saw was properly guarded or could be practicably guarded, those issues should be determined by the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010-1050.]

4. SAME—ADMISSION OF EVIDENCE—MATTERS NOT IN ISSUE.

In an action by a servant for injuries where there was no issue as to whether the saws used on a lath trimmer were larger than necessary, or less safe than smaller saws, evidence as to the master's trying smaller saws is immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 861-876.]

5. TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Though certain portions of instructions would be objectionable as abstract propositions of law, there is no error, if in the connection in which they are used they are so limited in their application that they could not mislead the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-717.]

6. DAMAGES—EXCESSIVE DAMAGES—LOSS OF FINGERS.

A verdict for \$5,000 for the loss of two front fingers of the right hand is excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 372, 379.]

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by Andrew Barclay against the Puget Sound Lumber Company. From a judgment for plaintiff, defendant appeals. Remanded, with directions.

F. D. Oakley, for appellant. Govnor Teats, for respondent.

FULLERTON, J. The respondent, while employed in the appellant's mill, cut his hand on one of the saws of a lath trimmer on which he was working, and brought this action to recover damages therefor. He based his cause of action on the contention that the saw on which he was injured was not guarded as required by the factory act. On the trial the jury returned a verdict in

his favor, assessing his damages in the sum of \$5,000. From the judgment entered on the verdict, this appeal is taken.

The first assignment is that the court erred in overruling the demurrer to the complaint. The third and fourth paragraphs of the complaint were as follows:

"(3) That on the 6th day of February, 1906, the said defendant was operating the said lathmill by and through a certain contract made by said defendant with one Robert S. Tillman, at 75 cents per 1,000 lath produced, wherein the said Robert S. Tillman was to employ the other men at work in said lathmill, and the said defendant was to pay the said employes so employed by the said Tillman out of the said 75 cents per 1,000 any and all wages due them in the operation of the said lathmill, and the said Tillman, in consideration of his employment, was to receive the balance and residue, if any, computing at the rate of 75 cents per 1,000 lath produced.

"(4) That on the 6th day of February, 1906, the plaintiff herein was employed to work in defendant's said lathmill by the said Robert S. Tillman, under and by virtue of said Tillman's contract with the said defendant as herein set out, and while at work in the said defendant's lathmill on said 6th day of February, 1906, in the operation of the same, pulling, tying, and trimming the lath at the trimmer saw," etc., he was injured.

It is the appellant's claim that the facts alleged show Tillman to have been an independent contractor conducting an independent enterprise; that the relation of master and servant existed between the respondent and Tillman, and not between the respondent and the appellant; and that in consequence the duty to guard the machinery devolved upon Tillman, the immediate employer, and was not a duty imposed upon it as between itself and Tillman's employer. But we cannot concede that this result follows from the facts pleaded. Tillman's relation to the appellant was rather that of an agent than that of an independent contractor. The appellant did not lease or surrender to him the management or control of this department of its mill. It surrendered only the right to employ the persons needed to carry on the work. It still retained control as to the manner and mode of doing the work, and control over the workmen employed by Tillman. This, as we say, did not make Tillman an independent contractor. He was but the agent of the appellant, acting in this regard for and on its behalf. Under a similar state of facts, the court, in *Nyback v. Champagne Lumber Co.*, 109 Fed. 732, 48 C. C. A. 632, used the following language: "The defendant here was engaged in the general operation of its own mill. Owning the mill and machinery, it had possession, and, in a general sense, control, of all operations and work carried on. The slasher belonged to the defendant, and its sole use was to cut

slabs and other like material belonging to the defendant into proper lengths for shingles, lath, and pickets, which, when cut, should belong to the defendant. The burden of keeping that machine in running order, the expense of oiling and repairing, remained with the defendant. The power to run it and the light to light it the defendant furnished; but it contracted with Barber to do the manual work necessary to operate the machine in cutting the material so furnished, giving him no authority to use it upon other material of his own, or for anybody other than the defendant, and for the doing of this manual work upon the defendant's machine and material, as directed by the defendant, the defendant agreed to pay him a price measured by the product. While nominally Barber was to employ and pay for such assistance as he needed, the wages of the helpers were paid by the defendant, and deducted from the amount, which otherwise should have been due to Barber. Without undertaking to lay down lines for the decision of other cases, we have no hesitation in saying that upon the facts stated, and as they appear in this record, Barber was not an independent contractor, but a servant of the defendant, put in charge of a particular machine upon the terms stated to operate it for the defendant, and that whatever duty there was to notify an inexperienced person engaged to work upon or about it of the dangers incident to the employment remained a duty of the defendant." See, also, *Ziebell v. Eclipse Lumber Co.*, 33 Wash. 591, 74 Pac. 680; *Johnson v. Spear*, 76 Mich. 139, 42 N. W. 1092, 15 Am. St. Rep. 298.

The appellant next argues that the evidence was insufficient to justify a finding on the part of the jury that the saw was not properly guarded, or could have been guarded in such a manner as to protect against injuries such as the respondent suffered and not seriously interfere with its practical operation. On these questions there was a substantial conflict in the evidence. Indeed the record shows that these were the principal questions of fact in dispute in the court below, and that the greater number of witnesses called on each side were called to establish or disprove one or the other of these propositions. Under these circumstances the questions were for the jury. As was said by us in *Rector v. Bryant Lumber, etc., Co.*, 41 Wash. 556, 84 Pac. 7: "Doubtless many cases will arise in which the court can say, as a matter of law, from the location of the machinery and the uses to which it is applied, that it can or cannot be advantageously guarded; but between these extremes there will necessarily arise a large class of cases where the question will be solely one of fact. The statute does not attempt to specify the particular machinery that shall be guarded, but declares that all machinery of a certain class shall be provided with proper safeguards, where this can be done

advantageously. If there is a conflict in the testimony as to whether a particular machine can or cannot be advantageously guarded, the question must be submitted to the jury under proper instructions. Under our system of jurisprudence there is no other way to determine the fact." See, also, *Erickson v. McNeeley Co.*, 41 Wash. 509, 84 Pac. 3; *Boyle v. Anderson & Middleton Lumber Co.* (Wash.) 90 Pac. 433; *Noren v. Larson Lumber Co.* (Wash.) 89 Pac. 563.

Certain witnesses, called on the part of the respondent, testified that the saw could have been effectively and practicably guarded against dangers similar to those causing the injury to the respondent by the use of an attachment to the contrivance on which the bundles of laths were laid before being pushed into the saws, called by them a "third leg." The appellant moved the court to take from the jury all evidence relating to this attachment on the ground that it was visionary and impracticable, and not in use in mills generally, and one not commonly known to millmen. This motion was properly denied. On the question of the practicability of the contrivance there was a difference of opinion among the witnesses, and this being so the jury were the proper judges of that question. It was no objection to its introduction as evidence that it was not in use in mills generally, or generally known to millmen. This plea, if allowed, would defeat the purposes of the factory act. That act was passed because owners and operators of dangerous machinery did not generally guard such machinery against possible injuries to their employes, and if the act requires the use of such guards only as were in general use at the time of its passage, or generally known to millmen at that time, its effectiveness is destroyed. Being intended to compel the guarding of dangerous machinery, owners and operators of such machinery, if they wish to avoid liability for accidents to their employes, must exercise reasonable prudence and care in guarding it. They must adopt such guards as reasonable prudence, observation, and care would suggest, regardless of the question whether other owners or operators of other mills have taken action on like machinery or not. And this being their duty, whether they have exercised that due care is ordinarily a question for the jury. They are not to be held because they may not have foreseen some ingenious contrivance that makes an effective guard, but they must not stand back and await the suggestion of remedies, when the exercise of reasonable prudence and care on their part will suggest them. This third leg, it seems to us, is not so far out of the ordinary that the court could say as a matter of law that it could not have been foreseen by the appellants, had they exercised the care required of them, and this being so, the court very properly submitted the question to the jury.

A witness, called on behalf of the appel-

lant, in answer to questions put to him by appellant's counsel, testified that it was necessary to use a 32-inch saw on the lath trimmer (the machine on which the respondent was injured), because a saw lesser in size would not trim all the laths in an ordinary bundle. He was then asked if the appellant had tried a 28-inch saw and found it too small. To this question an objection was interposed and sustained by the court, on the ground that the inquiry was immaterial. The ruling is assigned as error, but we think the court was right in holding the inquiry immaterial. There was no issue on this point. It was not contended that the appellant negligently used saws on the trimmer larger than the necessities of the business required, nor was it contended that smaller saws would have been more safe than the ones in use. This being true, the question sought to introduce immaterial matter, and was properly rejected.

The appellant complains of certain portions of the court's instructions to the jury. Separated from their connection with other instructions given, and considered as abstract propositions of law, doubtless some of them would be objectionable, because stating the rule too broadly. But, considering them in the connection in which they are used, they were sufficiently limited in their application, and limited in a way that could not possibly have misled the jury. For example, a portion of the charge is quoted and urged as error, because the court in that part of the charge did not mention the fact that practicability to guard a saw is a factor in determining whether a saw is or is not properly guarded, yet the court on this question charged the jury as follows: "(1) The laws of the state of Washington in force at the time of the accident to the plaintiff provide that any person, firm, or corporation, operating a mill where machinery is used, shall provide and maintain in use reasonable safeguards for all saws which it is practicable to guard, and which can be effectively guarded with due regard to the ordinary use of such machinery and appliances and the danger to employees therefrom, and with which employees of any such mill are liable to come in contact while in the performance of their duties. Under this law you are instructed that if you find that the trimmer saw or saws, upon which the plaintiff claims to have been injured, were unguarded and unprotected, and that it was practicable to guard the same effectively, having due regard for the use of the same, and if you find that it was not guarded, then you are to find the defendant negligent in that regard. (2) If, on the other hand, you should find that the saw was guarded, or that it was not practicable to guard it, and it could not be guarded and used, then you should find that the defendant was not negligent in failing to guard the saw. There is a question of practicability as well as of fact that the saw was actually

guarded. If it could not be guarded and used, the law would not require it to be guarded. (3) You are instructed that the only questions for you to decide as to the negligence of the defendant, if any, are: First, whether or not the trimmer saw upon which the plaintiff was injured was guarded; second, whether or not it was practicable to guard the said trimmer saw in question; and, third, whether or not the trimmer saw in question could have been guarded effectively, with due regard to the ordinary use of the same, and the dangers to the plaintiff therefrom, and with which the plaintiff was liable to come in contact while in the performance of his duties as operator of said trimmer saw. (4) You are instructed that, if you find from the evidence that the said trimmer saw or saws, or either of them, upon which the plaintiff was injured, were not guarded and protected, but could have been guarded and protected as you have been instructed, and that the plaintiff was injured by reason of the same being unguarded and unprotected, and not by his own negligence, then you are to find the verdict for the plaintiff." It is difficult to understand how the court could have been more explicit on this point.

The appellant next complains of the language of respondent's counsel used in his argument to the jury. Counsel unquestionably did go beyond the limits of legitimate argument; but the trial judge rebuked him for it, and we think removed any prejudice or wrong impression the jury may have imbibed from the argument.

The respondent suffered the loss of the two front fingers on his right hand. The verdict was for \$5,000. This, we think, so far excessive as to lead to the conclusion that it was given under the influence of prejudice. A verdict for one-half that sum, we think, will fully compensate for the injuries suffered.

The cause will be remanded to the superior court, with instructions to allow the respondent 30 days after notice to him that the remittitur has reached that court in which to remit from the amount of the judgment \$2,500. If the remission be made, the judgment will stand affirmed for the remainder, but if not made, the lower court will award a new trial.

HADLEY, C. J., and MOUNT, CROW, DUNBAR, and RUDKIN, JJ., concur.

GREENWOOD v. CORBIN.

(Supreme Court of Washington. Jan. 20, 1908.)

1. TROVER AND CONVERSION—EVIDENCE—REL-EVANCY.

In an action to recover the value of certain personal property alleged to belong to plaintiff, which defendant had acquired through attachment and sale thereof in a suit by defendant against plaintiff's father, evidence with ref-

erence to the merits of the controversy between defendant and plaintiff's father was irrelevant.

2. SAME—OWNERSHIP OF PROPERTY.

In conversion for the value of certain personal property acquired through attachment proceedings instituted by defendant against plaintiff's father, evidence held to require a finding that the property belonged to plaintiff, and was therefore not subject to the attachment.

3. FRAUDULENT CONVEYANCES—TRANSFER OF PERSONAL PROPERTY — CHANGE OF POSSESSION—STATUTES—APPLICATION.

Where a contract by which a son acquired certain personal property from his father was made prior to the removal of the property to Idaho, and prior to an indebtedness of the father to defendant, who claimed the property under attachment proceedings in Idaho, neither the statutes of Idaho, nor Ballinger's Ann. Codes & St. § 4578, providing that no bill of sale for the transfer of personal property shall be valid as against existing creditors or innocent purchasers, where the property is left in the possession of the vendor, unless the bill of sale is recorded, etc., were applicable to invalidate such transfer.

Appeal from Superior Court, Spokane County; D. C. Carey, Judge.

Action by Richard Greenwood against D. C. Corbin. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

George A. Latimer (Dalbert E. Twitchell, of counsel), for appellant. Allen & Allen, for respondent.

DUNBAR, J. This action was commenced by Richard Greenwood against D. C. Corbin to recover the value of the following described personal property, to wit: One blue roan mare named Pete, one light grey mare named Doll, one set of double harness, one double wagon, one-half truck, together with damages for the detention in July, 1906. The cause was tried without a jury, and a decision rendered in favor of the defendant. From the judgment of dismissal, the appeal is taken.

The property above described came into the possession of the defendant through a suit and attachment against the partnership composed of J. I. Greenwood, father of the plaintiff, and Frank Campbell, brought by the defendant in the courts of Idaho. The property was afterwards sold by defendant by an order of the court as perishable property, and the money therefrom was turned in to the clerk of the said Idaho court. At the time of said attachment the plaintiff was working for the aforesaid partnership as a teamster. An examination of the record in this case convinces us that the judgment of the court was wrong, not only in relation to some of the technical errors assigned by the appellant, but in consideration of the merits of the case; and the judgment, we think, was rendered by the lower court under a misapprehension of the law governing the case. The case seems to have been largely tried with reference to the merits of the original controversy between J. I. Greenwood, the father of the plaintiff, and D. C. Corbin, the

defendant in this action, and a great deal of testimony was introduced with regard to that controversy, while, of course, the only question at issue in this case is the ownership of the property by the appellant. The introduction of testimony in relation to the merits of the former case only served to confuse and obscure the issues in this case. We are constrained to think, from the findings of the court and the opinion of the trial judge, which is sent up in the record, that the delinquencies of the father, J. I. Greenwood, were to a certain extent visited upon the appellant in this case. Stripped of all immaterial facts, the record shows that the blue roan mare was given to the appellant by his father for a birthday present on appellant's twenty-first birthday, viz., the 7th day of July, 1905. This was testified to by the father in a straightforward manner, also by the son, and also by the mother of the appellant, who stated that they had talked the matter over, that the son had been working faithfully for them, and that they had concluded to, and did, make him a present of this mare. The record also shows by the testimony of the father and the appellant that the grey mare was sold to the appellant by his father on the 28th day of August, 1905; that the harness was bought by the appellant from a secondhand dealer, the money for the same being paid by the appellant with funds he received for labor while working for his father; and that the wagon was bought by the appellant from a liveryman at Spokane with his own money. The man who sold the harness, who seems to be entirely disinterested, and who only had a casual acquaintance with the appellant and his father, testified to the sale of the harness to the son, and the payment by him for the same; testified that the transaction was with the son, who told him that if he would throw in a couple of old collars he would take it at the price offered. The collars were thrown in, and the trade consummated. The man who sold the wagon to the son also testified to the purchase of the same by the son. There was no attempt by any one to dispute this testimony.

A single circumstance was proven, which on first thought would seem to be inconsistent with the theory of ownership on the part of the son. This circumstance was that J. I. Greenwood gave a chattel mortgage on this property to a man by the name of Root, after the time that ownership of it was claimed by the appellant, making the usual affidavit in relation to the ownership thereof. In explanation of this, however, the testimony shows that the appellant was with his father at the time this chattel mortgage was given; that the ownership of the son in the property was made known to Mr. Root, and it was agreed that if any more money were required the son would sign the mortgage with the father. Mr. Root, however, deeming the security ample, did not re-

quire this. This was testified to, not only by J. I. Greenwood and the appellant, but also by Mr. Root. It seems that there was no special attention called to the conditions of the affidavit, but that J. I. Greenwood in a rather careless manner signed the same and executed the mortgage. The transaction was made without the assistance of any outsider, Mr. Root having prepared the mortgage himself, and, while it is a practice which is not commendable and might be fraught with serious results to parties indulging in it, under all the circumstances as shown by the testimony we do not think it was sufficient to overbalance the real testimony in relation to the ownership of the property.

The only other circumstance tending in any way to dispute the testimony of the appellant was that of the deputy sheriff, who testifies that, when he levied upon the property, the appellant claimed to own a certain brown team instead of the team in controversy. This was denied by the appellant, who stated that he simply told the deputy that he claimed one of the teams, not specially mentioning the team, the teams all being together at the camp where the levy was made. We think, under all the circumstances surrounding the levy, and in consideration of the testimony of both parties, the deputy sheriff might easily have been mistaken as to what particular team was referred to by the appellant on that occasion.

The statutes of Idaho, which were introduced, even if they had been legally introduced, have no bearing upon this question, for it is conceded that the contract of sale to this appellant, if any was made, was made prior to the time when the property was removed to Idaho, and prior to any indebtedness on the part of J. I. Greenwood to the respondent in this action. For the same reason section 4578, Ballinger's Ann. Codes & St., which is to the effect that no bill of sale for the transfer of personal property shall be valid as against existing creditors or innocent purchasers, where the property is left in the possession of the vendor, unless the said bill of sale be recorded in the auditor's office of the county in which such property is situated within 10 days after such sale shall be made, is inapplicable, no debt existing at the time this sale and gift were alleged to have been made.

It was not inconsistent with the idea of ownership on the part of the appellant that his father gave him employment with his team upon the contract which he had taken from Mr. Corbin, nor was it inconsistent with the idea of ownership that when his father, whether justly or unjustly, left Idaho and started for his home in Washington, he accompanied him on the trip, bringing his team with him; and whatsoever may have been the merits of the original controversy between J. I. Greenwood and the respondent Corbin, the undisputed testimony in this case

in relation to the ownership of this property is so strong and convincing that, notwithstanding the judgment of the superior court on the same testimony, we cannot but deem it sufficient to establish legal ownership in the appellant.

The judgment will therefore be reversed, and the value alleged, viz., \$475 having been established by uncontradicted testimony, the court will enter judgment for the appellant for the sum of \$475, with legal interest from the date of the detention of the property.

HADLEY, C. J., and ROOT, MOUNT, RUDKIN, and FULLERTON, JJ., concur.

PIGOTT v. GRAHAM.

(Supreme Court of Washington. Jan. 20, 1908.)

FRAUD—FRAUDULENT REPRESENTATIONS—RELIANCE ON STATEMENTS—SALE OF BUSINESS.

Plaintiff, a stockholder of one company, negotiated with defendant, a stockholder of another company, engaged in similar business in the same city, for the consolidation of their respective companies. Defendant misrepresented that his company was in a prosperous condition, and plaintiff, believing and relying upon his statement of its assets and liabilities, agreed upon the consolidation. It did not appear that the property and assets of defendant's company were concealed, nor that it was impossible or inconvenient for plaintiff to have made an examination into the financial standing of the company, nor that he was induced by defendant to refrain from making such an examination as any prudent person would make under the circumstances, nor did it appear that such an examination was not made. *Held*, that plaintiff could not recover for the misrepresentations; since, where there are no fiduciary relations existing between a seller and buyer, and the means of knowledge are equally available to both parties, and the subject of purchase is open to their inspection, if the buyer does not avail himself of his means of investigation, he cannot complain of being deceived by the seller's misrepresentations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 19-23.]

Fullerton, J., dissenting.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by H. C. Pigott against A. B. Graham. From a judgment of dismissal, plaintiff appeals. Affirmed.

Peters & Powell, for appellant. Chas. F. Munday, for respondent.

DUNBAR, J. The appellant brought an action against the respondent for damages alleged to have been caused by reason of the deceit and misrepresentation of respondent, which induced him to enter into a certain contract. The material facts alleged in the complaint are: That the Metropolitan Press was a corporation having a capital of \$600,000, consisting of 600 shares of the par value of \$100 each, and that said shares of stock were worth \$65,000, of which stock the appellant Pigott owned 475 shares. That the

Graham-Hickman Company was a corporation having a capital of \$50,000, consisting of 500 shares of the par value of \$100 each. That of this stock Graham, the respondent owned 77 shares. That each company was doing business in Seattle. That the Graham-Hickman Company was, until the 29th day of March, 1905, engaged in the business of printing and the manufacture of paper boxes in the city of Seattle. That the Metropolitan Press was, until said last-mentioned date, in the printing and binding business in said city. That during the month of March the respondent Graham approached the appellant, and opened negotiations with him for the union and consolidation of the business and properties owned by the aforesaid corporations. That said negotiations were carried on between the plaintiff and the defendant, and through them with the other stockholders of said corporations respectively, extending over a period of several days. That in order to induce the appellant to consent to such union and consolidation the respondent stated and represented to the appellant that the Graham-Hickman Company was solvent, in a prosperous condition, and conducting a highly profitable business, and then had on hand a stock of merchandise to the amount in value, according to the inventoried cost thereof, of \$37,932.80; that it had bills receivable of the face value of \$5,447.80, and other property aggregating in excess of \$100,000; that the said Graham-Hickman Company owed no indebtedness excepting mortgage bonds to the amount of \$42,500, bills payable to the amount of \$2,119, and accounts payable to the amount of \$3,108.84. That the appellant believed these statements, and, so believing and relying upon them, agreed with the respondent that the two companies aforesaid should be consolidated into a new corporation to be called the "Metropolitan Press Printing Company," the property of the two original companies to be transferred to the Metropolitan Press Printing Company, each stockholder of the respective companies to receive such a proportion of one-half of the stock of the new company as his shares in the original companies bore to the capital stock of the new company, and that in consummation of said agreement a new corporation, known as the Metropolitan Press Printing Company, was organized by the stockholders of the Graham-Hickman Company and the Metropolitan Press on or about the 28th day of March, 1905, with a capital stock of \$100,000, divided into 1,000 shares of \$100 each. That the appellant subscribed for 376 shares of said capital stock, and the respondent subscribed for 77 shares, and that all of the capital stock of said corporation was duly subscribed on the 28th day of March, 1905. That thereupon the Graham-Hickman Company conveyed all of its property and assets of every kind and description to the said Metropolitan Press Printing Company, and at the same time the Metropolitan Press conveyed all of its prop-

erty and assets of every kind, except a small portion thereof, to the said Metropolitan Press Printing Company. That at the time of making said conveyance to the Metropolitan Press Printing Company, in order to induce this plaintiff to complete and consummate the plan of consolidation as aforesaid, the respondent stated and represented to the appellant that the Graham-Hickman Company was then transferring and conveying to the Metropolitan Press Printing Company all the property and assets which he, the said defendant, had theretofore stated and represented that the Graham-Hickman Company possessed. That in truth and in fact the statements and representations made by the appellant to the respondent, to the effect that the said Graham-Hickman Company had, as a part of its property and assets, merchandise of the amount of \$37,932.80, according to the inventoried cost thereof, were false and untrue, and the value of said merchandise was in reality only \$12,847.73, and that the representation that the Graham-Hickman Company did not owe on account of bills payable any amount in excess of \$2,119 was false and untrue, and that it did owe at that time the sum of \$4,544 in excess of the said \$2,119. That the representation that the Graham-Hickman Company transferred all the property and assets of which it was possessed was untrue, and that the representation made that the company was solvent and in a prosperous condition and doing a prosperous business was false and untrue. This suit is brought to recover the difference between the actual value as alleged of the Graham-Hickman Company and the value alleged by the respondent Graham. Demurrer was interposed to this complaint, to the effect that it did not state a cause of action. The court sustained the demurrer, the action was dismissed, and appeal was taken from the judgment of dismissal.

It will be noticed from the complaint that this is a plain action for deceit, the corporations not in any way being involved. But the essence of the complaint is that the respondent, by false representations, induced the appellant to make a trade by which he was damaged, and without discussing any of the preliminary questions discussed by the respondent in relation to the power of the appellant to bring this action, which it is claimed is an action in effect for the benefit of the corporation, we are satisfied that as between the appellant and respondent, considering them as vendor and vendee, there is no cause of action stated. There is no allegation in the complaint that the property and assets of the Graham-Hickman Company were concealed from plaintiff. There is no allegation that it was impossible or inconvenient for him to have made an examination into the financial standing of the company. He does not allege that he was induced by Graham to refrain from making such an examination as any prudent person would make

under the circumstances. He does not even allege that such an examination was not made.

This court in an early case, viz., *Washington Central Improvement Company v. Newlands*, 11 Wash. 212, 39 Pac. 366, laid down the rule that, where there were no fiduciary relations existing between the seller and the buyer, it was the duty of the buyer to make an examination with reference to the representations made by the seller and as to the value of the property purchased, and that a purchaser who refused to do this could not call upon the law to stand in loco parentis to him in the ordinary transactions of business and ordinary dealings with his fellow-men. Cases of this character are frequently hard to determine, for there are so many independent circumstances surrounding each case that it is difficult sometimes to discern the dividing line between that character of fraud and misrepresentation which justifies the purchaser in relying upon such representations and those representations which are made where the parties are standing on a plane, where the facts which are the subject-matter of the representations are ascertainable, and where it is the duty of the purchaser to put on foot such examination as is necessary to determine the facts concerning which the negotiations are made. But notwithstanding these different circumstances there are certain basic principles upon which the cases must be adjudicated, and the difficulty is not so much to determine the law as to determine whether the particular circumstances bring the cases within the established rules of law. This court, in the case above referred to, said: "We think the proper and sensible rule was laid down by the United States Supreme Court in *Slaughter's Adm'r v. Gerson*, 13 Wall. (U. S.) 379, 20 L. Ed. 627, where it was held that the misrepresentation which would vitiate a contract of sale and prevent a court of equity from aiding its enforcement must relate to a material matter constituting an inducement to the contract, and respecting which the complaining party did not possess at hand the means of knowledge." That court, after announcing the rule as noted, further said, through Judge Field, who delivered the opinion of the court: "A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to consideration when he complains that he has suffered from his own voluntary blindness

and been misled by overconfidence in the statements of another." This doctrine was followed by this court in *West Seattle Land & Imp. Co. v. Herren*, 16 Wash. 665, 48 Pac. 341; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 618; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 190; *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117.

In some more recent cases, for instance, in *Mulholland v. Washington Match Company*, 35 Wash. 315, 77 Pac. 497, it was said that it could not be the law that a person of ordinary faculties may never rely upon representations made to him, even though no fiduciary relations existed, and that each case must depend upon its own circumstances. In that case the representations were made with regard to an ingenious device for manufacturing matches, and involved a special, skilled knowledge of the mechanism itself. In addition to that the machine was not at hand, and the court found that it did not in fact exist, but that the facts with reference to the existence of such a machine and the patent thereof, together with the ownership thereof, were peculiarly within the knowledge of the appellant's officers and agents who made the representations. In that case the court held that the purchaser was not bound to rely upon the representations made by the seller, but reiterated the doctrine that, where the subject-matter was at hand, and the truth easily ascertainable, the purchaser must use his senses, and could not afterwards be held to say that he had been defrauded, if he neglected to avail himself of the present and reasonable opportunity to learn the truth. This case was followed by *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811, and was really the basis of the decision in that case. This case more nearly approaches the facts as stated by the complaint in the case at bar, but yet we think it is easily distinguished in principle. There the payee of a note was induced to loan money, by the fraud of officers of the corporation, and it was held that the payees were not bound to investigate the truth or falsity of the representations concerning the financial ability of the corporation, facts which would involve the examination of a concern represented as doing a banking business, and of public records, and a large number of houses said to be building, that the means of knowledge were not open, and that under all the circumstances of that case there was a reasonable call for reliance on the representations made. There too the officers, who represented themselves to be doing a certain banking business, and who were doing an intricate kind of business, were dealing with people who were not acquainted with that kind of business, and who would probably not have understood the intricate business of the appellant if they had undertaken to make an examination. At least it would have to have been done by employing expert

assistance, and at a great expense and trouble.

But here it will be observed the parties were in the same kind of business, competitors in the printing business in the city of Seattle, both stockholders in the business, and stockholders and managers of their respective businesses. It was their knowledge of the business in all its details that prompted them to enter into this consolidation, so that money might be made thereby and expenses saved. The property was on hand, it was all in the city of Seattle, and it would have been but an act of the most common kind of prudence on the part of the appellant to have investigated the business and books of the concern, which he was practically buying. In fact the representations made by Graham may have been preliminary, and he may have presumed that Pigott would exercise ordinary prudence and make the ordinary investigations before the trade was consummated. Certainly there is no showing that he was prevented by any manipulation, fraudulent, or otherwise, on the part of the Graham Company, from making such an examination. There was no obliteration of evidence in the case, as there was in *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. Rep. 880, where it was held that the vendee had a right of action where he had relied upon false representations of the vendor in pointing out certain lots as the ones offered for sale, when it developed that the lots pointed out were not the lots for which the deed was given; it appearing in that case that where the lots were located the ground was obscured by brush and trees, and that the stakes could not be found, and that under such circumstances the vendee had a right to rely upon the representations of the owner in pointing out the certain lots which he offered for sale. Nor does this case fall within the rule announced by this court in *Northwestern Lumber Company v. Callendar*, 36 Wash. 492, 79 Pac. 30, where the representations which the court decided the vendee had a right to rely upon were representations with reference to a patent and the working of machinery. There the court held that the representation of the vendor, familiar with machinery, amounted to a warranty, when relied upon by purchasers unfamiliar therewith, and they were induced to purchase by such representations. On the examination of this case it will be found that there was an attempt to make an examination by the vendee; but not having the peculiar knowledge necessary, such attempt proved futile.

In *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613, it was held that the purchaser of a stock of goods cannot avoid the sale on the ground of fraud, in that false representations were made to him as to the quality, quantity, and value of the goods, when there was no fiduciary relation between the parties, and

when it was within the purchaser's power to readily determine the truth or falsity of such representations by an inspection of the goods. In that case it was said: "It must not be forgotten that the contracting parties were dealing at arm's length. No fiduciary relations existed between them—nothing to inspire confidence or disarm suspicion—and there was no imbecility of age, weakness, or disease. The property in question was at hand, and an inspection of it by the defendants could have been made had they insisted upon it. The representations related solely to quantity, quality, and value, the truth or falsity of which could have been determined by an inspection. Under such circumstances we think it will not do to hold that a party may successfully complain of his own failure to exercise ordinary care, prudence, and caution, when, by the exercise thereof, the injury of which he complains could not have arisen. This language may, it seems to us, be appropriately applied to this case. While it is true that in that case it was a stock of goods, the value of which was involved, in this case it is the value of the property of the Graham-Hickman Company, which consisted of goods, book accounts, and of the good will of the business. The value of the goods and book accounts could have been easily ascertained by an examination of the corporation, and the good will of the concern is a character of property so indefinite that a statement of its value must necessarily be regarded by any man of any business acumen whatever as very largely a matter of opinion.

It was more recently decided by this court in *Hulett v. Achey*, 39 Wash. 91, 80 Pac. 1105, that a sale of standing timber and saw logs could not be rescinded by the vendee for false representations by the vendor as to quality, where no claim was made that there was no opportunity to make examination. In fact, the rule announced by the Supreme Court of the United States in *Slaughter's Adm'r v. Gerson*, *supra*, which has been consistently followed by this court, it seems to us is entirely applicable to the case at bar. If contracting parties were allowed, after making contracts and agreements with reference to business and property, and after discovering that their trade had not been a profitable one, to annul such contracts either by rescission or by actions for damages, it would render the business conditions of the country perilous and uncertain, make contracts unstable and unreliable, and keep the courts of the state busy in determining matters which ought to have been determined by the parties to the contract before they entered into the same.

The judgment is affirmed.

HADLEY, C. J., and MOUNT, CROW, and RUDKIN, JJ., concur. FULLERTON, J., dissents.

PEDERSON v. LEASE.

(Supreme Court of Washington. Jan. 15, 1908.)

1. EXECUTION—REQUISITES OF WRIT—NAME IN WHICH WRIT SHOULD RUN.

An execution: "State of Washington, C. County—ss.: To the Sheriff of C. County—Greeting"—and then proceeding in the usual form followed in executions, is not fatally defective as not running in the name of the state, though the form is not strictly in compliance with the Constitution and statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 175.]

2. NAMES—NAME OF DEFENDANT IN EXECUTION—IDEM SONANS.

That the name of defendant in execution "Peder Pederson" was written "Peter Peterson" did not render the sale thereunder void, the rule of idem sonans controlling, and it appearing that defendant was well known in the community under the name of Peter Peterson.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Names, §§ 12-15.]

3. SAME.

Objections that an execution did not state the amount actually due, and did not command the sheriff to levy on the "real property upon which the judgment is a lien," does not invalidate the sale, where no objections to the confirmation thereof were made, and the purchaser and his successor in interest have held and paid taxes on the property for over 12 years.

Appeal from Superior Court, Clallam County; Geo. C. Hatch, Judge.

Action by Peder Pederson against Fred Lease, Jr. Judgment for defendant, and plaintiff appeals. Affirmed.

Trumbull & Trumbull, for appellant. A. A. Richardson, for respondent.

ROOT, J. Plaintiff brought this action to quiet title to certain lots in Port Angeles, Clallam county, alleging ownership, and that the real estate was unoccupied. From the judgment in defendant's favor, plaintiff appeals.

It appears that plaintiff owned this property in 1895, at a time when one Fred Lease, father of respondent, obtained judgment against plaintiff in the justice court of Clallam county. The transcript of this judgment was, on the 1st day of June, 1895, filed and entered in the office of the clerk of the superior court of said county, and on the 26th day of July, 1895, an execution was issued out of the superior court upon said judgment, and the property in question levied upon and sold to said Fred Lease, and the sale confirmed by order of court on December 19, 1896, no exceptions or objections to the confirmation having been interposed. No redemption has been had. Fred Lease died on the 26th day of June, 1902, and it is conceded that respondent herein is his sole heir. Taxes have been paid ever since the sale by respondent and his father, a certificate having at one time been issued to appellant and redeemed by respondent. Appellant contends that the sale of the property was void, first, because the execution did not run in the name of the state of Washington; second, did not state the amount actually due; third, did not command the

sheriff to levy upon the real property upon which the judgment is a lien; fourth, that it was not issued against the property of appellant, but against that of one "Peter Peterson." The execution complained of reads, in the commencement thereof: "State of Washington, Clallam County—ss.: To the Sheriff of Clallam County—Greeting"—and then proceeds in the usual form followed in executions. It may be that this form is not strictly in compliance with the statute and Constitution, but we are not prepared to hold that it was fatally defective; and, inasmuch as no objections were made to the confirmation of the sale, we cannot hold the sale void by reason of this alleged defect.

As to the error in the name of plaintiff, it appears that he was sued as "Peter Peterson" in the justice court; that he appeared in response to such name at that time, and defended the action in person, testifying therein as a witness. He consequently had personal knowledge of the entry of the judgment, and that his name was misspelled in the proceedings. That another error was made in the spelling in the execution was not, in our opinion, sufficient to render the sale thereunder void. The name "Peter Peterson" is the English form of the Danish name "Peder Pederson," and we think the question is controlled by the rule of idem sonans. *Schooler v. Ashurst* and notes, 1 Litt. (Ky.) 216, 13 Am. Dec. 232-234. It appears from the evidence that appellant was well known in the community under the name of Peter Peterson. The contentions that the execution does not state the amount actually due, and does not command the sheriff to levy upon the "real property upon which the judgment is a lien," we cannot hold, at this late day, sufficient to invalidate the sale; no objections to the confirmation having been made, and the purchaser at such sale and his successor in interest having held and paid taxes upon the property for over 12 years. *Terry v. Furth*, 40 Wash. 493, 82 Pac. 882.

We think the judgment and decree of the trial court should be affirmed, and it is so ordered.

FULLERTON, MOUNT, DUNBAR, and **RUDKIN, JJ.**, concur. **HADLEY, C. J.**, and **CHOW, J.**, took no part.

HOUTZ v. UNION PAC. R. CO.

(Supreme Court of Utah. Jan. 27, 1908.)

1. CARRIERS—TRANSPORTATION OF PROPERTY—LIMITATION OF LIABILITY—NATURE OF RIGHT.

Though common carriers are as a general rule liable as insurers of property, and are responsible for loss or damage, unless caused by the act of God or of the public enemy, this liability may be limited by a fair and reasonable contract as to any loss not caused by its negligence or misconduct, or that of its servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 637, 933.]

2. SAME—LIABILITIES SUBJECT TO LIMITATION—NEGLIGENCE OR MISCONDUCT.

A carrier cannot by contract exempt itself from nor limit its liability for the loss of or damage to property caused by its negligence or misconduct or that of its servants.¹

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 654-659, 934, 935.]

3. SAME—TRANSPORTATION OF LIVE STOCK.

Provisions in a contract with a carrier that a shipper of sheep assumed all risk of damage from delay in transportation, or loss or damage from any other cause than willful or gross negligence, and other provisions exempting the carrier from or limiting its liability for loss or damage from failure to exercise a proper degree of care, contravene public policy and are void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 934, 935.]

4. SAME.

A contract provision that the rules, regulations, and conditions prescribed by a carrier of live stock, as evidenced by its published tariffs, classifications, and circulars, were binding on the shipper, and that his signature of the contract was conclusive evidence of his knowledge of and assent to the conditions thereof, is void.

5. APPEAL—REVIEW—FINDINGS—EFFECT.

Findings by the court as to a carrier's delay and negligence in the transportation of sheep are binding on the carrier on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955-3992.]

6. CARRIERS—TRANSPORTATION OF LIVE STOCK—LIMITATION OF LIABILITY—VALIDITY.

A stipulation with a carrier of live stock, fairly entered into and reasonable under all the circumstances, requiring the presentation of a claim for loss or damage, is not ineffectual in all cases where the loss or damage results from negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 938.]

7. SAME.

Where a contract for the shipment of sheep limits the carrier's liability to loss from willful or gross negligence, a paragraph requiring the presentation of a claim within 10 days as a condition of liability must be construed as referring only to claims for willful or gross negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 938.]

8. SAME.

A contract exempting carrier of sheep from liability except for willful or gross negligence, and then only on presentation of a claim, is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 934, 938.]

9. TRIAL—FINDINGS BY COURT—CONFORMITY TO PLEADING AND EVIDENCE.

In an action for injuries to a shipment of sheep, a finding, not based on any pleading or evidence, that a stipulation requiring notice within 10 days of claim for damage is reasonable, is a mere conclusion of law, without effect.²

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 935-938.]

Appeal from District Court, Second District; J. A. Howell, Judge.

Action by John S. Houtz against the Union Pacific Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

Heywood & McCormick, for appellant. I. L. Williams, Geo. H. Smith, and Jno. G. Willis, for respondent.

STRAUP, J. This is an action to recover damages for an injury to live stock, consisting of sheep, alleged to have been occasioned through the negligence of the defendant, a common carrier, in transporting the sheep from Soda Springs, Idaho, to Omaha, Neb. The case was tried to the court, who, among other things, found that the defendant, at Schuyler, Neb., negligently delayed the carriage of the sheep, and there negligently held and confined them on its cars for a period of 72 hours, and at a place where the sheep could neither be unloaded, watered, nor fed; that during the time the sheep were there delayed the plaintiff frequently urged the defendant to transport and convey the sheep to a place where they could be unloaded, fed, and watered, and, although the defendant could well have done so, nevertheless it negligently failed and refused to do so; and that in consequence thereof the plaintiff was damaged in the sum of \$1,326 by an excess shrinkage in weight of the sheep, and in the further sum of \$954 because of a drop in the market occurring within the time of the negligent delay and detention. The court further found that the plaintiff and defendant entered into a written contract by the terms of which it was stipulated (quoting from findings); "(1) That the carrier shall not be liable for the loss or damage of, nor for any injuries received by, any of said stock, unless the same is the direct result of willful misconduct or actual negligence of said carriers, their agents, servants, or employes. (2) That the shipper agreed to load and unload and reload all said stock at his own expense, and to feed, water, and attend to the same at his own risk, while it was in any stockyard. (3) That the shipper assumed all the risk of any of them being weak and maiming each other or themselves in consequence of cold or suffocation or any other defects, and the shipper agreed to assume all the risk of damage which may be sustained by reason of delay in transportation, or loss or damage for any other cause, or anything not resulting from the willful negligence of the defendant. (4) It is also specially agreed and provided that the defendant should not be liable for any loss or damage to said stock by causes beyond its control, or by floods or fire, shrinkage in weight, changes in weather, heat or cold, or any other thing or cause not directly the result of gross negligence on the part of said defendant, its agents, or servants. (5) Said contract further provided that unless claims for loss or damage or detention are presented within 10 days from the date of unloading said stock at destination, and before said stock has been mingled with the other stock, such claims shall be deemed to be waived, and the defendant under said contract was discharged

¹ Williams v. O. S. L. R. Co., 18 Utah, 210, 54 Pac. 991, 72 Am. St. Rep. 777.

² Dillon Imp. Co. v. Cleveland (Utah) 88 Pac. 670.

from all liability thereby. (6) It was still further provided in said contract that the rules, regulations, and conditions prescribed by the defendant for the transportation of live stock, as evidenced by their published tariffs, classifications, and circulars in force and effect at said time, were binding upon said plaintiff, and that the signing of the contract by the shipper, or his agent, was and should be conclusive evidence of the knowledge, assent, and agreement to each and every stipulation and condition thereof by said shipper, the plaintiff." It was further found that no claim was presented to the defendant within 10 days, nor before the mingling of the sheep with other sheep, and not until 24 days after the sheep reached their destination, and that the "provision requiring the claim to be presented within 10 days after the unloading of the sheep and before the sheep had been commingled with other sheep is a reasonable provision under the circumstances." Judgment was rendered for the defendant on the sole ground that the claim was not presented "within 10 days after the arrival of the sheep at their destination and before having been mingled with other sheep." The plaintiff appeals.

The only question presented by the appeal is with respect to the validity and effect of the contract. As a general rule common carriers are held liable as insurers of property intrusted to them, and are held responsible for any loss of or damage to the property, unless occasioned by the act of God or by the public enemy. The law is, however, well settled in this country that the carrier's liability as an insurer may be limited by special contract, when fairly entered into and reasonable in its terms, and that it may limit its common-law liability for any loss, provided such loss is not the result of its negligence or misconduct, or that of its servants. The rule is equally well settled that the carrier cannot make a valid contract by which it is to be exempt from liability for any loss or damage resulting from its misconduct or negligence, or that of its servants; nor can its liability for a failure to exercise a proper degree of care in the transportation of property intrusted to it be limited by special contract. *Williams v. O. S. L. R. Co.*, 18 Utah, 210, 54 Pac. 991, 72 Am. St. Rep. 777; 5 Am. & Eng. Ency. Law, 283-308, and cases there cited. These principles, of course, are not disputed. The contention made by respondent is that the stipulation requiring the presentation of a claim as a condition precedent of liability is not violative of these principles. The action was grounded on defendant's negligence. The court found plaintiff's loss and damage to be the result of such negligence. That the provisions of the contract whereby it was stipulated that the plaintiff assumed all risk of damage which might be sustained by reason of delay in transportation, or loss or damage for any other cause or thing not resulting from the willful or gross negligence of

the defendant, and all other provisions exempting the defendant from or limiting its liability for loss or damage resulting from its failure to exercise a proper degree of care, contravene public policy, and are void, is not seriously disputed. For the same and other reasons not necessary to here state, it may be said that paragraph 6 of the contract is also invalid.

At a former hearing of this case we rendered an opinion, which was filed, but not published, wherein it was in effect held by us that the stipulation in the contract requiring the presentation of a claim as a condition precedent of liability for loss or damage should only apply to and be given effect in case of a loss or damage not occasioned by the defendant's negligence or misconduct; and, as the court found plaintiff's damage to be the result of defendant's negligence, the stipulation was held to be inoperative. We reached this conclusion upon the theory that, when an injury has been sustained by the negligence of the carrier, a complete cause of action arose upon the infliction of the injury; that to permit the carrier by special contract to make an additional requirement, such as the presentation of a claim as a condition precedent of liability, and before a right of action existed, restricted or limited the right which the shipper would have to maintain an action for such negligence, and to that extent limited or conditioned the carrier's liability for negligence; that, if it was against public policy to permit a carrier in advance to contract against its negligence, then it followed that it could not by special contract in advance impose conditions precedent of liability for a loss or damage occasioned by its negligence; that, if such a condition as here could be lawfully imposed, then other conditions could also be imposed, if fairly entered into, and if found to be reasonable under the circumstances of the case; and hence the stipulation, when applied to a loss or damage occasioned by the negligence of the carrier, was against the policy of the law and ineffectual. These views seem to be supported by the following authorities: 6 Cyc. 505; *Mo. Pac. Ry. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Ormsby v. U. P. R. Co. (C. C.)* 4 Fed. 706; *Smith v. L. & N. R. R. Co.*, 86 Tenn. 198, 6 S. W. 209; *So. Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140; *So. Exp. Co. v. Bank of Tupelo*, 108 Ala. 517, 18 South. 604; *Baltimore & Oh. Exp. Co. v. Cooper*, 66 Miss. 558, 6 South. 327, 14 Am. St. Rep. 536; *Sanford v. Housatonic R. R. Co.*, 11 Cush. (Mass.) 155; *Adams Exp. Co. v. Reagan*, 29 Ind. 21, 92 Am. Dec. 332; *G., C. & S. F. Ry. Co. v. York & Johnson*, 2 Willson, Civ. Cas. Ct. App. § 813. The rule in 6 Cyc. 505, supra, is stated as follows: "It is usual to insert in bills of lading, or other contracts for shipment, a stipulation that written notice of a claim for loss of or damage to the goods shall be given to the agents of the carrier within some specified

time, such as 30 or 90 days, and that unless such notice is given there will be no liability on the part of the carrier, and such stipulations are generally upheld so far as they are found to be reasonable. Cases holding such stipulations to be invalid are usually based on the ground that the terms thereof are unreasonable, rather than on the general invalidity of such conditions. But they are regarded as limitations of the carrier's liability, and therefore as ineffectual against a claim for loss or injury due to the carrier's negligence, and also as invalid where limitation of common-law liability is prohibited by statute." Cases are cited from several states in support of the text. In the case of *Rathbone v. Railway Co.*, 140 N. Y. 48, 35 N. E. 418, the court says: "It is well settled that these stipulations in the contract will not be construed to relieve the carrier from liability for his own negligent acts. His duty and obligation to exercise a proper degree of care of the property while in his custody is not affected by them. Full and sufficient scope is given to their operation when it is held that they exempt the carrier from his common-law responsibility as an insurer of the property."

After our opinion was rendered, a petition for rehearing was filed. Upon further reflection we became somewhat doubtful of our position in this regard. A rehearing was therefore granted, and the case has again been argued and resubmitted. That the courts greatly divide on this question there can be no doubt. It may also be conceded that the greater number of cases hold, and many text-writers seemingly declare the law to be contrary to the views expressed by us. Among them may be cited the following: 4 *Elliott on Railroads*, § 1512; 1 *Hutchinson on Carriers*, § 442; *Moore on Carriers*, 333; 5 *Am. & Eng. Ency. Law*, 321. Many cases are cited by these text-writers. It is not necessary to set them forth here. The rule declared in 1 *Hutchinson on Carriers*, § 442, is as follows: "It is frequently the custom for the carrier to insert in the contract of shipment a condition that, in the event of loss, the owner shall give notice of his claim within a specified time. Such conditions are usually to the effect that the notice shall be in writing and presented to some officer or agent of the carrier, either before the goods are removed from the point of destination, or within a certain time thereafter, or within a designated time after the loss has occurred; and when such conditions are reasonable the owner will be precluded from the right to maintain an action against the carrier, unless he has presented the notice within the time stated and in the manner provided." Whether the author in the above quotation is dealing with a "loss" for which the carrier is liable as an insurer, or with a loss or damage occasioned from any cause for which the carrier is liable, including his misconduct and negligence, is not clear. The same is true of the statement in 4 *Elliott*, § 1512, where it is

said: "A valid contract may be made requiring claims for loss or damage to freight to be presented in a certain manner or within a certain time, provided it is reasonable." In *Moore on Carriers*, at page 333, it is said: "The carrier may lawfully, by contract with the shipper made by clause or stipulation in the bill of lading or shipping receipt or otherwise, provide a reasonable time within which the shipper shall present his claim or give notice of claim for loss or damage, and the manner of giving such notice or presenting his claim, and limit its liability to cases in which the claim shall be presented or notice given in accordance with the terms of the contract." But on page 336 the following statement is made by the same author: "Most of the authorities sustain such stipulations, even where the loss is one caused by the defendant company's negligence. In Texas such a stipulation is held to be a limitation of the common-law liability of the carrier, and of no effect where the loss is one resulting from the carrier's negligence." While some of the cases cited in support of these texts pertain to claims of loss or damage for which the carrier was sought to be held liable as an insurer, yet others pertain to claims of loss or damage occasioned by the negligence of the carrier. Among the latter may be cited: *Goggin v. Kan. Pac. Ry. Co.*, 12 Kan. 416; *Sprague v. Mo. Pac. Ry. Co.*, 34 Kan. 347, 8 Pac. 465; *W. & W. Ry. Co. v. Koch*, 47 Kan. 753, 28 Pac. 1013; *The St. Hubert*, 107 Fed. 727, 46 C. C. A. 603; *The Westminster*, 127 Fed. 680, 62 C. C. A. 406; *So. Ry. Co. v. Adams*, 115 Ga. 705, 42 S. E. 35; *Dawson v. Railway Co.*, 76 Mo. 514; *Hatch v. Minneapolis, etc., Ry. Co. (N. D.)* 107 N. W. 1087. The above are not all the cases that are cited on this point; but these sufficiently show that in a number of cases the requirement of notice or the presentation of a claim was held to apply to a loss or damage occasioned by the carrier's negligence, and by reason of their citation in support of the foregoing texts it may fairly be inferred that the text-writers intended the rule declared by them to apply to cases of loss or damage resulting from negligence or misconduct, as well as from other causes.

The cases cited from Illinois, Wisconsin, and New York are not in point, for the reason the rule obtained in those jurisdictions that it was not against the policy of the law to contract against ordinary negligence. All the courts giving effect to such stipulations, when applied to a loss or damage by negligence, in most positive terms assert that it is against public policy to permit a common carrier by special contract to relieve itself from, or limit its liability for, a loss or damage incurred by its negligence or misconduct; but it is asserted that the giving effect to such a stipulation in such a case is not violative of this principle. Some courts have given reasons for such a conclusion. Others merely discuss the ques-

tion as to whether the stipulation was reasonable under all the facts and circumstances of the case, and, when found to be so, merely assert that it was not against the policy of the law. In some cases the conclusion is supported by the citation of cases where the stipulation was given effect in case of loss for which the carrier was sought to be held liable as an insurer. We well can understand why a stipulation, when reasonably and fairly entered into, requiring notice of claim of loss as a condition precedent to charge the carrier with liability as an insurer, does not contravene the policy of the law under consideration; for it is readily perceived that a loss or damage may occur by accident, dangers of carriage or navigation, and from other causes for which the carrier, at common law, is liable, but against which human skill and vigilance could ordinarily not have guarded. The principle is well illustrated in the case of *So. Pac. Exp. Co. v. Caldwell*, 21 Wall. (U. S.) 264, 22 L. Ed. 556. Many such losses will and do occur of which the carrier has no knowledge until notified, and unless a notice is given within a reasonable time no opportunity of investigating and ascertaining the facts is afforded it. A stipulation, therefore, that the carrier shall be relieved from the rigid and severe rules of the common law, which hold it liable as an insurer, unless notice of claim of loss shall be given in order that it may protect itself against imposition and fraudulent claims, is no longer regarded as contravening the policy of the law. When the carrier is charged with liability as an insurer, the question of negligence is ordinarily not involved. While the plaintiff in such a case must aver and show a breach of duty, he is not required to aver and prove negligence on the part of the carrier. When the carrier and shipper contract with respect to the former's liability as an insurer, they are not contracting with respect to a liability for the carrier's tort or negligence; and, as remarked by Mr. Justice Strong in the *Caldwell Case*: "The contract is not a stipulation for exemption from responsibility for the defendant's negligence, or for that of their servants. It is freely conceded that, had it been such, it would have been against the policy of the law and inoperative. A common carrier is always responsible for his negligence, no matter what his stipulations may be." The reasons so well stated by that court why the stipulation was not against the policy of the law, when applied to a case of liability as an insurer, and where the question of negligence was not involved, are now given by many courts in cases of damage or injury to property by negligence, as is well illustrated in the case of *Sprague v. U. P. Ry. Co.*, *supra*. In that case the action was brought against the carrier for negligence in the management of its cars, by reason of which the plaintiff's horses, which were be-

ing shipped, were thrown down, bruised, and injured, so that one of them died and the others were disabled. The reason given why the stipulation in the contract of shipment requiring notice of claim as a condition precedent of liability was not against the policy of the law was that it tended "to protect the company from fraud and imposition in the adjustment and payment of claims for damages by giving the company a reasonable opportunity to ascertain the nature of the damage and its cause."

As we have attempted to show, in a case where the carrier is sought to be held liable as an insurer, there is much reason requiring notice of claim; for, in many instances, the carrier otherwise would not have knowledge of the loss. Even in such case, where it was shown that the carrier had full knowledge of the loss, the failure to give the notice did not defeat the action. When, however, the carrier, through its negligence, inflicts an injury or damage upon property intrusted to it, the reason for the rule no longer exists. The carrier certainly is bound to take notice of its own acts of negligence and of the consequences of such acts. The servants of the carrier undoubtedly are required to be attentive and vigilant in the handling of and looking after property intrusted to their master's care. If, through their negligence, stock under their immediate charge is killed or injured, they, better than any one else, ought to have knowledge of such fact. The carrier has, equally with the shipper, and in many instances much better, opportunity to ascertain the facts and results of its negligence and the extent and nature of the injury or damage inflicted by it. We need but to look at the case in hand to show the inapplicability of such a reason. Here the court found that the carriage of the stock was negligently delayed, and at a place where it could not be unloaded, fed, or watered; that the plaintiff at the time frequently urged the defendant to move the stock to a place where it could have been fed and watered, and, although the defendant well could have done so, nevertheless it refused; and that plaintiff's injury and damage was the direct result of such negligence. That the servants of the defendant in charge of the train, and other agents of the defendant connected with the movement and operation of the train, knew of the delay, goes without saying. That stock requires feeding and watering, and that shrinkage in weight is likely to occur if not done, must have been equally well known to them, especially when the plaintiff frequently complained at the time and urged that the sheep be taken to a place where they could be taken care of. The evidence on the part of the plaintiff shows that the delay was unnecessary, his complaints and requests wholly disregarded, and the defendant's refusal to take the sheep to a place where they could have been watered

and fed inexcusable. The court in effect so found. Such finding, on this record, is binding on the defendant. To say that it was not bound to take notice of the consequences of such negligent acts, and was not required to exercise any vigilance in that regard until the shipper arrived with a prepared list of injuries, is but to say that it is not bound to discharge the duties and trust with that degree of care and fidelity imposed upon it by law. Such a holding tends to relax the motives for the exercise of such care.

Why was not the defendant, equally with the plaintiff, accorded every opportunity, before the sheep were unloaded at destination and before they left the stockyards, to investigate the results of its negligence and ascertain the nature and extent of the injury inflicted in consequence of such acts? Upon what principle should the carrier, in such case, be excused from exercising any vigilance in such regard until notified by the shipper, and be discharged from all liability if such notice is not given. The facts concerning plaintiff's damages alleged to have been occasioned by a change in the market could as readily have been ascertained 24 days as 10 days after the arrival of the sheep at destination. We cannot well see why the presentation of a claim of such a loss was necessary in order that the defendant might properly protect itself against fraud and imposition, unless it shall be said that in all cases of tort the wrongdoer shall be timely notified of the mischief done by him, in order that he may, while the transaction is fresh, the better investigate the extent of it. But it is said the servants in charge had no means of determining the extent of shrinkage, for such facts could only be determined by a comparison of the weight of the sheep when delivered to the defendant and when they arrived at destination. It is quite true that the extent of such an alleged damage is largely determined from a consideration of such facts; but, in order that the defendant may protect itself from unjust claims, it is not essential that knowledge of all the facts should be possessed by some particular servant or servants in its employ. The facts concerning its alleged negligence of delay were as easily ascertained 24 days as 10 days after its commission. So was the condition of plaintiff's sheep when delivered to it. Whoever was possessed of knowledge of such fact knew it 24 days as well as 10 days after the sheep arrived at destination. Whatever was known by such persons, and whatever evidence was possessed by them of such fact, could have been ascertained by the defendant one time as well as another, at least until the matter became stale. The record of this case discloses that the sheep on their arrival were weighed at the stockyards, and the average weight of the different kinds of sheep ascertained. The record does not directly disclose the fact, but from the evidence in the

case we think it a fair inference that there was kept a stockyard record of such weight. But, whether there was or not, the fact that the sheep were there weighed and the result thereof was as readily ascertained 24 as 10 days thereafter. Such facts, in the very nature of things, were not peculiarly within the knowledge of the plaintiff. They were equally well known to the persons about the stockyards who attended the weighing and the person or persons to whom the sheep were sold. The contention made that the giving of notice within 10 days was essential to enable the defendant to investigate and ascertain the facts, so it might properly have protected itself against an unjust claim, is more plausible than sound. No good reason appears why the defendant, with full knowledge of its negligent acts occasioning the delay, and with knowledge that the natural and probable consequences of such acts would result to plaintiff's damage, was not, equally with the plaintiff, afforded every opportunity to investigate and ascertain the nature and extent of the injury after the sheep arrived at destination and before they left the stockyards.

A further argument made in this connection is that, owing to the vast amount of business conducted by common carriers, and to the impracticability of immediate supervision over their numerous employes, and to the limited knowledge of the servants as to the nature and extent of injuries, such as here, it is but just that notice of claim should be given before rendering the carrier liable. This position is likewise untenable. It involves the violation of the well-recognized doctrine of "respondeat superior." If it shall be once said that the master shall not be liable, or held responsible, for the negligence or misconduct of his servants in the discharge of his business and within the scope of their employment, unless notified within a reasonable time, then are not only the fundamental principles upon which the law of common carriers is founded disregarded, but also one of the essential principles of the law of negligence relaxed? Another reason given by courts is expressed in the case of *The Westminster*, supra, where it is said: "The notice stipulated for is not of the fact of damage, more or less, but of the intent to hold the carrier liable for it, which, on failure to give notice, the latter, in view of the stipulation, may well regard as being waived." With due regard to the very high standing of that court, we submit that the giving of such a reason begs the question; for it assumes the validity of the contract, the very thing to be demonstrated. Undoubtedly, if the carrier may assume such validity, then it may well act upon the assumption that unless notice is given all claim for damages is waived. If the stipulation is invalid, then upon what theory may it be said that the carrier may regulate its conduct upon it? Another reason given is stated in *Kalina v. U. P. R. R. Co.*,

69 Kan. 172, 76 Pac. 438, as follows: "The clause in question is not one exempting the carrier from its common-law liability, or limiting that liability, but one imposing a condition upon the shipper, which he must observe before he may recover for a breach of the carrier's duty. In other words, it is a condition of recovery, and not an exemption from liability."

Such statements tend rather to confuse the proposition than to solve it. They consist of the making of one statement and denying it by asserting another, or the proving of a negative by an affirmative statement of its opposite. That there is a well-recognized distinction between a substantive right or liability, and remedy, though at times difficult of exact definition, is admitted. The assertion that the liability is not exempted nor limited, but the right of recovery is only conditioned, is not the making of such distinction; nor is the stipulation remedial, and not substantive, if such was intended to be declared. To say that a liability exists unrestricted, but that the remedial right shall be asserted within a prescribed time or under a certain procedure, is one thing. To say that a liability exists, but that no right of action or recovery shall exist until something else is done, is quite another and different thing. The one pertains merely to remedy; the other, to the cause of action itself. If a carrier's contract should expressly provide a liability, to the fullest extent imposed by law, for all torts committed by it, but should further provide that no recovery should be had for such wrongs, there would not be much difficulty in holding such a contract invalid, notwithstanding the argument that might be made that the contract did not affect liability, but only the right of recovery. The natural effect of such a contract would be to destroy or impair the substantive right or liability itself. When it is said that the liability for negligence is not exempted, nor limited, but that there should be no right of recovery with respect to it, there is a substantial denial of the one statement by the making of another. When, also, it is said such liability is not limited, but the right of recovery with respect to it is made to depend upon some condition precedent, it is, in degree, doing the same thing. If there is no right of vindication, or restoration, or recovery for a liability, except upon some condition precedent, it naturally follows that the liability is to that extent limited or conditioned. The condition goes, not to the remedy merely, but to the cause of action itself. Until performance of the condition, no cause or right of action exists; and such is the obvious meaning of the plain terms of the stipulation under consideration.

We now come to the reasons given by other courts, and which are stated in Moore's work on Carriers (page 334), as follows: "They do not relieve carriers from any part of their obligation as common carriers. As such they are bound to the same diligence,

fidelity, and care as they would be required to exercise if no such stipulation had been made." We find these expressions first used by Mr. Justice Strong in the Caldwell Case, where, as we have shown, they were used with respect to a stipulation pertaining to a loss or damage not alleged to have been caused by negligence, but where the carrier was sought to be held liable as an insurer. The expressions were made because the loss and damage sought to be recovered had not been incurred by the negligence of the carrier, and because the stipulation did not pertain to such a loss. We do not think Mr. Justice Strong intended that the language used by him should apply to a case of damage or injury incurred by the negligence of the carrier. He had no such case before him. But let us see whether such language can properly be applied to a case of negligence by the carrier. Why is it against the policy of the law to allow the carrier, by special contract, to exempt itself from, or limit its liability for, negligence? It is because of the fiduciary relation between the carrier and the shipper, the inequality of their positions, and the duties owing by the carrier to the public. To permit it to make such a contract tends to make it less careful and prompt in the performance of its duties and obligations, and less faithful in the discharge of its trust. Hence the policy of the law forbids such a contract. Now, is it true that a stipulation providing that the carrier shall not be liable for its negligence, whether ordinary, willful, or gross, except upon the presentation of a claim within a specified time, has no bearing or influence upon the exercise of its care and the discharge of its trust? The question is well answered by the statement that, the more stringent the motives are for the exercise of care and diligence, the greater is the probability that the proper degree of care and diligence will be exercised; the less stringent the motives are, the less likelihood that such care will be exercised. It is readily perceived, in many instances, the motive for the exercise of a proper degree of care is not the same when the right of recovery is dependent upon some condition as when it is made absolute upon the infliction of the injury. The more conditions precedent of recovery which are imposed, the more difficult it is made on the part of the shipper to vindicate his right, and to recover for a loss or damage sustained by him. The more difficult it is made to vindicate the right, the less probable it is that it will be vindicated. Such matters have a natural tendency to influence the carrier in part to graduate its conduct, and to relax the degree of care and fidelity imposed upon it.

From a perusal of the cases we find no satisfactory reason for the conclusion that the stipulation in question does not affect the liability, nor influence the conduct of the carrier in the discharge of its duties, and is, therefore, not against the policy of the law.

We are, however, mindful that the views expressed by us are against the great weight of modern authority. We find ourselves in the position where the conclusion reached by us upon what we believe to be fundamental principles is contrary to the conclusion reached by many able courts upon a consideration of the same principles. When we find such to be the case, we confess the confidence in our original position on this point is somewhat shaken. We have therefore come to the conclusion not to rule the case upon the principle so broadly declared in our original opinion. Our holding in this regard is that a stipulation, when fairly entered into and found to be reasonable under all the circumstances, requiring the presentation of a claim for loss or damage, is not in all cases against the policy of the law, and for that reason ineffectual, merely because the claim pertains to a loss or damage occasioned by negligence. It is not necessary to consider the question when such a stipulation will be regarded reasonable and applicable, nor the circumstances under which the shipper is relieved from the giving of notice or presentation of such a claim, because of the further view entertained by us as to the invalidity of the contract before us. As we have seen, under the general doctrine of this country, a contract which exempts the carrier from, or limits its liability for, negligence, contravenes public policy. When the contract in question is considered as a whole, is it not such a contract? Considering it in its entirety, what was the ruling intention of the parties, as evidenced by the plain language of its terms? Is it with respect to the presentation of a claim for damage or loss of all kinds? Or is it with respect to an exemption from, or limitation of liability for, negligence? The alleged damages were found to have resulted from a negligent delay in transportation. In paragraphs 3 and 4 of the contract it is stipulated in most positive terms that the defendant should not be liable for any loss or damage which might be sustained from delay in transportation or shrinkage or for any other thing or cause not resulting from the defendant's willful or gross negligence. That such and all other stipulations in the contract exempting the defendant from liability for loss or damage, except for gross or willful negligence, are against the policy of the law, requires no discussion. Paragraph 5 relates to the question of presentation of claims for loss or damage or detention, not of all kinds for which the defendant in law would be liable, but for a liability of a loss or damage or detention stipulated about in the preceding paragraphs. We think the only fair meaning of the contract, and the ruling intention of the parties, as declared by its plain terms, are that the defendant should not, in any event, be liable for negligence or misconduct not amounting to gross or willful negligence, and that it should only be liable for gross or willful negligence upon

the presentation of a claim. Paragraph 5 cannot be regarded as a separate and independent stipulation wholly unaffected by the obnoxious stipulations preceding it, and treated as merely dealing with the question of the presentation of claims for loss or damage of all kinds and for which the defendant, under the law, would be liable. It is directly related to and affected by the preceding paragraphs. Each is a part and parcel of a contract exempting the defendant from liability for ordinary negligence, and making it liable only for gross or willful negligence upon the presentation of a claim.

After the parties had in unmistakable terms stipulated that there should be no liability for negligence, except for gross or willful negligence, how can it be said that by paragraph 5 they intended to stipulate that there should be a liability for ordinary negligence and for all losses and damages for which the defendant in law is responsible, provided a claim is presented? If such were the intention of the parties, then the words employed by them in paragraphs 3 and 4 were entirely useless. The giving of such a meaning to paragraph 5 is antagonistic to every other provision of the contract. The meaning which we have given it is in harmony with all other provisions of the contract. If the carrier and shipper intend not to contract for an exemption from or a restriction of the former's liability for negligence or misconduct, but merely intend to restrict the latter's remedy by the imposing of a reasonable condition, it ought not to be a difficult matter to express such an intention in language which is certain and which fairly conveys such a meaning. The contract under consideration is not susceptible of such a construction. When the proposition is reduced to its simplest form, it presents the question: Is a contract which exempts a common carrier from liability for ordinary negligence, and which renders it liable alone for gross or willful negligence, and that only upon the presentation of a claim, forbidden by the policy of the law? We think it is, and so hold.

Upon this record such holding controls the case, and necessarily requires a reversal of the judgment. But these further observations might also be noted: Though the stipulation in paragraph 5 were to be regarded valid, can it be held applicable to the loss or damage sustained by plaintiff because of a change in the market? The cases seem to hold that stipulations similar in language as is the one here, requiring the presentation of a claim as a condition precedent of the carrier's liability, cannot be extended to a loss or damage occasioned by a fall of the market. The reasons for such a conclusion are that "agreements of this character are viewed with some strictness by the law, and unless the exemption from liability is clearly expressed it should not be allowed" (*Railway Co. v. Poole*, 73 Kan. 466, 87 Pac. 465), and that such a loss

was not fairly contemplated by the parties and was not reasonably included within the terms of the stipulation. *Mo., K. & T. Ry. Co. v. Fry*, 74 Kan. 546, 87 Pac. 754; *Cornelius v. Atchison, etc., Ry. Co.*, 74 Kan. 599, 87 Pac. 751; *Atchison, etc., Ry. Co. v. Poole*, 73 Kan. 466, 87 Pac. 465; *Leonard v. C. & A. Ry. Co.*, 54 Mo. App. 293; *Kramer & Co. v. C. C. M. & St. P. Ry. Co.*, 101 Iowa, 178, 70 N. W. 119; 5 Am. & Eng. Ency. Law, 324.

The weight of authority also seems to be that, in an action where there is a plea of a special contract in defense limiting or conditioning the carrier's liability, the burden is upon the carrier, not only to show a valid special contract, but also to allege and prove facts and circumstances showing the stipulation to be reasonable. *Ft. W. & D. C. Ry. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Kan. & Ark. Valley R. Co. v. Ayers*, 63 Ark. 331, 38 S. W. 515; *Cox v. Cent. Vt. R. Co.*, 170 Mass. 129, 49 N. E. 97; *Brooks & Sons v. West. Un. Tel. Co.*, 26 Utah, 147, 72 Pac. 499; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; 6 Cyc. 507-519, and cases; 5 Am. & Eng. Ency. Law, 324-326, and cases; notes to cases, 10 A. & E. R. R. C. (N. S.) 864; notes to cases, 13 L. R. A. 518. In the case of *Railway Co. v. Greathouse*, supra, it was said: "Without determining whether this provision in a contract such as this can in any case be enforced, we do not think the appellant has brought itself within the rules laid down in those cases that permit such contracts to be enforced and that recognize their legality. When such provisions of a carrier's contract are enforced, it is upon the assumption that such agreement is reasonable, when considered in the light of the subject-matter of the contract and the circumstances and surroundings of the parties. To prove that such conditions in a contract are reasonable is a burden resting upon the carrier, who must show by proper pleadings and evidence the existence of facts that call for an enforcement of the condition. There were no pleadings and proof whatever upon this question coming from the carrier. *Railway v. Fagan*, 72 Tex. 132, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; *Railway v. Harris*, 67 Tex. 167, 2 S. W. 574." And in *Galveston, H. & S. A. Ry. Co. v. Williams* (Tex. Civ. App.) 25 S. W. 1019, it was observed: "It is the answer that must allege such facts as will show that the contract was reasonable in its character."

The answer here contained no allegations, nor was there any proof upon the question, of the reasonableness of the stipulation. While the court found that the provision requiring the claim to be presented within 10 days after the unloading of the sheep and before they had been mingled with other sheep was a reasonable provision, yet such a finding was a mere conclusion of law, without even evidence in support of it. Conclusions of law cannot be made to perform the office of find-

ings. *Dillon Imp. Co. v. Cleaveland* (Utah) 88 Pac. 670. The question of reasonableness of such a stipulation is generally one of fact, and is dependent upon the particular facts and circumstances of the case. No facts are alleged, proven, or found from which the reasonableness of the stipulation may be deduced. The finding must be treated as no finding on the subject. The burden being cast upon the defendant to show the reasonableness of the special provision, until such fact is found in defendant's favor, the special contract, though otherwise valid and applicable, cannot avail it. The reasonableness of the provision cannot be determined from the face of the contract. It was well said by the Supreme Court of the state of Illinois: "We think no court could intelligently hold that such a provision [the giving of notice at destination to the station agent or some officer of the carrier before the stock is removed from the place of delivery and mingling with other stock] is in and of itself reasonable and valid, regardless of the facts and circumstances surrounding the parties to the contract." *Baxter v. Louisville R. Co.*, 165 Ill. 78, 45 N. E. 1003. The provision in that case was held unreasonable and invalid, because of the inference from the evidence that the carrier did not have a station agent or officer at the place of destination. To the same effect are *Engesether v. Gt. N. Ry. Co.*, 65 Minn. 168, 68 N. W. 4; *Carpenter v. Eastern Ry. Co.*, 67 Minn. 188, 69 N. W. 720.

So, too, it has been held that stipulations requiring the presentation of claims at a particular place and within a specified time are not applicable to cases where the nature of the injury or extent of loss cannot be reasonably ascertained within such time; nor to damages for delay in transportation; nor where the communicated facts with respect to the loss or injury are as well or better understood by the carrier than the shipper. 6 Cyc. 508, 521, and cases; *Popham v. Barnard*, 77 Mo. App. 619; *Smitha v. Louisville, etc., R. Co.*, 86 Tenn. 198, 6 S. W. 209. Such provisions have likewise been held unreasonable "if there is indefiniteness and uncertainty as to the agent to whom notice is to be given, or an agent is named to whom it would be impracticable to give notice, or if there is no agent reasonably accessible." 6 Cyc. 506, and cases cited.

These cases but illustrate the rule that what may be a reasonable requirement with respect to the presentation of a claim in one case may be unreasonable in another. There being no allegations nor proof of the reasonableness of the stipulation, the court, on that ground, erred in giving it effect.

For the foregoing reasons, the judgment of the court below is reversed, and the cause remanded for a new trial. Costs to appellant.

McCARTY, C. J., and FRICK, J., concur.

UNITED STATES et al. v. CITIZENS'
TRADING CO.

(Supreme Court of Oklahoma. Nov. 14, 1907.)

PUBLIC LANDS—REVIEW IN EQUITY—DECISIONS OF LAND DEPARTMENT.

Courts of equity will always interfere to prevent injustice and wrong after the matter has been finally determined in the Land Department, when there has been a manifest misapplication of the law to the facts found by such department.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 301-307.]

(Syllabus by the Court.)

Error from District Court, Pawnee County; before Justice Bayard T. Hainer.

Action by the Citizens' Trading Company against the United States and T. E. Gibson, Judgment for plaintiff, and defendants bring error. Affirmed.

This is an action brought to declare a resulting trust to recover five lots in the townsite of Pawhuska, of which plaintiff below, defendant in error here, claims it had the preference right to purchase under Act Cong. March 3, 1905, c. 1479, 33 Stat. 1061, relative to the sale of the Pawhuska townsite, by reason of having permanent improvements thereon under the terms of that act. The character of the improvements is specifically set out in the petition. The defendant, in his answer and cross-petition, admitted the facts stated in plaintiff's petition to be true, but claimed that the improvements were not in law of the substantial character required by the instructions of the department. Both parties made motion for judgment on the pleadings. Motion of plaintiff below was sustained, judgment rendered in favor of plaintiff, exceptions saved, and the case is brought here for review.

John Embry, U. S. Atty., and Dale & Blier, for plaintiffs in error. E. W. King, for defendant in error.

IRWIN, J. (after stating the facts as above). Act Cong. March 3, 1905, c. 1479, 33 Stat. 1061, is as follows (omitting the caption): "That there shall be created an Osage Townsite Commission consisting of three members, one of whom shall be the United States Indian agent at the Osage agency, one to be appointed by the chief executive of the Osage tribe, and one by the Secretary of the Interior, who shall receive such compensation as the Secretary of the Interior may prescribe, to be paid out of the proceeds of the sale of the lots sold under this act. That the Secretary of the Interior shall reserve from selection and allotment the south half of section 4 and the north half of section 9, township 25 north, range 9 east of the Indian meridian, including the town of Paw-

huska, which, except the land occupied by the Indian school buildings, the agency reservoir, the agent's office, the council building, and the residences of agency employes, and a twenty acre tract of land including the Pawhuska cemetery, shall be surveyed, appraised, and laid off into lots, blocks, streets and alleys by said townsite commission under rules and regulations prescribed by the Secretary of the Interior, business lots to be twenty-five feet wide, and residence lots fifty feet wide, and sold at public auction, after due advertisement to the highest bidder, by said townsite commission, under such rules and regulations as may be prescribed by the Secretary of the Interior, and the proceeds of such sale shall be placed to the credit of the Osage tribe of Indians: provided, that said lots shall be appraised at their real value, exclusive of improvements thereon or adjacent thereto, and the improvements appraised separately; and provided, further, that any person, church, school, or other association in possession of any of said lots, and having permanent improvements thereon shall have preference right to purchase the same at appraised value, but in case the owner of the improvements refuses or neglects to purchase the same, then such lots shall be sold at public auction at not less than the appraised value, the purchaser at such sale to have the right to take possession of the same upon paying the occupant the appraised value of the improvements."

An examination of this record will disclose that the improvement upon which the occupant claims a preference right of purchase of the lots in controversy were of a permanent character. This fact is clearly set forth, and an accurate and particular description of the kind and character of the improvements is set up in the petition, and the facts are expressly admitted by the answer. This leaves no question as to the improvements being of a valuable and permanent character. This leaves nothing for the court to consider but the question of a misapplication of the law to the facts, and brings the case clearly within the class of cases of which courts of equity should and will take cognizance. *King v. Thompson*, 3 Okl. 644, 39 Pac. 466; *Paine v. Foster*, 9 Okl. 214, 53 Pac. 109; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848. The improvements in this case being conceded to be lasting, permanent, and valuable, there can be no room for doubt but that the townsite board misapplied the law to the facts; and hence the decision of the district court was right and should be affirmed, which is accordingly done, at the costs of the appellant. All Justices concurring, except Justice HAINER, who, having tried the case below, took no part in this decision, and PANCOAST, J., absent.

(51 Or. 21)

SMITH et al. v. SMITH et al.

(Supreme Court of Oregon. Feb. 4, 1908.)

DEEDS—EXHIBITION—PROOF—SUFFICIENCY.

Where a defendant who claims land under an unattested and unacknowledged deed containing unexplained erasures, said to have been executed by his father, did not disclose his claim until more than a year after his father's death, and in the meantime permitted the land to be treated as belonging to his father's estate, and allowed the executors to discharge a mortgage, taxes, etc., thereon, his explanation that he did not know that attestation or acknowledgment was necessary, and that he did not disclose the deed to his father's executors because "it was none of their business," was insufficient; there being no claim that his father, an experienced business man, did not understand the necessity of having the deed witnessed and acknowledged, and no explanation of a circumstance tending to dispute defendant's assertion that the deed was signed when it was prepared.

Appeal from Circuit Court, Multnomah County; M. C. George, Judge.

Suit by William C. Smith and another against Benjamin F. Smith and another. From a decree for defendants, plaintiffs appeal. Reversed.

James T. Lawler and E. T. Taggart, for appellants. H. H. Riddell and E. B. Dufur, for respondents.

BEAN, C. J. This is a controversy between the heirs of H. A. Smith, deceased, concerning the title to the home property of their father, being lots 7 and 8, block 21, Highland, Multnomah county. The defendant B. F. Smith claims to be the sole owner thereof, by virtue of a deed executed to him by his father about a year prior to his death. H. A. Smith died on the 18th of May, 1902, leaving a will executed on the same day, by which he bequeathed to his wife \$5,000 insurance on his life, subject to the payment of a \$1,200 mortgage "upon my house, lots seven and eight, block twenty-one, Highland, Multnomah county, Oregon," and gave to his son B. F. Smith \$1,000 in cash, and use of "my home place," and \$200 a year for the care and maintenance of the testator's wife during her life; and devised and bequeathed all the rest and residue of his property to his four children in equal shares. Mrs. Smith, his widow, died a short time after her husband's death. At the time of his father's death, and for some time prior thereto, B. F. Smith and family were living in the house on the property in controversy, and continued to so reside during the administration of the estate. H. A. Smith's will was admitted to probate a few days after his death, and the executors nominated by him appointed. They included the property in controversy in the inventory of the estate, with the knowledge and without objection or protest from B. F. Smith, and afterwards paid the mortgage thereon from funds belonging to the estate, and taxes, insurance, and street assessments. On October 4, 1902, they applied to the county court for an order for the sale of real estate, in-

cluding the property in controversy, for the payment of debts and expenses of administration, and defendant B. F. Smith admitted service of citation on the matter of such petition, and expressly consented in writing to the order of sale. The order was made, but the funds from other sources were sufficient to meet the expenses of administration and debts of the estate, without the sale of the home place. About the time this fact was ascertained, and more than a year after his father's death, B. F. Smith first asserted title to the property and disclosed the existence of the deed, under which he now claims. This deed purports to have been executed by H. A. Smith and wife on the 21st of May, 1901, about a year prior to the execution of a will asserting title and disposing of the same property. It is neither witnessed nor acknowledged, and, according to defendant's testimony, was prepared by him and signed by his father and mother, delivered to him, and was in his possession for more than a year after the death of his father before it was disclosed to the executors or any other person. In the meantime the property had been considered and treated by all parties, with his knowledge and without objection from him, as belonging to his father's estate, and had been listed and appraised as such. The executors had paid the mortgage, taxes, insurance, and assessments with his knowledge and acquiescence, and without the slightest idea that he had or claimed any interest in the property, other than as an heir. Now, these circumstances, while not conclusive against him, are such as to occasion grave doubts as to the validity of his asserted title, and call upon him for clear and convincing proof thereof, and this, in our opinion, he has not satisfactorily given. He explains the irregularity in the execution of the deed by saying that he did not know that a deed should be witnessed or acknowledged, and his failure to advise the executors of its existence was because it was none of their business. He does not claim, however, that his father, whom the record shows to have been a man of large business experience, did not understand the proper manner of executing deeds conveying real property, and it is hardly probable that he would have executed an instrument intending to convey his home place to his son, without having it witnessed and acknowledged.

Again, it is asserted by defendant that the deed was signed by the grantors at the time it was prepared, but the instrument in evidence shows that the signatures of the grantors are in a different ink from that used in writing the body of the deed, and there is no attempted explanation of this challenging circumstance. And, finally, an inspection of the deed itself raised a suspicion as to its genuineness. A printed form was used for making the deed. In the space designed for the description of the property three or four lines of writing appear to have been erased,

and the description of the property in controversy or part thereof written over the erased portion. The nature of the writing erased cannot be determined definitely, but the fact of an erasure can admit of no doubt. The defendant offered no explanation of any of these discrediting facts, and while some of the points were not made by plaintiff in the court below, and probably cannot be urged here as an objection to the admission of the instrument in evidence, they are pertinent and must be considered on the question of the genuineness of such instrument, which is an important, if not the controlling, fact in the case. We do not undertake to adopt any theory as to how the deed came to be in its present form, nor is it necessary for us to do so. It is enough that, without a satisfactory explanation of the matters alluded to, the instrument cannot be accepted as a conveyance of the property in controversy from H. A. Smith to the defendant, and given precedence over the will of the alleged grantors of a later date.

It follows, therefore, that the decree of the court below should be reversed, and it is so ordered.

MAGONE v. PORTLAND MFG. CO.

(Supreme Court of Oregon. Feb. 4, 1908.)

1. MASTER AND SERVANT—DUTY OF MASTER—WARNING—MINORS.

Where the dangers of an employment are visible so that any man of ordinary intelligence could not fail to see and comprehend them, an employer is under no obligation to warn the servant of their existence; but if the employé is a minor, who because of his immature age, inexperience, or want of comprehension does not appreciate the danger, though it is open and apparent, it is the duty of the employer to caution him of it, and instruct him how to avoid it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 308-316½.]

2. SAME—CARE REQUIRED OF A MINOR—ASSUMPTION OF RISK.

Care and caution of a minor to avoid danger can only be required to the extent that the danger is appreciated by him, and the assumption by a minor of the risks of an employment is commensurate with his age, experience, and capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 601-609.]

3. SAME—ACTIONS FOR INJURIES—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE OF MINOR.

Whether a servant, a minor, was negligent in putting his hand under certain knives of a machine while it was not in motion, *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

4. SAME—EFFECT OF CIRCUMSTANCE.

Where an employé's work requires haste, and his whole energy and attention is absorbed in performing it, he is not conclusively presumed to have a particular danger incident to his work constantly in mind, and the care and attention required may depend upon the facts of the particular case, so that whether they are such as to excuse him from the degree of care

and thoughtfulness ordinarily required will become a question of fact for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

5. SAME—SUFFICIENCY OF WARNING.

Whether a servant, a minor, was sufficiently warned of the dangers of his employment at a certain machine, *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1044-1050.]

Appeal from Circuit Court, Multnomah County; Alfred E. Sears, Jr., Judge.

Action by Roscoe Magone, by his guardian ad litem, against the Portland Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff, by his guardian ad litem, brought this action to recover damages for personal injuries. From a judgment for plaintiff, defendant appeals. Defendant is a corporation operating a mill at St. Johns, Or., for the manufacture of material for boxes, baskets, furniture, etc., by the use of various machines operated by steam power. The particular machine by which plaintiff was injured consists of two stationary knives set opposite each other with the edges downward, about 18 inches long and 6 inches apart, to cut stock for grape baskets, the stock being fed to the knives upon a movable table pressed up against them, which is operated automatically when the machine is in motion. When cut the finished stock is crowded up between the knives and removed by hand from above, the exposed stock being about 18 inches above the edge of the knives. The machine is operated intermittently at the will of the operator, being stopped to place a fresh supply of material on the table, viz., 25 or 30 thicknesses at a time, which would take, plaintiff says, "two or three minutes"; another witness says, "six or seven minutes"—and then the machine is set in motion, and continues so until such material is all cut. When the table is down, the space between it and the knives is about 6 inches. Plaintiff's duty at this machine was to carry away the finished stock from above the knives and place it upon tables situated from a few feet to 15 feet away; and when the machine was stopped for the reloading of the table his duty was to pick up from the floor the culls and waste with a fork and load them upon a wheelbarrow and take them to the engine, about 50 feet away—plaintiff's position being on the opposite side of the machine from the operator—and it kept him very busy. He says: "Why, I had to take the stuff, and run over to one table, and then run back again to get it; had to hurry, it piled up so quick there at the machine." Plaintiff went to work at this machine for the first time about 10 o'clock on the morning of the injury, and as the machine was stopped for the reloading of the table, he would put his hand up under the knives to push up the stock that could not be reached from above. When

asked why he put his hand up under the knives he said: "Well, I put my hand under the knives, because whenever the machines stopped—after it stopped—I would put my hand under the knives to get out the place for a distance of about 18 inches, and then I would go and clean up these here culls over the floor. I have to keep the waste from the machine, and when the machine would start up I would get back there in time. I would hear the machine start up, and get back in time before the machine would run over—the culls would run over—not the culls, but the stock, would run over the top and fall on the floor. I wanted to get back in time that way. Well, I would have more time that way. If I didn't do that, why then I would have to keep watching the machine so close I could not clean up the floor. I could not go far enough away. So I would clean up that, and I would not have to be watching the machine all the time while I went to clean up the floor, and as soon as I would hear the machine start to going then I would go back and be there in plenty of time." In another answer he says: "Well, it was all I could do to keep up with it. I could hardly keep up with it. There was so much stuff." He had been at work at this machine only about three-fourths of an hour when he again put his hand under the knives to remove the stock between them, and the machine was started, as he describes it: "When I went to get it out that time I was shoving it up through. I don't know whether I got it all out or not that time. The machine came right down and took my hand away. It hit so I didn't know it was off." Then again he says that it started up quicker that time than before; that it generally waits a minute or two, but that time it started a good deal quicker—in about 15 seconds. Plaintiff was about 16 years and 3 months old at the time of the injury. He was in the sixth grade in the public school. Previous to this time he had lived about four years in Sellwood, and then about two years in St. Johns. The only experience he had had in any kind of work prior to his employment by defendant on January 19, 1906, was about a month in a shingle mill helping to fix some concrete and assisting to clean trash out of the conveyor, and a little while in a brickyard wheeling soft brick. The accident occurred on the 13th of February, 1906. Prior to the morning of the accident he was off-bearer from a jointer, a machine consisting of one long knife, the material from which was received by the plaintiff directly from the knife. On the day he first went to work for defendant he was told by Oberg, the operator of the jointer, to "be careful of the knives," and at the time of the motion for the nonsuit there was no evidence of any other or different warning or caution given to plaintiff at any time.

R. W. Wilbur, for appellant. R. W. Montague and W. H. Stivers, for respondent.

EAKIN, J. (after stating the facts as above). The negligence of the defendant, alleged and relied upon by the plaintiff as the basis of recovery, is that the defendant carelessly and negligently failed and neglected to caution or warn plaintiff of the dangerous character of the said machine, and by reason of plaintiff's immaturity and inexperience he did not comprehend or appreciate the danger, and this is denied by the answer. And it further sets up the affirmative defense of contributory negligence that plaintiff knew of the danger, and that the injury was the result of want of care on the part of himself or of a fellow servant. Upon the trial at the close of plaintiff's evidence defendant moved the court for nonsuit (1) for the reason that there was no evidence to show any negligence on the part of defendant; (2) that it appears that defendant was guilty of contributory negligence; (3) that plaintiff assumed the risks of his employment; and (4) that the injury was the result of the negligence of a fellow servant. The motion was denied by the court, and a verdict rendered for the plaintiff, and the alleged error of the court in denying the motion for the nonsuit is the only question submitted on the appeal.

The general rule as to the duty of the master to warn the servant of the dangers incident to the employment is laid down by 4 Thompson, Law of Neg. § 4061, as follows: "The master owes no such legal duty to the servant in respect to dangers which are open, visible, and obvious to the comprehension of the servant, considering his years, experience, and understanding. In the case of an adult servant of sound mind the rule is understood to be that, where the dangers of the employment are visible, so that any man of ordinary intelligence, though not an expert, could not fail to see and comprehend them, an employer is under no legal obligation to warn the servant of their existence; but in cases of infants, as we shall hereafter see, the rule is to be applied with reference to their inexperience and want of comprehension." The question here is whether the age, experience, and comprehension of plaintiff was such as to render the danger open, visible, and obvious to him; that is, whether it was a matter of law or a question of fact and law for the jury under proper instructions. It is settled in this state that care and caution to avoid danger can be required of a minor to the extent only that such danger is appreciated by him, taking into consideration his age, experience, and comprehension of it. The assumption by the minor of the risks incident to the employment is commensurate with his age, experience, and capacity. *Mundhenke v. Oregon C. Mfg. Co.*, 47 Or. 127, 8 Pac. 977, 1 L. R. A. (N. S.) 278; *Westman v. Wind R. Lbr. Co. (Or.)* 91 Pac. 478; *Greenway v. Conroy et al.*, 160 Pa. 185, 28 Atl. 692, 40 Am. St. Rep. 715. In *Mundhenke v. Oregon C. Mfg. Co.*, supra, Mr.

Chief Justice Wolverton says: "It has been determined by this court that only such care and caution to avoid the dangers of accident can be expected or required of a person of immature age as is common to other persons of his years of prudence, forethought, and discretion. * * * This must necessarily be so, because infancy and youth spring into manhood and maturity by degrees only, and responsibility develops accordingly." In *MacDonald v. O'Reilly*, 45 Or. 589, 599, 78 Pac. 753, a case of an infant of tender years, and the liability not arising between master and servant, Mr. Justice Bean says: "There has been a time in the life of every person of mature judgment, as all agree, when he was incapable of exercising the care and judgment necessary to avoid or avert danger, and was non *sul juris*. There is a time also when he is in law an adult, and responsible as such. Between these two periods is a transition stage, during which his capacity is a matter of fact for the jury." In *Westman v. Wind R. Lbr. Co. (Or.)* 91 Pac. 478, 480, Mr. Chief Justice Bean says: "It was defendant's duty, therefore, to point out or give him notice of the danger incident to his employment and the risks attending the same, * * * unless they were so open and apparent that one of his age, experience, and capacity, in the exercise of ordinary care and prudence, should know and appreciate them to the same extent as an adult; and that was a question for the jury." These authorities lead to the inevitable conclusion that, if the minor, by reason of immature age, inexperience, or want of comprehension, does not appreciate the danger, although it is open and apparent, then it is the duty of the master to caution him of it, and instruct him how to avoid it. 4 *Thompson, Law of Neg.* §§ 4092-4093; *Bohn Mfg. Co. v. Erickson*, 55 Fed. 943, 5 C. C. A. 341.

The danger or risk which plaintiff incurred was not his contact with machinery in operation. In that it differs from most of the cases on this question. His was the risk of being surprised by the machine starting prematurely. Aside from the question of the carelessness of a fellow servant that this suggests, it also has to do with the charge of contributory negligence by plaintiff. When he placed his hand under the knife the machine was at rest and harmless, except for the danger of its starting unawares. He had previously noted that it took a certain time to reload the table, and was acting upon the presumption that such stops would continue uniform. He was rushed with his work, and absorbed with the one thought of keeping up with it, attempting to economize his time. Under these circumstances we are not justified in saying that as a matter of law such act was contributory negligence on his part. *Dowling v. Allen & Co.*, 74 Mo. 13, 41 Am. Rep. 298. It is a question of fact and law for the jury, under proper instructions, to say whether the danger was open, visible,

and obvious to plaintiff, considering his age, experience, and capacity. The defendant urges that, because the plaintiff knew if he got his hand under the knives while the machine was running it would be hurt; that, therefore, it was negligence for him to put his hand in the machine; and that he is thereby precluded from recovery. His testimony upon this matter is as follows: "Q. Didn't you know if you put your hand under there and it started it would cut your hand off? A. Yes; if it would start up, I knew it would get my hand. Q. Well, why did you do it? A. Well, I didn't suppose it would start up so quick. I didn't think about that. I was thinking about getting the stuff out of there the shortest time. I was thinking of getting the stuff out of the machine so as I could get that off of the floor. I wasn't thinking much about the knives. I was thinking of just keeping up with the work." Where plaintiff's work required haste, and his whole energy and attention was absorbed in performing it, he is not conclusively presumed to have constantly in mind a particular danger incident to his work. The care and attention required of an employé while working about dangerous machinery may depend upon the facts of the particular case—whether they were such as to excuse him from that degree of care and thoughtfulness, which a prudent man would ordinarily exercise. Whether in such a case the injured party was guilty of contributory negligence is a question of fact for the jury. In *Viohl v. N. P. Lbr. Co.*, 46 Or. 297, 301, 80 Pac. 112, Mr. Justice Bean says: "Indeed, in an action against a master to recover damages for an injury to a servant, due to the negligence of the former, the question of contributory negligence on the part of the injured party is ordinarily a question of fact in all cases. * * * It is not declared as a matter of law in any case, unless the danger was not only avoidable if the servant had acted prudently, but also such as no prudent man would have incurred. Mere knowledge of the danger is not conclusive of negligence in failing to avoid it. A servant's knowledge and his voluntary exposure to the danger are probative facts from which the ultimate fact of negligence must be determined, but they are not conclusive." See, also, *Nosler v. Coos B. R. Co.*, 39 Or. 331, 64 Pac. 644; *Roth v. N. P. Lbr. Co.*, 18 Or. 205, 22 Pac. 842; *Johnston v. O. S. L. Ry. Co.*, 23 Or. 94, 31 Pac. 283. In the latter case the danger was open and visible, and the question of contributory negligence was held to be for the jury, and a nonsuit was set aside.

Defendant insists, however, that plaintiff was duly warned of the danger, and, therefore, it was not at fault. The only warning was that given on the 19th of January, the day he began work for the defendant, not by the superintendent, or foreman of the defendant, but by a fellow workman. He says: "Mr. Oberg kind of warned me from the ma-

chine." He said: "Be careful of the knives." This referred to the jointer. It was more than three weeks later when he went to work at the machine in which he was injured. It was operated intermittently, and this was apparently what misled the plaintiff. He had been shown how to take hold of the stock in carrying it away to avoid dropping it; but there was no reference in such instructions to the dangers incident to the work. 4 Thompson, Law of Neg. § 4093, says: "The master is here, as in every other case, bound to act reasonably and justly; and this rule requires him to give suitable warning and instructions to a minor employé in regard to any danger, whether open or concealed, where the danger is not sufficiently obvious to the intelligence or experience of the employé in the exercise of ordinary care on his part; this care being measured by the maturity of his faculties and the amount of his experience." And he further says that the warning should be graduated to the youth, ignorance, and inexperience of a minor. In *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 3 Am. Rep. 506, in the case of a boy, 14 years of age, the dangers of the machinery were open and apparent, and it was held that whether the boy appreciated the danger, and whether the defendant had given him sufficient or reasonable notice of it, were questions for the jury. And on the second appeal (at page 596 of 102 Mass., 3 Am. Rep. 506) the court held that the notice of the nature of the risk to be given by an employer to a minor must be such as will enable a person of his youth and inexperience in business intelligently to appreciate the nature of the danger attending its performance; and it is held that this is a question of fact for the jury. To the same effect was *King v. Lbr. Co.*, 93 Mich. 172, 53 N. W. 10; *Bohn Mfg. Co. v. Erickson*, 55 Fed. 943, 5 C. C. A. 341. The work of plaintiff in the manner of its execution at the machine where he was injured in no manner resembled the work at the jointer. The machine was already in motion when the plaintiff was called to off-bear from it. Whether he should have been cautioned to keep entirely away from the knives, even when not in operation or as to the irregularity of its operation, or otherwise impressed with the dangers of the situation, depended upon plaintiff's capacity to appreciate it. Whatever was required to fix in his mind the risk to which his work was incident is the measure of defendant's duty. It is said by Mr. Justice McGraff in *King v. Lbr. Co.*, supra: "In determining the question of the sufficiency of the notice it is proper and necessary to take into consideration, not only the plaintiff's youth and inexperience, but also the nature of the service, and the degree to which his attention while at work would need to be devoted to its performance. As we have seen that the extent of his capacity is a matter for the jury, it is also for them to determine from

the whole case whether the notice given was sufficient or reasonable to enable plaintiff to appreciate the danger.

Therefore the motion for the nonsuit was properly denied, and the judgment is affirmed.

BECKWITH v. GALICE MINES CO. et al.
(Supreme Court of Oregon. Jan. 28, 1908.)

1. LARCENY — FALSE PRETENSES — DISTINCTION.

Where possession of personal property is obtained from the owner by fraud, trick, or device, and the owner intends to part with both possession and the title when he surrenders control of the property, the offense is obtaining property by false pretenses; but if the possession is fraudulently secured, and the owner does not intend to part with the title, the offense is larceny.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 32; vol. 23, False Pretenses, § 16.]

2. CORPORATIONS — STOCK — "CERTIFICATE OF STOCK."

A certificate of stock is the written evidence of the right of a party to a pro rata share of the net profits of a corporation when declared, or to a like share of the assets after payment of its debts in case of dissolution of the corporation. Such certificates are not negotiable, but the owners may be estopped to assert title as against bona fide purchasers for value without notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 404.

For other definitions, see Words and Phrases, vol. 2, pp. 1032-1033.]

3. SAME — TITLE — BONA FIDE PURCHASER — ESTOPPEL.

Plaintiff, pursuant to a contract for the sale of certain mining stock, sent the certificates containing a power of transfer duly signed to a bank designated by the seller, with instructions that it should collect a draft attached for the price, and then deliver the certificates to the buyer. The bank was in fact a mere pretended institution, organized by the buyer to promote his criminal operations in securing possession of unlisted securities without paying therefor. The bank, without authority, delivered the certificates to the buyer, who immediately sold the stock for less than its value, and the stock after several transfers came into hands of defendants, who were bona fide purchasers for value. Held that, as plaintiff's intention was to transfer the title to the stock, and his voluntary act in delivering the stock to the bank with the power of attorney executed in blank permitted the buyer to perpetrate the fraud, plaintiff was estopped to deny defendant's ownership.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 546.]

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Action by J. S. Beckwith, doing business under the style of J. S. Beckwith & Co., against Galice Mines Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This is a suit to enjoin the transfer on the books of a corporation of certain shares of stock, evidenced by certificates, and to secure a surrender thereof. The complaint sets forth some of the facts hereinafter detailed, and alleges inter alia that the plaintiff at all

the times stated herein was the owner of the stock mentioned, which was stolen from him and carried away by some person unknown to him, and that he had never received any compensation therefor. The defendant the Galice Consolidated Mines Company, a corporation, which issued the stock, and the defendants A. B. Cousin and Milton Weldler, who, at the days specified, were respectively the manager and secretary of the company, having no interest in the result of the suit, did not controvert the facts stated in the plaintiff's primary pleading. J. H. Pickart, H. A. Combs, and the Harry S. Lewis & Co., a corporation, by leave of court, were made parties defendant, and jointly answered, denying the material allegations of the complaint, and averring in effect that they were severally the owners of the stock mentioned, which each purchased in good faith for a valuable consideration, and without any notice of the plaintiff's rights to or interest in the property. The reply denied the allegations of new matter in the answer; and, the cause coming on for trial, the parties stipulated the facts, in substance, as follows: The plaintiff, J. S. Beckwith, is a broker, doing business at Pendleton, Or., under the firm name of J. S. Beckwith & Co., and dealing in unlisted mining stocks. The defendant mining company prior to October 10, 1905, issued two certificates of its stock to Robert C. Yenney for 10,000 shares each, and one certificate to E. D. Gaynor for 5,000 shares, in which vouchers it is stated that they were transferable on the books of the corporation only by the holder thereof in person, or by his attorney, upon a surrender of the certificate, properly indorsed. These certificates were transferred to the plaintiff by the persons to whom they were issued; but as the assignments are identical, except as to the name of the person subscribed thereto, only one indorsement will be given, to wit: "For value received, — hereby assign and transfer unto — shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint — to transfer said stock on the books of the within-named corporation, with full power of substitution in the premises. Dated — 190—. [Signed] Robert C. Yenney. In presence of [Signed] L. Y. Keady." Prior to October 12, 1905, one H. Levy had been dealing in such stock at Chicago, Ill., and his name then appeared in a list of persons engaged as brokers in that city, at which time he notified the plaintiff that his offer to sell 25,000 shares of the Galice Consolidated Mines Company at 5½ cents per share was accepted, whereupon he directed that the certificates, properly indorsed, should be sent to the Garfield Bank of Chicago, with instructions to hold the stock until the money stipulated should be paid. The plaintiff thereupon, without making any other indorsements of the certificates, placed them in an enve-

lope, to which was attached a bill of exchange drawn on Levy, payable at five days sight to the order of the First National Bank of Pendleton, Or., for \$1,437.50. The following address, "Mr. H. Levy, Chicago, Ill., Care of Garfield National Bank (Examination permitted)," was written on the envelope, which, with its contents, was delivered to the Pendleton bank to forward by mail as indicated. The cashier of the Pendleton bank wrote to the Garfield National Bank of Chicago as follows: "I inclose herewith for collection and return our regular No. 38,529. No protest. H. Levy. \$1,437.50"—and placed the letter and the envelope so delivered in another wrapper, which was addressed and forwarded by mail to the Garfield National Bank, Chicago, Ill. Soon thereafter the plaintiff received from Levy a telegram, which, omitting the immaterial parts, is as follows: "Stock not at Garfield Bank. If you mailed it to Garfield National Bank, notify postmaster by mail to deliver it to the Garfield Bank, 56 Fifth Avenue. Postmaster will not recognize instructions by wire. There is no Garfield National Bank. Wire answer." Upon the receipt of this message the Pendleton bank, complying with the plaintiff's request, instructed the postmaster at Chicago to deliver the envelope containing the papers specified, as thus directed by Levy. The Garfield Bank was not organized as a banking corporation, and never did any legitimate banking business; but Levy, or one George R. Neville, had procured its name to be inserted in the Rand-McNally Bankers' Directory, with address as 1028 E. Garfield boulevard, in order to advance their fraudulent schemes. The Garfield Bank is a pretended institution, and as such was conducted by Levy, Neville, and others to promote their criminal operations in securing possession of unlisted mining stocks which they disposed of without making any returns in money therefor. The plaintiff, prior to October 12, 1905, had never done any business with Levy or his associates; nor did he know either of them, or such simulated bank, or their method of doing business. The Garfield Bank, upon the receipt of the envelope mentioned, and without any authority therefor, delivered the certificates to Levy, who sold all the stock in question to brokers at prices not exceeding two cents per share; and neither he, his associates, nor the bank ever made any payment therefor, or accounted in any manner for the certificates. The method whereby the plaintiff was deprived of the stock was practiced by Levy and Neville prior thereto in dispossessing many other persons of like property. Levy, in November, 1905, was arrested and held under an indictment, which charged him with using the United States mails for fraudulent purposes, and Neville, to escape apprehension, left Chicago, and is a fugitive from justice. The stock in question, after several transfers, was purchased by the defendants: J.

H. Pickart, 10,000 shares for \$325; H. A. Combs, 5,000 shares for \$162.50; and the Harry S. Lewis & Company, a corporation, 10,000 shares for \$300. Each of the defendants last named was a bona fide purchaser of the stock for value, and obtained a certificate therefor, relying upon the authority conferred by the assignment and power of attorney, and each secured such property without notice or knowledge of any claim thereto on the part of the plaintiff. Based on these facts, which in a more extended form the court adopted as its findings, the temporary injunction that had been issued was dissolved, and the suit dismissed, from which decree the plaintiff appeals.

J. A. Fee, L. B. Reeder, and McCourt & Phelps, for appellant. H. K. Sargent, for respondents.

MOORE, J. (after stating the facts as above). It is contended by plaintiff's counsel that the mode adopted by Levy to secure possession of the stock constitutes larceny whereby no title passed by his delivery of the certificates to the persons from whom the defendants, answering herein, obtained them, and hence an error was committed in dismissing the suit. In support of the doctrine thus maintained two decisions of this court are cited: In *State v. Skinner*, 29 Or. 599, 46 Pac. 368, the defendant was indicted for the crime of larceny by bailee. At his trial evidence was introduced tending to show that, as an agent of a building and loan association, the defendant falsely represented to one R. B. Dixon that, in order to secure a loan of money from his principal, the applicant, as a condition and guaranty of good faith, was required to advance 1 per cent. of the sum desired, \$10 of which was to be paid for procuring and examining an abstract of the title to the farm land offered as security, if the loan was approved, and the remainder to be credited on the note given as evidence of the indebtedness; but if the application for the loan was rejected, the money so paid was to be returned. Dixon thereupon applied for a loan of \$10,000, and gave the defendant \$100, which the latter converted to his own use. A judgment of conviction having been rendered, the defendant appealed; his counsel maintaining that the evidence was insufficient to establish the existence of any trust relation between the defendant and Dixon, and hence the trial court erred in refusing to direct a verdict of acquittal as requested. In affirming the judgment it was held that the evidence was sufficient to show that Dixon parted with the title to the money advanced only in case a loan was made, and for that reason the testimony was sufficient to warrant a conviction. In deciding that case an excerpt from the opinion of Mr. Justice Caton, in *Welsh v. People*, 17 Ill. 339, is taken in distinguishing between simple larceny and larceny by bailee as follows:

"Where * * * the alleged larceny is perpetrated by obtaining the possession of the goods by the voluntary act of the owner under the influence of false pretenses and fraud, * * * there is no real difficulty in deducing the correct rule by which to determine whether the act was a larceny and felonious, or a mere cheat and swindle. The rule is plainly this: If the owner of the goods alleged to have been stolen parts with both the possession and the title to the goods to the alleged thief, then neither the taking nor the conversion is felonious. It can but amount to a fraud. It is obtaining goods under false pretenses. If, however, the owner parts with the possession voluntarily, but does not part with the title, expecting and intending that the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way, as directed or agreed upon, for his benefit, then the goods may be feloniously converted by the bailee, so as to relate back and make the taking and conversion a larceny. The pointed inquiry in such a case must always arise, did the owner part with the title to the thing, and was the legal title vested in the prisoner? If so, he was not guilty of larceny." The other case is *State v. Ryan*, 47 Or. 338, 82 Pac. 703, 1 L. R. A. (N. S.) 862, in which the defendant was charged with the crime of larceny. At his trial testimony was introduced tending to show that pursuant to his fraudulent representations he induced one John F. Roth to deliver to him \$2,000 as evidence of responsibility to hold a sum of money claimed to have been staked on a trial of human speed, which proved to be a fake race. The court thereupon charged the jury *inter alia* as follows: "So you are to consider whether or not this whole transaction was a mere scheme or device to steal Roth's money." An exception having been taken to such language, it was contended by defendant's counsel, on an appeal from a judgment of conviction, that an error was thus committed. In affirming the judgment, a part of the opinion of Mr. Justice Caton (*Welsh v. People*, *supra*) is again quoted, and it was ruled that, if the possession of the money was obtained by fraud, trick, or device, and the owner intended to part with the title when he surrendered the control, the offense, if any, was obtaining money under false pretenses, but that, though the possession might have been secured in the manner last indicated, yet, if the owner did not intend to part with the title, the crime was larceny, and hence the instruction was a correct statement of the law applicable to the facts involved.

The elementary proposition thus announced is undoubtedly controlling in the case at bar, and the question to be considered is whether or not the delivery of the certificates to the Garfield Bank of Chicago manifests an intention on the part of the plaintiff to dispose of the title to the property, or evinces such conduct, on his part, as to estop him, as

is alleged in the answer, from asserting any right to the stock as against the parties who purchased it in good faith, for a valuable consideration, and without any notice or knowledge of the means adopted to effectuate the transfer. A certificate of stock is the written evidence of the right of a party to a pro rata share of the net profits of a corporation when declared, or to a like share of all its property, after the payment of its debts, in case of a dissolution of the artificial being. Such certificates are not negotiable instruments; but the owners thereof have frequently been held to have been estopped to assert any title thereto as against bona fide purchasers thereof for value, without notice of the rights of prior holders. This rule is founded upon the principle that, when the owner of corporate stock voluntarily delivers to another a certificate evidencing a right to participate in the profits or property of a corporation, indorsed in blank, but containing all the indicia of ownership of the property, he is estopped to assert a title thereto as against a person, who in good faith and for value, purchased the certificate from the apparent owner, relying upon the written assignment. The reason advanced for this rule is thus stated by a text-writer: "In view of the custom by which certificates indorsed in blank are transferable from hand to hand, like negotiable paper, the owners of such certificates should be required to use the utmost care and diligence in their safe keeping. If a bona fide purchaser should be deceived through any negligence or want of diligence in this respect, justice requires that the owner should suffer the loss." Morawetz, *Priv. Corp.* (2d Ed.) § 190. As supporting the text quoted, the case of *Shattuck v. American Cement Company*, 205 Pa. 197, 54 Atl. 785, 97 Am. St. Rep. 735, affords a good illustration. In that case the plaintiff secured a title to certain certificates of stock, issued by the defendant to another, and delivered to him with an assignment and power of attorney indorsed thereon in blank. Without surrendering the certificates and obtaining others in lieu thereof, or filling the blank spaces in the indorsement, the plaintiff took the certificates to brokers with whom he had been accustomed to deal. The certificates, inclosed in an envelope on which the plaintiff's name was written, were placed in a pocketbook in a safe in which the brokers were in the habit of keeping securities belonging to their customers. One of the brokers, without authority from or knowledge of the plaintiff, took the certificates from the wrapper and pledged them to a bank as collateral security for a bona fide loan of money, made to him in the name of his firm, without notice of any interest of the plaintiff therein. Default having been made in the payment of the sum lent, the bank sold the certificates to third parties, whereupon a suit was instituted to enjoin the defendant from transferring on its books such certificates and issuing others in place there-

of. The relief sought was granted by the lower court; but on appeal the decree was reversed, the court holding that the rights of a bona fide holder as against the true owner of the stock to whom the apparent owner had sold or pledged it do not depend on a negotiable character of the certificates, but rest on the principle that, where one has conferred upon another by a written transfer all the indicia of ownership of property, he is estopped to assert title to it as against a third person, who has in good faith purchased it for value from the apparent owner. So too, in *McNell v. Tenth National Bank*, 46 N. Y. 325, 7 Am. Rep. 341, it was held that, where the owner of bank stock delivers to his brokers, to secure a balance of account, certificate of shares, indorsed with blank assignment, and irrevocable power of transfer, and the brokers without his knowledge pledge the shares with other securities for advances, one who pays the advances at the brokers' request, and in good faith receives from them the certificates and other securities, is entitled to hold the shares as against the owner for the full amount of the advances remaining unpaid, after the other securities are exhausted. In deciding that case Mr. Justice Rapallo, speaking for the court, says: "It must be conceded that, as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. But this is a truism, predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle that, where the true owner holds out another, or allows him to appear, as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing as against them the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." To the same effect see, also, 26 Am. & Eng. Ency. Law (2d Ed.) 879; 10 Cyc. 631; *Brittan v. Oakland Bank*, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; *Walker v. Detroit Transit Ry. Co.*, 47 Mich. 338, 11 N. W. 187; *Mount Holly, etc., Co. v. Ferree*, 17 N. J. Eq. 117; *Pennsylvania R. Co.'s Appeal*, 86 Pa. 80; *Wood's Appeal*, 92 Pa. 379, 37 Am. Rep. 694; *Burton's Appeal*, 93 Pa. 214.

In the case at bar the Garfield Bank of Chicago was evidently organized to promote the fraudulent practices of Levy and his associates, who knew that certificates of stock, assigned in blank, would not in all probability be sent to strangers as intending purchasers. The insertion in a Bankers' Directory of such pretended institution would allay sus-

picion, and give color to Levy's apparent honesty, when he requested the plaintiff to send the certificates to that bank, properly indorsed, to be held until the consideration agreed upon had been paid. The First National Bank of Pendleton, instead of mailing the certificates to its regular correspondent in Chicago, which would undoubtedly have been done except for the plaintiff's request, obeyed his direction, and sent the papers, and ultimately caused the postmaster of that city to deliver them to the simulated bank. That the scheme throughout was the rankest kind of fraud will be admitted. The plaintiff, however, voluntarily made such bank his agent, clothed with apparent authority, and surrendered possession of the certificates with the intent that the title to the stock should be transferred to Levy, and the only breach of the agreement consists in his failure to pay the consideration which he had promised for the stock. The facts herein are not the same as in *State v. Skinner*, 29 Or. 599, 46 Pac. 363, or in *State v. Ryan*, 47 Or. 338, 82 Pac. 703, 1 L. R. A. (N. S.) 862, for in such cases the title to the money, the possession of which was delivered to the respective defendants, was never expected to pass to them.

It was the plaintiff's voluntary act that made it possible for the defendants, answering herein, to rely upon the apparent ownership of the stock, evidenced by the assignment and irrevocable power of attorney executed in blank, and as a consequence of such belief to expend their money without notice of any adverse right in or title to the stock. The plaintiff's intention to transfer the title to the stock, and his conduct in relation thereto, estop him, and bring the case within the rule that, when one of two innocent persons must necessarily sustain injury by the fraudulent act of a third party, he who first trusted such party, and placed in his hands the means of committing the wrong, must bear the loss.

The decree is therefore affirmed.

TRICKEY v. CLARK et al.

(Supreme Court of Oregon. Jan. 28, 1908.)

1. TRIAL—WAIVER AND CORRECTION OF ERRORS—REFUSAL OF NONSUIT.

Though plaintiff did not prove a case sufficient to go to the jury, a refusal of a nonsuit will not be disturbed if defendant afterward supplied the omission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 982.]

2. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY.

Whether defendants exercised reasonable care in providing a safe fastening for a lever, by the displacement of which a servant was injured, *held*, under the evidence, to be a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1011-1013, 1017.]

3. SAME—CONCURRING NEGLIGENCE OF MASTER AND FELLOW SERVANT.

A master is liable for injuries to a servant caused by the concurring negligence of the master and a fellow servant, which would not have happened but for the master's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 515-524.]

4. SAME—INJURY TO SERVANT—PROXIMATE CAUSE—QUESTION FOR JURY.

Whether the knocking loose of a carriage fastener by a fellow employé falling against it, resulting in plaintiff's son being injured, was a natural consequence to be anticipated from defendant's failure to provide a safe and suitable fastener, *held*, under the evidence, a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1016.]

5. TRIAL—INSTRUCTIONS—FAILURE TO REQUEST.

Where a party did not request a direct instruction upon a point, he may not complain of the court's failure to instruct thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 627.]

6. EVIDENCE—ADMISSIONS BY AGENT—COMPETENCY.

In an action to recover for injuries to plaintiff's son, resulting from the lever of a log carriage becoming unfastened, statements by defendant's agent while reconstructing the mill that the lever fastening was defective was properly received, as notice of such defect to the agent was notice to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 909.]

7. SAME—OPINION EVIDENCE—EXPERT TESTIMONY—WHEN PROPER.

In an action for injuries resulting from a lever being defectively fastened, the opinion of expert millmen as to the safety and propriety of the fastening was not necessary or competent, where the construction of the device was fully explained to the jury, and no particular skill was required to determine its safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2310.]

8. SAME—MATTERS OF COMMON KNOWLEDGE.

In an action for injuries resulting from a lever being defectively fastened, testimony that the pin in the fastener was so loose that the jar of the mill worked it out, and that the fall of the fastener tended to knock it out, given in explaining the models of the lever and fastener to the jury, was not expert testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2310.]

9. APPEAL—RECORD—QUESTIONS PRESENTED—ARGUMENT OF COUNSEL.

Where an objection to an argument was overruled on the ground that it was in reply to defendant's argument, the argument of defendant's counsel not being in the record, such ruling cannot be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2896.]

Appeal from Circuit Court, Multnomah County; Alfred F. Sears, Judge.

Action by Charles G. Trickey, as guardian ad litem for Harry K. Trickey, a minor, against O. M. Clark and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an action to recover damages for personal injury suffered by plaintiff's son, a lad about 17 years of age, while working for defendants. At the time of the injury, and

for some time prior thereto, defendants were operating a steam sawmill at Linnton, a few miles below Portland, which they had purchased a few months previously. The mill was equipped with an upright iron feed lever fastened to the floor about $2\frac{1}{2}$ feet from the saw pit, and which was connected with the engine and operated by the sawyer in moving the log carriage forward and backward while cutting lumber. When the lever was in an upright position the log carriage was at rest; but as there was danger of it being accidentally moved, and the carriage set in motion, it was provided with a cast-iron drop fork lock or fastener attached to the frame a few inches from the floor on the side next to the saw pit, and an iron pin passing through the lever and frame just below the lock for the purpose of securely holding the lever in position when the carriage was at rest. As the appliance came from the manufacturer, the lock or fastener projected about an inch from the lever frame, and could be conveniently raised and lowered into place with the hand only. Some time prior to defendants' purchase of the mill, however, a concave steel plate projecting about $2\frac{1}{4}$ inches had been riveted to the face of the lock to enable the sawyer to manipulate it with his foot; but for some reason the use of the lock, as thus equipped, had been abandoned by the former owner of the mill. Two or three months before the accident complained of, and while defendants were overhauling and repairing the mill, their millwright and superintendent contemplated reinstalling the lock; but objection was made to his doing so by some employes because it was unsafe, and had previously permitted an automatic movement of the carriage. The attention of one of the defendants was called to the matter, and he suggested that a hole be made through the frame and lever just below the lock, and an iron pin be provided to supplement the lock, which was done accordingly. As thus equipped the lever was used by defendants up to the time of the accident. It was necessary in the operation of the mill to remove the band saws from the wheels upon which they operated four times a day and take them to the filing room to be filed. Plaintiff was employed by defendants as saw filer, with his son as an assistant, and they were accustomed to aid in the work of removing the saws and taking them to the filing room. It required five or six men to do this, and they had to work in the space between the saw pit and the lever, and roll or move the saws over and across the carriage track to get them to the filing room. On the day of the accident, and while a saw was being removed and taken to the filing room, the teeth caught in the clothes of one of the workmen, and he was thrown against the lever, knocking out the pin, loosening the lock, and starting the log carriage, which caught and severely injured plaintiff's son. This action is brought to recover damages for the injuries so sustained.

The negligence charged in the complaint is that defendants "carelessly and negligently failed to maintain a proper or safe fastening for said lever, so as to prevent it from jarring loose, or from being accidentally moved by workmen employed in and about the mill, and that the unsafe condition of said lever in being insufficiently fastened and secured was known to the defendant during all of said time." The defendants deny the negligence charged in the complaint, and affirmatively allege (1) that they had equipped their mill with reasonably safe machinery, tools, and implements, such as ordinarily used in similar mills, and that it was provided with ordinary safe machinery and appliances in good repair and condition at the time of injury to plaintiff's ward; (2) that while the saw was being removed to the filing room by plaintiff and his fellow servants one of such servants accidentally fell against the lever and released the fastening thereof, so that the log carriage was propelled forward, injuring plaintiff's son, which accident was unavoidable by defendants; (3) that whatever negligence, if any, caused the injury was that of a fellow servant and not the defendants; (4) that plaintiff's son fully understood the manner in which the lever was fastened, and the dangers incident thereto, and with such knowledge voluntarily entered upon and continued in defendants' service, and thus assumed all the risks and hazards reasonably to be apprehended in the performance of his duties. The reply put in issue the averments of the answer. Trial resulted in verdict and judgment in favor of plaintiff, and defendants appeal, assigning error in overruling their motion for nonsuit, in the admission and rejection of evidence, and in giving and refusing certain instructions.

J. F. Boothe and Rufus Mallory, for appellants. E. E. Coovert and G. W. Stapleton, for respondent.

BEAN, C. J. (after stating the facts as above). The record contains all the evidence given on the trial. In determining the questions arising on the motion for nonsuit we are therefore to consider the entire evidence. If plaintiff had not proved a cause sufficient to be submitted to the jury when he rested, the ruling on a motion for a nonsuit will not be disturbed if defendants afterward supplied the omission. *Bennett v. N. P. Ex. Co.*, 12 Or. 49, 6 Pac. 160. Upon the entire record we think it cannot be said, as a matter of law, that there was no competent evidence tending to show that defendants did not exercise reasonable care in providing a suitable lock or fastener for the log carriage lever, under the circumstances attending its situation and location. The lock had been changed as it came from the manufacturer by the addition of a steel plate about $2\frac{1}{4}$ inches square, which necessarily made it more likely to drop from its own weight or

the accumulation of sawdust thereon, or be displaced by defendants' employes working near it. Defendant Wilson testified that he was informed of its alleged unsafe conditions and the danger to be apprehended therefrom, and that he advised the use of a pin as an additional fastener. The evidence tends to show, however, that the pin as actually made was so short and loose in the hole that a dropping of the plate or an accidental contact therewith by an employe would have a tendency to drive the pin out, throw the lever, and start the carriage. Witness McKereghan testified that he could knock the lock down and drive the pin out so as to throw the lever by one motion of his foot. Moreover the fastener was located at a place where the employes were compelled to work in the discharge of their duties. There were only $2\frac{1}{2}$ feet between the lever and the saw pit. In this space five or six men were required to work in removing the saw. The saw itself was 12 inches wide, so there was necessarily danger of the workmen coming in contact with the lever, displacing the lock, and starting the carriage, unless the lever was safely fastened. On this evidence the court would not be justified in taking the case from the jury, and declaring as a matter of law that defendants exercised reasonable care in providing a safe fastening for the lever. Nor do we understand counsel for defendants to make any serious contention on this point. Their position is that the negligence of defendants was not the proximate cause of the injury, but it was caused by an employe accidentally or negligently coming in contact with the lever and disengaging the lock, an event for which they were not responsible. The doctrine of proximate cause in negligence cases is often difficult, and much learning has been displayed in its discussion. While there is an apparent if not real conflict in the authorities, or rather in the application of the rule to the facts of particular cases, we take the law, in any event, to be settled that a master is liable for an injury to his servant, caused by the concurring negligence of himself and fellow servant, which would not have happened had the master performed his duty. 12 Ency. (2d Ed.) 905; *Sherman v. Menominee River Lumber Co.*, 72 Wis. 122, 39 N. W. 365, 1 L. R. A. 173; *Goe v. N. P. Ry. Co.*, 30 Wash. 654, 71 Pac. 182; *Gila Valley, G. & N. Ry. Co. v. Lyon (Ariz.)* 80 Pac. 337; *Siegel, Cooper & Co. v. Trcka*, 218 Ill. 559, 75 N. E. 1053, 2 L. R. A. (N. S.) 147, 109 Am. St. Rep. 302; *McGregor v. Reid, Murdock Co.*, 178 Ill. 464, 53 N. E. 323, 69 Am. St. Rep. 332; *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399, 73 N. E. 787; *Armour v. Golkouska*, 202 Ill. 144, 66 N. E. 1037; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215.

In *Sherman v. Menominee River Lumber Co.*, supra, plaintiff was injured by an edger

in defendant's sawmill, which, by reason of a defect, was unnecessarily dangerous. He was working with the edger, and was injured by a plank which was thrown backward from the machinery, due to the negligence of another operator. The trial court held that plaintiff could not recover because the negligence which caused his injury was due to a co-employe. But on appeal the cause was reversed. The court said: "We are of the opinion that the negligence of the co-employe of the plaintiff, under such circumstances, would not excuse the defendant, but would simply be negligence contributing to the injury caused by the negligence of the defendant and the co-employe, and the defendant would be liable to the plaintiff. The culpability of defendant lies in the fact that it permitted the use of a machine in doing its work, which, by reason of its defects, was unnecessarily dangerous to its employes; and it cannot excuse itself by alleging that if it had been carefully used no accident would have happened to the plaintiff."

In *Siegel, Cooper & Co. v. Trcka*, supra, two servants of defendant were riding in an elevator. One threw the other down, so as to cause his foot to project over the floor of the elevator, and it was crushed in passing a new defectively constructed entrance. It was contended that defendant was not liable for the injury thus received, because the proximate cause was the negligent act of the servant who threw the plaintiff upon the floor of the elevator. But the court ruled that, if the defendant "was guilty of the negligence charged in the declaration, and without which the injury in question would not have occurred, then it would make no difference as to its liability that some act or agency of some other person or thing also contributed to bring about the result from which damages are claimed. Both or either of the contributing agencies were liable for the injury occasioned by their negligence, appellee being without fault, and not held to have assumed the risk involved in the improper construction."

In *McGregor v. Reid, Murdock & Co.*, supra, defendant had employed competent mechanics to put in a new cable for its elevator. The contractors left the fastenings insecure and unsafe, by reason of which the cable parted, and on account of a defective safety device the elevator fell, injuring plaintiff. The defendant insisted that the imperfect fastening of the cable was the proximate cause of the injury, and that no recovery could be had against it, on account of the defective condition of the safety device. The court said: "This position is clearly untenable. The two causes operated together, and neither alone would have caused the elevator to fall, and if the pulling out of the cables was attributed to an accident or to the negligence of a third person, and still the elevator would not have fallen without the

negligence of appellee, appellee would be liable; for both causes, operating proximately at the same time, caused the injury."

In *Gila Valley, G. & N. Ry. Co. v. Lyon*, supra, plaintiff's intestate was killed by reason of the concurring negligence of defendant company in constructing and maintaining a spur track, and that of the conductor of the train upon which he was riding at the time of the accident. In discussing the question the court said: "In the case at bar it was the duty of the railroad company to have exercised reasonable care and caution to construct and maintain its spur at the place where the accident occurred so as to guard against such accidents as might reasonably have been foreseen as liable to happen. If it failed in its duty in this respect, it was guilty of negligence, and if this negligence contributed to the accident in the sense that otherwise it would not have occurred, then its negligence, coupled with the negligence of the conductor, in operating the train, became the proximate cause. On the other hand, if the conductor was guilty of negligence in operating the train, and this negligence, coupled with the negligence of the railroad company in the matter of the construction and maintenance of its spur, was the cause of the injury, such negligence on the part of the conductor was a concurring or co-operative cause, but not the sole cause. If the negligence of the conductor was such as would have resulted in the accident even had the railroad company exercised due care and diligence, then the negligence of the conductor would have been not only the 'proximate,' but the 'sole,' cause of the injury, and the railroad company would not be liable. The issue raised by the pleadings and submitted was whether the accident was caused in whole or in part by the negligence of the company. The question whether the company was liable would be answered in the negative, were the jury to say that the conductor's negligence was the sole cause of the accident, for, if the sole cause, then no negligence on the part of the company could have contributed to it. The court did therefore properly charge the jury that in determining the question whether the company was liable for the injury they were to find whether negligence on the part of the company contributed to the accident, or whether it was brought about solely by the negligence of the conductor."

In *Goe v. N. P. Ry. Co.*, supra, a servant employed about machinery slipped, and in falling struck an unguarded lever, which set the machinery in motion. In endeavoring to catch himself he threw his hand against a cog wheel, which caught and ground it. It was insisted by the defendant that the injury to plaintiff was caused by an accident, for which it was in no way responsible, and it was argued that, if it had not been for the accident of falling, supplemented by the accident of striking the lever, still further sup-

plemented by plaintiff throwing his hand in the cog, no injury would have been sustained. The court said: "This may be conceded without settling the question of proximate cause, for it is well established that, where the primary cause of an injury is a pure accident, occasioned without fault of the injured party, if the negligent act of the defendant is a co-operating or culminating cause of the injury, or if the accident would not have resulted in the injury excepting for the negligent act, the negligence is the proximate cause of the injury for which damages may be recovered."

We conclude from these authorities that, if defendants were negligent in not providing a suitable and safe lock or fastener for the feed lever, and without such negligence the accident to plaintiff's son would not have happened, they are liable notwithstanding the act or negligence of a co-employee may have been a concurrent or co-operating cause of the injury. It is true a master is responsible only for the result of his own negligence. To render him liable for an injury to his servant, there must be a direct causal connection between his misconduct and the injury, and the latter must be the direct result of some negligent act of the master. But he is chargeable with the natural and probable consequence of his own act, and the causal connection will be sufficient, if, according to the usual experience of mankind, the result ought to have been foreseen and provided against by him. The intervening act of a third person or other agency contributing to, and bringing about, a condition necessary to produce the injurious effect of the original negligence, will not excuse the first wrongdoer, if the intervening cause and its probable consequence be such as should have been anticipated by the latter. *Ahern v. Oregon Telephone Co.*, 24 Or. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635. "The test," says the Supreme Court of Massachusetts, "is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." *Stone v. Boston & Albany R. R.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794.

It is claimed that the accidental or negligent tripping of the lock by one of the workmen falling against the lever was a thing not likely to happen in the ordinary course of events, and it was therefore not the duty of defendants to have anticipated or provided against it. But this was a question for the jury to determine, as a matter of fact, from all the circumstances of the case. The proximate cause of an injury is generally a question for the jury. It is only when the facts and inferences to be drawn from them are undisputed that it becomes a question for the court. *Ahern v. Oregon Telephone Co.*, supra. There was certainly a sufficient dispute in this case as to whether according to the usual experience of mankind the lever

by which the log carriage was operated was likely to be moved and the carriage accidentally started by an employé of defendant coming in contact with it, unless it was securely fastened, to render it a question of fact for the jury whether the defendants should have anticipated and guarded against such an event. Counsel complain that this question was not directly submitted to the jury. But the record does not disclose that a request to do so was made by defendants, not that an exception was saved to the court's failure in this regard, if there was any such failure. The defendants requested an instruction that, even if they were negligent as charged, they would not be liable if the injury would not have happened but for some intervening cause not produced by them, and which ordinary care on their part could not have prevented. This is not the law as we understand it. If defendants were negligent, an intervening cause or agency would not excuse them from the natural and probable result of their negligence if it was their duty to have anticipated and provided against such event, because such intervention would be a thing likely to happen in the ordinary course of events. *Lane v. Atlantic Works*, 111 Mass. 136.

Plaintiff testified that at the time the mill was being reconstructed he overheard a conversation between some of the employés and Mr. Mitchell, who was in charge of the reconstruction for defendants, in reference to a defect in the lever and the manner in which it was fastened, and was permitted, over the objection and exception of defendants, to relate such conversation. This evidence was, in our opinion, competent. Mitchell was the representative of defendants in charge of the reconstruction of the mill, and notice to him of a defect in the lever or fastener was notice to them. We do not think the jury could have been misled by supposing from this testimony that a previous runaway of the carriage had occurred while a lever was in use with the same fastening as it had at the time of the injury to plaintiff's son, since the record shows that the court on motion of defendants withdrew from their consideration all testimony concerning the former runaway. It clearly appears that the conversation testified to by the witness, so far as the jury were permitted to consider, had reference to the lever used in the mill prior to defendants' purchase, and the advisability of reinstalling such lever with its then fastener.

The defendants called as witnesses several expert millmen, and sought to show by them that, in their opinion, the lever in use at the time of the injury complained of was provided with a reasonably safe and proper lock or fastener. The plaintiff had previously asked such a question of one of his witnesses, but on the objection of defendants, the witness was not permitted to answer. Having thus been instrumental in establishing the law of the case, it would seem that

defendants could not reasonably complain because the court adhered to it throughout the trial. But, however that may be, the evidence was incompetent. It was directed to the principal issue in the case, and one which the jury were required to determine from the facts, and not from the opinions of witnesses. Models of the lever and fastener were before the jury. Its construction and operation were fully explained to them, and it required no particular skill or science to determine whether the fastener was reasonably safe. The opinion of experts was neither necessary nor competent. *Labett, Master & Servant*, § 880; *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 31, 36 N. E. 813; *Pulstifer v. Berry*, 87 Me. 405, 82 Atl. 986. The testimony of the witness Trickey that the pin used in the fastener at the time of the accident was so loose that the jar of the mill, when in operation, would work it out, and that of Bradford that the fall of the clip would have a tendency to knock the pin out was not of this character. It was given with reference to the models of the lever and fastener used on the trial and in explanation of the construction of such fastener, and its operation.

It appeared incidentally from the evidence that a fastener for the lever used by the previous owner of the mill had been removed by defendants, and the one in use at the time of the accident substituted in place thereof. In referring to the former fastener one of the witnesses denominated it as a "farmer's rig." Counsel for plaintiff in his closing argument, in alluding to the old fastener, so designated it, but did not undertake to describe it, but called the jury's attention to the fact that it had been adopted after a previous runaway of the carriage, and that it had been removed and another substituted in its place by defendants. Counsel for defendants objected to these remarks on the ground that they were a discussion of a matter not in evidence. The court overruled the objection, for the reason that the argument "was fairly an answer to the contention of the defendants," and as the argument of defendants' counsel is not in the record, we cannot say the ruling was error.

The judgment of the court below will be affirmed.

IN RE TURNER'S WILL.

(Supreme Court of Oregon. Jan. 28, 1908.)

1. **WILLS—EXECUTION—UNDUE INFLUENCE.**
Evidence examined, and held to show that a will was the free and voluntary act of the testatrix.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 421-437.]

2. **SAME—NATURE OF TESTAMENTARY POWER.**
Every person possesses absolute dominion over his property, and may bestow it upon whomsoever he pleases without regard to natural or legal claim upon his bounty, if he pos-

sesses testamentary capacity and exercises his own individual will and judgment in the matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1.]

3. SAME—VALIDITY—UNDUE INFLUENCE.

A mere confidential relation existing between the testator and a beneficiary under his will, or the opportunity of such beneficiary to exercise undue influence over the testator, is not enough to avoid a will, but fraud or undue influence to set aside a will must be such as to overcome the testator's free volition or conscious judgment and to substitute the wicked purposes of another instead, and must be the efficient cause without which the obnoxious disposition would not have been made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 383.]

4. SAME—EVIDENCE.

Evidence of a statement of a testatrix, made after the execution of her will, that she had given her home place to one son and the rest of her property to her other children in equal shares, while the will gave such son substantially all her property, leaving only a cemetery lot to pass by the residuary clause to her other children, although it might be admissible to show the state of her mind, and whether she fully understood what she was doing when she made her will, is no substantial proof of fraud, duress, or undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 431.]

Appeal from Circuit Court, Umatilla County; H. J. Bean, Judge.

Action by Alvin F. Turner and others against Oliver C. Turner and others to contest a will. Decree for proponents, and contestants appeal. Affirmed.

This is a proceeding instituted in the county court of Umatilla county to have the probate of the will of Cynthia A. Turner revoked and the will set aside. The will was executed October 7, 1901, and the testatrix died August 30, 1905. At the time of her death she left, surviving her, seven children and one grandchild. Her husband, and the father of these children, died on May 26, 1898, leaving a will, in which, after bequeathing to each of his other children the sum of \$50, he devised and bequeathed the remainder of his property, consisting principally of a farm near Weston, to his youngest sons, Samuel O. and Oliver C., charged with the payment of one-third the rent therefrom to his wife, during her lifetime. These two sons were 26 and 28 years of age, respectively, at the time of their father's death, and had, since their majority, lived with and assisted in the support of their parents. After the father's death, the eldest of them (Otis) resided on the farm which had been devised to himself and brother, and the youngest (Chauncey) lived with his mother in a house belonging to her in the town of Weston. About the 1st of October, 1901, Mrs. Turner was in poor health, and went to the hospital at Walla Walla for treatment. Chauncey accompanied her, and remained a day or two before returning home. After diagnosing her case, her physician, finding she was suffering from an ailment that would require a surgical operation, advised

her to that effect, and at his suggestion she consented to submit to the same. A few days before the time fixed for the operation, she inquired of her physician if he thought she had better make a will, and he told her that she need feel no alarm as to the result of the operation, but thought it a good idea for every person to have a will. When her son Chauncey was advised of the day the operation was to be performed, he went from Weston to Walla Walla to see his mother, and to remain with her until after the operation. She told him to secure the services of an attorney to prepare her will, as she had concluded to make one. He tried to persuade her to abandon the idea, assuring her that she was in no danger from the contemplated operation, but she was persistent, and, after consulting her physician and being told by him that it could do no harm for his mother to make a will, he, accompanied by the physician, called on Judge Dumphy, a lawyer in Walla Walla, and requested him to prepare the will. Dumphy visited the hospital, obtained the necessary data from the testatrix, returned to his office, prepared the will, and took it back to the hospital, where it was duly and regularly executed and witnessed, after which it was placed in a sealed envelope by Dumphy, and, at the request of the testatrix, taken by her son Chauncey to Weston, and deposited with her other papers in the local bank, where it remained until after her death some four years later. At the time of her death, Mrs. Turner owned and possessed a house and $4\frac{1}{2}$ lots in Weston, where she and her son Chauncey had resided for several years, of the probable value of \$1,500; and personal property consisting principally of cash, amounting to about \$4,000. After providing for the payment of her debts and funeral expenses, she declared, by the second clause of her will, her desire that the will and testament of her husband, deceased, should be executed and carried into effect, according to the terms and tenor thereof, and devised and bequeathed to her two sons, Otis and Chauncey, any interest in her husband's estate of which she might die seised. By the third clause she devised and bequeathed to her son Chauncey her home place in Weston, and all personal property of every kind and description situated and located in that town; and in the residuary clause gave the names of all her children and heirs, except Chauncey, and devised to them all the rest, residue, and remainder of her estate, both real and personal, share and share alike. The will was duly proved and admitted to probate in common form, September 5, 1905. A petition was filed in the county court for Umatilla county, June 20, 1906, by some of the heirs, praying for an order revoking the former probate and setting the will aside on the ground: (1) A want of testamentary capacity at the time it was executed, and (2) that it was induced by the fraud and undue

influence of the chief beneficiary thereunder. After issue joined in the county court, testimony was taken, upon the consideration of which that court sustained the will and dismissed the petition. From this decree the contestants appealed to the circuit court, with like result, and they now bring the case to this court for final adjudication.

Charles H. Carter and Will M. Peterson, for appellant. James A. Fee and G. W. Phelps, for respondents.

BEAN, C. J. (after stating the facts as above). The averment that Mrs. Turner's mental and physical condition was such, at the time the will was executed, as to render her incapable of intelligently disposing of her property, has been abandoned by the contestants, and their sole reliance is upon the contention that the will was the result of the fraud and undue influence of her son Chauncey. The only witnesses who gave any definite or direct testimony concerning the making of the will and the circumstances surrounding its execution are Dr. Nelms, the attending physician, Chauncey Turner, chief legatee and devisee thereunder, and Judge Dumphy, who drew the will, and was present when it was executed. Dr. Nelms testified that while Mrs. Turner was in the hospital in Walla Walla, and after he had concluded that an operation was necessary she asked him if he thought she had better make a will, as she was afraid the operation was going to be serious; that witness told her that he did not want her to feel alarmed about the result of the operation, but thought it a good idea for all persons to have a will; that she asked him whom he would advise her to get to prepare the will, and he told her he thought Garrecht & Dumphy would be competent; that neither of her sons, Otis nor Chauncey, were present at that time or in Walla Walla; that Mrs. Turner told him she wanted her husband's wishes carried out, and that she was going to give Chauncey a home, or what she had, or something to that effect (witness could not exactly remember) because he had been with her all the time and taken care of her, and she wanted to make a liberal provision for him. Chauncey Turner testified that he lived with his father and mother before his father's death, and with his mother afterwards, until her death; that Otis lived on the farm during his father's lifetime and after his death; that his mother visited in Tacoma in 1901, returning to Weston in September; that soon afterwards she went to Walla Walla to consult a physician, and on the 3d of October of that year went to the hospital for the purpose of submitting to a surgical operation, and, at her request, he went with her; that he was at the hospital when the operation was performed and two or three days before that time; that he never undertook to induce his mother to make a will in his favor or to persuade her

not to give as much to other members of the family as to himself, and never spoke to her about a will at his own instance, and that his mother acted of her own free will and according to her own judgment in everything she did; that two or three days prior to the operation he went to Walla Walla to see his mother, and she said to him that the physician had decided to operate on her, and she thought she ought to make a will as she might not live through the operation; that he told her not to do so as she was not in danger; but she insisted upon making a will, and requested him to get somebody to prepare it for her; that he went to Dr. Nelms' office and spoke to him about it, and the Doctor said he thought his mother would recover from the operation, but if she wanted to make a will to let her do so, as it would not do any harm; that he asked the Doctor whom to employ to prepare the will, and the Doctor took him across the hall to Judge Dumphy's office, and introduced him to Dumphy; that the Doctor told Dumphy our business and he said he would call at the hospital and see mother; that he (witness) did not see Dumphy again until after the will was prepared and brought by him to the hospital to be executed; that he was not in his mother's room while the will was being read by Dumphy, or until after it was executed, when he returned to the room, and told his mother she had better pay the lawyer, and at her request, he took from her purse \$10 and gave it to him; that he never made any suggestion to his mother as to what should go in the will nor did she ask him anything in respect to that matter; that after the will was executed he put it in the family deed book in the bank, at her request, where it remained until after her death; that he did not know the contents of the will and his mother never mentioned it to him afterwards, and he never had any conversation with her about giving him the Weston property, and never asked her for it; that he never spoke to his mother about a will, nor she to him, until the day it was drawn; that she never said anything to him about the will or the way she wanted her property to go, and he never saw Judge Dumphy until the day he was introduced to him by Dr. Nelms. Judge Dumphy testified that he was employed by Dr. Nelms and Chauncey Turner to prepare the will; that they came to his office, and the doctor said they wanted him to draw a will for a lady at the hospital; that he told them he had to go to the courthouse soon on business, and when through there would go to the hospital and see Mrs. Turner; that after he finished his business at the courthouse he went to the hospital, called on Mrs. Turner, told her his name and that he came to see her about drawing her will; that she gave him the data and told him how she wanted to dispose of her property; that he returned to his office and prepared the will from the memorandum made by him, and

then returned to the hospital where the will was executed; that no one but Mrs. Turner, the testatrix, ever spoke to him about anything contained in the will, and he put into form the data she gave him; that no one else told him about her husband's death or the names or ages of her children, and Chauncey never undertook to talk to him about the will except to tell him that his mother was in the hospital and wanted a will drawn; that he got all his information from Mrs. Turner, and, so far as he knew, Mrs. Turner dictated the terms of her will.

The evidence of these witnesses is uncontradicted, and the witnesses are unimpeached. In our opinion it shows quite clearly that the will in question was the free and voluntary act of the testatrix, and not the result of the undue influence of her son or anyone else. The principal features relied upon to overcome the effect of this testimony are the alleged unnatural and unjust disposition made by the testatrix of her property, the opportunity that her son Chauncey had to influence her in the matter of making her will, and testimony that she told some of her children, after the will had been executed, that she made a will giving her home in Weston to Chauncey and the remainder of her property equally to her other children. But these circumstances are not sufficient to justify the court in setting aside a will which clearly appears to have been the free and voluntary act of a competent testator. Every person possesses absolute dominion over his property, and may bestow it upon whomsoever he pleases, without regard to natural or legal claim upon his bounty, if he possesses testamentary capacity, and exercises his own individual will and judgment in the matter. *Potter v. Jones*, 20 Or. 239, 25 Pac. 769, 12 L. R. A. 161. A mere confidential relation existing between the testator and a beneficiary under a will, or the opportunity of such beneficiary to exercise undue influence over the testator, is not enough to avoid a will. The fraud or undue influence that will suffice to set aside a will, "must be such as to overcome the free volition or conscious judgment of the testator, and to substitute the wicked purposes of another instead, and must be the efficient cause, without which the obnoxious disposition would not have been made." *Holman's Will*, 42 Or. 345-358, 70 Pac. 908. Or, as put by Mr. Justice Moore, in *Re Darst's Will*, 34 Or. 58-65, 54 Pac. 947, "Influence arising from gratitude, affection, or esteem is not undue, nor can it become such unless it destroys the free agency of the testator at the time the instrument is executed, and shows that the disposition which he attempted to make of his property therein results from the fraud, imposition, and restraint of the person whose superior will prompts the execution of the testament in the particular manner which the testator adopts."

It is said in some cases that when the

will of a testator is such that it could not have been made consistent with the claims of natural duty and affection, and a close confidential relation exists between him and the recipient of his bounty, slight evidence that the legatee or devisee had betrayed the confidence placed in him would be sufficient to avoid the will. *Greenwood v. Cline*, 7 Or. 17; *Holman's Will*, supra. But in this case there is not the slightest evidence in the record, that we are able to find, that Chauncey Turner ever attempted to take advantage of the confidential relation existing between himself and his mother, to unduly influence her in the disposition of her property, or that the terms of her will were ever discussed by them.

The statement of the testatrix, made after the execution of her will, that she had given her home place to Chauncey, and the remainder of her property to her other children, in equal shares, is not competent to invalidate the will. These statements may have been admissible to show the state of the testatrix's mind, and whether she fully understood and comprehended what she was doing at the time she made her will, but they afforded no substantial proof of fraud, duress, or undue influence. *Loennecker's Will*, 112 Wis. 461, 89 N. W. 215; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Trish v. Newell*, 62 Ill. 196, 14 Am. Rep. 79.

Much stress was laid by counsel for contestants upon the fact that the only property belonging to testatrix, upon which the residuary clause could apply, was a cemetery lot, and it was stoutly insisted that this is strong, if not conclusive, evidence that the testatrix did not know or comprehend the disposition she was making of her property at the time she executed her will. But the reason for the residuary clause and the object had in view by the draftsman of the will is explained by Judge Dumphy in his testimony. It was adopted by him as a convenient means of naming all the children and heirs of the testatrix, and providing for the disposition of any legacies which might lapse, and is, therefore, of no particular weight in determining the question whether the will was the free and voluntary act of the testatrix.

Careful examination of the entire record has convinced us that the decree of the court below should be affirmed, and it is so ordered.

DECHENBACH v. RIMA.*

(50 Or. 540)

(Supreme Court of Oregon. Jan. 28, 1908.)

1. TENDER—PAYMENT INTO COURT—CONDITIONAL TENDER—WITHDRAWAL.

Where, in forcible entry and detainer, defendant answered that he had tendered plaintiff \$115 on July 1, 1903, and a like amount on August 1st of the same year, as rent for those months pursuant to an alleged oral contract for a lease, and that he brought said sum into court and deposited it with the clerk for plaintiff, he

*Rehearing denied March 17, 1908.

could not thereafter claim that the tender was conditional only as a part payment on the oral contract, and having paid the money into court, could not withdraw it without plaintiff's consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tender, §§ 93-95.]

2. SAME—RIGHT TO DEPOSIT.

Where defendant paid money into court for rent already earned under an alleged parol contract for a lease, the tender being unconditional, plaintiff was entitled to the money whether defendant was successful in enforcing the alleged parol contract for a lease or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tender, §§ 88-95.]

Appeal from Circuit Court, Multnomah County; Arthur L. Frazer, Judge.

Action by J. Dechenbach against D. C. Rima. From an order directing the clerk of the circuit court to pay plaintiff money deposited in court, defendant appeals. Affirmed.

This is an appeal from an order of the circuit court directing the clerk of that court to pay to the plaintiff \$230, tendered by the defendant, and deposited in court with his answer in the case. The proceeding was a forcible entry and detainer action, commenced in the justice's court to oust defendant from certain property occupied by him as a saloon, possession of which he claimed under a parol agreement for a three years' lease. By his answer defendant alleged that he had tendered to plaintiff \$115 on July 1, 1903, and a like amount again on August 1st of that year, as rent for those months, pursuant to such alleged lease, and that he "now brings the same, viz., \$230, in like coin, into court, and deposits it with the clerk for the plaintiff, and with the above-entitled court for the plaintiff." The cause was taken by appeal to the circuit court, and from that court to the Supreme Court, where plaintiff recovered final judgment for the property against the defendant. *Dechenbach v. Rima*, 45 Or. 500, 77 Pac. 391, 78 Pac. 666. After the mandate from the Supreme Court was entered in the circuit court that court, upon the motion of plaintiff, made an order requiring the clerk to pay such deposit, viz., \$230, to the plaintiff, from which order defendant appeals. For the issues in the action, see the opinion on the former appeal. The lease under which defendant's predecessor (Lake) occupied the premises expired July 1, 1903, and prior thereto on June 25th plaintiff served notice on Lake and the defendant to quit, and the complaint in this action was filed August 11, 1903.

George J. Perkins, for appellant. Wirt Minor, for respondent.

EAKIN, J. (after stating the facts as above). Defendant's answer, in which he tenders the money into court, was filed August 29, 1903, and his contention is that the tender was only a conditional tender as part payment upon the parol contract; but it is not so alleged. Plaintiff's right of recovery under the forcible entry and detainer action depends upon the conditions as they existed when the com-

plaint was filed, and it was based upon the expiration of Lake's lease and the notice to quit, served June 25th, and had no reference to nonpayment of rent by either Lake or defendant. If the circumstances under which the parol lease was made constituted an estoppel, it was such without reference to the tender of the rent money, because the court in a forcible entry and detainer action can only determine plaintiff's right to immediate possession, and cannot decree specific performance or adjudicate defendant's rights otherwise than as affecting the plaintiff's right of possession at the time of the filing of his complaint. But at the time defendant filed his answer he had had the possession of the premises two months, lacking two days, and in effect admits that he owes for these two months, and by the answer deposits the money for the plaintiff. This had the effect of placing the money in the custody of the law, and defendant cannot withdraw it without the consent of plaintiff. It does not stand in the position of a tender of purchase money made contingent upon acquiring title in a suit for the specific performance of the sale of real estate. This is money apparently already earned, and tendered unconditionally, and plaintiff's right to it does not depend upon whether defendant is successful in enforcing the parol contract. Where an unconditional tender of money is made by a party, and the same deposited in court, the money is the property of the party for whom it is so tendered. *West Portland Park Ass'n v. Kelly*, 29 Or. 412, 45 Pac. 901; *O. R. & N. Co. v. Oregon R. E. Co.*, 10 Or. 444.

Therefore there is no error in the order of the court, and the same is affirmed.

McGREGOR v. OREGON R. CO.

(Supreme Court of Oregon. Jan. 28, 1908.)

1. EXCEPTIONS, BILL OF—AMENDMENT—NUNC PRO TUNC ORDER.

Where an original bill of exceptions as filed purported to contain the matters which were inadvertently omitted, the appellant, after argument of the appeal, and after notice given in the Supreme Court, was entitled to a nunc pro tunc order of the trial court amending the bill by inserting the omitted matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, §§ 106-111.]

2. SAME—RECORD OF TRIAL—PRESUMPTIONS.

Under B. & C. Comp. §§ 169-172, relating to the record of the trial and preparation of a bill of exceptions, it is presumed that the record was kept by the court, and that the court prepared the bill of exceptions, so that an oversight in omitting matter intended to be included in the bill is in law the error of the court, though it is the practice for the counsel to prepare and submit the bill of exceptions to the court for its approval.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, §§ 106-111.]

3. CARRIERS—LOSS OF FREIGHT—ACTION—PLEA—ESTOPPEL.

In an action against a carrier for loss of freight, a plea of estoppel by reason of plaintiff having received the bill of lading after loss,

and having forwarded it to defendant with his claim for damages, was insufficient, where it alleged no facts showing that defendant acted on the contents of the bill of lading to its prejudice, or that it was misled by anything plaintiff did with reference thereto.

4. SAME—FINDINGS—EVIDENCE—LIMITATION OF LIABILITY.

In an action against a carrier for loss of goods by fire, evidence *held* to support a finding that plaintiff never entered into a special contract, evidenced by a bill of lading limiting the carrier's liability.

5. SAME—EXECUTION AFTER LOSS.

Where, after loss of goods while in the possession of a carrier, it executed and sent to the shipper a bill of lading limiting the carrier's liability as a matter of convenience for the purpose of identifying the property lost, the shipper's receipt of such bill did not limit the carrier's common-law liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 696.]

6. SAME.

Mere notice by a carrier to a shipper is insufficient to limit the carrier's liability, an express stipulation being necessary for that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 675-677.]

7. SAME—CARRIER'S LIABILITY—WAREHOUSEMEN—DUTY OF CARRIER.

Where the consignee is present on the arrival of goods, he is required to receive them without unreasonable delay, or the carrier's liability as such is terminated. If the consignee is absent, but lives in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, after which he has a reasonable time to remove them; but if he is absent, unknown, or cannot be found, the carrier may place the goods in a warehouse, and after keeping them a reasonable time, if not delivered, the carrier's liability as such ceases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 608-609½.]

8. SAME—REASONABLE TIME.

Plaintiff's agent learned of the arrival of the goods in question between 4 and 5 o'clock p. m., which was a few hours after the car in which the goods were transported reached destination. The shipping receipt had not arrived, and it was customary for the carrier's office to close at 6 p. m. Plaintiff did not remove the goods that night, during which they were destroyed by fire. *Held*, that the loss occurred before the expiration of a reasonable time for the removal of the goods as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 608-609½.]

9. SAME—QUESTION FOR COURT OR JURY.

Where the facts relating to the reasonableness of the opportunity offered to a consignee for the removal of goods after arrival are few and simple, and conclusively established, whether a reasonable time has or has not elapsed is a question for the court; it being proper to submit it to the jury only in case of a conflict in the testimony, or when the facts are doubtful or complicated, etc.

10. SAME—LOSS OF GOODS—DEFENSES—PLEADING.

A defense by a carrier that part of the goods sued for did not belong to plaintiff could not be proved where not specially pleaded.

11. SAME—LIMITATION OF LIABILITY—BURDEN OF PROOF.

A carrier being ordinarily an insurer of the goods it undertakes to transport, and all limitations of its common-law liability being in the nature of exceptions to its general responsibility,

the burden is on the carrier to allege and prove a limited liability contract on which it seeks to relieve itself of its common-law liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 722, 723.]

12. TRIAL—ORDER OF PROOF.

Where, in an action against a carrier for loss of goods, it relied on a limited liability contract, defendant, though entitled to introduce such contract as a part of its case, had no right to introduce it as a part of plaintiff's cross-examination, or to ask plaintiff whether at any time prior to the shipment his attention was directed by the carrier's agent or by any one to any of the printed matter on the back of the contract.

13. TRIAL—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

Requested instructions substantially covered by the general charge are properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

Appeal from Circuit Court, Union County; T. H. Crawford, Judge.

Action by L. McGregor against the Oregon Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Arthur C. Spencer, Jas. G. Wilson, and W. W. Cotton, for appellant. J. D. Slater, for respondent.

KING, C. This is an appeal by defendant from a judgment in favor of plaintiff for \$900 damages for the loss, by fire, of certain household goods and bar supplies, used by him in the hotel business. The goods were left by plaintiff for shipment with defendant's agent at North Powder, Or., on February 9, 1906, and directed to be shipped to him at Elgin in the county named, with the view of having them transported from there by wagon a distance of 60 miles into Wallo-wa county, to which place he was removing. The goods reached Elgin about noon on February 12th following, and were left in the car in which they were shipped in front of the Elgin Forwarding Company's warehouse, which, from causes unknown, took fire during the night and spread to the car near by containing plaintiff's freight, destroying the goods. It is alleged that no receipt, bill of lading, or other instrument in writing was issued to the shipper thereof at the time the goods were shipped, but conceded that a few days after the fire he received a bill of lading with plaintiff's name thereon, which had been signed by the defendant's agent, who claims he was authorized to do so by plaintiff.

After the argument, and after notice thereof having been given in this court, counsel for defendant applied to the court below for permission to have the bill of exceptions amended *nunc pro tunc* to include the bill of lading and other matters inadvertently overlooked in preparing the bill of exceptions in the first instance. After due notice of the proposed amended bill it was signed by the judge of the circuit court as of the same date as that of the first one filed. Counsel for

plaintiff moves to strike this amended bill from the files, stating as a reason therefor that the lower court had no authority, power, or jurisdiction to authorize the amendment in the case after the term at which the action was tried had expired, and that the application to amend shows there was no mistake made by the court in signing or approving the original bill of exceptions, and that it appears that the defect arises merely from certain matters not having been included therein, but now desired, and that the oversight was that of counsel and not of the court. In *State v. Estes*, 34 Or. 196, 205, 51 Pac. 77, 52 Pac. 571, 572, 55 Pac. 25, Mr. Justice Wolverton, after observing that some states, including the United States Supreme Court, have adopted a rigid rule as respects amendments to a bill of exceptions after having been filed in the appellate courts, announces as a rule of this court that: "A bill of exceptions, once settled and signed and properly filed, becomes a part of the record in the case to which it relates, and stands precisely upon the same footing as any other record," and that "if, however, a bill of exceptions, through inadvertence or mistake, has been so made up as not to fairly and truly recite or represent what it purports to show as having actually transpired during the course of the proceedings, it may, by order of the court, entered nunc pro tunc, upon proper notice, be so amended at a subsequent term as that it will accord with the real facts"; further stating: "We incline strongly to the more liberal practice as being better suited to subserve the ends of justice, and are therefore constrained to adopt it." Measured by the rule thus announced, and finding that the original bill of exceptions as filed purports to contain the matters included in the bill as amended, it follows that the court, in approving and signing the amended bill of exceptions, acted within its powers. Nor could it be material that the oversight upon which the amended bill was sought appears to be that of the attorney. It is sufficient if it appears that the matters were omitted by the inadvertence of either the court or counsel preparing the bill; for, if omitted, it is to be presumed that the court overlooked it. Although it has become the practice, and a commendable one, for the counsel to prepare and submit the bill of exceptions to the court for its approval, yet, under B. & C. Comp. §§ 109-172, inclusive, it is presumed that the court keeps the record of the trial and prepares the bill of exceptions when the case may be appealed, from which it follows that from whatever cause the oversight may have occurred it is in law the error of the court before which the cause may have been tried, and on having its attention called thereto, after notice seasonably made to those interested, the court has power to correct the bill of exceptions so as to conform to the facts intended to be included therein. It clearly

appears, however, from the amended bill presented, and the court's certificate appended thereto, that it is intended to supersede the original bill, and to include all matters to be considered here, and it will be so treated.

In this connection counsel for plaintiff urge that the bill of exceptions, on account of containing more than sufficient testimony to explain the errors assigned, and not having stated separately and distinctly the evidence intended to show the application of the rulings of the court, etc., does not come within the rule of this court, as required in *Hedin v. Suburban Ry. Co.*, 26 Or. 155, 37 Pac. 540, and subsequent decisions on the subject. Owing to the conclusion we have reached on the merits of the controversy, a consideration of this point becomes unnecessary. *Steiger v. Fronhofer*, 43 Or. 178, 72 Pac. 698.

This action is based upon the common-law liability of the defendant, which, after denying any negligence on its part, sets up four defenses: (1) Exemption from liability, in case of fire, by special contract with plaintiff; (2) that, if liable at all, it is responsible as a warehouseman only; (3) that by a contract with plaintiff its liability is limited to \$5 per hundred weight for the household goods, and 50 cents per gallon for the liquors shipped, and that prior to the shipment the rates under which the goods were shipped had been established by the defendant for their transportation upon the character and value thereof, a higher rate being charged for goods shipped at the risk of the carrier, and a lower rate for goods shipped at the risk of the consignee; (4) estoppel by reason of plaintiff having subsequently received the bill of lading, and having forwarded it to defendant, with his claim for damages. The defense of estoppel was stricken out on motion of plaintiff as being sham, frivolous, redundant, and surplusage; but the other defenses were put in issue by the reply. It is urged first that the court erred in striking out the plea of estoppel. An examination of the averments discloses no facts alleged in support thereof, except such as might have been established under the other defenses relied upon. Again, the plea, as given, contains no allegation of facts showing that defendant acted upon the contents of the receipt or bill of lading to its prejudice, or that it was in any manner misled by anything done by plaintiff in reference thereto, all of which were essential to estop plaintiff from asserting his claim against the company. *Haun v. Martin*, 48 Or. 304, 86 Pac. 371. There is also testimony tending to show that plaintiff received no receipt, bill of lading, or other instrument from defendant until after the fire; that the shipment was made with no understanding between them in reference thereto or as to the contents thereof, all of which was submitted to and passed upon by the jury, as to which facts their verdict is conclusive. And there is testimony from which it could reasonably be inferred that the bill of lading was first

wanted by the plaintiff and his agent in order that, by furnishing a means of identification thereof, they could more conveniently procure the goods from the agent at Elgin, and that it was not forwarded to that point until after the loss occurred. McGregor denies ever signing the instrument, and his testimony is broad enough to indicate that no authority was given to any one else to affix his name thereto. When he presented to the company his claim for the loss, he sent no bill of lading, nor did he state upon what theory his claim was based—whether upon the common-law liability of the company as a common carrier, or upon the special and written contract. So far as disclosed by the record, this shipping receipt was sent to the company as a matter of convenience for the purpose of identifying the property lost. On receipt of the demand for damages from plaintiff's attorney the company requested that the shipping receipt be sent in conformity with their rules in such cases, and it was evidently sent under this request. The claim was disallowed by the company, the receipt returned to plaintiff's attorney, and this action brought, not under the special contract here relied upon by the company, but upon its common-law liability. In this respect this case is unlike those cited by appellant, where the actions were brought upon the contract disclosed by the receipts, bill of lading, etc., and where an attempt is made at the trial to shift the character of the claim. It will be observed in the cases cited, in which this question was fully considered, that the shippers received their bills of lading at the time of the shipment, and not after the loss, as in this case, and that when so received they either expressly or impliedly ratified the contents thereof. There is evidence sufficient to support the findings of the jury to the effect that plaintiff never entered into the special contract claimed through the shipper's receipt, commonly known as the bill of lading, and the mere fact that he received it after the loss cannot avail defendant anything. There is a vast difference between consenting to the terms expressed in a bill of lading before the shipment, if such consent can be implied from the mere fact of receiving it without the signature of the consignor, and a case like the one at bar, where the jury has found that there was no consent to receive the bill of lading at some future time, nor to make the contract included therein. Many authorities hold that the acceptance of such receipt after the loss cannot be taken advantage of by the carrier, and that the shipper under such circumstances is not estopped from asserting his claim against the carrier under its common-law liability, among which are: 6 Am. & Eng. Ency. Law (2d Ed.) 642; *Baltimore & O. R. Co. v. Doyle*, 142 Fed. 669, 74 C. C. A. 245; *Gott v. Dinsmore*, 111 Mass. 45; *John Hood Co. v. Am. P. S. Co.*, 191 Mass. 27, 77 N. E. 638; *Bostwick v. Balt. & O. R. Co.*, 45 N. Y. 712; *American Ex. Co. v. Spellman*,

90 Ill. 455; *Phoenix Powder Mfg. Co. v. Wabash R. Co.*, 101 Mo. App. 442, 74 S. W. 492; *Allen, etc., Co. v. Can. Pac. Ry. Co.*, 42 Wash. 64, 84 Pac. 620. Under the verdict of the jury we must presume that plaintiff neither consented nor authorized his name to be signed to this receipt, and under the rule as substantially stated and recognized in this state in *Seller v. Steamship Pacific*, 1 Or. 409, Fed. Cas. No. 12,644, nothing short of an express stipulation will constitute such an agreement. It cannot depend upon implication or inference, nor conflicting and doubtful evidence, and mere notice to the shipper must be held insufficient. In that case the shipper, at the time of the delivery of the goods for transportation, and before they were transported, was handed a shipping receipt for the goods, which consisted of looking glasses, valued at \$450, and the receipt received by the owner thereof contained the words "not accountable for contents." This receipt the owner of the goods accepted without signing, and without being requested to do so, which fact was relied upon by the company as a defense in a suit brought by the owner for the recovery of the value of the goods which were injured in transportation, it being claimed as such defense that, under the law, it was the custom for the company to ship goods in this manner without the signatures of both parties thereto, and that this released the company from liability thereon; but in discussing this feature Mr. Justice Deady says: "The law, and not such a custom, ascertains and determines the rights and liabilities of shippers and common carriers. Such pretenses of custom as this appears to be, if allowed to modify the law of the land, would place it in the power of common carriers to make and unmake the law as they choose. I conclude, therefore, that these words, 'not responsible for contents,' amount to nothing, and in no way affect the rights of the shipper or the liability of the carrier. This being the case, and it appearing that the goods were 'received in good order,' the burden of proof lies on the carrier to show that the injury to the goods arose from the only exceptions to his liability. * * *"

It is urged that, since defendant had landed the goods at Elgin, and informed plaintiff's agent (Beals) that they were there and ready for delivery, and the latter, as agent of the plaintiff, had not removed them on the evening of the receipt of the notice, defendant thereafter became liable, if at all, as a warehouseman only. In this connection defendant claims that it was customary in that locality for defendant to unload from the cars on the track the goods of this class shipped to that point, which cars were usually placed in a certain locality for that purpose, and became what is known as "spotted," meaning that the car with its contents was thus placed preparatory to having the goods delivered therefrom, and that after the car reached its

destination and was "spotted," and plaintiff's agent was apprised of these facts, the car, as a matter of fact, as well as of law, became a "warehouse on wheels," by reason of which it is maintained that its liability as a carrier then terminated. But whether the car became a warehouse as indicated or not the responsibility of defendant as a carrier continued until after the goods reached their destination and were either unloaded into a warehouse, or left in some other place equivalent thereto, and until plaintiff or his agent had a reasonable time to call for, examine, and remove them. "There is an irreconcilable conflict in the authorities," says Mr. Justice Wolverton, in *Normile v. Oregon Nav. Co.*, 41 Or. 177, 182, 69 Pac. 928, "as to when the duties of a common carrier cease and those of a warehouseman begin, where freight is carried to its destination, and unloaded, and put in a place usual and convenient for its reception by the shipper. Many of the authorities hold that the shipper must have a reasonable time after the arrival and deposit thereof in which to receive and take it away; some requiring notice to the shipper also, while others relieve the carrier at once upon the safe deposit and storage at the usual place, the same being convenient for its reception by the shipper." The owner of the property shipped should undoubtedly have the right, if he chooses, of preventing his goods from remaining stored in a warehouse subject to the warehouseman's liability only as such, and, unless the carriers can announce the exact time when the goods will reach their destination, this would be impossible. That much uncertainty always exists in this respect is universally recognized, and to insist that the consignee must be on hand at the precise moment of the arrival of his cargo, which might require days, and in some instances weeks, of constant waiting and watching at the depot, is, in effect, to force upon him what he should clearly be permitted to avoid by the use of reasonable diligence. The enforcement of the rule invoked by the defendant would make these unreasonable requirements of the shipper or consignee necessary, in order to avoid the extra risk of a probable loss that might occur in a warehouse, even if such loss should occur within an hour after the cargo is unloaded and placed there. And, as stated by Mr. Justice Cooley, in *McMillan v. M. S. & N. I. R. Co.*, 16 Mich. 79, 103, 93 Am. Dec. 208, cited with approval in *Walters v. Detroit U. Ry.*, 139 Mich. 303, 305, 102 N. W. 1037: "To require the consignee to watch from day to day the arrival of trains, and to renew his inquiries respecting the consignment, seems to me to be imposing a burden upon him without in the least relieving the carrier. For it can hardly be doubted that it would be less burdensome to the carrier to be required to give notice than to be subjected to the numberless inquiries and examinations of his books, which would oth-

erwise be necessary, especially at important points." In order, therefore, to avoid this burden, and at the same time impose diligence upon both the shipper and carrier without inconvenience to either, we find the weight of authority recognizes certain rules governing the delivery of the goods at their place of destination by the common carrier, which may be summarized as follows: If the person to whom the goods are shipped is present upon the arrival thereof, he must take them without unreasonable delay; if he is absent, but lives in the immediate vicinity of the place of delivery, the carrier should notify him of the arrival of the goods, after which he has a reasonable time to take and remove them; while, if he is absent, unknown, or cannot be found, then the carrier may place the goods in some warehouse, and, after keeping them a reasonable time, if the owner does not call for them, its liability as a common carrier ceases, but if, after the arrival, the consignee has a reasonable opportunity to remove them, and does not, he cannot hold the carrier as an insurer. The liability of the common carrier thus applied and limited we believe to be consonant with public policy, and sufficiently convenient and practicable. Among the authorities in support of this position are: *Moses v. Boston & Maine Ry. Co.*, 32 N. H. 523, 64 Am. Dec. 381; *Walters v. Detroit United Ry. Co.*, 139 Mich. 303, 102 N. W. 745; *Hicks v. Wabash R. Co.*, 131 Iowa, 295, 108 N. W. 534, 8 L. R. A. (N. S.) 235; *L. L. & G. R. Co. v. Maris*, 16 Kan. 333; *Mo. Pac. Ry. Co. v. Grocery Co.*, 55 Kan. 525, 40 Pac. 899; *Normile v. Nor. Pac. Ry. Co.*, 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271; *Burr v. Adams Ex. Co.*, 71 N. J. Law, 263, 58 Atl. 609; *Winslow v. Vt. & Mass. R. Co.*, 42 Vt. 700, 1 Am. Rep. 365; *Wood et al. v. Crocker*, 18 Wis. 345, 86 Am. Dec. 773.

But it is insisted by counsel for defendant that the question as to whether a reasonable time had elapsed after the arrival of the goods in which to permit plaintiff or his agent to remove them is, under the undisputed facts presented, one for the court and not for the jury to determine, and that the court erred in submitting the question to the jury. The rule on this point is clearly, concisely, and, we think, correctly, stated in *Lemke v. Chicago, M. & St. P. Ry. Co.*, 39 Wis. 449, 455, in which the court say: "The rule doubtless is that, whenever there is a conflict of testimony in respect to material facts bearing upon the question, or when the facts are doubtful or complicated and the court cannot satisfactorily determine their weight or importance, the question as to whether a reasonable time has or has not elapsed should be submitted to the jury, under proper instructions. But when, as in this case, the facts relating to the question are few and simple, and are conclusively established by a special finding, or by the undisputed evidence, it is for the court to say whether a reasonable time has or has not

elapsed for the performance of a given act." In the case before us it is disclosed by the evidence that the plaintiff's agent learned of the arrival of the goods between the hours of 4 and 5 o'clock p. m., which was a few hours after the car in which the goods were transported reached Elgin; that the shipping receipt had not arrived; that it was customary for the office to close at the hour of 8; and that, after considering these facts, he decided to wait until morning. It becomes unnecessary, therefore, to determine here whether the question of the reasonableness of the time in this instance should have been submitted to the jury, for, if the question was properly submitted to the jury, they have found adversely to defendant, and their decision thereon is not, under the testimony, subject to review; but if, on the other hand, it is a question for the court's determination, it appears from the evidence that, after the arrival of the car, the time was so short in which the goods could have been delivered, together with the lateness of the hour when plaintiff's agent was informed of the arrival thereof, that the court, under such circumstances, would have been impelled to hold that the loss occurred before the expiration of the reasonable time to which plaintiff was entitled in which to remove the property, and it would have been imperative upon the court so to instruct the jury, leaving no change in the result. It is clear, therefore, that defendant is in no position to complain in this respect.

It is next insisted that the court erred in sustaining the objections to the interrogatories tending to show that a part of the goods lost were not the property of plaintiff. Defendant makes no attempt to plead that plaintiff is not the real party in interest. Such defense must be specially pleaded, in the absence of which, testimony of the character offered on this point is inadmissible; and no error was committed in sustaining the objection thereto. *Overholt v. Dietz*, 43 Or. 184, 72 Pac. 695.

It is maintained that the court erred in not permitting the defendant to introduce the bill of lading in evidence on cross-examination of plaintiff, and in not permitting him to ask the plaintiff on cross-examination whether at any time prior to the shipment his attention was directed by the agent of the Oregon Railroad & Navigation Company, or by any one, to any of the printed contents on the back of the receipt, which was received by him after the fire. The point intended to be raised by the bill of lading or receipt was that it constituted a special contract between the parties releasing the defendant from liability as an insurer, and for this purpose was at the proper time admissible in evidence. *West v. Washington & C. R. R. Co.*, 49 Or. —, 90 Pac. 666, 671. A common carrier is ordinarily considered and treated as an insurer of the goods it undertakes to transport, and all limitations of the common-

law liability are in the nature of exceptions to its general responsibility, from which it follows that, in order to avoid such liability, and rely upon a limitation contract, it devolves upon the carrier both to allege and prove it. *Normile v. Oregon Nav. Co.*, 41 Or. 177, 69 Pac. 928. This being an affirmative defense, and the burden of proof in this respect being upon the defendant, it follows that to have permitted him to go fully into this question on cross-examination would thereby have enabled him to have procured the advantage by prematurely making the witness his own, and at the same time, under the pretense of cross-examination, of depriving plaintiff of any cross-examination on the points thereby elicited. The court properly sustained the objection to this method of procedure. *Hildebrand v. United Artisans*, 49 Or. —, 91 Pac. 542.

A number of errors are assigned on account of instructions requested by defendant and refused by the court; but on examination we find the substance of the instructions requested, except to direct a verdict, were included in those given. Defendant was accordingly not prejudiced by the refusal to give the instructions in the form asked.

We find no error in the record detrimental to defendant, from which it follows that the judgment of the circuit court should be affirmed.

(51 Or. 35)

JOHNSON v. SHERIDAN LUMBER CO.*

(Supreme Court of Oregon. Feb. 4, 1908.)

1. CORPORATIONS—PROMOTERS—FIDUCIARY RELATION.

One who agrees with others to organize a corporation, in pursuance of which contract he purchases property to be turned over to the corporation, sustains toward the corporation a fiduciary relation which precludes him from deriving any secret advantage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 98.]

2. FRAUD—DEFENSE—ACTION AT LAW.

Fraud is available as a defense in an action at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 27.]

3. PLEADING—ANSWER—CONSTRUCTION.

An amended answer not challenged by motion or a demurrer should be construed liberally, and is sufficient, where the facts would uphold a verdict if rendered thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 60-69.]

4. CORPORATIONS—ACTIONS—PLEADING.

Under an amended answer, in an action on a note executed by a corporation, averring that plaintiff fraudulently represented that the mill and timber lands had been purchased at a price named, and that the corporation relying on such representation adopted a resolution that in consideration of the transfer of the mill and timber lands to the corporation the stock subscribed by plaintiff and other promoters should be declared fully paid, it is fairly to be inferred that the corporation relied on the fraudulent representation, and that it had no knowledge of the secret profit alleged to have been made by plaintiff, and the facts are therefore sufficient to uphold a verdict, if rendered thereon.

*Rehearing denied March 10, 1908.

5. EVIDENCE—ADMISSIONS—PLEADINGS.

An original answer, though withdrawn by the filing of an amended answer, is admissible in evidence as a declaration against interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 718, 719.]

6. SAME.

Where an answer denies the execution of a writing, and in a separate defense alleges that the same was made for a specific purpose, the defenses are so inconsistent that both cannot stand, and as the affirmative allegation is the latest expression of the pleader's intent, it will prevail, and the execution of the writing is thereby admitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 713-718.]

7. SAME.

Admissions in a pleading that has been superseded by filing other formal allegations are extrajudicial, and the pleader is not concluded thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 718, 719; vol. 39, Pleading, § 86.]

8. SAME.

Where a pleading that has been withdrawn or superseded is offered in evidence, admissions contained therein should be construed in connection with qualifying statements, if any, and it is for the jury and not the court to determine from an inspection of the entire pleading the intent of the party interposing it.

Appeal from Circuit Court, Polk County; George H. Burnett, Judge.

Action by J. H. Johnson against the Sheridan Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed, and a new trial ordered.

This is an action by J. H. Johnson against the Sheridan Lumber Company, a corporation, to recover the amount of a promissory note given August 12, 1905, for \$4,200, payable six months thereafter, with interest, at the rate of 7 per cent. per annum from that time, containing a stipulation to pay a reasonable sum as attorney's fees in case suit should be instituted thereon, and purporting to have been executed to the plaintiff by the president and secretary of the corporation on its behalf. The amended answer admits the incorporation of the defendant, but denies all the other allegations of the complaint. For a further defense it is averred that the note sued on is without any consideration. For a second defense it is stated, in effect, that in January, 1905, the plaintiff and Henry Stevenson, E. M. Yeaton, and A. A. Brace entered into an agreement to purchase a sawmill and timber lands, and to organize a corporation to engage in the manufacture of lumber. That the plaintiff and Stevenson were skilled in estimating the value of such property, and for that reason they were selected to make the purchase thereof; that, conspiring to cheat, wrong, and defraud Yeaton, Brace, and the corporation thereafter to be formed, the plaintiff and Stevenson entered into a contract with one T. H. March to purchase certain real property, agreeing to pay therefor \$16,000. That thereupon the defendant corporation was or-

ganized with a capital stock of \$50,000, of which sum the plaintiff subscribed \$10,000, falsely representing that one-half thereof was for Stevenson, one Emil Schreier subscribed \$10,000, Yeaton \$5,000, and Brace \$10,000; that pursuant to their intent to cheat, wrong, and defraud the defendant the plaintiff and Stevenson falsely stated to it that the price agreed to be paid for the land was \$21,000; that, conformable to such fraudulent purpose, the plaintiff procured a deed of the land to be made by March to Stevenson to hold the title for the benefit of the defendant, and thereupon the plaintiff proposed to cause the premises to be conveyed to the corporation upon the payment of the several subscriptions mentioned, "and this defendant, through its board of directors, then and there relying upon the said representations, duly passed a resolution to the effect that, in consideration" of the plaintiff, Brace, Yeaton, and Schreier conveying the real property to the defendant, the stock so subscribed should be declared fully paid; that the plaintiff further represented to the defendant that he had paid March \$5,000, the remainder of the purchase price above \$16,000, and that the corporation owed him that sum, when he had not paid any part thereof; "that the said note was executed for and on behalf of this defendant, but without authority of the board of directors thereof, to the said J. H. Johnson in reliance upon the said false and fraudulent representations, and was pretended to be made on behalf of the said corporation without any other or further consideration than as hereinbefore stated." The reply denied the allegations of new matter in the answer, and averred, in substance, that the plaintiff, having agreed with the defendant to cut for it certain saw logs whereby he could have made a large profit, surrendered all his right under the contract to the corporation August 12, 1905, and transferred to it 84 shares of its capital stock, in consideration of \$8,400, evidenced by two promissory notes, each for \$4,200, one of which had been paid, and the other instrument is the note described in the complaint. The reply states further facts by way of estoppel, which are not deemed necessary to a decision herein. The cause was tried and judgment rendered in favor of the plaintiff for the amount of the note and \$350 as attorney's fees, which sum was stipulated by the parties as reasonable therefor, and the defendant appeals.

Martin L. Pipes, for appellant. Bert E. Hauey, for respondent.

MOORE, J. (after stating the facts as above). It is contended by defendant's counsel that the court erred in admitting in evidence the original answer filed in this cause, and in holding that an averment in that pleading afforded competent proof of the defendant's execution of the promissory note

described in the complaint, and in refusing to instruct the jury as requested. To render the legal principles thus insisted upon intelligible, it becomes necessary to advert to the bill of exceptions, which contains all the evidence given at the trial, and shows that the plaintiff offered in evidence the books of the corporation, which contained the minutes of its proceedings as they consecutively occurred. An inspection of the record discloses that at a meeting of the board of directors held August 12, 1905, a resolution was adopted, authorizing the making of the note sued on in payment of certain stock of the defendant corporation, and also shows the consummation of a logging contract on behalf of the company with the plaintiff. It appears, however, that the meeting was special, at which only three of the five directors of the corporation were present, and the books do not indicate that any notice of such assembly was given to the absent officers. The parties having stipulated that the records of the corporation after August 12, 1905, do not contain any reference to the note in question, the court sustained an objection to the admission of books in evidence, on the ground that they failed to show any authority on the part of the president and secretary of the corporation to make the note. An amended answer in this cause having been filed, the note sued on, and the original answer, which was verified by the secretary of the corporation, were received in evidence over the defendant's objection and exception. E. M. Yeaton, a stockholder of the corporation, appearing as its witness, after answering a few preliminary questions, was directed as follows: "Now you may state whether or not you and Mr. Brace and Mr. Johnson (the plaintiff herein) and Mr. Stevenson had any conversation or arrangement between yourselves for the purchase of a sawmill and timber land." An objection to such inquiry having been interposed on the ground that the amended answer failed to state facts sufficient to constitute a defense, the defendant's counsel thereupon offered to prove by the witness the substance of the agreement thus alleged as new matter, and to show that during all the negotiations Johnson and Stevenson represented that the purchase price of the mill and lands was \$21,000; that the directors of the corporation, being ignorant of the facts, relied upon such representations, in pursuance of which they adopted a resolution accepting a deed of the property in full payment of the subscriptions for stock; that Schreier sold his stock to the plaintiff, who, by reason of the declarations that he held his own stock and that which he had so purchased, received a certificate for 84 shares of the par value of \$8,400, which he thereafter sold to the corporation; that the directors did not know that he had not paid any sum on account of his subscription or for the stock; that two of the directors were absent from the state on August 12, 1905, and two

other directors—there being five in all—undertook to authorize the execution of the note in question. The defendant's counsel offered to prove by T. H. March, the person from whom the mill and timber land were secured, that \$16,000 was the entire consideration therefor, but that, when a conveyance of the property was made, the plaintiff gave to him a check for \$5,000, which the witness indorsed and returned. The court having sustained an objection to the offers so made, refused to permit the testimony to be given, and allowed an exception. The defendant having rested, the court directed a verdict to be returned for the plaintiff for the amount of the note and attorney's fees as agreed upon, and refused to instruct the jury, as requested, to consider the entire answer offered in evidence, and to determine therefrom whether or not the execution of the note was ever authorized by the defendant, and exceptions from such rulings were saved.

A consideration of the errors assigned necessitates an examination of the averments of new matter in the answer. As a preliminary matter, however, attention will be called to the rules of law applicable to the defense evidently intended to be interposed. Any person who agrees with others to organize a private corporation, in pursuance of which contract he purchases property for the company to be turned over to it, when legally created, sustains toward such artificial being a fiduciary relation which precludes him from deriving any secret advantage from the transaction. 23 Am. & Eng. Ency. Law (2d Ed.) 234; 7 Cur. Law, 871. If a promoter of a private corporation deceives its members as to the actual price which he paid for property and transferred to the company, or if, by collusion with the vendor, he retains or secures credit for a part of the alleged purchase price, he must account for the excess in a suit in equity, instituted for that purpose, or the company may maintain an action at law against him for the sum withheld, or for which he secured evidence of indebtedness, as money had and received to its use. *Thomp. Corp.* § 457. Fraud invalidates all contracts in a suit or action thereon between the original parties, and as a corollary from this legal principle the deceit of a payee of a promissory note destroys the efficacy of the negotiable instrument into the consideration of which the imposition enters. 1 Daniel, Neg. Inst. (2d Ed.) § 193. In discussing this question Mr. Justice Thacher, in *Brewer v. Harris*, 2 Smedes & M. 84, 41 Am. Dec. 587, says: "It has been repeatedly decided that courts of law have concurrent jurisdiction with courts of equity upon questions of fraud. Fraud saps the foundation of every contract in which it exists, and, where it evinces that a plaintiff is not entitled to recover anything because of its existence, is properly cognizable by a court of law. It has also frequently been decided that a failure of consideration, as well partial as total, may be

introduced legitimately in evidence in an action at law upon a promissory note, because such defense may diminish the multiplicity and circuity of actions, which it is the policy of the law to discourage." So too, in *Ferrall v. Bradford*, 2 Fla. 508, 50 Am. Dec. 293, Mr. Justice Hawkins, commenting upon this rule, says: "It is an admitted principle that a court of law has a concurrent jurisdiction with a court of chancery in cases of fraud. The principles as to fraud may be often more correctly applied in a court of equity than in courts of law. Chancery can compel discovery of facts which a court of law cannot. Fraud may frequently be presumed in equity by the chancellor, while at law it is the province of the jury to find the facts and determine their character, under the instruction of the court." To the same effect see: *Fleming v. Slocum*, 18 Johns. (N. Y.) 403, 9 Am. Dec. 224; *Lamborn v. Watson*, 6 Har. & J. (Md.) 252, 14 Am. Dec. 275; *Jamison v. Beaubien*, 3 Scam. (Ill.) 113, 36 Am. Dec. 534.

Fraud being thus available as a defense in an action at law, the averments of new matter in the amended answer will be investigated. It is not alleged in such pleading that, when dealing with the plaintiff, the defendant had no knowledge that the mill and timber lands which it is stated he asserted cost \$21,000 was purchased for \$16,000, or that his profit was undisclosed. The amended answer was not challenged by a motion or a demurrer, in the absence of which that pleading should be construed liberally and its sufficiency determined by an affirmative answer to the inquiry: Would the facts thus defectively stated uphold a verdict if rendered thereon? The verdict in the case at bar is not based on the answer, it is true, but that pleading, when its adequacy is unassailed, is to be governed by the test that, while a general verdict will not supply a material averment, going to the gist of the action or defense, it will aid and may cure a defective informal statement. *Houghton v. Beck*, 9 Or. 325; *Booth v. Moody*, 30 Or. 222, 46 Pac. 884; *Savage v. Savage*, 36 Or. 268, 59 Pac. 461. It will be remembered that the amended answer avers, in effect, that the plaintiff fraudulently represented that the mill and timber lands had been purchased for \$21,000, and that the defendant's agents, relying upon such statement, adopted a resolution that, in consideration of the transfer of the property to the corporation, the stock subscribed by the promoters should be declared fully paid. In *State v. Miller*, 47 Or. 562, 570, 85 Pac. 81, 6 L. R. A. (N. S.) 365, it is said: "Reliance by a person upon the representations of another implies a belief in the accuracy of the declarations that inspired the confidence reposed. In the absence of faith in the truth of the statements thus made, a dependence thereon is an impossibility." It is therefore fairly to be inferred from the averment that the defendant relied upon the plaintiff's fraudulent representa-

tions that it had no knowledge of the secret profit which it is claimed he made by the transaction, and, this being so, the facts thus defectively stated would, in our opinion, uphold a verdict, if one had been rendered thereon.

The offer of the defendant's counsel to prove by the witnesses produced at the trial that his client had no knowledge of the plaintiff's alleged fraud, or of the secret profit which it is asserted he made in dealing with the property, should have been accepted, in rejecting which an error was committed. An amended answer having been filed by leave of the court, the original answer was thereby withdrawn; but, notwithstanding such pleading was thus eliminated, it was nevertheless admissible in evidence as a declaration against interest. *Sayre v. Mohney*, 35 Or. 141, 56 Pac. 526. If the rejected answer, when received in evidence, is to be treated as a pleading, the court properly construed the averments; for it has been held that, when an answer denies the execution of a writing, and in a separate defense alleges that the instrument was made for a specific purpose, the defenses are so inconsistent that both cannot stand, and as the affirmative allegation is the latest expression of the pleader's intention, it will prevail, and the execution of the instrument is thereby admitted. *Veasey v. Humphreys*, 27 Or. 515, 41 Pac. 8; *Maxwell v. Bolles*, 28 Or. 1, 41 Pac. 661; *Baines v. Coos Bay Nav. Co.*, 41 Or. 135, 68 Pac. 397. Admissions in a pleading that has been superseded by filing other formal allegations of a cause of action or defense are treated as extrajudicial, by which the pleader is not concluded. 16 Cyc. 1049. Judge Elliott in his work on evidence (section 236) sanctions the admission in evidence of an adversary's pleading that has been superseded; but in discussing the effect of avowals against interest contained therein, very pertinently observes: "Suppose, however, that there are several distinct issues raised by different counts or paragraphs of a pleading. In such a case, can the statements in one of them be used as admissions upon the other issues? Upon this question there seem to be few authorities, and in the few cases in which the question has arisen the courts have not been of one mind. There is much reason in support of the view that, where the law authorizes a party to plead in this way, as, for instance, where it authorizes him to set up independent and even inconsistent defenses in different paragraphs of answer, the statements in a particular paragraph are made for the purpose of presenting the issue to which they relate, and no other, and to permit them to be used against the pleader on another issue would deprive him of his denials, or at least make it dangerous for him to do what the law authorizes him to do. He may, for instance, plead by way of denial in one paragraph, and by way of confession and avoidance in

another, and it would seem unjust to permit his unavoidable and, in a sense, conditional, admissions in the latter paragraph to be taken as admissions upon the issue raised by the denial. This seems to be the view taken by most of the courts by which the question has been expressly decided." We believe reason supports the rule that, when a pleading that has been withdrawn or superseded is offered in evidence, the admissions contained therein should be construed in connection with the qualifying statements, if any, and that it is for the jury, and not for the court, to determine from an inspection of the entire pleading the intent of the party who interposed it. As supporting this view see, *Jones, Ev.* § 296; *Granite Gold Mining Co. v. Maginness*, 118 Cal. 131, 50 Pac. 269; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Gildersleeve v. Landon*, 73 N. Y. 609.

An observance of the rules thus announced would have required the court, under proper instructions, to submit to the jury the amended answer, and also to have given the charge requested, in failing to do which errors were committed necessitating a reversal of the judgment and the granting of a new trial, which are ordered.

HORNEFIUS v. WILKINSON.

(Supreme Court of Oregon. Feb. 4, 1908.)

1. ASSUMPSIT, ACTION OF—PLEADING.

Where the complaint in an action of assumpsit for money had and received fails to allege that the money intrusted to defendant was the property of plaintiff, or that there was any consideration for the transaction, and the absence of such averment is supplied by the answer, from which it can be clearly inferred that the money was the property of plaintiff, the defect will be cured by a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Assumpsit, Action of, § 129.]

2. ACTION—WAIVER OF TORT.

In an action for money received for money given to defendant to invest with his own, with which he purchased a mortgage, selling the mortgage without accounting to plaintiff for the proceeds, the claim in tort can be waived, and the action brought on implied contract.

3. ASSUMPSIT, ACTION OF—GROUNDS.

In assumpsit for money received and converted by defendant, although it is claimed that the proof merely shows defendant to have been plaintiff's agent, and that the action should have been *ex delicto* and not *ex contractu*, the right to elect to proceed on the contract and to waive the tort is the privilege of plaintiff, and not of defendant, and having so elected she is entitled to have the verdict construed to support the judgment, if possible.

4. EVIDENCE—DOCUMENTARY EVIDENCE—LETTERS—ALTERATIONS.

Letters with alterations in immaterial parts are admissible in evidence without accounting for the alterations under B. & C. Comp. § 800, providing that a party introducing a writing altered as to a material part shall account therefor.

5. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE.

In assumpsit for money had and received, the error of admitting in evidence a draft for \$125 sent to plaintiff and containing the initials

of defendant's name, without further identification to show a payment of the amount of the draft, was harmless, where defendant admitted the payment to plaintiff of that amount.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

Appeal from Circuit Court, Umatilla County; H. J. Bean, Judge.

Action by Louisa Hornefius against William J. Wilkinson. From a judgment for plaintiff, defendant appeals. Affirmed.

D. W. Bailey and W. M. Peterson, for appellant. G. W. Phelps, for respondent.

KING, C. This is an action to recover \$1,500, with interest, alleged to have been delivered and intrusted to defendant by plaintiff under an express and implied contract of repayment on demand, on which contract it is averred that defendant on January 1, 1902, acknowledged \$1,600 to be due plaintiff, which he then and there agreed to pay, but had, after repeated requests, neglected and refused to do. The complaint is in the usual form for money had and received; failing, however, to allege that it was the property of plaintiff, and that there was any consideration for the transaction. The answer admits the receipt of the money referred to, and asserts that it was received by defendant for the purpose of loaning it for plaintiff with money of his own, the profits from which were to be divided between them in proportion to their respective interests; and that in response to her request from time to time for current expense money he had advanced various sums to plaintiff, aggregating \$710; that the funds were loaned as requested and in the manner agreed, but that, through no fault of defendant, but owing to unfortunate investments, the money of both was lost, on account of which his liability is denied. A reply being filed placing the cause at issue, trial was had resulting in a verdict and judgment as demanded.

Defendant assigns as error: (1) The admission of a certain check in evidence without sufficient identification; (2) the admission in evidence of certain letters offered, in which erasures appear without first accounting therefor; (3) the refusal of the court to grant defendant's motion for a nonsuit. The points named will be treated in their inverse order. Other questions were raised, both in the pleadings and at the trial, not indicated either in the foregoing synopsis of issues stated or errors suggested, which, not being before us, will pass unnoticed. Independent of the letters offered, an examination of the testimony discloses sufficient evidence in support of plaintiff's averments to be submitted to the jury. It appears from the testimony that plaintiff furnished the money as alleged, and that defendant purchased a mortgage with it which he afterwards sold, without accounting for the proceeds thereof. The receipt of the money is substantially admitted by the answer, and, as stated, the proof on

the other points is sufficient to support the verdict.

It is insisted, however, that the complaint does not state sufficient facts to constitute a cause of action, nor to warrant a judgment under the testimony offered, in respect to which it is maintained that the complaint omits stating that the money intrusted and delivered to defendant was the property of the plaintiff, and that, in the absence of this averment, it must be presumed to be the property of defendant, making a sufficient consideration for its return an essential allegation. This contention overlooks the important feature that the absence of these averments, if considered otherwise necessary, is supplied by the answer, from which it can clearly be inferred that the money furnished was the property of plaintiff. And this is also sustained by testimony offered without objection to that effect, which, in the absence of a demurrer to the complaint and after verdict, is sufficient. *Nicolai v. Krimbel*, 29 Or. 76, 43 Pac. 865; *Patterson v. Patterson*, 40 Or. 560, 67 Pac. 664; *Keene v. Eldridge*, 47 Or. 179, 82 Pac. 802; *Madden v. Welch*, 48 Or. 199, 86 Pac. 2; *Bade v. Hibbard* (decided Jan. 21, 1908) 93 Pac. 364.

It is further maintained in this connection that the motion for nonsuit should have been allowed on the theory that the facts proved do not support the averments of the complaint, in support of which it is argued that the proof merely shows defendant to have been an agent of plaintiff, and that, if any cause of action is shown, it is *ex delicto* and not *ex contractu*, and our attention is directed to some authorities supporting this position; but we find the weight of authority supports the rule, and we believe it the better one, that in cases of this kind the claim in tort can be waived and the action brought upon an implied contract. *Pomeroy's Code Rem.* (3d Ed.) §§ 493, 571. This is certainly the settled rule in this state; and the question of the election is with the plaintiff, and not with the defendant. *Miller v. Hirschberg*, 27 Or. 522, 40 Pac. 506. It is immaterial whether defendant rightfully or wrongfully received the money, for, as announced in *Peterson v. Foss*, 12 Or. 81, 82, 6 Pac. 397, "whenever one person obtains possession of money which, *ex quo et bono*, belongs to another, the latter may maintain an action to recover it." The defendant having received and wrongfully converted to his own use money to which it is practically conceded plaintiff is entitled, he cannot insist that plaintiff shall waive her contract and sue in tort for damages. She was entitled to adopt the form of action which she preferred, and, having elected to proceed in assumpsit, is entitled to have the verdict of the jury construed to support the judgment, if it can be done without violating the well-settled rules of law. See also, *Crown Cycle Co. v. Brown*, 30 Or. 285, 64 Pac. 451; *Humbird v. Davis*, 210 Pa. 311, 59 Atl. 1082; *Hindmarch v.*

Hoffman, 127 Pa. 284, 18 Atl. 14, 4 L. R. A. 368, 14 Am. St. Rep. 842.

It is maintained that the letters offered should not have been admitted in evidence, and that the court erred in submitting them to the jury with the erasures thereon. It appears from section 800, B. & C. Comp., and from the interpretation thereof by this court in *Simpkins v. Windsor*, 21 Or. 382, 28 Pac. 72, that the party producing an altered writing as genuine after its execution or making, in a part material to the dispute in question, shall account for the appearance or alteration, and further provides that it shall not be admitted in evidence unless the party producing it shows that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or that the alteration did not change the meaning or language of the instrument. With the exception of three or four words, the contents of the letters can be read with reasonable effort; and it is not only apparent from the letters themselves that the erasures were made merely for the purpose of omitting some of the immaterial matters in them, and connected only with matters not in dispute, but it is evident that the partially erased words consist of a part of only the immaterial portion thereof, which we think clearly comes within the rule intended by the statute.

The other error assigned relates to a certain draft for \$125, sent to plaintiff by the bank of Athena, Or., containing the initials "W. J. W.," which it is insisted should not have been submitted to the jury without further identification. It is only claimed for this draft that it tends to prove a payment by defendant of the amount there indicated, and since he admits this payment, the proper identification thereof becomes immaterial, for it could not have in any way misled the jury, and the error, if it can be deemed such, was harmless.

The judgment of the court below should be affirmed.

(40 Colo. 395)

ENOS et al. v. ANDERSON et al.

(Supreme Court of Colorado. July 1, 1907.)

1. FRAUDS, STATUTE OF—PROMISE TO ANSWER FOR DEBT OF ANOTHER—NATURE OF DEBT.

Defendants' oral agreement to pay certain notes given by plaintiffs, and secured by a deed of trust upon property conveyed by them to defendants, is not an agreement to answer for the debt of another within the statute of frauds, the statute referring only to the debt of some person other than the immediate parties to the contract of guaranty and owed to one of those parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, *Frauds*, Statute of, §§ 27, 31.]

2. SAME—AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR—EFFECT OF PART PERFORMANCE.

Plaintiffs conveyed certain property to defendants in consideration for certain other property and defendants' oral promise to pay certain notes given by plaintiffs, and secured by

a deed of trust upon the property conveyed to defendants. The notes were not due within a year. *Held*, that the contract being completely executed on one side was not within the statute of frauds, providing that agreements not to be performed within a year must be in writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 288.]

3. LIMITATION OF ACTIONS—COMPUTATION OF PERIOD OF LIMITATIONS—INSTRUMENTS FOR PAYMENT OF MONEY.

In consideration for certain property conveyed to them, defendants agreed to pay certain notes of plaintiffs. Defendants failed to keep their promise, and plaintiffs were compelled to pay the notes. *Held*, in an action to recover the amount so paid, that the statute of limitations did not begin to run until plaintiffs were required to pay the notes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 249, 261.]

4. DEEDS—CONSTRUCTION—MERGER OF PREVIOUS AGREEMENTS.

The rule applicable to all contracts that prior stipulations are merged in the final and formal contract executed by the parties applies to a deed based upon a contract to convey.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 266.]

5. EVIDENCE—WEIGHT AND SUFFICIENCY—DEGREE OF PROOF IN GENERAL.

The quantity and quality of the proof required to establish parol agreements varying the terms of deeds is not the mere preponderance required in the ordinary civil action, but that degree of proof required to sustain a conviction in a criminal case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2448.]

6. DEEDS—SUFFICIENCY OF EVIDENCE—CONSIDERATION.

In an action for defendants' failure to pay plaintiffs' notes, which they orally promised to do in consideration for plaintiffs' conveyance to them by warranty deed of certain property, evidence examined, and *held* not to establish, beyond a reasonable doubt, so as to vary the terms of the deed by parol proof, that such promise was made.

7. FRAUDS, STATUTE OF—PROMISE TO ANSWER FOR DEBT OF ANOTHER.

Where the parties to a deed were dealing with each other regarding the grantee's assumption of certain notes as part consideration for the property, but failed to include in the deed the words which would make the grantee liable to pay such notes because the parties could not agree that such words should be included, and thereafter the grantor was compelled to pay the notes, he cannot recover from the grantee the amount so paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 27, 31.]

Appeal from District Court, City and County of Denver; F. T. Johnson, Judge.

Action by Isabel L. E. Anderson and another against Charles W. Enos and another. From a judgment for plaintiffs, defendants appeal. Reversed.

Benedict & Phelps, for appellants. W. T. Rogers and John F. Mail, for appellees.

STEELE, C. J. On May 3, 1893, the plaintiffs (appellees here) executed and delivered to the defendants a warranty deed for the premises known as lots 23 and 24, block 3, Kettle's addition to the city of Denver. The consideration named in the deed is \$12,000. This deed contains a covenant that the

property is free and clear of all liens and incumbrances "except a certain deed of trust recorded in Book 888, March 7th, 1893, given to secure six thousand dollars at seven and one-half per cent. per annum." On September 25, 1894, the property was sold under the deed of trust for the sum of \$2,600, and this amount, less the costs and expenses of the sale, was credited upon the notes secured by the deed of trust. Thereafter suit was brought against the plaintiffs (appellees here) to recover judgment against them for the balance due upon the notes, approximately \$4,000. While the suit was pending, plaintiffs settled with the holders of the notes, and in December, 1897, or in 1898, paid \$1,000 in full settlement of the demand against them. On May 27, 1902, this suit was brought; the plaintiffs alleging in their complaint that the defendants orally assumed the notes given by the plaintiffs and agreed to pay them; that the property conveyed to the defendants by the plaintiffs was of the value of \$12,000; that the consideration for the conveyance of the property was the assumption of the \$6,000 incumbrance and the conveyance by the defendants to the plaintiffs of property valued at \$6,000; and they asked judgment against the defendants for the sum of \$1,000 and interest, being the amount the plaintiffs paid to compromise the suit mentioned herein. The defendants deny that they assumed and agreed to pay the notes mentioned, and deny that the consideration for the conveyance to them was, in part, the assumption and agreement to pay the said notes. In other defenses they plead the statute of frauds and the statute of limitations, and in still others they allege, by way of cross-demand, damages sustained by reason of an alleged breach of the covenant of warranty. The court found in favor of the plaintiffs, and rendered judgment against the defendants in the sum of \$1,326.65. From this judgment the defendants appealed to the court of appeals.

It is contended that the alleged contract is within that section of the statute of frauds which declares that every special promise to answer for the debt, default, or miscarriage of another shall be void unless such agreement or some note or memorandum thereof be in writing and subscribed by the party charged therewith. The agreement set out in the pleadings, and testified to by the plaintiffs, was not an agreement to answer for the debt of another person. The plaintiffs testified that the defendants agreed to assume and pay certain notes given by the plaintiffs, and secured by a deed of trust upon the property conveyed by them to the defendants. "The statute applies to promises to pay the debt of another; and this is construed by the courts of both countries to mean the debt of some person other than the immediate parties to the contract of guaranty and owed to one of those parties." Browne on the Statute of Frauds, § 188.

It is also claimed that the agreement was not to be performed within a year, and therefore came within the provisions of the statute of frauds. The case of *Curtis v. Sage*, 35 Ill. 22, holds, under a state of facts very similar to those shown in this case, that such a contract is not within the statute of frauds. Nor was the action barred by the statute of limitations. The alleged agreement was to pay the notes of the plaintiffs. The cause of action did not accrue to the plaintiffs until they were required to pay the notes. Within six years after they were required to make payment they brought this action, therefore it was not barred. "The rule applicable to all contracts that prior stipulations are merged in the final and formal contract executed by the parties applies, of course, to a deed based upon a contract to convey. When a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, still the deed must be looked to alone to determine the rights of the parties." 2 Devlin on Deeds, § 850a. The courts have recognized various kinds of stipulations and agreements as not coming within the rule, and have permitted parties to show that a deed absolute on its face is not so in fact, and that the consideration named was not the real consideration. Whether the agreement alleged to have been made between the parties to this case could be proved and enforced as being within one of the exceptions to the rule stated, or could not be shown or enforced because within the rule, we shall not determine, but we shall assume that such an agreement can be proved and enforced. While courts have recognized parol agreements which vary the terms of deeds, the quantity and quality of the proof required to establish such agreements is not the mere preponderance required in the ordinary civil action, but that degree of proof required to sustain a conviction in a criminal case. *Armor v. Spalding*, 14 Colo. 302, 23 Pac. 789; *Davis v. Hopkins*, 18 Colo. 153, 32 Pac. 70.

There was a direct conflict in the testimony. The plaintiffs testified that the defendant Charles W. Enos agreed to pay the incumbrance on the property. He testified as positively that he refused to accept a conveyance binding him to become personally liable for the mortgage debt. He says that a deed was first prepared by the broker who acted as agent in the negotiations, containing a clause that the grantee assumed and agreed to pay the incumbrance, and that he refused to accept such a deed. One of the plaintiffs testified that he did not read the deed carefully, and that the deed was not made in accordance with his directions. He said: "I saw the deed, but I did not read it particularly over. I trusted to my real estate man, and he betrayed me." Question. "How so?" Answer. "The way you think; he made the deed out to read wrong." The

court excluded any further testimony upon this subject.

The deed itself does not release the plaintiffs from personal liability on the notes, but merely excepts the deed of trust from the covenant against incumbrances. We can place no other construction upon the language of the plaintiff John Anderson than that he had instructed the broker to prepare a deed by which the defendants were to assume the mortgage debt and to pay it, and that he had failed to do so. The deed itself should be regarded as important evidence. It acknowledges the receipt of \$12,000, simply conveys the property subject to the deed of trust, and contains no statement of assumption or agreement to pay the notes, and does not allege that the amount of the incumbrance was allowed to the defendants on account of purchase money. From the deed itself it would appear that the plaintiffs had received \$12,000 from the defendants, in consideration of which they had conveyed the property to the defendants, and that they, and not the defendants, were to pay the incumbrance. The plaintiffs claim that of the consideration \$6,000 was allowed defendants because they agreed to pay the incumbrance, and that the balance was made of items of cash paid and property transferred to plaintiffs, by the defendants. To thus vary the terms of the deed by parol proof, it was incumbent upon plaintiffs to establish beyond a reasonable doubt that such agreement was made. This, we think, the plaintiffs have not done. We are not unmindful of the numerous decisions of this court holding that the findings of a trial court will not be disturbed where there is a conflict of testimony, but we are satisfied that the court must have based his decision upon the ground that the testimony preponderated in favor of the plaintiffs, and overlooked the rule which requires the establishment of such agreements beyond a reasonable doubt. Moreover, from the testimony of John Anderson, it appears that he instructed the broker to incorporate into the deed words by which the defendants assumed and agreed to pay the notes secured by the deed of trust; clearly establishing the fact that the subject of becoming personally liable for the incumbrance was the matter of negotiations between the parties. It also appears that Dr. Enos refused to accept such a deed, and if they were dealing with each other upon the subject, and failed to include in the deed the words which would make the defendants liable because the parties could not agree that such words should be included in the deed, the law will not permit plaintiffs to recover. Such was the holding in *Nesmith v. Martin*, 32 Colo. 77, 75 Pac. 590.

For the reasons given, the judgment is reversed.

CASWELL and MAXWELL, JJ., concur.

WICKHAM v. PEOPLE.

(Supreme Court of Colorado. Nov. 4, 1907.
Rehearing Denied Feb. 3, 1908.)

1. INFORMATION—AFFIDAVIT TO SUPPORT—SUFFICIENCY.

Under 3 Mills' Ann. St. Rev. Supp. § 1432b, authorizing a district attorney in certain cases to file an information upon affidavit of any person knowing of the commission of an offense, and who is a competent witness setting forth the offense, etc., an information is not defective because the party who verifies it did not have personal knowledge of the commission of the offense, where an affidavit in conformity to the statute was filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 168.]

2. CRIMINAL LAW—APPEAL—HARMLESS ERROR.

3 Mills' Ann. St. Rev. Supp. § 1432b, requires the district attorney to indorse on an information the names of witnesses known to him at the time of filing and names of other witnesses becoming known to him before the trial, but provides that witnesses whose names or the materiality of whose testimony are first learned by the attorney upon the trial may be called. *Held* that, though the statute is mandatory, it was not reversible error to allow, on the day before the day a case was set for trial, the district attorney to indorse upon the information the names of additional witnesses said to have been known to him when the information was filed, where defendant did not apply for a continuance, nor make a showing of surprise or prejudice, and no such showing is made on appeal.

3. WITNESSES—LEADING QUESTIONS.

It was proper to allow the district attorney to ask a witness leading questions, where the witness had made a previous statement to him, a portion of which the witness was attempting to conceal to the district attorney's surprise, the questions objected to being asked to refresh the witness' recollection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 848.]

4. CRIMINAL LAW—ORDER OF PROOF—WITHDRAWING EVIDENCE.

In a murder trial, it was proper for the court upon its own motion to withdraw from the jury testimony relating to decedent's reputation for peace, etc., where it was received upon the supposition that it would be made competent by subsequent testimony, and the subsequent testimony was not offered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1612.]

5. CRIMINAL LAW—WITHDRAWING EVIDENCE ORALLY—PROPRIETY.

Where testimony has been received upon the supposition that it would be made competent by subsequent testimony, and the subsequent testimony is not offered, the court properly directs orally the withdrawal of the testimony given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1612.]

6. HOMICIDE—MURDER—"COOLING TIME"—INSTRUCTION ON—PROPRIETY.

In a murder trial, it was proper to refuse to instruct respecting "cooling time," where accused went to a house and there discussed charges against him of immoral conduct said to have been made by decedent, and putting a gun in his pocket declared he was going to hunt decedent, an hour or more elapsing from the time he went to, until he left the house, and where he met decedent a short distance from the house and struck him, and while decedent was retreating shot him, walked three blocks, talked with several persons, examined a cut in his

neck inflicted by decedent, and 10 or 15 minutes later returned to where decedent lay and killed him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 62-64.]

7. SAME—QUESTION OF LAW.

In a murder trial, whether accused had sufficient "cooling time" after being provoked to heat of passion by, and before killing, decedent, is a question of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 565.]

8. SAME—MURDER IN FIRST DEGREE—DELIBERATION—EXTENT.

If one actually forms the purpose maliciously to kill another, and deliberates and premeditates upon it, and then does the act, he commits murder in the first degree, no matter how short the time may have been, if but the time necessary for one thought to follow another between the purpose and its execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 14.]

9. SAME—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In a murder trial, error in an instruction taking from the jury the consideration of all degrees of murder, excepting the first, is not ground for reversing a conviction in the first degree and a sentence of life imprisonment, where the evidence warranted the conviction and the infliction of a death penalty, and if the jury had returned a verdict in the second degree the judge would have been in duty bound to impose a life sentence; the entire evidence, including accused's, excluding the idea of manslaughter.

Bailey and Caswell, JJ., dissenting.

En Banc. Error to District Court, City and County of Denver; E. E. Armour, Judge.

Peter Wickham was convicted of murder in the first degree, and he brings error. Affirmed.

Morrison & De Soto and Morrison & Bailey, for plaintiff in error. William H. Dickson, Atty. Gen., and Samuel H. Thompson, Jr., Asst. Atty. Gen., for the People.

MAXWELL, J. Under an information charging murder, plaintiff in error was convicted of murder of the first degree, and sentenced to the penitentiary for life.

1. The court overruled a motion to quash the information, based upon the ground that the information was not supported by the affidavit of any person having knowledge of the commission of the offense, as required by section 1432b, 3 Mills' Ann. St. Rev. Supp., the pertinent part of which is: "But if a preliminary examination has not been had or when upon such examination the accused has been discharged, or when the affidavit or complaint upon which the examination has been held has not been delivered to the clerk of the proper court, the district attorney may, upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof, upon being furnished with the names of the witnesses for the prosecution, by leave of court first had, file an information, and process shall forthwith issue there-

on." The affidavit was in conformity with the requirements of the statute. Where this is true, this court has held that an information cannot be attacked upon the ground that the party who verified it did not have personal knowledge of the commission of the offense charged. *Holt v. People*, 23 Colo. 1, 45 Pac. 374; *Bergdahl v. People*, 27 Colo. 302, 61 Pac. 228; *Barr v. People*, 30 Colo. 522, 71 Pac. 392; *Overland C. M. Co. v. People*, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74.

2. Over the objection of plaintiff in error, the day preceding the day the case was set for trial the district attorney by order of court was permitted to indorse upon the information the names of additional witnesses for the people. This is claimed to be error upon the ground that the witnesses whose names were so indorsed were known to the district attorney at and before the time the information was filed. Section 1432b, 3 Mills' Ann. St. Rev. Supp., referring to the duty of the district attorney in this behalf, provides: "He shall indorse thereon the names of such witnesses as are known to him at the time of filing the same, and shall also indorse upon such information the names of such other witnesses as may become known to him before the trial at such time as the court may, by rule or otherwise, prescribe; but this shall not preclude the calling of witnesses whose names or the materiality of whose testimony are first learned by the district attorney upon the trial." Three classes of witnesses are designated by the statute—those known to the district attorney at the time of filing the information, those who shall become known before the trial, and those whose names or the materiality of whose testimony are first learned upon the trial. That this statute is mandatory cannot be doubted. It is the duty of the district attorney to comply with it. Justice to the accused demands such compliance, so that he may be fully advised of those who will confront him as witnesses at the trial. No application for a continuance was made, and no showing of surprise or prejudice was made, by plaintiff in error, by reason of the action complained of, and there is no such contention here. Plaintiff in error may have been fully advised as to what the witnesses would testify to, their character, and all other matters desirable for him to know. Under this condition we cannot say that the action of the court was reversible error. *Boyd v. People*, 22 Colo. 496, 498, 45 Pac. 419.

3. It is urged that error was committed in allowing the district attorney to ask a witness leading questions. It appears that the witness had made a previous statement to the district attorney, a portion of which he was attempting to conceal, to the surprise of the district attorney. The questions to which objections were made were propounded for the purpose of refreshing the recollection of the

witness. In *Babcock v. People*, 13 Colo. 515, 520, 22 Pac. 817, 819, in discussing this subject, it is said: "Under such circumstances, where a party is really taken by surprise at the conduct of his own witness, it is in the discretion, and is often the duty, of the trial court to allow a party to put leading questions to his own witness, as the only means of preventing an unwilling witness from concealing the truth by unsatisfactory or evasive answers; and in extreme cases, where it is apparent that a witness is giving testimony contrary to the reasonable expectation of the party calling him, such party should be allowed to cross-examine such witness for the purpose of refreshing his recollection, with the view of modifying his testimony or of revealing his real animus in the case." In *Hickory v. U. S.*, 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170, the court said: "When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony." The court committed no error in overruling the objections to the questions.

4. At the close of all the testimony, upon his own motion, the court withdrew from the consideration of the jury testimony relating to the reputation of the deceased for peace and good order, stating that such testimony was received upon the supposition that it would be rendered material and competent by testimony offered later in the case, and that such later testimony was not forthcoming. *Davidson v. People*, 4 Colo. 145, and *Babcock v. People*, 13 Colo. 515, 22 Pac. 817, are cited in support of this assignment of error. Neither case cited supports the contention of counsel. In both evidence of uncommunicated threats made by the deceased against the accused immediately before the killing was excluded. This was held to be error. In the case at bar there is no evidence in the record to justify the admission of testimony as to the reputation of deceased for peace and good order. There was no error in excluding the testimony under consideration. The above ruling was made by the court orally. It was objected to upon this ground. It does not come within the rule which applies to oral instructions. An instruction is thus defined: "An instruction is an exposition of the principles of law applicable to a case, or to some branch or phase of a case, which the jury are bound to apply in order to render the verdict establishing the rights of the parties in accordance with the facts proved." 11 Ency. P. & P. 56. The ruling was one which had been reserved upon the question of the admissibility of certain testimony, which had been admitted upon the statement of counsel that testimony to be subsequently offered would render it material. To hold that a ruling upon the admission or rejection of testimony,

made during the progress of a trial, must be reduced to writing, would be an innovation. This is the ultimate result of counsels' contention. There is no merit in the assignment of error.

5. Plaintiff in error requested a number of instructions, many, if not all of which, were refused. Counsel for plaintiff in error, in their printed brief and upon oral argument, discussed only those assignments of error based upon the refusal of the court to give requested instructions relative to "cooling time," and we shall confine our examination to such assignments. A discussion of this assignment of error and others which are to follow necessitates a statement of the evidence in the case. Between 8 and 9 o'clock of the evening of April 21, 1906, Wickham, plaintiff in error, having put a gun in his hip pocket, left a hotel at Elyria in this city, and went to the house of Mrs. Erickson, where he met his wife, who was temporarily stopping with Mrs. Erickson, having recently left the County Hospital. Some conversation took place between Wickham, his wife, Mrs. Erickson, and others present, relating to remarks which Tom Darling, the deceased, is said to have made to Wickham's wife to the effect that Wickham had had improper relations with another woman. Wickham's wife said to plaintiff in error that she was only fooling in what she told him, and that he ought to have no feeling against Darling. Wickham took his gun out of his hip pocket, made threats against Darling, put the gun into his coat pocket, and said that he was going out to hunt Darling. Mrs. Wickham, Mrs. Erickson, and others tried to dissuade him from having any trouble with Darling, and Mrs. Erickson told her daughters to hunt up Darling, warn him that Wickham was after him, and tell him to get away. It appears that an hour or more elapsed from the time when Wickham came to Mrs. Erickson's house and when he left. Wickham left the house, and within a few feet thereof met Darling coming towards the house with three others, accosted him, charged him with telling stories to his wife, struck him with his left fist, and knocked him down. Darling arose, and was knocked down by Wickham three times in succession. Wickham testified that he knocked Darling down once, and that he (Darling) fell down twice. Five witnesses for the prosecution testified that Wickham knocked Darling down three times, and that when Darling arose the third time Wickham pulled his gun out of his coat pocket and began to beat Darling over the head with it. Wickham testified that he did not pull his gun until after he had discovered that he had been cut. Witnesses for the prosecution testified that Wickham did not discover that he had been cut until after he had beaten Darling with the gun, and that Darling was retreating on the run when Wickham followed him along the sidewalk to the line of a vacant lot, where Darling dropped to his hands and knees, and Wickham

fell over him. Darling arose and started to run across the vacant lot, when Wickham called to him to halt, which Darling did, and turned part way around, and Wickham shot him in the side. Darling fell in his tracks, and Wickham started to walk up the street, cut across a vacant lot to Forty-Seventh street, distant about half a block, walked along this street two blocks and a half to a barber shop, which he entered. On his way to the barber shop he stopped and talked to two or three different parties whom he met. After entering the barber shop he walked up to a mirror and examined the cut on the side of his neck. Wickham testified: "I says: 'Good God, fellows, I believe I am going to die.' I says: 'He has cut my juglar vein.' With that I walked out of the shop." A witness for the prosecution, who was in the barber shop, testified, in answer to the question, "Was there anything else said there?" as follows: "Why, there was nothing any more than after he had seen himself in the glass, and says: '——— has got me.' He says: 'I am going back and finish him, or something like that.'" Another witness for the prosecution, who was in the barber shop, testified: "He pulled out a gun, and he says: 'I have got one more shot in there, and I will fix him,' and out he went." A witness for the defense, who was in the barber shop, testified: "He said something about he had fixed him, the fellow had got him, and he had fixed the other fellow. At that he turned, and he pulled his gun and pointed it towards me, and I walked out." As to what took place after plaintiff in error left the barber shop, he testified: "I walked down the street, and I met another fellow. He says: 'Pete,' he says, 'why don't you go to a doctor?' I says: 'I don't know where I can find one.' Well, after that I walked down, and come across the lot. I says: 'He has——' 'If he got me,' I says, 'I will get him.' I walked down through the vacant lot again and through the alley. I got around in the vacant lot where he was. He seen me, and I seen him. He says: 'Never mind, you ——, I will get you yet.' At that I pulled away, and shot him again. Q. What did you have in your mind at the time you left that barber shop with the gun in your hand, if you had it in your hand? A. Well, after I seen I was bleeding so, and after they said I would bleed to death if I didn't get that blood stopped, why, I would bleed to death, and I thought then that when this Darling dropped he dropped just for a stall like he did on the sidewalk, and I thought as long as I was going to die, why, I thought I would get him. Q. And then you intended to kill him at the time you started from the barber shop. Isn't that true? A. Well, I didn't exactly intend to kill him—no, sir—until he made this remark: 'You dirty ——, I will get you yet.' Q. What did you go back to that vacant lot for if you didn't intend to kill him on that occasion?

A. I don't know, sir. * * * Q. Now, if you had it in your mind and in your intention to let him go, why did you leave the barber shop and go back to that vacant lot? A. I couldn't tell, sir. * * * Well, I knowed that after that he would kill me if I didn't kill him. Q. But you were up at the barber shop, two or three and a half blocks away from him. There was no danger of his killing you. * * * A. Not at the time. Q. Is that the only reason you have to give why you went back to the vacant lot from the barber shop? A. I didn't have no reasons. Only I knowed if I hadn't hit him the first shot, I knowed he would kill me. Q. You knew that if you hadn't hit him with the first shot he was probably alive yet? A. Yes, sir. Q. And you went back there to kill him? A. Yes, sir; he has made threats on me before." Five witnesses for the prosecution testified that when Wickham came back to where Darling was lying on the ground he put his foot under Darling's head, turned it over, and said: "You ———, haven't you got enough yet?" put his gun close to Darling's head, and shot him the second time, the shot blowing his brains out. Powder marks were found on the left side of Darling's head, showing that he could not have been looking in the direction of Wickham when the last shot was fired. The interval of time between the first and second shot was from 10 to 15 minutes.

Going back to the request for instructions as to "cooling time," it is not clear from the brief or argument of counsel whether they mean "cooling time" between the time Wickham made the threats against Darling in Mrs. Erickson's house, or the time between the first and second shots. In either case we do not believe that under the evidence in this case error was committed in refusing the request for an instruction relating to "cooling time." While there is some conflict in the authorities, the weight of authority and the better doctrine seems to be that "cooling time" is a question of law for the court, and not a question for the jury. "Ordinarily the sufficiency the cooling time, and the sufficiency of the provocation, are respectively deemed questions of law, not of fact. But the time required to cool, for example, is sometimes, it is believed with great propriety, submitted to the jury." 2 Bishop's New Criminal Law, § 713. "It is well settled that the question of cooling time is a question of law to be decided by the court, and not a question for the jury. But if such question is left to the jury, and they decide it as the court should, it will be but harmless error." Hughes, Criminal Law, § 4. "The court may, as a matter of law, instruct that the defendant had sufficient cooling time after being provoked to a heat of passion, where the evidence clearly warrants the instruction, and that in such case an unlawful killing would not be reduced to manslaughter." Hughes, Instructions to Juries,

93 P.—31

§ 254. Numerous cases are cited by the authorities above quoted, many of which we have examined, and believe that the weight of authority is with the doctrine announced by the text-writers above quoted from. Upon this subject, as a part of instruction 4 given by the court, the jury were told: "If one actually forms the purpose maliciously to kill a human being, and deliberates and premeditates upon it before performing the act, and then performs it, he is guilty of murder in the first degree, no matter how short the time may have been, if but the time necessary for one thought to follow another between the purpose and its execution." The above-quoted portion of the instruction is the basis of one of the assignments of error urged. This instruction is warranted by what this court said in *Van Houton v. People*, 22 Colo. 53, 66, 43 Pac. 137. Under the evidence in this case there was no error in refusing the instructions requested, or the instruction given, above quoted.

6. The seventeenth instruction related to the law of self-defense. It is criticised by counsel upon the ground, as they say, that it totally ignores the distinction between an assault committed with felonious intent, and an assault committed with the intention to inflict a beating only. We do not think the instruction is subject to the criticism made, but, on the contrary, believe that it correctly states the law applicable to the facts of this case.

7. The eighteenth instruction was: "You are instructed that, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant was informed that deceased had stated to defendant's wife that the defendant had had or was having improper relations with some other woman, and that thereupon he sought out the deceased and assaulted him only with the intention of giving him a beating, and if you still further believe from the evidence, beyond a reasonable doubt, that the defendant did assault the deceased by beating him and knocking him down, and while so doing was resisted and wounded by the deceased with a knife or in some other manner, and that then and thereupon the defendant shot and killed the deceased, you should find the defendant guilty as charged in the information, notwithstanding any wounds, however serious, that he may have received at the hands of the deceased." The instruction is objected to upon the ground that it took from the jury the consideration of all degrees of murder except the first. The court had fully, correctly, and fairly instructed the jury as to the several degrees of murder and manslaughter, and had instructed them that in arriving at their verdict the instructions were to be considered as a whole. With the exception of this instruction, the charge as a whole was without error. An indictment or information for murder in the first degree includes also murder

in the second degree and manslaughter, and as the court had defined the several degrees of murder and manslaughter the jury could have returned any verdict they believed the evidence justified. The instruction is faulty, and should not have been given. As an abstract proposition of law, it is entirely indefensible. As applied to the evidence in this case, it incorrectly states the facts, and cannot be defended as a correct statement of the law, applicable to cases upon facts similar to those stated in the instruction. There is nothing in the evidence to show that the accused sought out the deceased and assaulted him only with the intention of giving him a beating. On the contrary there is abundant evidence to justify the conclusion that it was the deliberate and premeditated intention of the accused to seek the defendant and kill him. This intention was manifest from the brutal and heartless conduct of the accused from the moment he assaulted the deceased until he blew his brains out, while he was lying in a dying condition upon the ground; and every act of accused showed an abandoned and malignant heart, bent on murder, from the time he left the house in search of his victim until he fired the last shot. Again, the entire evidence, except that of the accused, showed the deceased was at all times trying to protect himself against the assault of the accused, and finally to escape his assailant; that deceased did not cut the accused until after he had been beaten over the head with a gun in the hands of the accused; that thereupon he endeavored to make his escape by flight, and after he had started to run, and was at a distance of 50 feet from the accused, he halted, at the command of the accused, and received the first bullet (which was necessarily fatal, according to the testimony of the doctor who performed the autopsy), so that the statement in the instruction to the effect that deceased resisted and wounded the accused at the time of his being knocked down and beaten was contrary to the evidence in the case.

The language of this court in *Van Houton v. People*, 22 Colo., 53, 66, 43 Pac. 137, 142, we think is peculiarly applicable to the facts shown by the evidence in this case: "The entire evidence, excepting only that of the accused, negatives the conclusion that this was a case of mutual combat, and thereby excludes the idea of manslaughter. So, also, the plea of self-defense is not within our consideration, and it is negatived by all the evidence except that of the defendant, and was resolved against him by the jury. The crime of murder alone remains. This the statute divides into two degrees, i. e., murder of the first degree, and murder of the second degree. Murder being established, the law in its humanity declares it to be murder of the second degree in the absence of circumstances showing it to have been murder of the first degree." The entire evidence in this case, including that of the accused, excludes

the idea of manslaughter. A verdict of manslaughter would have been a gross miscarriage of justice. The punishment imposed by statute for murder of the second degree is imprisonment in the penitentiary for a term of not less than 10 years, and may be extended to life. If the jury had returned a verdict of murder of the second degree, under the testimony in this case, including that of the accused, the judge who presided at the trial would have been recreant and remiss in the discharge of his duty, had he failed to have sentenced the accused to the penitentiary for life. The jury, in the exercise of the discretion, mercy, and humanity vested in them by the law, by their verdict, sentenced the plaintiff in error to imprisonment in the penitentiary for life, whereas, the evidence in this case, in our judgment, would have warranted the infliction of the death penalty. When a case is entirely free from doubt, and it affirmatively appears that the defendant was not and could not have been prejudiced by error in the instructions, error in the charge is not ground for reversal. *Mackey v. People*, 2 Colo. 13; *Clare v. People*, 9 Colo. 122, 125, 10 Pac. 799; In *People v. Donahue*, 45 Cal. 321, it is said: "The rule is that judgments will be reversed for alleged errors in instructions only when, looking at the testimony, we can see that the jury may have been misled by them to the prejudice of the defendant, or when, in the absence of the testimony, it is apparent that the instructions would be improper under any possible condition of the evidence." We believe that the rule announced in the cases last cited is a wholesome one, and should be applied in this case. There is no pretense that the evidence is not sufficient to sustain the verdict. Our conclusion is that, while the eighteenth instruction, for the reasons above stated, should not have been given, the same was without prejudice to the accused.

8. The nineteenth instruction given by the court is assigned as error. This instruction relates to the second shot fired by the accused, and is objected to upon substantially the same grounds as those urged to instruction No. 18. The instruction is not in any wise open to the objections urged against it. It correctly stated the facts as shown by all the evidence in the case, and is a correct statement of the law applicable to such facts.

There being no prejudicial error in the record, the judgment will be affirmed.

Affirmed.

BAILEY, J., dissents, for the reason that the eighteenth instruction given by the court to the jury was erroneous in that it took from the jury the consideration of all degrees of murder except the first degree. No matter what the facts and circumstances of the killing were, and even though they pointed conclusively to the guilt of the defendant of murder in the first degree, still the degree of guilt was a question to be determined by the

jury, and the court did not have the power or authority to relieve the jury of that duty. The error is not cured by the fact that in other instructions the jury was informed as to the several degrees of murder and manslaughter. The giving of three correct instructions does not dissipate the evil effect of one incorrect one. Neither the trial court nor this court can determine what influence the eighteenth instruction had upon the minds of the jury. By that instruction the jury was practically told that, if it believed the contention made by the defense, it should, nevertheless, find the defendant guilty of murder in the first degree.

CASWELL, J., joins in the above dissent.

LOWER LATHAM DITCH CO. et al. v. BIJOU IRRIGATION CO.

(Supreme Court of Colorado. Nov. 4, 1907.
Rehearing Denied Feb. 3, 1908.)

1. WATERS AND WATER COURSES—IRRIGATION—CHANGE IN PLACE OF DIVERSION—PROCEEDINGS—ABANDONMENT.

Sess. Laws 1899, p. 235, c. 105, relating to irrigation, provides for changes of the point of diversion where an adjudication of relative priorities has been had under the statutes enacted for that purpose, but does not contemplate the determination of the question of abandonment, and the presumption is that such rights continue in existence until a court of competent jurisdiction in an appropriate proceeding has otherwise determined.

2. SAME—DEFENSES.

In a proceeding to change the point of diversion of water from an irrigation ditch, it is no defense that consumers in another district, who are not parties to the proceeding, would be injured by the change.

3. SAME—RIGHT TO CHANGE POINT OF DIVERSION AN INCIDENT OF OWNERSHIP.

The right to change the point of diversion or place of use of water, which has been obtained as the result of an appropriation, is one of the incidents of ownership, independent of statute, and the only limitation upon it is that the rights of others be not infringed.

4. SAME—STATUTES—REMEDIAL STATUTES—IRRIGATION.

Sess. Laws 1899, p. 235, c. 105, providing for a change of the point of diversion of water from an irrigation ditch, is purely remedial, and one of its objects is to prevent a multiplicity of suits, and not to allow a change to be made until all persons who might be affected thereby are notified and given an opportunity to be heard.

5. SAME.

Before the passage of Sess. Laws 1899, p. 235, c. 105, providing for a change of the point of diversion of water from an irrigation ditch, the owner of a right to use water from any of the streams of the state for irrigation might in equity sue one respondent alone, and have determined as against him the right to change the point of diversion, and the right was not limited to any particular territory, or confined to any arbitrary diversion of the stream.

6. SAME—JURISDICTION OF DISTRICT COURT.

Under Sess. Laws 1899, p. 235, c. 105, providing for a change of the point of diversion of water from an irrigation ditch, the district court has jurisdiction to render a decree permitting a change in the point of diversion from one water district to another.

Appeal from District Court, City and County of Denver; F. T. Johnson, Judge.

Petition by the Bijou Irrigation Company against the Lower Latham Ditch Company and others to obtain a change in the point of diversion of water from an irrigation ditch. Judgment for petitioner, and certain respondents appeal. Affirmed.

H. N. Haynes and Goudy & Twitchell, for appellants. James W. McCreery, for appellee.

CAMPBELL, J. This proceeding by appellee, as petitioner below, was under "an act in relation to irrigation" (Sess. Laws 1899, p. 235, c. 105), and the object was to obtain a decree permitting a change of the point of diversion of the right to the use of water for irrigation originally decreed to the Frederick Bros. ditch, which is situate in water district No. 2, and now owned by petitioner, to the head gate of the Bijou ditch, also owned by petitioner, and situate in water district No. 1. The cause was referred to a referee to take evidence and make findings of fact and report a decree. The court, with some modifications and corrections, approved of the referee's findings, and entered a decree in favor of the petitioner as prayed for. Some of the respondents appealed, and rely for reversal upon four grounds: (1) That the priority in question had been totally abandoned prior to its acquisition by the petitioner; (2) that a partial abandonment thereof occurred; (3) that the change, if allowed, would injuriously affect the vested rights of the respondents; (4) that the district court was without jurisdiction of the subject-matter of the petition.

The first two contentions are at rest in this jurisdiction. Trial and decision of the pending cause was had, and briefs were filed here before publication of the opinion of this court in *Wadsworth Ditch Co. v. Brown* (Colo.) 88 Pac. 1060. We decided there that the statute under which such proceedings are conducted does not contemplate the determination of the question of abandonment. The statute provides for changes of the point of diversion where an adjudication of relative priorities has been had under the statutes enacted for that purpose. The presumption is that such rights continue in existence until a court of competent jurisdiction in an appropriate proceeding has otherwise determined, and no such determination has been had of this priority. We adhere to, and approve of, the former decision.

The record shows that appellants' claim of injury was, though not entirely, yet largely, based upon the assumption that the Frederick Bros.' priority had been abandoned in whole or in part, and thereafter appropriated and used by respondents. Since the issue of abandonment could not be herein determined, it necessarily follows that, in so far as appellants' claim of injury grows out of, or depends upon, a resolution of that issue in their favor, it cannot be upheld here.

We have examined with care the further claim that the evidence, aside from that concerning the issue of abandonment, proves that the desired change in the point of diversion, if made, would injuriously affect the vested rights of appellants. We think the finding of the referee, which was approved by the court, that appellants are not injuriously affected, is abundantly sustained by the evidence. It would serve no useful purpose to examine this evidence in detail; for decision of such issues depends so largely upon the facts of each particular case that determination in one cause is of little or no value in another.

Counsel for appellants vigorously argues that vested rights of water consumers in district No. 1, which is farther down the natural stream than district No. 2, would necessarily be infringed by the contemplated change in the point of diversion from the original headgate of the Frederick Bros.' ditch in district No. 2 to the headgate of the Bijou ditch in district No. 1. If that be true, and we express no opinion about it, certainly appellants would not be affected thereby, for they own neither land nor water rights in district No. 1. They are concerned only as to the effect the change may have upon their own rights, as appropriators of water in district No. 2, and may not interpose an objection that consumers other than themselves would be hurt. *Crippen v. Glasgow* (Colo.) 87 Pac. 1073.

The only important or fairly debatable question in the case is that of jurisdiction. Appellants say that changes in the point of diversion from one water district to another are not within the purview of this statute. This is said to be so because the remedial statute requires proof that all parties who may be affected by such change have been duly notified of the proceeding, and the practice and procedure thereunder is the same as if the petition were for an original decree; and if a decree is rendered permitting the change, only the water commissioner of the water district in which the original headgate, or point of diversion, is situate, is required to be notified thereof, so as to allot the priority in accordance with such change. These requirements, together with the provision of the statutes under which such original decrees are rendered, that notice is to be given only to persons thereby affected, and who live within the same water district, and not to those outside, demonstrate, says counsel, that the changes contemplated are to be restricted to one water district. The fundamental error in the contention that under this statute changes cannot be made from one water district to another lies in the erroneous assumption that the right to a change is conferred by the statute. It is a pre-existing right, and the only limitation to its enjoyment and enforcement is that the rights of others be not thereby infringed. The statute is purely remedial, as we have held in *New*

Cache la Poudre Irr. Co. v. Water S. & S. Co., 29 Colo. 469, 68 Pac. 781, and other subsequent cases. The right to change the point of diversion, or place of use, of water which has been obtained as the result of an appropriation, is one of the incidents of ownership, and existed and was exercised in this state long before this remedial statute was enacted. *Wadsworth Ditch Co. Case*, supra. In *Strickler v. Colo. Springs Co.*, 16 Colo. 61, 26 Pac. 313, 25 Am. St. Rep. 245, a change in the point of diversion was made where there was only one party respondent. True it is that there both points of diversion were within the same water district; but before this statute was passed the owner of a right to use water from any of the streams of this state for irrigation might bring an equitable action against one respondent alone, and have determined as against him the right to change the point of diversion. Such right was not limited to any particular territory, or confined to any arbitrary division of the stream.

One of the objects of the remedial statute under which this proceeding is being conducted was to put a stop to a multiplicity of actions, and not to allow such changes to be made until all persons who might be affected thereby are notified and given an opportunity to be heard. It must be admitted that the prescribed procedure will not fully effectuate that object. But the statute prescribes that the practice and procedure as to notice, etc., thereunder, shall be the same as if the petition were for an original decree, and therewith petitioner and the court have fully complied. This court more than once has expressed regret that our General Assembly did not include in one water district the principal stream and all its tributaries, so that a decree therein, when pronounced, should absolutely bind all the users of water therefrom. Notwithstanding this, our courts have proceeded to adjudications thereunder, and this court has held that the resulting decrees are conclusive and binding upon all those within the same water district, and *prima facie* correct, as between different water districts. *Ind. Ditch Co. v. Agri. Ditch Co.*, 22 Colo. 513, 528, 45 Pac. 444, 55 Am. St. Rep. 149. And in *Ft. Lyon Canal Co. v. Arkansas Valley S. B. & I. L. Co.* (Colo.) 90 Pac. 1023, it was held that they become binding upon all consumers from the same source of supply, both within and beyond the district, when not questioned within the time limited therefor by the statute. We may also say here that it is unfortunate that this remedial statute did not contain a provision for giving notice to those outside the particular water district when a change from one district to another is sought, and that it lacked the specific directions for giving effect to the decree which the curative act (Sess. Laws 1903, p. 278, c. 124) contains. But these omissions and defects do not destroy the property right of a water-right owner to

have his point of diversion changed from one water district to another, though it may affect the conclusiveness of the decree which permits him to make such change, in accordance with the decisions just cited.

The objection which appellants now interpose to the jurisdiction of the district court to render a decree authorizing a change in the point of diversion from one water district to another is just as applicable to the jurisdiction of the district court to enter the original decrees, and such objection has repeatedly been held not good. Our conclusion is that the district court had jurisdiction under the act of 1899, upon a compliance by petitioner and the court with the practice as to notice, etc., therein prescribed, which was observed in this case, to render a decree permitting a change in the point of diversion from one water district to another.

The judgment of the district court must be affirmed, and it is so ordered.

Affirmed.

STEELE, C. J., and GABBERT, J., concur.

SEVEN LAKES RESERVOIR CO. v. NEW LOVELAND & GREELEY IRRIGATION & LAND CO.

(Supreme Court of Colorado. July 1, 1907.
On Rehearing, Nov. 4, 1907.)

1. WATERS AND WATER COURSES—IRRIGATION—PRIORITY—USE.

A priority to the use of water is a property right, which is the subject of purchase and sale, and in its character and method of use may be changed, provided such change does not injuriously affect the rights of others.

2. SAME—STORAGE OF WATER—QUANTITY.

The owner of a priority for direct irrigation is entitled to store, during the direct irrigation season, the quantity of water, measured by volume and time, which it would be entitled to divert during that period for the purpose of direct irrigation, and to use the same later in the same season for irrigating crops requiring irrigation at that time, when the direct supply would be insufficient.

On Rehearing.

3. APPEAL—REHEARING—QUESTIONS CONSIDERED.

Where on appeal from a judgment in an action to determine water rights it was not urged that the decree should not be entered until all the parties whose rights might be thereby affected were before the court, such question would not be considered on an application for a rehearing.

4. SAME.

Where, in an action to prevent a sole defendant from diverting the water represented by its purchase during the irrigation season for storage as against plaintiff, plaintiff could not on petition for rehearing of an appeal by defendant contend that the right sought to be determined as between the parties should not be adjudicated without the presence of other parties whose rights might be affected by the adjudication.

Steele, C. J., and Campbell and Caswell, JJ., dissenting.

Appeal from District Court, Boulder County; Christian A. Bennett, Judge.

Action by the New Loveland & Greeley Irrigation & Land Company against the Seven Lakes Reservoir Company. Judgment for plaintiff, and defendant appeals. Reversed.

The question presented by this appeal is the right of the owner of a priority for direct irrigation to store the water thereby represented for use later in the season. Appellant is a corporation, organized under the laws of this state for the purpose of acquiring and maintaining reservoirs for the storage of water to supplement the water supply of its stockholders obtained through the Loveland & Greeley ditch to irrigate lands belonging to them under this ditch. Pursuant to this purpose it acquired reservoir sites, and purchased 34 shares of the Loudon Irrigation Canal Company and 50 inches in the Barnes ditch. The priorities belonging to these ditches were awarded for direct irrigation purposes. The water represented by these purchases it did not apply to lands directly, but, during the irrigating season, stored in one or more of its reservoirs for use upon lands later to mature crops, like beets and potatoes, which it is not necessary to irrigate in the early part of the season, but which do require water about August, and later, when the direct supply belonging to its stockholders in the Loveland & Greeley ditch was insufficient for this purpose. The several ditches named derive their respective supply from the same general source. Appellee, the owner of priorities supplied from this same source, brought a suit against appellant, the object of which was to prevent the appellant from diverting the water represented by its purchases during the irrigation season for storage. To the complaint filed the appellant filed a cross-complaint, claiming the right to divert the water represented by its purchases for storage purposes, based substantially upon the grounds above stated. There was no dispute with respect to the dates and amounts of the respective priorities of the parties to the action involved in this appeal; it being the contention on the part of plaintiff that, although the defendant was entitled to divert the water represented by its purchases for the purpose of direct irrigation when needed, and that these priorities for this purpose were superior to any claimed by plaintiff, the defendant could not abandon the use of the rights purchased by it for direct irrigation during the irrigating season, and store the water thereby represented for future use in irrigating crops. The judgment of the court was in favor of the contention of the plaintiff, and the defendant brings the case here for review on appeal.

H. N. Haynes, for appellant. James W. McCreery, for appellee.

GABBERT, J. (after stating the facts as above). The particular question presented by this appeal has not been determined in the concrete by any previous decision of this

court; but it is by no means a new one, because it merely involves the application of principles which have been announced in numerous cases. A priority to the use of water is a property right, which is the subject of purchase and sale, and its character and method of use may be changed, provided such change does not injuriously affect the rights of others. *Fuller v. Swan River P. M. Co.*, 12 Colo. 12, 19 Pac. 836; *Strickler v. Colo. Springs*, 16 Colo. 61, 26 Pac. 313, 25 Am. St. Rep. 245; *Cache la Poudre I. Co. v. Larimer & Weld R. Co.*, 25 Colo. 144, 53 Pac. 318, 71 Am. St. Rep. 123.

Appellant owns certain rights to the use of water, which, prior to its purchase, had been directly applied to the irrigation of lands. Instead of continuing to so use this water, it has ceased its direct application during the period it was theretofore applied, and stores the water which it would have the right to thus apply for use later in the same season. This change is in no manner detrimental to the rights of the appellee. It is not thereby deprived of any water which it would have the right to divert and apply to lands during the irrigating season as against the rights of the appellant. By the change no greater burden is imposed upon the common source of supply of the respective ditches. It must therefore logically follow that the appellant is entitled to divert the water represented by its purchase, and store for use later in irrigating crops, measured by volume and time, which it would have the right to apply directly to lands for purposes of irrigation at the time of such diversion.

The case presented is not one, as seems to have been the view of the trial court, where appellant seeks to convert a junior reservoir right to a senior appropriation for storage, but merely involves the right of appellant to utilize a priority for irrigation by using it at a later period. It appears from the record that the stockholders of appellant, instead of planting crops which require irrigation during the early part of the season, utilize their lands by growing crops which do not require irrigation until about August, when the direct supply through the ditches is not sufficient to furnish the volume of water necessary to irrigate such crops. And so, instead of applying the water to which they are entitled for direct irrigation in the early part of the season, they store this water for use later to mature crops, like beets and potatoes, which do not require irrigation until about the month of August. It would be unfortunate indeed if the law were such that it could not be adapted to changed conditions resulting from the character of crops grown by those engaged in agricultural pursuits. If water for direct irrigation can only be utilized for that purpose, the result would be to retard agricultural progress, and limit the growth of agricultural products to those which can be matured by means of direct ir-

rigation early in the season. If the judgment of the trial court should be sustained upon the theory that one owning a priority for direct irrigation may not cease to utilize it for that purpose upon crops in May, June, and July, and store it for use during the same season thereafter, the result would be to take from the owner of such a priority his rights and confer them upon others growing crops of a different nature. Such a rule would make the right to the use of water dependent upon the character of crops grown instead of upon the right to utilize it in any manner which does not injuriously affect the vested rights of others. In principle the case is no different from that of *Strickler v. Colorado Springs*, supra, wherein the right to change the use of water from agricultural to domestic purposes was recognized. If the right to change from agricultural to domestic, and from mining to agricultural, uses, and vice versa, is legal, certainly no good reason can be advanced why the change from one agricultural use to another may not be allowed.

The trial court seems in a measure to have been guided in rendering the judgment it did by section 2270, 1 Mills' Ann. St., which provides that persons desiring to divert water for storage may take "from any of the natural streams of the state and store away any unappropriated water not needed for immediate use for domestic or irrigating purposes." We do not think this section is involved, because appellant is not asserting any right to the water in controversy by virtue of any appropriation for reservoir purposes, but is merely seeking to utilize priorities which it is conceded it is entitled to for direct irrigation purposes by storing the volume to which it is thus entitled for use at a later period. We are of the opinion that the appellant is entitled to so utilize these priorities, that is to say, entitled to store, during the direct irrigation season, the quantity of water, measured by volume and time, which it would be entitled to divert during that period for the purpose of direct irrigation.

The judgment of the district court, in so far as it involved the rights of the parties to this appeal to the water represented by the stock purchased by appellant in the Louden Irrigation Canal Company, and the purchase of water in the Barnes ditch, is reversed, and the cause remanded, with directions to the trial court to enter a judgment in favor of appellant with respect to these matters in accordance with the views expressed in this opinion.

Judgment reversed.

STEELE, C. J., and CAMPBELL and CASWELL, JJ., dissent.

On Petition for Rehearing.

GABBERT, J. The arguments of counsel for appellee, and amici curiæ in support of the petition for rehearing of appellee, are

evidently based upon an erroneous assumption of what has been determined in this case. It is contended that adjudication decrees are disturbed, and that appellant, by the decree directed, will be awarded an enlarged use of water represented by its purchases, both in quantity and time. It must be borne in mind that this decision is based upon the fact, which is undisputed, that the stockholders of appellant are growing crops which do not, from their nature, require irrigation during the early part of the season, but do later, and that they desire to utilize the water in controversy for this purpose. Based upon these facts we have declared, what has time and again been decided by this court, that the character and method of use of a priority to the use of water may be changed, provided such change does not injuriously affect the rights of others, and that appellant is entitled to divert and store the water represented by the priorities purchased for the use of its stockholders for application to crops later, but in no greater quantity and at no other or different time than could be diverted and applied to land directly to nourish crops requiring irrigation at the time of such diversion; or, otherwise expressed, appellant is permitted to divert and store the water in controversy, but this right is measured and fixed by the limitations which the law would impose upon its use for diversion and application to crops requiring irrigation at the time of such diversion. This does not conflict with any previous decisions of this court; but, on the contrary, is sustained by Colo. M. & E. Co. v. Larimer & Weld I. Co., 28 Colo. 47, 56 Pac. 185. See, also, Mills' Irrigation Manual, § 56. This does not enlarge the use of the priorities of appellant, either in time or quantity; neither does it confer upon it the right to divert and store the water represented by its priorities every day during the irrigation season, or to convert such priorities into a storage right during the nonirrigating season, as contended by counsel, but limits its rights strictly to the diversion of water, both as to volume and time, to the same quantity and the same time we have indicated. Thus it is apparent that no rights are infringed, that no one is deprived of water to which he is entitled by reason of the change in the method of use, and that to supply appellant with the water which it will be entitled to store under the decree directed there cannot possibly be any greater burden imposed upon the common source of supply of the respective ditches owned or controlled by the parties to this appeal. Neither are any priorities disturbed; but, on the contrary, the decree directed leaves the relative rights of the parties to this appeal precisely as they were, whereas, if the judgment of the lower court should be affirmed, the result would be, where an appropriator had no use for water represented by his priorities in the early part of the season because of the fact that he was grow-

ing crops of a character which did not require irrigation during that period, and he could not store it at that time for use upon these crops, when later it was necessary to irrigate them, to take from him and give to another.

It is contended by counsel that the decision in this case is contrary to New Loveland & Greeley I. & L. Co. v. Consolidated Home Supply Ditch Co., 27 Colo. 525, 62 Pac. 366, 52 L. R. A. 266, and Fort Lyon Canal Co. v. Chew, 33 Colo. 392, 81 Pac. 37. In the New Loveland Case it was determined that the appropriation of water for the irrigation of lands during the irrigation season gave the appropriator no priority of right to store water during the nonirrigating season for future use. This does not conflict with the opinion in the case at bar. No right to store water during the nonirrigating season is conferred. The gist of the decision in the Chew Case is that the owner of a water right would not be permitted to make it do double duty. When he had applied it for the purpose for which it was appropriated, he could not loan or lease it to another for irrigation purposes; but that is not this case. The stockholders of appellant do not at once apply the water diverted; but appellant is allowed to divert and store for their use the volume of the priorities in question, which it would be entitled to divert for application by its stockholders to land directly, to mature crops requiring water at the time of such diversion, so that but one use of the appropriations in question is made, and that use does not, under the limitations we have specified, result in any greater draft upon the river than if the water had been directly applied to land at the time of diversion.

It is also urged that no decree of the character directed should be entered until all the parties whose rights might be affected thereby are before the court. No question of that character was suggested at the original hearing, and it will not be considered on an application for a rehearing. Besides we do not believe appellee is in a position to urge that question. Appellee instituted the action from which this appeal was prosecuted, making the appellant the only party. The purpose of the action was to prevent the appellant from diverting the water represented by its purchase during the irrigation season for storage as against the appellee, and hence it is not in a position to now contend that the rights which it now seeks to have determined as between the appellant and itself should not be adjudicated without the presence of other parties whose rights might be affected by such adjudication. Counsel *amici curiæ* also say, quoting from their brief: "Many members of the legal profession, and many irrigators, contend that this decision enables the holder of old decrees for excessive priorities—decrees obtained in the early days, when water rights were not so valuable as now, nor so carefully guarded—to success-

fully assert that the full amount of water decreed may be now used, notwithstanding that but a portion of it has ever been heretofore used. They maintain that the old priorities, whether used or not, are recognized by this decision to such an extent that the owners of those priorities are, as against even subsequent appropriators who have used the water for years, entitled to now utilize it upon lands described in the decree, or other lands owned by them."

Such a case is not before us; but we can only say that we fail to comprehend wherein the opinion is susceptible of such a construction. It would be impossible, in any one opinion, to determine all the questions which may arise with respect to water rights. Each case of this character must depend upon its own particular facts.

A majority of the court is of opinion that the petition for rehearing should be denied, and it is so ordered.

Rehearing denied.

EDWARD MALLEY CO. v. LONDONER.

(Supreme Court of Colorado. Dec. 2, 1908.

Rehearing Denied Feb. 3, 1908.)

1. CORPORATIONS—FOREIGN CORPORATIONS—SALES—ACTION FOR PRICE—DEFENSES.

In an action to recover for goods furnished defendant's son in 1899, the failure of plaintiff corporation to comply with Laws 1901, pp. 118, 121, c. 52, §§ 4, 10, and Laws 1901, p. 273, c. 94, § 70b, requiring the payment of certain fees, and the filing of certain papers by foreign corporations, was not a good defense, since these statutes were not retroactive.

2. PLEADING—ANSWER—DEMURRER TO PLEADING GOOD IN PART.

In an action by plaintiff corporation for goods furnished defendant's minor son, where defendant's answer, in addition to alleging facts not constituting a good defense, also denied the corporate existence of plaintiff, a demurrer to the answer as a whole was properly overruled, the proper manner of reaching the immaterial allegations being by motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 486-490.]

3. SAME—DEMURRER.

Though a demurrer to an answer alleging immaterial facts, in addition to denying plaintiff's corporate existence, was properly overruled, it was error to give judgment for defendant on such demurrer, since the issue of plaintiff's incorporation remained to be tried.

4. APPEAL—OBJECTIONS NOT RAISED BELOW—DEFECTIVE COMPLAINT—FAILURE TO STATE CAUSE OF ACTION.

Though the failure of a complaint to state facts constituting a cause of action may be raised after appeal, if it is apparent from the complaint that the defects were passed over when they might have been cured by amendment during trial, the parties will not be permitted to take advantage of them on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1228-1240.]

5. SAME.

An objection made for the first time on appeal is not favored, though it is one which may be properly raised at any time during the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1141-1160.]

6. APPEAL—BILLS OF EXCEPTIONS—NECESSITY.

Under the direct provisions of Mills' Ann. Code, § 387, a bill of exceptions need not be taken to a decision overruling a demurrer to a pleading.

7. COURTS—SUPREME COURT—CASES TRANSFERRED FROM COURT OF APPEALS—AMOUNT INVOLVED.

While an action involving less than \$100 may not be appealed to this court, the Court of Appeals, to which a judgment involving any amount could be taken, being in existence when this appeal was taken, and the cases pending therein having been transferred to this court upon their consolidation, it properly has jurisdiction of the present case, though the amount involved is less than \$100.

Appeal from District Court, City and County of Denver; Samuel L. Carpenter, Judge.

Action by the Edward Malley Company against Wolfe Londoner. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

Van Cise & Grant, for appellant. Joshua Grozier, for appellee.

BAILEY, J. In November, 1901, the appellant filed its complaint against appellee, wherein it was alleged that the plaintiff was a corporation, organized and doing business under the laws of the state of Connecticut; that defendant was the father of Herman W. Londoner; that while said Herman W. Londoner was attending the Yale University in Connecticut during the year 1899 he purchased from plaintiff wearing apparel and other merchandise necessary to his maintenance of the value of \$44.36; "that at the time of the purchase by defendant of plaintiff of the merchandise above referred to, he, said defendant, was a minor, and supported by and at the expense of the defendant herein"; and that the indebtedness had not been paid. The answer of the defendant consisted of four alleged defenses, the first being an admission that the defendant was the father of H. W. Londoner, and a denial of all other allegations in the complaint. The second defense was a denial that the plaintiff was a corporation existing under the laws of any state, and further that if it was a corporation it had failed to comply with the provisions of section 4 of an act of the Legislature relating to corporations prescribing certain fees to be paid by corporations, passed by the General Assembly during the year 1901. Laws 1901, p. 118, c. 52. The third defense was that, if the plaintiff was a corporation, which the defendant denied, it had failed to comply with section 10 of said act; and the fourth defense was that, if the plaintiff was a corporation, which the defendant denied, it had failed to comply with section 70b of an act in relation to public revenues and repealing all previous acts in relation thereto. This act was passed in 1901. Laws 1901, p. 273, c. 94. The plaintiff demurred to the second, third, and fourth defenses. Plaintiff elected to stand by its de-

demurrer, and judgment was rendered against plaintiff for costs. An appeal was taken to the Court of Appeals.

The demurrers were properly overruled. Notwithstanding that, as we shall presently see, the court erred in rendering judgment against the plaintiff, so far as the allegations of the second, third, and fourth defenses, which relate to the failure of the plaintiff to comply with the statutes of 1901, are concerned. They did not constitute a defense to the cause of action set forth in plaintiff's complaint, for the reason that the complaint avers that the goods were purchased in October, November, and December, 1899. The act pleaded by the defendant in relation to corporations was passed April 6, 1901, and the act pleaded by defendant in relation to revenue was passed April 5, 1901. We have already held that these statutes are not retroactive, and do not affect contracts made previous to their adoption. *Stone v. Victor Elec. Co.*, 36 Colo. 370, 85 Pac. 327. If these several defenses alleged nothing further than the allegation that plaintiff had failed to comply with these acts of the Legislature, the demurrer should have been sustained; but each of these several defenses contained a denial of the corporate existence of plaintiff. A denial to a material allegation contained in the complaint cannot be demurred to, and where an answer puts in issue some of the material averments of the complaint, a demurrer thereto as a whole should be overruled. *Wellington v. Beck*, 30 Colo. 409, 70 Pac. 687. So that, while the affirmative allegation in the several defenses did not constitute a defense to plaintiff's cause of action, that defect should have been reached by motion because of the denial of a material allegation in the complaint, which was included in each of these defenses. The averments of the failure of plaintiff to comply with the provisions of the act of 1901 being insufficient to prevent it from maintaining this action, the overruling of the demurrer to this defense and the election of the plaintiff to stand by its demurrer still left the matter in controversy to be tried upon the allegations of plaintiff's complaint and the denials contained in the answer, so that the court erred in rendering judgment against the plaintiff for costs; but the appellee says that notwithstanding all this plaintiff's demurrer searches the record, and that the complaint is defective because it fails to state that the defendant had refused to supply his minor son with the necessities which were sold to said son by the plaintiff, and because of the allegations of the complaint hereinbefore set forth that at the time of the purchase by defendant he, the said defendant, was a minor, and supported by and at the expense of the defendant herein, the contention being that the allegation should be that at the time of the purchase the son was a minor. Neither of these objections were raised be-

low, and were raised here for the first time just before the matter was heard upon oral argument. The rule is that, where a complaint fails to state facts sufficient to constitute a cause of action, the matter may be raised at any time even after appeal is taken. The same rule prevails where it is apparent upon the face of the complaint that the court is without jurisdiction, but this rule is subject to some exceptions. If from the nature of the complaint it is apparent that the defects therein might be cured by amendment, the matter should be called to the attention of the court below so that opportunity be given the parties to amend their complaint if they so elect. As was said in the case of *Frue v. Houghton*, 6 Colo. 318, where the question of jurisdiction of the court was raised for the first time in this court: "It could not have been the intention of the framers of the Code, that, where a case is being tried in a court having jurisdiction of the subject-matter of the action, and competent to administer either equitable or legal relief, as the case may warrant, an objection of this nature may be silently reserved and afterwards raised for the first time in the appellate court, whereas, if seasonably made at the hearing, might have saved the labor and expense incident to a new trial." Parties will not be permitted to allow a case to be prosecuted to judgment, and then bring the matter to this court upon appeal, and here call attention for the first time to a failure upon the part of plaintiff to make some necessary averment in the complaint, when, if attention had been called to the matter previous to or during the trial, the complaint could have been amended by the interlineation of a few words. An objection made for the first time in the appellate court is viewed with disfavor, even though it be one which may be raised at any time in such case. *Mulock v. Wilson*, 19 Colo. 296, 35 Pac. 532.

Appellee contends that the proceedings should be dismissed because of the absence of a bill of exceptions. In cases of this character a bill of exceptions is not necessary. Section 387, Code Civ. Proc. (Mills' Ann. Code). We express no opinion as to whether or not it is necessary to allege in the complaint that the father had refused to supply the necessities for his son, which it is contended the plaintiff furnished, because it does not appear to be necessary in the determination of the matters herein involved.

It is also contended that the appeal should be dismissed for the reason that the amount involved is less than \$100, and this court has no jurisdiction to entertain the matter upon appeal. At the time the appeal was taken the Court of Appeals was in existence, and any judgment might be appealed from to that court irrespective of the amount involved. Upon the consolidation of the two courts all cases which had been appealed to the Court of Appeals were properly transferred

to the Supreme Court, and if the Court of Appeals had jurisdiction, then this court will also entertain jurisdiction.

While the judgment of the trial court in overruling the demurrer was proper, for the reasons above stated, it erred in rendering judgment for the defendant, because there were issues still to be tried. The cause will therefore be reversed and remanded, with leave given to the parties to amend their pleadings as they shall be advised.

Reversed and remanded.

STEELE, C. J., and GODDARD, J., concur.

GLASS v. LAWLOR, Judge.

(Supreme Court of California. Jan. 3, 1908.)
COURTS—APPELLATE JURISDICTION—DISTRICT COURT OF APPEAL.

Code Civ. Proc. § 652, and Pen. Code, § 1174, providing for proving exceptions, being merely incidental to appeals, fall within the provision of Const. art. 6, § 4, providing that existing statutes as to appeals to the Supreme Court shall apply to appeals to the District Court of Appeal so far as consistent with that article, and hence the District Court of Appeal may take cognizance of a proceeding to prove an exception without an order from the Supreme Court transferring the matter to it for decision.

In Bank. Original application to the Supreme Court by Louis Glass for an order transferring to the District Court of Appeal for the First District a proceeding to prove an exception improperly disallowed by the superior court for use on his appeal to the District Court of Appeal from a conviction in the superior court.

BEATTY, C. J. The petitioner having been convicted in the superior court upon a criminal charge, has appealed to the District Court of Appeal for the First District, which, in his case, is the proper court of review on direct appeal. For the purpose of the appeal he desires to prove an exception which he alleges the trial court has wrongfully refused to allow. For this purpose he has filed a petition in said District Court of Appeal, but the justices of that court being doubtful of their authority to grant the relief prayed without an order of this court transferring the matter to them for hearing and decision, he has made application here for such an order.

We do not deem it necessary to make any special order of transfer, as we think the District Court of Appeal has been given authority to act in such matters by the recent amendment to article 6 of the Constitution by which the court was created and its jurisdiction defined. By section 4 of that article it is provided: "All statutes now in force allowing, providing for, or regulating appeals to the Supreme Court shall apply to appeals to the District Courts of Appeal so far as such statutes are not inconsistent with this article and until the Legislature shall otherwise provide."

We are of the opinion that the provisions for proving exceptions (Code Civ. Proc. § 652; Pen. Code, § 1174), and for obtaining certificates of probable cause for appeal (Pen. Code, § 1243), being merely incidental to appeals, fall within the meaning of this clause of the Constitution, and that petitions under these sections, and all others relating to the mode of presenting appeals or stay of proceedings pending appeal, are properly cognizable in the "District Court of Appeal having jurisdiction under the Constitution of the particular cause by direct appeal from the trial court."

The petition is returned to the District Court of Appeal for such action as is proper in the premises.

We concur: LORIGAN, J.; SHAW, J.; HENSHAW, J.; ANGELLOTTI, J.

CITY OF SOUTH PASADENA v. PASADENA LAND & WATER CO.
(L. A. 1,793.)

(Supreme Court of California. Jan. 2, 1908.)

WATERS AND WATER COURSES — WATER COMPANIES—FRANCHISES AND PROPERTY—TRANSFERS.

A quasi public corporation, engaged in supplying water for public use, cannot, without legislative sanction, transfer to another the entire property devoted to such service and the business of carrying it on.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 287.]

2. CORPORATIONS — TRANSFER OF PROPERTY — LEGISLATIVE AUTHORITY.

In the absence of legislative restrictions, an ordinary commercial corporation, not doing a public service business, can alienate its entire property whenever it is necessary or proper to do so for the best interests of its stockholders and creditors.

3. WATERS AND WATER COURSES — WATER COMPANIES—TRANSFER OF PROPERTY AND FRANCHISE—STATUTES.

Civ. Code, § 361a, providing that no transfer of the business, franchise, and property, as a whole, of any corporation, shall be valid without the consent of two-thirds of the stockholders thereof, etc., embodied in the part of the Code devoted to provisions concerning corporations, expresses a consent to a transfer in the manner prescribed, prohibits a transfer in any other mode, deprives ordinary business corporations of the power previously possessed of alienating its entire property, and confers on quasi public corporations authority to transfer their entire property, franchises, and business as a whole, and a public service corporation engaged in supplying water for public use may transfer its property, franchise, and business as a whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 287.]

4. SAME—FRANCHISES.

The right of a quasi public corporation, engaged in supplying water for public use, resulting from its laying and using water pipes in the streets of a city, as authorized by Const. art. 11, § 19, is a species of real property, properly designated as a franchise, and is transferable, under Civ. Code, § 361a, relating to the transfer of the business, franchise, and property of a corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 287.]

5. SAME.

A transfer by a quasi public corporation engaged in supplying water for public use of its business, franchise, and property as a whole, as authorized by Civ. Code, § 361a, does not relieve the franchise or any property held under it or for its operation from any liability, and the transfer is not prohibited by Const. art. 12, § 10, providing that the Legislature shall not pass laws permitting the alienation of any franchise, so as to release the franchise or property held thereunder from the liabilities of the grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 287.]

6. MANDAMUS — WATER COMPANIES — PERFORMANCE OF OBLIGATIONS.

Persons to whose use water is appropriated or dedicated by a quasi public corporation engaged in supplying water for public use, whether the water is supplied for use on land for irrigation, or for personal use, to all persons within a specified territory, are vested, under Const. art. 14, § 1, and Civ. Code, §§ 549-552, relating to the use of water appropriated for sale or distribution, etc., with a right to have the supply continued by whosoever may be in control of the corporation, which right is enforceable by mandamus.

7. CORPORATIONS—TRANSFERS OF PROPERTY.

A transfer of property used in public service from one corporation to another is invalid unless the transferee has power to accept the property and continue the use to which it has been devoted.

8. MUNICIPAL CORPORATIONS — ACQUISITION OF WATER SYSTEM—STATUTES.

Under St. 1891, p. 102, c. 96, authorizing any city to acquire water rights, etc., for supplying its inhabitants with water, and under the charter of the city of Pasadena [St. 1901, pp. 888-890, c. 11, and St. 1905, pp. 1019, 1021, c. 19] authorizing the city to maintain waterworks for supplying its inhabitants with water, and to purchase property both within and without its limits, etc., the city has authority to acquire and carry on a water system outside the city, so far as it may be necessary or convenient to accomplish the main purpose of furnishing water to it and its inhabitants.

9. SAME.

A mere grant of power to a city to provide and supply water to its inhabitants gives power to acquire for that purpose water supplies without the city.

10. SAME — POWERS INCIDENT TO THOSE GRANTED.

The powers of a municipal corporation include not only those expressly named in the grant of powers, but also the authority to do such acts as are incidental and necessary to the exercise of the powers specifically granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 149.]

11. EVIDENCE—JUDICIAL NOTICE.

The court will take judicial notice that designated cities are situated in an arid region where there is little, if any, water not already applied to some valuable public or private use, and that the water sources in that vicinity are in great demand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 9, 10.]

12. WATERS—PUBLIC WATER SUPPLY—ACQUISITION OF WATERWORKS SYSTEM.

A city acquiring the property, franchise, and business of a quasi public corporation engaged in supplying water to a municipality subject to the power of the municipality to fix the rates for water supplied, and to control the manner of laying pipes in its streets, acts in a proprietary capacity in carrying on the obligations of the quasi public corporation to supply water to the municipality, and the powers of

the city and the municipality are separate and distinct, and the city is under the obligation and possesses the rights of the quasi public corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 278.]

13. MUNICIPAL CORPORATIONS — POWERS — "MUNICIPAL AFFAIR."

The supplying of water by a city to outside territory, when incidental to the main purpose of supplying water to its own inhabitants is a "municipal affair" of the city, within Const. art. 11, § 6, providing that the charters of cities "except in municipal affairs" shall be controlled by general laws, and the charter of the city prevails over the general legislation embodied in Act March 27, 1897, St. 1897, p. 182, c. 121, authorizing a city, having in its supply more water than is necessary for its inhabitants, to sell the surplus, etc.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4619; vol. 8, p. 7726.]

14. SAME.

Where a quasi public corporation engaged in supplying water to the inhabitants of a municipality transfers its property, franchise, and business to a city, empowered to acquire a waterworks system, the city acquires the property, franchise, and business of the corporation, subject to the obligation to furnish water to the inhabitants of the municipality, which obligation it must perform.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 278.]

15. WATERS—PUBLIC WATER SUPPLY—RIGHTS IN STREETS—"CORPORATION DULY INCORPORATED."

Where a city, pursuant to its authority to acquire a waterworks system to supply water to its inhabitants, purchases the property, franchise, and business of a corporation engaged in supplying water to the inhabitants of a municipality, and the city possesses as an incident to its power to supply water to its inhabitants power to furnish water to others, the city is a "corporation duly incorporated" within Const. art. 11, § 19, providing that in any city, where there are no municipal waterworks, any "corporation duly incorporated for such purpose" may lay mains in the streets for supplying water.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 279.]

16. EQUITY—ADEQUACY OF LEGAL REMEDY.

Where the remedy by mandamus is adequate, a suit in equity cannot be maintained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 151, 152.]

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by the city of South Pasadena against the Pasadena Land & Water Company. From a judgment for defendant rendered after sustaining a general demurrer to the complaint, plaintiff appeals. Affirmed.

John E. Carson and Lynn Helm, for appellant. Anderson & Anderson, for respondent.

SHAW, J. The defendant is a corporation engaged in supplying water to certain parts of the cities of Pasadena and South Pasadena, respectively, for the use of the respective inhabitants thereof within said territories, and to the said cities, respectively, for sprinkling of streets. The territory thus supplied within South Pasadena embraces from one-half to two-thirds of its area. This suit

is to enjoin the defendant from selling and transferring to the city of Pasadena its water, water rights, water plant or system, and all franchises and property of any and every description heretofore used by the defendant in so supplying said water to the plaintiff and its inhabitants, as aforesaid. It appears that the defendant is about to make such transfer, so far as it has the lawful power to do so. A general demurrer to the complaint was sustained, and thereupon judgment was given for the defendant, from which the plaintiff appeals. The record further shows that an answer was filed with the demurrer, that plaintiff demurred to the answer and moved to strike out certain parts thereof, and that this demurrer was overruled, and the motion denied. As we have concluded that the demurrer to the complaint was properly sustained, the other orders are immaterial to the disposition of the appeal.

It is proper to say here that two other cases, namely, *Graham v. Pasadena Land & Water Company* (L. A. No. 1,957) 93 Pac. 498, and *Orcutt et al. v. Pasadena Land & Water Company and the City of Pasadena* (L. A. No. 1,958) 93 Pac. 497, the latter begun by residents of South Pasadena, entitled to water from the defendant water company, and the former by a stockholder of the defendant herein, to obtain similar relief were submitted with this case, and that, as requested by counsel, the briefs in those cases have been considered in this case, so far as applicable.

The appellant presents for our determination four questions: First. Has the Pasadena Land & Water Company, while it continues to exist as a going corporation and without the assent of the state, power or authority to transfer its entire property, privileges, and franchises, and thereby discharge itself of the duty and deprive itself of the ability to continue the public service of supplying water to the plaintiff and its people? Second. Has the state consented to such transfer? Third. Has the city of Pasadena, to which the transfer is to be made, power to accept said property, privileges, and franchises and to perform the duties to the plaintiff and its people hitherto imposed upon and performed by the Pasadena Land & Water Company, and which constitute a charge upon the property to be transferred? Fourth. If such power is possessed by the respective corporations, as aforesaid, can the subsequent performance of such duties by the city of Pasadena be enforced by the city of South Pasadena and its inhabitants entitled to the water, or only by the grantor, the Pasadena Land & Water Company? The first, second, and fourth of these propositions will be considered together.

1. The respondent is a quasi public corporation, engaged in supplying water for public use. This is admitted, and it is also conceded that corporations of that character cannot, without legislative sanction, transfer to another the entire property devoted to such

service and the business of carrying it on. This appears to be settled by the authorities. *Visalia Gas, etc., Co. v. Sims*, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. Rep. 105; *Thomas v. Railroad Co.*, 101 U. S. 82, 25 L. Ed. 950; *Central T. Co. v. Pullman P. P. Co.*, 139 U. S. 48, 11 Sup. Ct. 478, 35 L. Ed. 55; *Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; *York, etc., Ry. Co. v. Winans*, 17 How. (U. S.) 30, 15 L. Ed. 27; *Green Bay, etc., Co. v. Union S. B. Co.*, 107 U. S. 98, 2 Sup. Ct. 221, 27 L. Ed. 413; *Cumberland T. & T. Co. v. Evansville (C. C.)* 127 Fed. 187; *Morawetz on Cor.* §§ 565, 1114, 1115, 1129; 1 *Clark & Marshall on Cor.* § 162. In 1903 the Legislature enacted section 361a of the Civil Code, which reads as follows: "No sale, lease, assignment, transfer, or conveyance, of the business, franchise and property, as a whole, of any corporation now existing, or hereafter to be formed in this state, shall be valid without the consent of the stockholders thereof, holding of record at least two-thirds of the issued capital stock of such corporation; such consent to be either expressed in writing executed and acknowledged by such stockholders, and attached to such sale, lease, assignment, transfer, or conveyance, or by a vote at a stockholders' meeting of such corporation, called for that purpose; but with such assent, so expressed, such sale, lease, assignment, transfer, or conveyance shall be valid; provided however, that nothing herein contained shall be construed to limit the power of the directors of such corporation to make sales, leases, assignments, transfers, or conveyances of corporate property other than those hereinabove set forth." This enactment is not, on its face, a mere negative or prohibitive statute, forbidding that which before was permitted. It is both affirmative and negative in its terms. Its affirmative provisions may be paraphrased thus: "With the consent of the stockholders thereof, holding of record at least two-thirds of its issued capital stock (expressed in the prescribed manner), any corporation in this state may make a valid sale, lease, assignment, transfer or conveyance of its business, franchises and property, as a whole." It expresses a consent to such transfer in the manner prescribed, as well as a prohibition against such transfer in any other mode.

In the absence of legislative restrictions, it is the law in this state that an ordinary commercial corporation, not doing a public service business, can alienate its entire property whenever it is necessary or proper to do so for the best interests of its stockholders and creditors. *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 588-592, 99 Am. Dec. 300. And it would seem that the stockholders and creditors, alone, would have the right to object to such a transfer by a corporation of that character (*Oakland R. R. v. Oakland, etc., R. R. Co.*, 45 Cal. 379, 13 Am. Rep. 181; *Illinois Bank v. Pacific Railway Co.*, 117 Cal. 332, 49 Pac.

197), though we presume the state could maintain an action to forfeit the corporate franchise for nonuser or misuser. In the case first cited, the Miner's Ditch Company, which had transferred its entire property, was, in fact, a water company selling water upon the market to miners for their use. But this was before the Constitution of 1879 had declared the use of water for sale, rental, or distribution, to be a public use. The opinion distinctly declares it to be a matter of private concern only, and the decision is expressly based on that fact, distinguishing that class of corporations from quasi public corporations. The effect of this statute is, therefore, twofold. It deprives ordinary private business corporations of the power they previously possessed to dispose of their entire property, franchises, and business, as a whole, at the will of a mere majority of the stockholders, or of less than two-thirds of them, and it confers upon quasi public corporations the power to make such dispositions with the consent of two-thirds of the stockholders expressed in the mode fixed, a power which such corporations did not have before. The words of the section expressly apply to "any corporation" then existing or thereafter to be formed. It constitutes a part of the Code devoted to general provisions concerning all corporations, except those of a public nature, such as cities, counties, school districts, and the like. There is nothing in the context of the Code which requires, or would justify, an interpretation limiting its meaning so as to exclude quasi public corporations. The words are express—positive—not at all ambiguous in this particular, and the intent is clear. There is no occasion for resorting to implication to give them an effect not expressly declared, nor for applying the rules restricting the meaning of ambiguous statutes affecting public interests. It is suggested that, if taken literally, it would give power to transfer the corporate franchise, the right to be a corporation and do business in that capacity. We do not perceive that this is important in this case, even if it were true, for it is not alleged that the defendant is attempting to transfer any franchise of that character. The Legislature doubtless had in mind the fact that there are many quasi public corporations doing business in the state, and possessing rights and privileges, properly termed "franchises," which they had acquired and possessed after they became incorporated, and which they had devoted to the public service in which they were engaged, and which, therefore, could not be disposed of without legislative assent, and the word "franchise" was aptly used to describe this class of property and leave no doubt as to what was intended. The transfer of all its property would not work a dissolution of the corporation, nor operate as a transfer of the corporate franchise. *Miner's Ditch Co. v. Zellerbach*, supra, page 590 of 37 Cal. (99 Am. Dec. 300).

The defendant company had laid its water

pipes in the streets of the cities of Pasadena and South Pasadena, was using those streets as a way through which to transmit water to the users, and had the right to make this use of the streets under the provisions of article 11, § 19, of the Constitution. This right, when made available by actual possession and use, is a species of real property, appropriately designated as a franchise. *Stockton, etc., Co. v. San Joaquin Co.*, 148 Cal. 313, 83 Pac. 54, 5 L. R. A. (N. S.) 174. The appellant argues that this right, or franchise, is not in its nature, transmissible, or alienable, unless the precise mode of transfer is fixed by statute, and a means provided for the enforcement of the use against the transferee, and that section 361a is inadequate in these respects. In this connection counsel cite section 10 of article 12 of the Constitution, which is as follows: "The Legislature shall not pass any laws permitting the leasing or alienation of any franchise, so as to release the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges."

It is urged that the effect of a transfer, such as that here proposed, would relieve the defendant corporation of its duty to continue the service of supplying water, which is imposed upon it by reason of its control of the water and its enjoyment of the constitutional franchise to use the streets for its pipe lines, and that there would be no corresponding transfer of the duty to the transferee of the property, the city of Pasadena, nor any means of enforcing from said city the performance of that duty. The section does not forbid the transfer of a franchise so as to relieve the previous owner thereof, or the grantee or lessee, personally, from liability incurred in the operation of the franchise, if such a thing were possible. It merely forbids the transfer of a franchise "so as to relieve the franchise, or property held thereunder," from liabilities so incurred or contracted. The Code section (361a) authorizes a transfer of such franchise, or of all the interest the possessor may have in it, but it does not purport to relieve the franchise itself, or any property held under it or for its operation, from any liability or charge imposed, or to be imposed, upon it. If the proposed transfer provided that the property and franchise should be free from any such liability existing against it, or thereafter to arise from its possession and use, or attempted to transfer it so as to free it therefrom in the hands of the transferee, the transaction would be, to that extent, void, and the transferee would take the franchise and property pertaining to it subject to all the burdens of this nature, and, so long as it held it, would be obliged to continue the performance of the public service to which the property and franchise had been dedicated, or to allow others to do so in its behalf. *Fellows v. Los Angeles* (Cal.

Sup.) 90 Pac. 141. This is the purpose and effect of the constitutional provision above given. The transfer will have the effect of divesting the defendant company of the property, and as, according to the admitted allegations, there is no other water supply available, it will then have neither the means nor the ability to continue the performance of the public duty of supplying water for public use. It could not directly abnegate this personal duty without the consent of the proper public authority, and, of course, it could not do it indirectly by the device of transferring to another the only means whereby the duty could be performed. The effect of the statute (section 361a) is to give this consent, in pursuance whereof the public agent in charge of the use and property will be changed, and the effect of the constitutional provision is that the new agent must continue to devote the property to the same use as before. There does not appear to be anything unlawful, unconstitutional, or improper in a change so made.

The contention that no remedy exists to compel performance by the successor in interest, is without force. In case of the establishment of a water system of this character, all the persons to whose use the water is appropriated or dedicated are vested with a right to have the supply continued by whomsoever may be in control thereof. Const., art. 14, § 1; Civ. Code, §§ 549-552; *Crow v. San Joaquin, etc., Co.*, 130 Cal. 309, 62 Pac. 562, 1058; *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264; *Price v. Riverside, etc., Co.*, 56 Cal. 432. If the water is supplied for use upon land for its benefit, as for irrigation, the right to receive and use it becomes in the nature of an appurtenance to the land. If it is supplied for personal use to all persons within a certain territory or to all of a certain class within the territory, the right to its use is personal to the inhabitants of the territory, or to the members of the class, as the case may be, so long as they remain such. In either case the right may be enforced against the person in control of the supply and the works by which it is distributed, regardless of the title, by means of an action in mandamus to compel the continuance of the distribution, in the usual and proper manner, to those entitled. *Price v. Riverside, etc., Co.*, page 434 of 56 Cal.; *Merrill v. South Side Irr. Co.*, 112 Cal. 426, 44 Pac. 720; *Felows v. Los Angeles*, supra.

Our conclusion is that all of the objections to the validity of section 361a, and all of the reasons advanced for giving it a meaning different from its literal import, are untenable, and that it gives authority to the defendant to make the transfer of its business, franchises, and property, as a whole, in the manner prescribed and as here proposed. It is admitted that the statutory manner of making the transfer has been and will be followed.

2. It is settled law that a transfer of prop-

erty used in a public service, from one corporation to another, although made by a corporation having power to convey, is invalid unless the transferee has the power to accept the property, and continue the use to which it has been devoted. If such power is wanting in the transferee, the transfer is not binding on the grantor or lessor. *Central Transportation Co. v. Pullman P. P. Co.*, supra; *Thomas v. Railroad Co.*, supra; *Oregon Ry. Co. v. Oregonian Ry. Co.*, supra; *Pennsylvania R. R. Co. v. St. Louis R. R. Co.*, 118 U. S. 307, 6 Sup. Ct. 1094, 30 L. Ed. 83. For the purposes of the case we may concede that the plaintiff, or any private party, has sufficient interest to raise this question.

We are of the opinion that the city of Pasadena has the power to accept the transfer in question, and to undertake and perform the public service of supplying the water to the cities of Pasadena and South Pasadena and the respective inhabitants thereof, as it has been heretofore supplied, which is the duty attached to the property and imposed upon the possessor thereof. The statute of 1891 on this subject is broad and comprehensive. It is as follows: "Any incorporated city in this state may acquire by gift, purchase, or condemnation proceeding under the power of eminent domain, water, water rights, reservoir sites, rights of way for pipes, aqueducts, flumes, or other conduits, and all other property and appliances suitable and proper for supplying such city and its inhabitants with water." St. 1891, p. 102, c. 96. The special charter of the city of Pasadena gives the city power, "to construct and maintain water works, pipes, pipe lines, aqueducts and hydrants for supplying the city and its inhabitants with water, and the right to supply water to persons who live without the city limits." Subdivision 8, § 3, art. 1, St. 1905, p. 1021, c. 19. It further provides for a board of water commissioners of five members, which board is given "control and management of all water and waterworks that now belong, or may hereafter be acquired by the city," and for a "water fund" which may be applied to the "purchase of necessary lands, water rights, and other property" for the improvement of the water system. Subdivision 2, § 6, art. 6½, St. 1905, p. 1019. Subdivision 4 of section 3, art. 1, gives the city power "to purchase, receive, have, take, hold, lease, use and enjoy property of every kind and description, both within and without the limits of said city and control and dispose of the same for the common benefit." By subdivision 16 of the same section power is given to create a bonded debt, equal to 15 per cent. of the assessed value of the property, to pay the cost of public utilities, and under subdivision 23 it may exercise the right of eminent domain to acquire "water, water rights and waterworks, within or without the corporate limits, necessary or convenient for the use of said city and its inhabitants." St. 1901, pp. 888-890, c. 11.

These provisions are ample to confer power to acquire and carry on a water system outside the city, so far as it may be necessary or convenient to do so in order to accomplish the main purpose of furnishing water to the city and its inhabitants. Indeed, it is so seldom that a water supply can be obtained within the limits of a city, especially in this state, that a mere grant of power to provide and supply water to the city and its inhabitants would be construed to give power to acquire for that purpose water supplies without the city. The powers of a municipal corporation include not only those expressly named in the grant, but also "the authority to do such subsidiary acts as are incidental and necessary to the exercise of" the powers specifically described. *Von Schmidt v. Widber*, 105 Cal. 157, 38 Pac. 682. Or, as stated by Mr. Dillon, they include "those necessarily or fairly implied in or incident to the powers expressly granted." 1 Dill. Mun. Cor. (4th Ed.) § 89; *Hammond v. San Leandro*, 135 Cal. 452, 67 Pac. 692. Under powers much less comprehensive in terms it has been held that a municipal or public corporation may carry on a system and supply water to persons outside its limits, whenever it becomes necessary or convenient to do so in order to accomplish the main purpose of supplying waters to those within. In *Fellows v. Los Angeles*, supra, in considering a provision merely giving that city power to acquire water and water rights within or without the city for the use of its inhabitants, it is said: "In the exercise of this power, it would have the right to buy from any corporation or person, engaged in supplying water for public use outside the city, any surplus water which such person might possess. If it were necessary, in order to obtain such surplus, the city might, under this power, purchase the entire water supply of such person or corporation and the water plant or system used in connection with it, so that, after operating the system and supplying the persons entitled to use the water, it could devote the surplus to the use of the inhabitants of the city." In *Hewitt v. San Jacinto Irr. Dist.*, 124 Cal. 192, 56 Pac. 893, it was held that an irrigation district, under its general power to acquire and hold such water, water rights, and other property as should be necessary to supply water to irrigate the lands within the district, had power to purchase and hold water already in part used on lands outside the district, to take it subject to such use, and to continue to furnish the water to such outside lands as it had been furnished before. These authorities would seem sufficient to settle the question in favor of the respondent. The ingenuity of counsel for appellant has, however, suggested many objections to the rule stated and difficulties which he fears may arise in its application, and, in view of the importance of the question, we deem it proper to discuss them at more length.

In considering what powers are necessary,

incidental, or fairly to be implied from the powers expressly given to the city of Pasadena by the foregoing provisions, it is proper to look to the conditions surrounding the city at the time. The court will take judicial notice that the two cities interested are situated in a comparatively arid region where there is little, if any, water not already applied to some extremely valuable public or private use, and that water sources in that vicinity are in great demand, and command a high price where they can be purchased at all. It appears from the complaint that for many years the defendant company has been supplying water to portions of the two cities, precisely as it does now, the area supplied in South Pasadena being about two-thirds of its territory, that more than 300 families are now supplied therein from this source, and that if they are now deprived thereof there is no other known source from which it can be replaced, and they would be without water for any purpose. It may well be assumed that Pasadena could obtain no sufficient quantity of water for a municipal water system, except by buying or condemning that portion of the water of the defendant company now distributed to its inhabitants, or some other supply already devoted to use outside the city. It would be bad public policy under these conditions, to require a city, desiring to obtain water for its inhabitants, to take water in use by others for similar purposes outside its limits, where the effect would be to devastate and depopulate such outside territory. To condemn the individual right of each member of the outside community would be impracticable, and even if it could legally be done it would probably prove too costly for the resources of the city. To separate the supply, and endeavor to control, manage, and, if necessary, develop and increase the supply from time to time, in concert or partnership with some other corporation, would probably cause many complications, and render the successful administration of the municipal system much more difficult and doubtful. In order to accomplish the purpose for which these powers were given it is reasonably certain that it would be advisable, and it might be necessary, for the city to take over a supply already partly in use outside, and continue the service to the outside territory, while supplying the remainder to the use of its own people. These probabilities, and the conditions we have stated, must have been well known to the framers of the charter, to the people of Pasadena, and to the Legislature, when the charter was prepared, adopted and ratified. In view of all the circumstances, we may reasonably believe that the clause adopted in 1905, giving the "right to supply water to persons who live without the city limits," was intended to authorize a plan such as that here under consideration. If not designed to authorize some similar plan it might as well never have been enacted at all.

Under the Constitution South Pasadena has power to fix the rates to be charged for water supplied to its inhabitants, and to control the manner of laying and repairing pipes in its streets for that purpose. Necessarily, it has this power as against another city engaged in supplying such water, as well as when an individual or water corporation does so. It is suggested that the two cities each represent the sovereign power, and would have equal authority in all municipal affairs, that a conflict would ensue, and that such consequences cannot be considered as intended, unless the intention is expressly and unmistakably declared. In this connection the rule is invoked that there cannot be two municipalities exercising the same powers at the same time within the same territory. But the two cities would not be of equal authority with respect to the use of water in South Pasadena in such a case. South Pasadena would have the power above stated, under the Constitution, and Pasadena, so far as that service is concerned, would be subject to those powers to the same extent as the Pasadena Land & Water Company is now subject thereto. In the carrying on of the water service to the people of South Pasadena the city of Pasadena will not be acting in its political, public, or governmental capacity as an agent of the sovereign power equal in all respects to the city within which it operates. In administering a public utility, such as a water system, even within its own limits, a city does not act in its governmental capacity, but in a proprietary and only quasi public capacity. *Davoust v. Alameda*, 149 Cal. 70, 84 Pac. 700, 5 L. R. A. (N. S.) 536; *Illinois, etc., Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; *Esberg Cigar Co. v. Portland*, 34 Or. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651. Having taken over the whole system subject to the burden of supplying a part of the water to inhabitants of South Pasadena, the city of Pasadena will have no greater rights or powers, respecting that part of the service, than its grantor previously had. It will be under the same obligation as its grantor to continue the service and supply the water to all persons who may become entitled to it in the future, so long as it retains possession and control of the property so charged. *Fellows v. Los Angeles*, supra. The powers of the two cities in regard to this water service will be separate and distinct, one will be subordinate to the other, and, hence, there will not be two cities exercising the same powers in the same territory at the same time. South Pasadena, within its own limits, will be the sole representative of sovereignty in the fixing of rates, and in the supervision of the streets, and Pasadena will be subject thereto, as a private person. If, by fixing too low rates, South Pasadena should attempt to compel the service to be made at a loss, Pasadena would have the same remedies, and no greater, in the courts, that a quasi

public corporation or natural person would have in the same circumstances. The fact that the outside service is within another city does not appear to be a significant factor in the question of the power. If it were in a rural community, the rates charged would be subject to judicial control to make them reasonable. Being in another city, the serving city has a right to demand reasonable rates, and may enforce them if not granted. The limitations would not affect the power in one case more than in the other.

The act of March 27, 1897 (St. 1897, p. 182, c. 121), authorizes a city having in its supply more water than is necessary for its inhabitants, to sell the surplus, but provides that contracts for such sales shall not run for a period longer than one year. It is contended that the service of water to outside communities is not a "municipal affair," within the meaning of that phrase in section 6, art. 11, of the Constitution, that it is therefore subject to general laws, and that, under the above-mentioned statute, the city cannot undertake, as it proposes to do, to render a perpetual water service to the inhabitants of outside territory, which, it is claimed, will be equivalent to a contract to sell to them its surplus water for a period longer than one year. There are two answers to this contention. The supplying of water to outside territory, being necessarily a matter incidental to the main purpose of supplying water to its own inhabitants, is as much a municipal affair of Pasadena as is the main purpose, which is conceded to be such, and therefore the charter provisions relating thereto prevail over general laws, if inconsistent therewith. In truth, however, the city will not be selling its surplus in the sense intended by the statute. The right to the use of the required quantity of this water is now vested in the city of South Pasadena and its inhabitants within the portion of its territory where it is to be served and the city of Pasadena does not propose to take away this right. It is about to buy only the right of the Pasadena Land & Water Company to the water, which did not include the use. It will be obliged to put it to the same use as fully as that company is now compelled to do so. Water which is in this manner dedicated to the use of an outside community, cannot be at the same time surplus water subject to sale to others. The sale is already, in effect, accomplished. The city of Pasadena, with respect to this part of the water, will hold title as a mere trustee, bound to apply it to the use of those beneficially interested.

Section 19, art. 11, of the Constitution, provides that, in any city where there are no municipal waterworks for the supply of its inhabitants, "any individual, or any corporation duly incorporated for such purpose," may lay mains in the streets for supplying such water. This grant clearly does not, in terms, extend to a municipal corporation. It is contended that it, in effect, forbids the ex-

ercise of such privilege by another city. The provision is intended to further the interest of the public and facilitate the supply of water to the inhabitants of the city, and it should be liberally construed to effect that purpose. When the state gives such power to a city that, as an incident to supplying water to its own people, it may furnish water to the inhabitants of another city to whose use a part of the water is dedicated, the city having such incidental powers should be considered as a "corporation duly incorporated for such purpose." A city is duly incorporated for all purposes to which its powers extend. There is nothing incongruous, or particularly unusual in such an arrangement. In other states similar powers have been upheld. *Mayo v. Dover, etc., Co.*, 96 Me. 539, 53 Atl. 62; *Cooper v. Brooklyn*, 11 App. Div. 71, 42 N. Y. Supp. 762; *Hartford v. Hartford W. Com.*, 68 Conn. 323, 36 Atl. 786; *People v. Briggs*, 50 N. Y. 553; *Pittsburgh v. Brace*, 158 Pa. 174, 27 Atl. 354.

It is alleged that the city of Pasadena threatens and intends, when it has acquired the water system of the defendant corporation, to cut off the supply of water to South Pasadena and its inhabitants, that it is acquiring the water for its own inhabitants, whose needs will be so great that the entire water supply will be required therefor, that, in order to carry out its purpose, it will be compelled to refuse to continue supplying water to outside persons, and that it will deprive the plaintiff and its inhabitants of water unless the proposed sale is enjoined. It sufficiently appears from what has been said that, if the other allegations of the complaint are true, this could not be lawfully be done. We have shown that if it is attempted the persons injured will have a remedy by a suit in mandamus. There will therefore be an adequate remedy at law, and a suit in equity to enjoin the threatened transfer cannot be maintained.

The court below properly held that the complaint did not state facts sufficient to constitute a cause of action.

The judgment is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; MCFARLAND, J.; LORIGAN, J.; HENSHAW, J.

132 Cal. 599

ORCUTT et al. v. PASADENA LAND & WATER CO. et al. (L. A. 1958.)

(Supreme Court of California. Jan. 2, 1908.)

1. WATERS AND WATER COURSES—INJUNCTION—RIGHT TO WATER SUPPLY.

A city which acquires the water system of a quasi public corporation, engaged in supplying water for public use, does so as a corporation engaged in supplying a public use, and on its refusal to furnish water to those entitled thereto the remedy is by mandamus and not by injunction.

93 P.—32

2. SAME — INJUNCTION — GROUNDS — PROBABILITY OF INJURY.

Where the general allegations in a complaint that a city acquiring the water system of a public water supply company intends to divert the whole water supply to the use of its own inhabitants, are mere conclusions, based on the theory that the city has no power to continue serving persons outside of its limits, and that it has the right to change the use to which the water had been appropriated without the consent of the persons beneficially interested, and are insufficient to authorize an injunction on the ground that the rights of persons entitled to water are in danger of injury.

3. WATERS AND WATER COURSES—MUNICIPAL CORPORATIONS — ACQUISITION OF WATER SUPPLY—PERSONS ENTITLED TO QUESTION AUTHORITY.

Where the law and charter of a city giving it power to acquire the water system of a quasi public corporation, engaged in supplying water for public use, do not require that the purchase, when made, shall be approved by the voters of the city, it is immaterial so far as the purchase is concerned whether the voters on being asked to vote for the issuance of bonds to buy the system were informed that the system was burdened with the duty of supplying water to individuals, and collateral inquiry on behalf of persons not taxpayers or residents of the city into the validity of the purchase cannot be made on that ground nor on the ground that the bonds issued are invalid.

In Bank. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by O. W. Orcutt and others against the Pasadena Land & Water Company and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Lynn Helm and John E. Carson, for appellants. Anderson & Anderson, Porter, Sutton & Cruickshank, John C. Fitz Gerald, Fitz Gerald & Barry, J. P. Wood, City Atty., and Works, Lee & Works, for respondents.

SHAW, J. The transaction attacked in this case is the same that was considered in *South Pasadena v. Pasadena Land & Water Company* (L. A. 1,793) 93 Pac. 490. We refer to that case for a more detailed statement of the facts, which, with the exceptions to be mentioned, are substantially the same as the facts involved here. A general demurrer to the amended complaint was sustained, without leave to amend further, and from the judgment thereon given the plaintiffs appeal.

The plaintiffs are residents of the portion of South Pasadena supplied with water by the defendant company, and owners of land therein, and it is alleged that a certain share of said water is appurtenant to the respective tracts of land for irrigation and domestic use thereon. They sue on behalf of themselves and of others having similar rights. The fact that the right to receive the water is appurtenant to the land and is a private right of property, and not a mere right as one of a class entitled to share in a public use, does not in any way materially distinguish the case from *South Pasadena v. Pasadena Land & Water Company*, supra. If the city of Pasadena should acquire the water

system of the defendant water company, it would do so as a corporation engaged in supplying a public use, and the right to mandamus, if it should refuse to furnish water to those who were entitled thereto, would be as clear in such a case as if the water right was not a private right or an appurtenance to real estate, but was a right to share in a public service of water, such as that considered in the former case. There would therefore be an adequate remedy at law, and the right to an injunction was properly denied. Furthermore, it does not clearly appear that the rights of the plaintiffs are in any immediate danger of injury. There are general allegations that the city of Pasadena threatens and intends to divert the whole water supply to the use of its own inhabitants, if it should require the same, and will, in that event, deprive the plaintiffs of any share thereof. But the context shows that these are obviously mere conclusions, based on the theory that that city has no power to continue serving persons outside of its limits, and that it would have the right to change the use to which the water had been appropriated without the consent of the persons beneficially interested. It is not claimed that the city is about to do this, but that it will do so in the future, if the necessities of its own inhabitants demand it. It is not to be presumed that this will be done, in the face of a decision of this court declaring that it would be unlawful. Anything short of a reasonable probability of injury is insufficient to warrant the issuance of an injunction against the act which it is claimed will cause such injury. *Lorenz v. Waldron*, 96 Cal. 249, 31 Pac. 54. The appellants do not argue this point, and have apparently abandoned it. We think it is without merit.

The complaint alleges that the city of Pasadena has declared that the cost of the water system it proposes to buy is too great to be paid out of the ordinary revenues of the city, and that, in pursuance of proceedings in that behalf, its citizens have voted bonds whereon to raise sufficient money to pay the price agreed to be paid therefor. It is further claimed that the proceedings to issue bonds are defective to such an extent that the bonds are void, and from this it is argued that the city has no power to buy the property. The particular objection alleged is that the voters were asked to vote for the issuance of these bonds to buy the water system, but that they were not informed by resolution, notice, or otherwise that the system was burdened with the duty of supplying water to plaintiffs and to a large part of the city of South Pasadena, and was to be acquired subject to that burden. It is not necessary to pass on the merits of this objection to the validity of the bonds. The provisions of law and of the city charter giving the city of Pasadena power to take this property and continue the outside service are set forth and fully considered in the opinion above

mentioned. These provisions do not require that the purchase, when made by the city of Pasadena, shall be approved by the voters of the city. It is immaterial, so far as the purchase is concerned, whether the voters knew of the incumbrance on the property or not. Collateral inquiry on behalf of persons not taxpayers or residents of the city of Pasadena into the validity of the purchase cannot be made on that ground, nor on the ground that the bonds are invalid and that consequently the city cannot buy the property. The plaintiffs have no interest in these questions. If the Pasadena Land & Water Company is satisfied on the score of price and of the ability of the city to pay, other persons cannot revise its decision, in the absence of any showing that they are interested as stockholders and will suffer injury. The validity or invalidity of the bonds is immaterial. Purchasers thereof may be found, and if they take them it is sufficient. If none are sold, the proposed transfer to the city may fail, in which case plaintiffs should be satisfied with the result. The other points urged in this case are considered and disposed of in the opinion in *South Pasadena v. Pasadena Land & Water Co.*, supra.

The judgment is affirmed.

We concur: BEATTY, C. J.; ANGEL-LOTTI, J.; MCFARLAND, J.; LORIGAN, J.; HENSHAW, J.

152 Cal. 596

GRAHAM v. PASADENA LAND & WATER CO. (L. A. 1957.)

(Supreme Court of California. Jan. 2, 1908.)

1. WATERS AND WATER COURSES—IRRIGATION—WATER RIGHTS.

A corporation owning a water supply for land conveyed the land to a purchaser, and subsequently transferred the supply with its water system to a third person. The by-laws of the corporation provided that the water should be supplied to the land to be used thereon. *Held*, that the right to receive water for the land was an easement appurtenant thereto within Civ. Code, §§ 552, 801, defining the rights of purchasers to use water for irrigation, etc.

2. APPEAL—ERRONEOUS FINDINGS—PREJUDICIAL ERROR.

Where the court held that owners of land had the right to receive water for their lands, and that the right was a continuing one, in effect running with the land for its benefit, an erroneous finding that the right was not an easement appurtenant to the land was not cause for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3. Appeal and Error, §§ 4234, 4235.]

3. WATERS AND WATER COURSES—SALE OF WATER COMPANY—RIGHTS OF USERS OF WATER.

Where a water company, bound to supply water to land as an easement appurtenant thereto, sought to transfer its system, subject to the rights of the owners of the land as consumers and users of the water, and the transferee sought to purchase, subject to the rights of the owners which it would protect, an owner of such land could not maintain a suit to re-

strain the transfer on the ground that by it he would be deprived of his rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 814.]

4. CORPORATIONS—TRANSFERS OF PROPERTY—DISSENTING STOCKHOLDERS.

A stockholder of a quasi public corporation, engaged in supplying water for public use, is bound by the action of the holders of two-thirds of the stock and the directors consenting to a transfer of the property, franchise, and business of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 665-668.]

In Bank. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Margaret C. Graham against the Pasadena Land & Water Company. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Affirmed.

Lynn Helm, John E. Carson, and William Collier, for appellant. Porter, Sutton & Cruickshank and Anderson & Anderson, for respondent.

SHAW, J. The record presents appeals by the plaintiff on a judgment in favor of the defendant and from an order denying her motion for a new trial. The transaction involved in the case, the validity of which is attacked by the plaintiff, is the same as that which was considered and held valid by us in the companion case entitled *City of South Pasadena v. Pasadena Land & Water Co.* (L. A. No. 1,793) 93 Pac. 490. The facts are fully stated in the opinion in that case, so far as they correspond with the facts here. In this case a trial was had and findings made which present some different questions. We will, in this opinion, consider only these questions, so far as they are presented in the argument.

The plaintiff owns land on which she resides. It is situated within the district served with water by the defendant, in the city of South Pasadena. She is also a stockholder in the defendant company. She sues on behalf of herself and of other stockholders similarly situated and having similar rights. It is specifically alleged that the water furnished for use on the land is an easement appurtenant to the land. The court found that this allegation was not true. It is admitted by the pleadings, however, that the plaintiff had bought the land from the San Gabriel Orange Grove Association, a corporation which then owned the water supply in question, and which afterwards transferred the said supply together with this water system to the defendant, that the by-laws of said association provided that the water should be supplied to the lands which it sold to be used thereon, and that always thereafter said water was supplied to said land for such use in accordance with the original understanding. It is clear that the finding is not warranted by the admitted facts of the case, and we think it was not sustained by the evidence

introduced. Under the facts stated, the right to receive water from the supply under the control of the defendant is clearly appurtenant to the land of the plaintiff. Civ. Code, §§ 552, 801. The finding, however, is a mere conclusion of law, and, besides, we think it is entirely immaterial. The record shows that it was assumed throughout the case that the plaintiff and others similarly interested have the right to receive of the waters in controversy for use on their respective tracts of land a sufficient quantity for the need thereof, if there is enough for that purpose, and, if not, then their due share of the water available, and that this is a continuing right and still remains vested in them. This being the case, it is immaterial whether the court below understood that this right came within the legal definition of an easement appurtenant to the land or not. Taking the view apparently held by that court, the right would run with the land for its benefit, and the owner of the land would have the same right to enforce the delivery of the water as if it were an easement and appurtenance as claimed. An erroneous finding upon an immaterial issue is not cause for a reversal.

The court further found that it was the intention of the defendant company to transfer its water plant and system to the city of Pasadena, subject to all the rights of the plaintiff as a consumer and user of the water; that the city has offered to buy all the defendant's water, subject to the obligations of the defendant to its consumers; and that the company has duly accepted said offer and authorized a conveyance thereof to be made on its behalf, subject to the condition that all users and consumers of the water, outside of the city of Pasadena, shall be fully protected in their rights as they now exist, and in the use of water as now enjoyed. This finding is not challenged by the specifications. It sufficiently appears therefrom that the defendant is not purporting to transfer its property so as to deprive the plaintiff or those in her situation of the water rights they now enjoy, and hence she is not entitled to an injunction on that ground.

So far as her rights as a stockholder of the defendant are concerned, she is bound by the action of the holders of two-thirds of the stock consenting to the transfer proposed and the action of the directors in accordance therewith. It is not claimed that there is any fraud in the transaction. The right of the defendant company to make this transfer and all other questions presented by the record, not mentioned above, are fully considered and decided in *South Pasadena v. Pasadena Land & Water Company*, above referred to. No injurious error appears in the record.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

PEOPLE v. NAPOLI. (Cr. 104.)

(Court of Appeal, First District, California, Dec. 4, 1907. Rehearing Denied Jan. 2, 1908; Denied by Supreme Court Jan. 27, 1908.)

CRIMINAL LAW — NEW TRIAL — STATUTORY PROVISIONS—CONSTRUCTION.

Laws 1907, p. 998, c. 537, providing that, when any bill of exceptions, etc., on motion for new trial, is lost or destroyed by fire or other public calamity, and no other record of the proceedings on the trial can be obtained, and the action is subject to review by motion for new trial pending, and it is "by the court in which such action or proceeding is pending" deemed impossible to restore the proceedings, etc., the court shall have power to grant a new trial, has reference to a trial court, and does not apply where an accused has appealed after a motion for new trial is denied.

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge

Angelo Napoli was convicted of murder in the second degree, and from a denial of a motion for a new trial, made pending an appeal from the conviction and denial of a former motion for new trial, he appeals. Affirmed.

Daniel O'Connell, for appellant. Attorney General Webb, for the People.

COOPER, P. J. Defendant was convicted in the superior court of the crime of murder in the second degree. He made a motion for a new trial, which was denied, and he appealed to this court from the order and judgment of conviction, which appeal has never been disposed of. After the said appeals had been perfected, and before the defendant's bill of exceptions had been allowed and settled by the trial court, all the records of the proceedings in said cause were destroyed by the fire of April 18, 1906, and the record has never been restored. The defendant, in May, 1907, made a second motion for a new trial, under an act entitled "An act providing for the disposition of actions and proceedings in which bills of exceptions and statements on motion for a new trial have been lost or destroyed by conflagration or other public calamity," approved March 25, 1907. St. 1907, p. 998, c. 537. The court denied the said second motion, and this appeal is from the latter order.

The act provides: "When any proposed bill of exceptions, or statement of the case on motion for a new trial, in action or proceedings, is lost or destroyed by reason of conflagration or other public calamity, and no other record of the proceedings upon the trial thereof can be obtained, and such action or proceeding is subject to review by motion for new trial, pending at the time of such loss or destruction, and it is by the court in which such action or proceeding is pending, deemed impossible or impracticable to restore such proceedings (and to settle a bill of exceptions or statement of the case containing such proceedings) so as to enable the court to review the judgment or order there-

in by motion for new trial, the court may grant a new trial of such action or proceeding if at the time of such loss or destruction a motion for new trial be pending therein, and such action or proceeding shall thereupon be tried anew. In order to grant such new trial, it shall be unnecessary to have any bill of exceptions or statement of the case settled, but upon the facts above recited being shown to the satisfaction of the court by affidavit or otherwise, the court shall have power in its discretion to grant such new trial." The act has reference to a trial court in which the "action or proceeding is pending." It is therein provided that "the court may grant a new trial of such action or proceeding if at the time of such loss or destruction a motion for a new trial be pending therein, and such action or proceeding shall thereupon be tried anew. After the superior court had denied the motion for a new trial, and the defendant had appealed, the motion was no longer pending in that court. That court had lost jurisdiction, and the action was then in the appellate court for review on questions of law. *Peycke v. Keefe*, 114 Cal. 213, 46 Pac. 78; *Vosburg v. Vosburg*, 137 Cal. 493, 70 Pac. 473. It is not necessary to decide the question as to whether or not the act applies to civil cases only. It is sufficient to say that in this case the order of the trial court was correct, and must be affirmed.

So ordered.

We concur: HALL, J.; KERRIGAN, J.

KIRMAN v. JOHNSON et al. (No. 1685.)

(Supreme Court of Nevada. Jan. 31, 1908.)

APPEAL—AFFIRMANCE—ON MOTION—DEFECTIVE RECORD.

Supreme Court rule 8 (73 Pac. xiii) provides that objection to the transcript or statement on appeal or any technical objection to the record must be made before argument. Comp. Laws, §§ 3862, 3863, provides that, if an appellant elect to have the original papers certified as the record on appeal, they shall be attached together and the pages numbered, and shall be certified by the clerk to be such originals and to constitute the record. Section 3431 provides that a copy of the statement shall be annexed to a copy of the judgment roll, if the appeal be from the judgment, or to a copy of the order, if from an order. Section 327 of the Civil Practice Act (Comp. Laws, § 3422) authorizes the Supreme Court to review judgments, etc., from which appeals may be taken as "prescribed by law, and not otherwise." On appeal on the original papers they were neither numbered nor indexed, and the certificate of the clerk was not attached to anything, and though the notice of appeal stated that it was from the judgment and order denying a new trial, the papers failed to show any order with reference to such motion on any copy thereof, nor did the certificate of the clerk mention such order. The statement appeared to have been filed as a statement for a new trial, and the record contained no stipulation that it might be considered as a statement on appeal. *Held*, that the defects were jurisdictional, and hence the

judgment would be affirmed, though objection was not made as required by rule 8 (73 Pac. xiii).

Appeal from District Court, Ormsby County.

Action by Richard Kirman against J. M. Johnson, a bankrupt, and another as his trustee in bankruptcy. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

J. Ponjade, for appellants. Mack & Farington, for respondent.

NORCROSS, J. This was an action brought by respondent in the first judicial district court in and for Ormsby county to foreclose a chattel mortgage upon a stock of merchandise in Carson City. A judgment was entered in favor of respondent. The notice of appeal, appearing among the papers sent up from the court below, states that the appeal is taken from the judgment, and decree rendered in favor of the plaintiff, and against said defendant H. Harris, trustee, "and also from the order entered in said district court in said action on the 10th day of June, 1905, denying said defendant H. Harris' (trustee's) motion for a new trial."

The record upon appeal in this cause was filed in this court on the 7th day of September, 1905. By consent of counsel the case came on for oral argument before this court on the 23d day of April, 1907, and thereafter time was taken to file briefs in addition to those previously filed. At the time of the oral argument counsel for respondent made and filed a motion to dismiss the appeal, and to strike out all the papers filed therein upon the following grounds: "First, that there is no record whatever in said case before the Supreme Court, none having been certified to this court by the clerk of the lower court; second, that the papers, documents, and exhibits that were used on the motion for a new trial in the lower court have not been certified to by the judge of the lower court, nor by the clerk thereof, as having been used upon said motion for a new trial, nor have the same or any of them been certified to this court by the clerk of the district court; third, that there is no notice of appeal or undertaking on appeal in this case, and the same have not been certified to this court if any exists; fourth, there is no record of any kind or character before the court or certified to this court upon which this court can base any action or opinion or judgment; fifth, there is no stipulation of the attorneys or agreement of the attorneys sending up or submitting said appeal to the Supreme Court." The motion to dismiss and to strike out was heard, subject to the objection of counsel for appellant that the motion was not made in accordance with the rules of this court.

Rule 8 of this court provides: "Exceptions or objections to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service or proof of service, or any tech-

nical exception or objection to the record affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken at the first term after the transcript is filed, and must be noted in the written or the printed points of the respondent, and filed at least one day before the argument, or they will not be regarded." 73 Pac. xiii. Had the motion been made in accordance with the provisions of the rule, we would have been compelled to grant it, unless application had been made to correct the transcript as provided for in rule 7 (73 Pac. xiii), for the transcript upon appeal in this case shows little pretense of complying with either the statutes or rules of this court governing the same. As the motion was not made in accordance with the provisions of the rule quoted, the respondent is deemed to have waived objections to the transcript that are not jurisdictional. The record in this case is in a more objectionable condition than that in the case of *Linville v. Scheeline* (recently decided by this court) 93 Pac. 225. Referring to the transcript in the latter case, we took occasion to say: "It is a serious question whether appeals presenting transcripts of this character ought not to be dismissed without consideration, or else the appellant be required to re-form his record before it would be considered." The record in this case is made up of the original papers from the court below. "An Act regulating appeals to the Supreme Court," approved March 13, 1895 (Comp. Laws, §§ 3862-3863), leaves it in the discretion of the appellant to have the original papers sent up. Section 1 of the act provides, among other things, that, "in case he shall elect to have the original papers certified they shall be attached together and the pages numbered and indexed the same as transcripts on appeal, and shall be certified by the clerk of the district court or by the respective parties or their attorneys to be such originals, and to constitute in whole or in part the record on appeal and the clerk shall then transmit them to the clerk of the Supreme Court; provided, that where it would not be convenient to attach maps or exhibits to the other papers, they may be sent separately, properly identified and certified." In this case the papers are neither attached together, numbered, nor indexed. It would seem that the clerk had bundled up all the papers filed in the lower court and sent them to the clerk of this court. Many of the papers have no proper place in this record upon appeal, even if the record was otherwise unobjectionable. The only certificate of clerk in the so-called record is upon a separate sheet of paper, and was never attached to anything. It is manifest that this is not a proper certificate. *Holmes v. Iowa Mining Co.*, 23 Nev. 23, 41 Pac. 762. It may be contended that it was the fault of the clerk in sending up a record of this kind; but, even if that be so in the strict sense of the law, nevertheless it would be better for

counsel to see that clerks send up proper transcripts. While we are referring to the provisions of this act we deem it expedient to say that the conditions which occasioned the passage of this act, authorizing the bringing up of original papers have ceased to exist, and that an early repeal of the act will be advantageous, not only to this court, but to counsel and litigants.

"The method of procedure in taking appeals is regulated by statute. Section 327 of the Civil Practice Act (Comp. Laws, § 3422) in direct terms confers authority upon this court to review judgments and orders from which appeals can be taken in the manner prescribed by the act, 'and not otherwise.'" *Marx v. Lewis*, 24 Nev. 306, 53 Pac. 600. Section 336 of the Civil Practice Act (Comp. Laws, § 3431) provides: "A copy of the statement shall be annexed to a copy of the judgment roll, if the appeal be from the judgment; if the appeal be from an order, to a copy of such order." An examination of the papers appearing to have been sent up in this case fails to disclose any order in reference to the motion for a new trial or a copy thereof, nor does the certificate of the clerk mention any such order. So far as the record shows there may never have been such an order made. In the case of *Kalmes v. Gerish*, 7 Nev. 31, 35, this court, by Garber, J., said: "The appeal purports to be from the judgment, and from an order overruling the motion for a new trial. The record fails to show that the motion has yet been disposed of, or acted upon by the district court. The appeal from the order is therefore premature, and is dismissed."

While counsel by failing to interpose a proper objection to the record may waive all technical objections thereto, they cannot waive the essentials of a record necessary to give this court jurisdiction, such as the entire absence of an order overruling a motion for new trial, if such order were ever made. *Corbett v. Job*, 5 Nev. 201; *Irwin v. Sampson*, 10 Nev. 282; *Greeley v. Holland*, 14 Nev. 320; *Marx v. Lewis*, 24 Nev. 306, 53 Pac. 600; *Hart v. Spencer*, 29 Nev. —, 80 Pac. 289. As was said by this court in *Sherman v. Shaw*, 9 Nev. 152, "it is as unsatisfactory to the court as it is to counsel and litigants to have cases disposed of upon mere questions of practice. But it must be remembered that the rules of practice are as obligatory upon us as upon the parties to a suit; and, if attorneys desire to have their cases examined upon the merits, they must comply with the plain provisions of the statute and the rules of practice, as established by the court." In this case counsel have at great labor prepared and filed exhaustive briefs upon the merits, and it is especially regrettable that the record is not in such shape to empower this court to determine the questions so ably presented. The record does not contain a stipulation of counsel that the statement on mo-

tion for a new trial may be considered also as a statement on appeal. The statement appears to have been filed exclusively as a statement on motion for a new trial. This court has repeatedly held that such a statement, in the absence of stipulation of counsel, cannot be considered as a statement on appeal. *Williams v. Rice*, 13 Nev. 234; *Nesbitt v. Chisholm*, 16 Nev. 39; *Robinson v. Benson*, 19 Nev. 331, 10 Pac. 441.

While the judgment roll in this case contains papers not authorized to be included therein, it does contain all the essentials. Although it is not certified to otherwise than as hereinbefore stated, in the absence of proper objection, it may be conceded as being before us for consideration. Where there is nothing before the court but the judgment roll, we can only consider any alleged errors which may appear upon the face thereof. In the present case we find no error so appearing, and it becomes our duty to affirm the judgment, and it is so ordered.

TALBOT, C. J., and SWEENEY, J., concur.

STROSNIDER v. TURNER. (No. 1743.)

(Supreme Court of Nevada. Jan. 31, 1908.)

1. ELECTIONS — BALLOTS — INDICATION OF CHOICE BY VOTER—DISTINGUISHING MARKS.

Under St. 1901, p. 112, c. 100, providing that a voter shall prepare his ballot by stamping a cross in the square, and in no other place, after the name of the person for whom he intends to vote for each office, ballots containing three crosses opposite the name of a candidate, two within and one without the square, or two crosses in the square, or two crosses outside the square, or on which none of the crosses are stamped, but which are marked with a lead pencil or by using a corner of a stamp as a pencil, or containing two rectangular marks in squares opposite the names of two candidates, or containing crosses stamped between the name of the candidate and the party designation, or containing an indescrivable mark opposite the name of a candidate and a double cross opposite the name of another candidate, must be rejected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 166, 167.]

2. SAME.

A ballot having the appearance of an attempt to make a second impression of the stamp to make it clearer, or to rectify some defect, is valid, though the second stamping does not exactly cover the first.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 166, 167.]

3. SAME.

A ballot was first marked with a cross with a corner of the stamp. The voter, on discovering his error, made a proper stamp beside the illegal one. *Held*, that the ballot was illegal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 166, 167.]

4. SAME—PREPARATION OF BALLOT BY VOTER.

A voter, on discovering his mistake in marking his ballot, should, instead of trying to rectify it himself, return the ballot to the election officers, and obtain a new one.

5. SAME.

A voter, while preparing his ballot, used a stamp containing very little ink on it, and he did not thereafter apply the stamp to the ink pad before completing the marking of the ballot. The first few crosses stamped were fairly distinct, and all the remaining marks were made by the stamp properly applied. *Held*, that the ballot was valid, though a number of the marks on it had little, if any, resemblance to a cross.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 166, 167.]

6. SAME.

A small portion of the cross marked on a ballot projected over the line dividing the squares opposite the names of two candidates. The main portion of the cross was opposite the name of one of the candidates. *Held*, that the voter intended to cast his vote for the latter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 151-153.]

7. SAME.

A ballot is unobjectionable, though some of the crosses stamped on it are imperfect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 166, 167.]

Appeal from District Court, Lyon County. Election contest by I. A. Strosnider against C. C. Turner. From a judgment for defendant, plaintiff appeals. Reversed, and remanded for new trial.

C. E. Mack, for appellant. Alfred Chartz, for respondent.

NORCROSS, J. This is the second appeal of this cause. Action was brought by appellant to contest the election of respondent to the office of short term commissioner of Lyon county. Upon the first trial of the case the lower court found that the plaintiff, Strosnider, had received 276, and defendant, Turner, 275, lawful ballots. Upon the first appeal we held that the court had rejected certain ballots cast for respondent, which were lawful, and should have been counted. Upon the second trial of this cause the lower court found that the plaintiff had received 277, and the defendant 278, lawful ballots. This appeal again presents for consideration the rulings of the court upon the admission and rejection of certain ballots.

Plaintiff's Exhibit No. 11 was properly rejected, there appearing upon the face of the ballot three crosses stamped opposite the name of George Springmeyer, candidate for Attorney General, two within, and one without, the square.

Plaintiff's Exhibits Nos. 3 and 10 were properly rejected, none of the crosses appearing thereon being stamped. Apparently they were made by using one corner of the stamp as a pencil would be used. Section 20 of the act of the Legislature, known as the "Australian Ballot Law," as amended March 21, 1901, provides, among other things, that: "On receiving his ballot the voter shall immediately retire alone to one of the places, booth or compartments. He shall prepare his ballot by stamping a cross or X in the square, and in no other place, after the name of the person for whom he intends to vote for each office. In

case of a constitutional amendment or other question submitted to the voters, the cross or X shall be placed after the answer which he desires to give. Such stamping shall be done only with a stamp in black ink, which stamp, ink and ink pad shall be furnished in sufficient number by the county clerk for each election precinct in the county." St. 1901, p. 112, c. 100.

Plaintiff's Exhibit No. 9 was properly rejected. The ballot contains two rectangular marks or blotches in squares opposite the names of two candidates. Marks of this kind were fully considered upon the former appeal.

Plaintiff's Exhibit No. 8 was properly rejected. The ballot contains two distinct crosses deliberately stamped in the square opposite the name of J. A. Carter, candidate for justice of the peace. Ballots so marked have repeatedly been held illegal by this court.

Error is assigned in the court's refusal to reject ballot marked "Plaintiff's Exhibit No. 7." Objection was made upon the ground that in the squares opposite the names of two candidates there appears double crosses. We think these marks can hardly be considered double crosses in the sense that they would be regarded as distinguishing marks. They have the appearance of an attempt to make a second impression of the stamp in order to make it clearer, or to rectify some defect. The second stamping did not exactly cover the first. The resulting mark is in character similar to that held to be valid in the case of *State v. Sadler*, 25 Nev. 131, 179, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, and therein referred to as "the so-called double crosses, where it is apparent the voter had attempted to retrace the lines composing the cross."

Ballot marked "Plaintiff's Exhibit No. 6" was objected to upon the ground that in the square opposite the name of George A. Bartlett, candidate for member of Congress, there appears a double cross. We think the court erred in overruling this objection. The voter evidently first marked a cross with one corner of the stamp as plaintiff's Exhibit Nos. 3 and 10, *supra*, were marked. Upon discovering his error he made a proper stamp beside the illegal one. The voter, when he discovered his mistake, instead of trying himself to rectify it, should have returned his ballot to the election officers and obtained a new one, as the law prescribes. To hold a ballot of this kind to be legal would open the way for the secrecy of the ballot to be evaded, the prevention of which is one of the main purposes of the law.

Error is assigned in not rejecting ballot marked "Plaintiff's Exhibit No. 5." This ballot is similar to Exhibit No. 7, and the court, we think, did not err in counting it.

Ballot marked "Exhibit No. 4" was not stamped as required by law, but was marked with a lead pencil throughout, and was properly rejected.

Ballot marked "Exhibit No. 2" was erroneously counted over plaintiff's objection.

All of the crosses were stamped between the name of the candidate and the party designation, instead of in the square after the name of the person for whom he intended to vote, as required by the statute. Ballots so marked were held to be legal in *State v. Sadler*, supra. That case, however, was decided before the amendment of 1901, supra, which changed the law in respect to the place prescribed for marking the ballot. The law now requires the cross to be stamped "in the square, and in no other place, after the name of the person for whom he intends to vote for each office." The printed ballots provide a square within which it is the intention of the law the stamp should be placed.

Ballot marked "Exhibit No. 1" is objected to upon the ground that a distinguishing mark appears after the name of O. A. Brooks, candidate for member of Assembly. The mark in question is a blurred cross. The cross is plainly visible, and the defect apparently was occasioned by too much ink upon the stamp, or from some other accidental cause.

Appellant assigns error in the counting of three ballots, the legality of which we determined upon the former appeal. Such assignments require no further consideration.

The record in this case contains certain ballots, admitted and counted for appellant over respondent's objections. As we held upon the former appeal, following the case of *Dennis v. Caughlin*, 22 Nev. 453,¹ these ballots are not strictly before us. However, as their validity has been argued, we deem it advantageous to express our views upon them in order that the case may reach a final determination at the earliest possible date.

Ballot marked "Plaintiff's Exhibit No. 12" was objected to "upon the ground that there appear indistinguishable and distinguishing marks from which the ballot could be identified opposite nearly all the names." It is apparent that the person who prepared this ballot used a stamp containing very little ink upon it to begin with, and did not thereafter apply it to the ink pad before completing the marking of the ballot. While one may readily conclude, from the fact that the first few crosses stamped were fairly distinct, that all the remaining marks were made by the stamp properly applied, it must be admitted that a number of the resultant marks have little, if any, resemblance to a cross, and taken alone would not be recognized as such. However, this ballot should have been rejected for the reason that two crosses appear to have been deliberately stamped opposite the name of Robert Raffice, candidate for State Controller. It would seem quite probable from this ballot that the voter, having first stamped a cross in the square opposite the name of J. C. Knust, Socialist Party candidate for State Controller, placed two opposite that of Raffice, possibly to impress the fact that Raffice was the one for whom he intended to vote.

Ballot marked "Defendant's Exhibit No. 2"

was admitted and counted for appellant over respondent's objection, as follows: "That opposite the name of Orris Ring there is an indistinguishable mark, and opposite the name of D. W. Melarkey there is a double cross." We think the objection is well taken, and the ballot should have been excluded.

Ballot marked "Defendant's Exhibit No. 1" was admitted, and counted for appellant over the following objection of respondent: "That, taking the ballot as a whole, it is impossible to determine for whom the voter intended to vote for county commissioner." So far as the objection made is concerned, we think it is not well taken. A small portion of the cross projects over the line dividing the squares opposite the names of appellant and respondent. The main portion of the cross, however, is opposite the name of appellant, and we think, "taking the ballot as a whole," it was the voter's intention to cast his vote for appellant.

Ballot marked "Defendant's Exhibit No. 3" was objected to upon the grounds: "That there appears a distinguishing mark after the name of D. P. Randall," etc. Without determining whether the ballot is subject to other objections noted, it is sufficient to say that it contains a cross deliberately stamped outside the square provided for such purpose, and in the blank space immediately below the words "Silver Party," thus rendering the ballot invalid.

Ballot marked "Defendant's Exhibit No. 4" is unobjectionable. The most that can be said against this ballot is that some of the crosses stamped are imperfect. The ballot is clearly admissible under the rule laid down in the case of *State v. Sadler*, supra.

If all of the ballots contained in the record were properly before us, we should affirm the judgment. However, as our action must find its basis upon some error assigned, and as we have determined that the court admitted and counted for respondent, over appellant's objection, three ballots which we think should have been excluded, we are obliged to reverse the judgment and remand the cause for a new trial, which is ordered.

TALBOT, C. J., and SWEENEY, J., concur.

(14 Idaho, 75)

BANK OF COMMERCE, Limited, v. BALDWIN et al.

(Supreme Court of Idaho. Jan. 13, 1908.)

1. HUSBAND AND WIFE—LIABILITY OF WIFE—SEPARATE ESTATE.

Under the provisions of section 2 of the act of the Legislature approved March 9, 1903 (Sess. Laws 1903, p. 346), construed in connection with the other provisions of the Code, a married woman cannot bind herself personally for the payment of a debt that was not contracted for her own use or benefit, or for the use or benefit of her separate estate, or in connection with the control and management thereof, or in carrying on or conducting business therewith, unless the contract and obligation is

¹ 41 Pac. 768, 29 L. R. A. 731, 53 Am. St. Rep. 761.

made so as to create a lien or incumbrance on her separate estate, or some portion thereof, as security for the payment of the debt.

2. SAME—LIABILITY AS SURETY.

Under the provisions of section 2, Act March 9, 1903, p. 346, which transfers to the wife the management, control, and absolute right of disposition of her separate property, and confers upon her all the privileges of contracting in relation thereto, and all the rights or privileges necessary to the complete enjoyment and power of disposition thereof, a married woman has no authority to become surety or guarantor for the debts of others; such right and the concurrent obligations thereof not being necessary or essential to the complete enjoyment of her separate estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 348-352.]

3. SAME—CONTRACTS.

The power to contract with reference to her separate property is not an absolute and unlimited right of contract on all matters, but on the contrary confines that right to those contracts that "have reference to her separate estate."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 317-326, 597.]

(Syllabus by the Court.)

Appeal from District Court, Ada County; George H. Stewart, Judge.

Action by the Bank of Commerce against George E. Baldwin and Sarah A. Bowers. Judgment for defendants, and plaintiff appeals. Affirmed.

See 85 Pac. 497.

Action by plaintiff on a promissory note executed by the defendants jointly, where the debt was contracted for the use and benefit of Baldwin, and the money was received by him for his individual use and benefit, and no part thereof was received by Mrs. Bowers. Judgment for defendant Bowers.

Edwin Snow and Carl A. Davis, for appellant. N. M. Ruick, for respondents.

AILSHIE, C. J. This is an appeal from the judgment and an order striking a proposed statement from the files and refusing to settle the same. The trial court had made an order extending the time for preparing the statement to June 7, 1906. Thereafter a further order was made, but the second order was not made until after the expiration of the time allowed by the first order. When the statement was presented for settlement, on motion of the adverse party the same was stricken from the files, and the court refused to settle it on the ground that it had not been presented in time, and that the court had lost jurisdiction to settle or allow it. The action of the court was clearly correct, and in conformity with the repeated decisions of this court. *Lydon v. Piper*, 5 Idaho, 541, 51 Pac. 101; *Hoehnan v. New York Dry Goods Co.*, 8 Idaho, 66, 67 Pac. 796; *Swartz v. Davis*, 9 Idaho, 238, 74 Pac. 800; *Sandstrom v. Smith*, 11 Idaho, 779, 84 Pac. 1060.

On the appeal from the judgment the only question presented for our consideration is: Can a married woman be held for the payment of a promissory note, executed by her

as a co-maker, with a person not her husband, where the debt was not contracted for her own use, or for the use or benefit of her separate estate, or in connection with the control and management of her separate estate, or in carrying on or conducting business with her separate estate? It is admitted that under the repeated decisions of this court she would not be liable for this debt, if the party for whose benefit the debt was incurred had been her husband. Indeed it has been repeatedly so held by this court. See *Dernham & Kaufman v. Rowley*, 4 Idaho, 753, 44 Pac. 643; *Jaekel v. Pease*, 6 Idaho, 131, 53 Pac. 399; *Strode v. Miller*, 7 Idaho, 16, 59 Pac. 893; *Holt v. Gridley*, 7 Idaho, 416, 63 Pac. 188. This case was here once before (*Bank of Commerce v. Baldwin*, 12 Idaho, 202, 85 Pac. 497), and on that appeal the court held that "a married woman cannot bind herself personally for the payment of a debt that was not contracted for her own use, or for the use and benefit of her separate estate, or in connection with the control and management thereof, or in carrying on or conducting business therewith." We might rest our decision upon the opinion in the last appeal as being the law of the case; but, since the question squarely arises on this appeal as to the liability of the wife as a surety or guarantor for the debt of a stranger, we have thought it best to pass on that point. The findings of fact upon which our decision and conclusion must necessarily rest in this consideration are as follows: "That the defendant Sarah A. Bowers at the time she signed the said note was a married woman, and at the date of the execution of said note was living with her husband as husband and wife in Ada county, Idaho, and that the said note was not made or signed by her as a charge upon her separate estate, nor for her own use or benefit. That the said note was not made in or about the carrying on of any trade or business by the defendant Sarah A. Bowers, or for her use, or for her benefit, or for the use or benefit of her separate property." The act of March 9, 1903, repealed sections 2498 and 2499 of the Revised Statutes of 1887, with reference to a married woman, which sections had previously given the husband the management and control of her separate property, and had also provided for her becoming a sole trader, and instead thereof section 2 of the amendatory act provides that, "during the continuance of the marriage a wife has the management, control and absolute power of disposing of her separate property, and may bargain, sell and convey her real and personal property, and may enter into any contract with reference to the same in the same manner and to the same extent and with like effect as a married man may in relation to real and personal property." Sess. Laws 1903, p. 346. It is argued by counsel for appellant that any and all contracts that a married woman can possibly enter into necessarily have reference to

"her separate property," and that she may therefore enter into any contract that could be entered into by a feme sole. It is further argued that no contract can be entered into but what has reference to property, and that, therefore, a contract by a married woman which has reference to "her separate property" will comprehend any and all contracts she might enter into. That position appears to be supported by the Supreme Court of Kansas in *Deering v. Boyle*, 8 Kan. 525, 12 Am. Rep. 480, wherein the Supreme Court in considering the liability of a married woman on a promissory note executed for the debt of her husband, and in construing a statute identical with ours, said: "It must be equally clear that such a contract as the note sued on has reference, more or less remote, to the general property of the person signing the contract. If it has not such reference, then it has no reference to anything whatever, but is totally and absolutely void."

In both North and South Dakota the statute provides that "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts." The Supreme Court of North Dakota, in *Colonial & U. S. Mtg. Co. v. Stevens*, 3 N. D. 265, 55 N. W. 578, in considering their statute and the liability of a married woman as surety on a promissory note for her husband, said: "This statute is very broad in its language. It is true that the contract must be one respecting property; but we cannot assent to the view that it must relate to the married woman's separate property. It would have been easy to have said so in express terms had such been the purpose of the lawmaking power. When the Legislature has established the single and simple test that the contract must be one respecting property generally, we have no right to amend the law, and thereby inject into the act a further limitation which will exclude many contracts respecting property." It will be seen from the foregoing quotation that the North Dakota court practically conceded that, if the statute read "with reference to her separate property" as does our statute, the action could not have been maintained. A like statute was under consideration later by the Supreme Court of South Dakota in *Colonial & U. S. Mtg. Co. v. Bradley*, 4 S. D. 158, 55 N. W. 1108, and the court cited *Mortgage Co. v. Stevens*, supra, with approval, and in commenting on this statute, said: "The learned counsel for the respondents contends that, the authority of a married woman to enter into contracts being limited to contracts 'respecting property,' this limitation should be construed to mean her separate property; but to so construe the limitation would require us to interpolate into the section terms

that are not found in the section, which this court would not be authorized to do. It must be presumed that, if the Legislature intended to so limit the authority of married women to contract, it would have inserted such qualifying words into the section." The statute of California has been for many years the same as that quoted from North and South Dakota, and the California court has held that it authorized a contract of the character of the one under consideration here. *Marlow v. Barlew*, 53 Cal. 456; *Goad v. Moulton*, 67 Cal. 536, 8 Pac. 63; *Farmers' Bank v. DeShorb*, 137 Cal. 685, 70 Pac. 771. The same is true in Nevada. See *Cartan v. David*, 18 Nev. 310, 4 Pac. 61. In view of the material essential in which our statute differs from the statutes in California, Nevada, and the Dakotas, we feel that the decisions from those courts are not in point in this consideration further than the general reasoning of the cases might appeal to the court as throwing light upon the legislative intent. The two Dakota cases, however, admit that, if their statutes read the same as ours, their decisions would probably have been different.

It is insisted by counsel that our amendatory statute must have been taken from the statute of Kansas, and that with it we necessarily adopted the Kansas construction as embodied in *Deering v. Boyle*, supra. *Shoshone County v. Proffitt*, 11 Idaho, 772, 84 Pac. 712; *Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246. If it were conceded that the amended statute (section 2, p. 346, Act March 9, 1903) had been taken from the Kansas Code, still there would be this objection to the adoption of the Kansas construction thereof. The Supreme Court of this state has, through a continuous line of decisions for nearly 12 years, held that, "in order to charge the separate property of the wife, and render it liable to levy and sale, it must be alleged in the complaint and proven that the debt was incurred for the use and benefit of her separate property, or for her own use or benefit." Section 2504, Rev. St. 1897, has lent a great deal of force to that conclusion, and that section stands to this day without amendment. Notwithstanding this interpretation of the statute as it has existed in this state, the Legislature, although meeting biennially, never attempted in any way to change the rule or announced a different legislative intent until the act of March 9, 1903. When it did make a change, it simply abrogated the statute providing for a married woman becoming a sole trader, and transferred the management and control and right of disposing of her separate property from her husband to her; and that transfer of management, control, and right of disposition granted a concurrent and commensurate power and authority to dispose of the same and contract in reference thereto. It is evident to us that, had the Legislature desired to change the rule as previously announced by this court, and grant the wife the right to become surety and guar-

antor aid to sign accommodation paper and go bail, it would have done so in clear and unmistakable terms. In other words, the Legislature would not have limited her right to contract to those instances merely which have "reference to her separate property." As it is, they have said in substance that, "with reference to the wife's separate property, she may enter into contracts in like manner and to the same effect as a married man may in relation to his property." When the Legislature said that the contracts the wife can enter into are those "with reference to her separate property," it evidently intended to grant her all the rights and privileges of contracting that are necessary or essential to the full and complete enjoyment of her separate property, and the right of management and control and disposition of the same. On the other hand, it clearly appears that by the use of this modifying phrase they did not mean to extend her liability on contracts beyond that which would be for her own use or benefit, or in reference to her separate estate.

It is argued, however, that the execution of a promissory note for a third party is a contract with reference to the wife's separate property for the reason that, if she should have to pay it, she could not do so except out of her separate estate. This as a highly attenuated theory may have some logic in it; but, on the contrary, it contains much fallacy. A promissory note does not become property until it is executed and delivered. When delivered, it is the property of the payee. It is to be paid by the makers out of whatever property they may have at the time of its maturity, or in case action is instituted for its collection out of such property as may be reached by execution. But at the time of the execution of the note the married woman might not have a single dollar's worth of property in existence, nor the expectation of anything but her daily earnings. Still the person taking the note might rely upon her honesty and earning capacity for its payment, and yet, contrary to expectations, she might not have a dollar when it becomes due, and might not thereafter have anything subject to execution. Now to say that this note was executed with reference to her separate property is too far-fetched to have much application to the consideration of this statute. Again, a married woman, who has not a dollar's worth of property, might execute a note in payment of her own debt, or for goods and wares furnished directly to her, or for the necessaries of life, where the property was parted with on the faith of her promise to pay, and the contract would be a binding and valid contract against her; but it would not be binding merely because it was a contract "with reference to property," but because it is a contract to pay her own debt for her own use and benefit, and, if she failed to pay it, the creditor could collect it by execution, if she ever had prop-

erty subject to execution that he could reach before the bar of the statute of limitations cut him off. Where, however, the debt is not hers, and she has received none of the consideration either for her own use or benefit or that of her separate estate, in order for the contract to be one "with reference to her separate property," within the purview of our statute, the obligation as to her must become one in rem whereby she creates a lien or incumbrance on her separate property for the payment of the debt. In such case the contract clearly becomes one with reference to her separate estate in so far as it obligates that estate, or any part thereof, for the payment of this specific obligation.

The case of *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503, has perhaps been more generally criticised than any other American case in reference to its holding on this specific point, and yet to us its reasoning seems more logical and sound than that contained in any of the opinions that have assumed to criticise it. Among other things, the court there says: "Can, then, the principle on which the liability depends be extended to cases of mere suretyship for the husband or a stranger? It seems to me it cannot. The obligation of a surety in all other cases is held to be stricti juris; and if his contract is void at law, there is no liability in equity founded on the consideration between the principal parties. * * * Why should a married woman be made an exception to this rule? We are to remember that her contract is absolutely void at law, and, when she is a mere surety, there is no equity springing out of the consideration. If the promise is on her own account, if she or her separate estate receive a benefit, equity will lay hold of these circumstances, and compel her property to respond to the engagement. Where these grounds of liability do not exist, there is no principle on which her estate can be made answerable. If we hold that the signing of a note as surety brings a charge upon her estate, we must go further and hold also that her guaranty, her indorsement, her accommodation acceptance, her bail bond, indeed, every conceivable instrument which she may be persuaded to sign, for her husband or others, although absolutely void at law, are so far binding in equity as to charge her property with its payment. This would be a doctrine sustained by no analogies, and opposed to the soundest policy. It would go far to withdraw those checks which are intended to preserve a wife from marital influences, which may be, and often are, unduly exerted, and yet baffle all detection. The doctrine that equity regards her as feme sole in respect to her separate estate only admits that she may dispose of such estate with or without a written consent of her husband, and without the solemnities which the law in other cases requires. But her mere promise to pay money, as we have seen, is not of itself such a disposition. Courts of

equity, proceeding in rem, will take hold of her estate, and appropriate it to the payment of her debts, but when her obligation is one of suretyship merely, she owes no debt at law or in equity; if not at law, which is very clear, then quite as clearly not in equity."

It has been urged that a wife at common law would be liable for a debt like the one sued on here, and that since the statute does not specifically prohibit such a contract, she should be held liable. We would be reluctant to concede such a doctrine. Originally at common law the wife had no separate estate, and could not contract. Later the English Courts of Chancery, through the medium of trusts, began to recognize and allow separate estates to be settled upon married women. Following the allowance of such estates, the Courts of Chancery, irrespective of the feme covert's incapacity to contract, held that, where the promise was made with reference to her separate estate, and she had signified an intention or desire to obligate her estate for a debt where the benefit or consideration moved to her or her estate, the Courts of Chancery would decree the payment of the same out of the separate estate. Controversies, however, arose not infrequently as to whether such obligation should be paid out of the separate estate that the feme covert had at the time the debt was contracted and of the promise to pay, or whether it could be made out of estate coming to her after the obligation was incurred. *Pike v. Fitzgibbon*, and *Martin v. Fitzgibbon*, 6 Eng. Ruling Cases, 56. An examination of the English cases on this subject discloses that, with a very few exceptions, they were cases where the debt was contracted by the wife for her separate use and benefit, or her separate estate, or in reference thereto. It will also be seen on a perusal of those cases that there was no unanimity of opinion as to the true principle to be applied, and that such eminent English chancellors and jurists as Lords Hardwicke, Thurlow, Bathurst, Alvanley, Rosslyn, and Eldon frequently disagreed as to the true principle upon which such decrees rested and as to the facts under which that principle, whatever it was, should be applied. As late as 1873 in *London Chartered Bank of Australia v. Lempriere*, 21 Eng. Ruling Cases, 553, on an appeal from the Supreme Court of the colony of Victoria, the court had under consideration the character of the "engagement" for which a wife's separate property would be held in equity. The diversity of opinion as to the extent of such liability is disclosed by a quotation in the latter case from *Johnson v. Gallagher*, 30 L. J. Ch. 298, wherein the Lord Justice said: "I am not prepared, however, to go to the length of saying that the separate estate will, in all cases, be affected by a mere general engagement. The cases of *Jones v. Harris* and *Agullar v. Agullar* show that the engagement which, if the married woman was a feme sole, the

law would create for repayment of the consideration of a void annuity, would not affect it. It seems to follow that, to affect the separate estate, there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be must, I think, depend in each case upon the circumstances. What might affect the separate estate in the case of a married woman living separate from her husband might not, as I apprehend, affect it in the case of a married woman living with her husband. What might bind the separate estate, if the credit be given to the married woman, would not, as I conceive, bind it if the credit be not so given." The *London Chartered Bank of Australia Case* was cited and distinguished in *Pike v. Fitzgibbon*, supra, wherein it was expressly admitted that there could be no liability against a married woman at common law, and the relief there was granted upon the theory of a "promise" rather than that of a "contract." It will also be noticed that the principle which has been kept uppermost was that the wife received the consideration for the "promise," or that it inured to the use and benefit of her separate estate. In practically every instance where a decree has been allowed against her estate it has been upon the theory—if not express, then implied—that the obligation was one incurred "with reference to her separate estate or property." For interesting American reviews of the English authorities on this subject, see *Ewing v. Smith*, 3 Desaus. (S. C.) 417, 5 Am. Dec. 557; *Jaques v. Trustees 1st Me. Episcopal Church*, 17 Johns. (N. Y.) 548, 8 Am. Dec. 447; *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503; *Yale v. Dederer*, 22 N. Y. 450, 78 Am. Dec. 216; *Cartan v. David*, 18 Nev. 310, 4 Pac. 61.

We conclude that the action of the trial court in entering judgment in favor of the defendant Bowers, and in denying the motion, was correct, and the same is hereby affirmed, costs awarded in favor of respondent.

STEWART, J., concurs.

SULLIVAN, J. (concurring). I concur in the conclusion reached, for, as I view this case, the former opinion rendered by a divided court is the law of the case on the questions decided by my associates on this appeal. For that reason it is not necessary for me to express my views of the questions decided on this appeal.

UNION STOCKYARDS NAT. BANK OF SOUTH OMAHA, NEB., v. BOLAN.

(Supreme Court of Idaho. Jan. 14, 1908.)

1. CORPORATIONS—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS.

Where the indorsee of a promissory note sues the maker thereof, and the defendant sets up as one of his defenses that the payee was a

foreign corporation doing business in this state, and that it failed to comply with the Constitution and statutes of the state in designating an agent upon whom service of process could be made, and in filing copies of its articles of incorporation, it is error for the court to strike such defense from defendant's answer.

2. BILLS AND NOTES—"NEGOTIABLE PROMISSORY NOTE."

A promissory note containing a stipulation whereby the sureties, guarantors, indorsers, and makers waive notice of the granting of any extension of time for payment, and waive the right of defense on the ground that extension has been made without notice to them or either of them, is not a "negotiable promissory note," within the meaning and intent of the negotiable instrument law of this state. Sess. Laws 1903, p. 380.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4770-4771.]

3. SAME — DEFENSES TO NONNEGOTIABLE NOTE.

The note sued upon in this case being a nonnegotiable promissory note is subject to all the defenses and equities in favor of the maker, while in the hands of the indorsee, to the same extent and effect as if in the hands of the payee named therein.

(Syllabus by the Court.)

Appeal from District Court, Washington County; Frank J. Smith, Judge.

Action by the Union Stockyards National Bank of South Omaha, Neb., against J. H. Bolan. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Rhea & Son, for appellant. Harris & Smith, for respondent.

AILSHIE, C. J. This action was commenced by the respondent as the indorsee of a promissory note made and executed by the appellant in the following form:

"\$900.00

No. 0187.

"Cambridge, Idaho, May 8, 1903.

"Six months after date, for value received, I, we, or either of us jointly and severally promise to pay to the order of Uinta Hereford Cattle Company the sum of nine hundred dollars, with interest at the rate of ten per centum per annum from date until paid.

"Payable at the office of the Peoples' Bank, Salubria, Idaho.

"Should this note be collected by suit, ten per cent. shall be allowed holder as attorney fee. The sureties, guarantors, and indorsers of this note severally waive presentation for payment, protest and notice of protest. No extension of time of payment with or without our knowledge by the receipt of interest or otherwise shall release us or either of us from the obligation of payment.

"J. H. Bolan."

The plaintiff alleged that it was a bona fide purchaser of this note for value before maturity, and received it in the due and ordinary course of business. Defendant answered, admitting the execution and delivery of the note, but denied that the plaintiff was a bona fide purchaser of the note for value and in the due course of business. He alleg-

ed as a defense to the action that the note was executed in payment for certain live stock purchased by him from the payee of the note, the Uinta Hereford Cattle Company, and that the stock purchased were not up to the guaranty furnished him by the company at the time of the sale, and he thereupon claimed damages in the sum of \$1,000. He also alleged that the Uinta Hereford Cattle Company was a foreign corporation, organized and existing under the laws of the state of Nebraska, and that it was on the date of the execution of the note, and had been for a long time previous thereto, doing business in the state of Idaho, and that it had failed and neglected to comply with the laws of this state in filing certified copies of its articles of incorporation and the designation of an agent upon whom process could be served, and that it never at any time made any designation of an agent in any county of this state upon whom process might be served. Other matters were pleaded in defense and as counterclaims to plaintiff's cause of action. On motion of the plaintiff, the court struck from defendant's answer all the allegations with reference to the Uinta Hereford Cattle Company being a foreign corporation, and failing and neglecting to comply with the laws of this state in designating an agent upon whom service of process might be made, and filing a certified copy of its articles of incorporation. Defendant took an exception to the ruling of the court, and assigns the same as error. After the plaintiff had submitted its proofs at the trial the defendant moved for a nonsuit upon the grounds, among other things, that it appeared from the evidence introduced by the plaintiff that the Uinta Hereford Cattle Company was a foreign corporation, organized under the laws of the state of Nebraska, and that the plaintiff had failed to prove that such corporation had complied with section 10 of article 11 of the Constitution of the state of Idaho, and the act of the Legislature in reference to foreign corporations doing business in this state. The motion was denied by the court, whereupon the defendant asked leave to file an amended answer again setting up the facts as to the Uinta Hereford Cattle Company being a foreign corporation doing business within this state, and having failed and neglected to comply with the Constitution and statutes in reference to foreign corporations doing business within the state. Thereupon defendant offered to pay the actual costs that had been incurred, in the case, in the event it became necessary for a continuance over the term on account of such amendment. The motion and application were denied by the court, and the defendant excepted, and assigns the action of the court as error on this appeal.

It was clearly error on the part of the court to sustain plaintiff's motion and strike from defendant's answer that part of his defense setting up the failure of the Uinta

Hereford Cattle Company to comply with the Constitution and statutes of this state in the designation of an agent on whom process could be served, and filing its articles of incorporation. He had an undoubted right to interpose such a defense. *Katz v. Herrick*, 12 Idaho, 1, 86 Pac. 873; *Valley Lumber Co. v. Driessel* (Idaho) 93 Pac. 765; *Valley Lumber Co. v. Nickerson* (Idaho) 93 Pac. 24. It was also an abuse of discretion on the part of the court, after it had erroneously granted the motion to strike this defense from defendant's answer, to deny the defendant's motion and application to amend his answer setting up this defense.

On the trial of this case the most important and decisive question that arose was that as to whether the plaintiff, Union Stockyards National Bank of South Omaha, was a bona fide purchaser for value in due course of business, within the meaning of the law, so as to preclude the defendant from setting up equities that existed between him and the Uinta Hereford Cattle Company, the payee named in the note. The test to be applied, therefore, in this case is: Was the note sued on a negotiable instrument within the meaning of the statute of this state defining and governing such instruments? Sess. Laws 1903, p. 380. We may note in passing that the uniform negotiable instrument law is in substance merely a codification of the law-merchant on the subject. Appellant contends that since the note sued on contained an express waiver on the part of the sureties, guarantors, indorsers and maker of any and all rights of defense on account of extensions of time of payment of the note, it thereby rendered the note nonnegotiable. Subdivision 3 of section 1 of the negotiable instrument law requires that an instrument in order to be negotiable "must be payable on demand or at a fixed or determinable future time." Section 4 of the act provides as follows: "An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable: First, at a fixed rate period after date or sight; or, second, on or before a fixed or determinable future time specified therein, or, third, on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

Section 184 of the act defines a negotiable promissory note, and, among other requisites, provides that it must engage "to pay on demand or at a fixed or determinable future time a sum certain in money, to order or to bearer." The note sued on in this case cannot be said to comply with these provisions of the statute. Its closing sentence provides that, "No extension of time of payment, with or without our knowledge, by the receipt of

interest or otherwise, shall release us or either of us from the obligation of payment." This is an express contract to the effect that the time of payment may be extended to any one or all of the sureties, guarantors, indorsers, or makers of the note without notice to all or any one of them. This undoubtedly renders the note nonnegotiable under all the authorities that have been brought to our attention on the subject. By section 52 of the act (Sess. Laws 1903, p. 389), in order to establish that one is "a holder in due course" of commercial paper, the instrument must be "complete and regular upon its face." In *Matchett v. Anderson Foundry & Machine Works*, 29 Ind. App. 207, 64 N. E. 229, 94 Am. St. Rep. 272, the note provided that "the drawers and indorsers severally waived presentment for payment, protest, and notice of protest, and on payment of this note, and all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them or either of them." In that case the Indiana Court of Appeals held that the note was nonnegotiable, and was subject to defense on all the equities that the maker held against the payee. It will be noticed by comparison that the stipulation contained in that note is almost identical with the stipulation in the note at bar, and was to the same effect as the one here. For other cases in point, see *Smith v. Van Blarcom*, 45 Mich. 371, 8 N. W. 90; *Citizens' National Bank v. PloMet*, 126 Pa. 194, 7 Atl. 603, 4 L. R. A. 190, 12 Am. St. Rep. 860; *Miller v. Poage*, 56 Iowa, 96, 8 N. W. 799, 41 Am. Rep. 82; *Woodbury v. Roberts*, 59 Iowa, 348, 13 N. W. 812, 44 Am. Rep. 685; *Glidden v. Henry*, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316; *Mitchell v. St. Mary*, 148 Ind. 111, 47 N. E. 224; *Second Nat. Bank of Richmond v. Wheeler*, 75 Mich. 546, 42 N. W. 963.

The note is nonnegotiable, and the indorsee holds it subject to all the equities, counterclaims, and defenses that existed between the maker (Bolan) and the payee (Uinta Hereford Cattle Company). *Eaton & Gilbert on Commercial Paper*, § 71, p. 354, and cases cited; 2 A. & E. Ency. (2d Ed.) 253. As to the sufficiency or merit of the defense set up on the alleged guaranty of the live stock and damages claimed, we express no opinion as that question is not properly before us.

The conclusion we have reached on the foregoing questions renders it unnecessary for us to consider or pass upon any of the other assignments of error presented on this appeal. The judgment must be reversed, and it is so ordered, and the cause is remanded to the district court, with direction to permit the parties to amend their pleadings if they so desire, and to grant them a new trial; costs awarded in favor of appellant.

SULLIVAN and STEWART, JJ., concur.

BACON v. RICE.

(Supreme Court of Idaho. Jan. 17, 1908.)

1. PLEADING—ANSWER—CROSS-COMPLAINT.

Under the provisions of section 4188 of the Revised Statutes of 1887 the defendant may, in addition to his answer, file a cross-complaint demanding affirmative relief affecting the property to which the action relates.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 299.]

2. QUIETING TITLE—CROSS-COMPLAINT.

The sufficiency of a cross-complaint, in an action to quiet title, is determined by the same rules as the sufficiency of the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 80.]

3. SAME.

In an action to quiet title, where a defendant relies upon title in himself, a cross-complaint is not necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 80.]

4. SAME.

In an action to quiet title, where the defendant seeks to enforce an equitable title against the plaintiff as the holder of the legal title, a cross-complaint is proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 80.]

5. SAME.

In an action to quiet title, the defendant may put in issue the plaintiff's right to recover by denials alone; but, where he seeks affirmative relief, to have the title quieted in himself as against the plaintiff, it is necessary that he file a cross-complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 80.]

6. CONSTITUTIONAL LAW—WAIVING CONSTITUTIONAL QUESTION—TAXATION—TAX SALE—DEED—IMPEACHMENT.

Where the defendant pleads title by reason of a tax sale and a tax deed issued thereon, and it appears that the law governing the assessment and sale of property for taxes has been substantially complied with, the original owner of the property cannot question the constitutionality of the law under which the sale was made, where he has not been misled, and had permitted the property to be sold for delinquent taxes, and the purchaser to take possession thereof, and pay taxes thereon for a period of 12 years, during which time he has taken no steps to call in question the validity of such sale, or the title acquired thereunder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 41.]

(Syllabus by the Court.)

Appeal from District Court, Fremont County; J. M. Stevens, Judge.

Action by Lemuel J. Rice against Harvey M. Bacon. Judgment for plaintiff. Defendant appeals. Affirmed.

Soule & Soule, for appellant. J. D. Millsaps, for respondent.

STEWART, J. This is an action brought under the provisions of section 4538 of the Revised Statutes of 1887 of this state, which provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." The complaint is in the ordinary form of an action to quiet title. The

plaintiff alleges that for more than 15 years immediately preceding the commencement of the action he has been the owner and in possession of and claims title in fee to the land described; that the defendant claims some estate, right, title, or interest in or to the premises, the nature and extent of which is unknown to the plaintiff, unless it be that the defendant claims the title or interest through and by virtue of a quitclaim deed from one Bird H. Miller and Rose D. Miller, his wife, purporting to convey the premises to the defendant; and the plaintiff alleges that, if defendant claims title through said deed, said Bird H. Miller and Rose D. Miller had no title to said land conveyed or attempted to be conveyed by said quitclaim deed, and that the claim or claims of the defendant are without right or title. To this complaint the defendant answered, denying specifically the allegations of the complaint, except admitting that the defendant claims an estate and title to said premises, and admits that he claims title by virtue of a quitclaim deed from one Bird H. Miller, and denies that Miller had no title to said premises. And for cross-complaint the defendant alleges that said premises were sold at tax sale to the county of Fremont for nonpayment of taxes for the years 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, and 1903, and that Fremont county assigned the certificates of tax sale to one Bird H. Miller; that on the 14th day of July, 1905, the assessor and ex officio tax collector of Fremont county made, executed, and delivered to said Bird H. Miller a tax deed to said premises for the delinquent taxes upon said property for the years 1895, 1896, and 1897, and on the same day executed another tax deed to said Bird H. Miller for said premises for the delinquent taxes for the year 1898, and on the 25th day of September, 1905, Bird H. Miller and wife conveyed said premises to this defendant by quitclaim deed. The defendant further alleges that he is the owner of said premises, and has been since the 3d day of October 1905, the date of the delivery of the deed from Bird H. Miller to this defendant, and since which date he has been in the possession, holding and claiming adversely to the plaintiff and adversely to all other persons, the lands and premises described in the pleadings and in the Miller deed; and that at the commencement of this suit the defendant and his grantors for more than five years had been in the quiet and peaceable possession, claiming the same under color of right and title open and notoriously to the plaintiff and all the world, and that defendant paid all the taxes assessed against said premises, and that the plaintiff has no right or title to the same, from which he prays that his title be quieted. To this cross-complaint the plaintiff filed a motion for an order requiring that the defendant make his cross-complaint on file more definite and certain by separating and stating the different causes of action set out,

contending that, inasmuch as the cross-complaint sets up several tax-sale certificates and two separate tax deeds, each tax-sale certificate and tax deed constitutes a separate cause of action, and that the cross-complaint should plead a separate cause of action upon each tax certificate and tax deed. The plaintiff also filed a demurrer to the cross-complaint, setting forth practically the same grounds as the motion. Both the motion and the demurrer were overruled by the court.

The appellant assigns as error No. 1 the action of the court in denying the motion of the appellant to require the defendant to make his cross-complaint more definite and certain. Under the provisions of section 4188 of the Revised Statutes of 1887 the defendant may, in addition to his answer, file a cross-complaint demanding affirmative relief affecting the property to which the action relates. The defendant in his cross-complaint was required to state all, but no more, than the plaintiff was required to state in his complaint. The cross-complaint asked for the same relief as the complaint. Its sufficiency is to be determined by the same rules of pleading as the complaint. It was unnecessary in the cross-complaint to set forth the evidence by which the cross-complainant expected to prove his title. He might have contented himself by alleging ownership and possession, and, under such allegations, have proven his title, the same as the plaintiff could prove his title under similar allegations. The defendant has gone further than the law required him to do by stating the proof upon which he based his title. A cross-complaint must, like a complaint, state facts sufficient to entitle the pleader to affirmative relief. Like a complaint, it must itself contain all the requisite facts. *Coulthurst v. Coulthurst*, 58 Cal. 239; *Collins v. Bartlett*, 44 Cal. 371; *Kreichbaum v. Melton*, 49 Cal. 50. In an action to quiet title, where defendant relies upon title in himself, a cross-complaint is not necessary. *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Mining Co. v. Mining Co.*, 83 Cal. 589, 23 Pac. 1102; *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637. However, in an action to quiet title, where the defendant seeks to enforce an equitable title against the plaintiff as a holder of the legal title, a cross-complaint is proper. *Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243. In this case the defendant might have put in issue the plaintiff's right to recover by denials alone. However, if the defendant desired to have title quieted in himself as against the plaintiff, it was necessary that he file a cross-complaint. In the cross-complaint he was not required to state facts any more elaborately than he would have been required to have stated such facts, had the defendant brought an action originally against the plaintiff to quiet title. It was therefore not necessary for the defendant to plead the several tax certificates and tax deeds which he set forth in his cross-complaint, as the same

are muniments of title and need not be plead. The cause of action set forth in defendant's cross-complaint was his title or interest in the lands involved. The tax certificates and deeds were the evidence offered to support that interest or title. There was but one cause of action. The court committed no error in overruling the motion and demurrer.

The appellant assigns as error in specifications from 3 to 12, inclusive, the action of the court in admitting in evidence certain tax-sale certificates, contending that under the statute a tax-sale certificate is not admissible for the purpose of establishing title to land. This is correct. Under section 1547 of the Revised Statutes of 1887, as amended by Laws 1899, p. 267, and Laws 1901, p. 276, § 126, the tax-sale certificate vests in the purchaser only a lien for the sum paid. In this case the defendant having alleged in his cross-complaint the sale of the property in controversy for taxes, the issuing of certificates of sale therefor, and the acquisition of the interests covered by such certificates by this defendant, the defendant was entitled to introduce such certificates for the purpose of showing that the plaintiff was not entitled to have his title quieted as against this defendant, without first discharging such lien covered by such tax certificates, and upon that ground alone such tax certificates were admissible in evidence.

The plaintiff, however, contends that, inasmuch as the defendant has plead title under such issue, he could not prove a lien upon the premises in controversy. This contention is not sound. While the defendant alleges title in fee, yet, if in the trial of the case it should develop that he does not own a title in fee, but does own a lien upon the premises which has not been discharged by the plaintiff under the general issue, he could prove such fact, and thereby defeat the plaintiff's right to have his title quieted as against said lien. In this case the tax certificates clearly established a lien, and in no event could the plaintiff recover as against such liens without discharging the same. *Brandt v. Thompson*, 91 Cal. 458, 27 Pac. 763; *De Cazara v. Orena*, 80 Cal. 132, 22 Pac. 74.

Error No. 13 specifies the action of the court in admitting in evidence the assignment of the tax-sale certificate by the board of county commissioners of Fremont county to Bird H. Miller. Specifications 14 and 15 relate to the admission in evidence of the two tax deeds. We will discuss these three errors together. The appellant contends that the tax sales were void, therefore the county had no interest to assign to Bird H. Miller, the grantor of the defendant. This argument is based upon the contention that the tax-sale certificates for the years 1895, 1896, 1897, and 1898, and the tax deed issued thereon, show upon their face, first, that the county was a competitive bidder at each of said sales; second, that notice of sale was never published as required by law for either of

said sales; third, that they do not show or recite when the purchaser will be entitled to a deed. The first contention is based upon the provisions of section 1539 of the Revised Statutes of 1887, as amended by Laws 1901, p. 274, § 118, which reads: "But in case there is no purchaser in good faith for a portion not less than the whole of the property embraced in any one separate description, the assessor may sell the whole thereof, and if there is then no purchaser on the first day that the property is offered for sale, then when the property is offered thereafter for sale, and there is no purchaser in good faith of the same, the whole amount of the property assessed in any or separate description shall be struck off to the county or the purchaser, and the duplicate certificate delivered to the county treasurer and filed by him in his office." The first tax certificate, which is common as to all, except as to dates, among other things, recites: "After due and legal notice as required by said chapter, on the 9th day of July, 1896, in accordance with law, offered for sale to pay said taxes at public auction, in front of the county courthouse of said county, that at said auction Fremont county was a bidder who was willing to take the least quantity or smallest portion of the interest in said land and pay the taxes, costs, etc., * * * and said property was by me, J. C. Brannan, assessor and tax collector, struck off to the said Fremont county, who paid the full amount of said taxes, etc." The tax deed recites, among other things, the time of publication of the delinquent tax list upon which said sale was based, and also: "And there was no purchaser for the same who was willing to take the least quantity or smallest part of said property and pay said taxes and costs as provided by law, therefore the whole amount of said property was by said assessor, at the proper time and place, struck off to Fremont county," and "that such property was sold subject to redemption within two years from the date of any one of said sales."

The argument of counsel is that under the provisions of section 1539, *supra*, as amended, the county should have offered said property for sale on one day, and if there was no bidder at such sale, to have waited until the next day before it was again offered or could be purchased by the county. To support this contention, we are cited to a statute of the state of Colorado construed by the Supreme Court of that state. There is a very wide difference between the statutes of Colorado and of this state upon this subject. Sess. Laws Colo. 1879, p. 155, reads: "If there shall be no bid for any tract offered, the treasurer shall pass it over for the time and shall re-offer it at the beginning of the sale next day, until all tracts are sold." The statute of this state, however, does not provide that it shall be first offered, and if not sold, that it may be offered on the next day, and the county may become the purchaser.

The statute of this state provides "that the assessor may sell the whole thereof, and if there is then no purchaser on the first day that the property is offered for sale, then when the property is offered thereafter for sale and there is no purchaser, the same may be struck off to the county." In other words, this statute requires the assessor to first offer the property generally, and if there is no offer to purchase, then he may again offer the property upon the same day or, at any time subsequent to the first offer, and if there be no purchaser, then the same may be struck off to the county. We think it sufficiently appears from the certificates of tax sale and the deed that this course was substantially pursued in the sales covered by said certificates, and that the county was not a competitive bidder.

The contention that the notice of sale for delinquent taxes, and that the certificates do not show when the purchaser will be entitled to a deed, may be considered together, and are based upon the contention that, while it is true, that the first tax sale was regular, and the certificate issued in accordance with the law, as it appeared upon the statute books, and that the deed was regular and made in accordance with the law as it appeared on the statute books, yet, inasmuch as the certificates and deed show upon their face that the sale was conducted, and such certificate and deed issued under the provision of section 1530 of the Revised Statutes of 1887 of this state, as amended by Laws 1895, p. 101, and Rev. St. 1887, § 1532, as amended by Laws 1891, p. 235, the charge is made that such amendatory acts have not been passed as required by the Constitution of this state, therefore the sale and deed are void, and the defendant acquired no title to said property.

Counsel also contends that the deeds are void for the reason that the property was sold subject to redemption within two years from date of sale, as provided by the amendment of section 1548, p. 101, Laws 1895, while the original section before amendment allows one year from the date of purchase for redemption, and that said amendment was not passed according to the requirements of the Constitution.

Rev. St. 1887, § 1544, provides: "After receiving the amount of the taxes and costs, the collector must make out in duplicate a certificate, dated on the day of sale, stating (when known) the name of the person assessed, a description of the land sold, the amount paid therefor, that it was sold for taxes, giving the amount and year of the assessment, and specifying the time when the purchaser will be entitled to a deed."

Rev. St. 1887, § 1555, provides: "The matters recited in the certificate of sale must be recited in the deed, and such deed, duly acknowledged or proved, is prima facie evidence that: (1) The property was assessed as required by law; (2) the property was equalized as required by law; (3) the tax-

es were levied in accordance with law; (4) the taxes were not paid; (5) at a proper time and place the property was sold as prescribed by law, and by the proper officer; (6) the property was not redeemed; (7) the person who executed the deed was the proper officer; (8) where the real estate was sold to pay taxes on personal property, that the real estate belonged to the person liable to pay the tax."

And Rev. St. 1887, § 1556, provides: "Such deed duly acknowledged or proved is (except as against actual fraud) conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed."

It will thus be seen that the tax certificate and tax deed to which objection is made recite facts which it was not necessary to recite in either. The statute makes certain matters in the deed prima facie evidence of certain facts, and conclusive evidence as to certain other facts, and requires the deed to recite the matters required to be recited in the certificate of sale. But, assuming that under the recitals in the tax certificate and deed the officers acted under the authority of the amendatory acts, which counsel claim are unconstitutional, yet we do not believe that the appellant is in a position to question the constitutionality of such acts. It will be observed that this property was assessed for taxes in the year 1895, and that it was sold in July, 1896, for the delinquent taxes for the year 1895. It was appellant's duty to bear his share of the burdens of taxation. He knew what the law was. He knew that his property was subject to taxation. He knew that taxes became delinquent once a year, yet from the year 1895 until after this action was commenced the appellant gave no attention whatever to the duty imposed upon him to discharge his share of the burdens of taxation. From the evidence it appears that he made no inquiry about the taxes, that he never offered any payment, and that he never ascertained whether the property had been sold. He permitted others to pay the taxes. He stood by and permitted a tax deed to be issued in 1905 for the delinquent taxes for the year 1895. From 1895 up until this suit was commenced, August 6, 1906, the plaintiff exercised no fixed, specific ownership over the property in controversy. His possession was casual and questionable, and after the execution of the tax deed in 1905 the defendant appears to have been in possession, and long before that the plaintiff's possession was divided with others.

Under all the facts in this case we are clearly of the opinion that the appellant is not in a position to raise the constitutionality of the acts in question. The appellant is certainly guilty of such laches in paying his taxes and asserting his right and ownership to this property that he should not now be permitted to come into a court of equity and ask that such silence be permitted to inure

to his benefit. What constitutes laches depends upon the circumstances of each case. No arbitrary rule exists, and it is for the courts to determine from all the facts and circumstances surrounding each particular case whether or not the party is guilty of laches. 16 Cyc. 152. *Sayers v. Burkhardt*, 85 Fed. 246, 29 C. C. A. 137. As was said by the Supreme Court of Illinois in the case of *Oakley v. Hurlbut*, 100 Ill. 204, where the owner of property suffers the same to be sold for taxes, and the purchaser takes possession and pays taxes for the period of 12 years, the owner will not be heard to allege under such circumstances that he was injured in that way. In this case the respondent and his grantor have paid the taxes from 1895 to the commencement of this suit, and the appellant has never paid one cent of taxes. A person may by his own acts, or by his own omission to act, waive a right which he might otherwise have under the provisions of the Constitution. 8 Cyc. 791. The certificate of sale issued in July, 1896, for the delinquent taxes for the year 1895 is not void, and the deed made in April, 1905, upon said tax sale certificate, even though the tax deed covers sales for other years, would not for that reason be void. While it is true that after property has once been sold for delinquent taxes to the county, it cannot again be offered for sale during the period of redemption, still if the sale in 1896 was valid, and the deed issued thereon is valid, it is immaterial whether the subsequent sales are valid or not. The grantee's title would be complete under the sale made in 1896 for the delinquent taxes for the year 1895, and the deed issued thereon. In the case of the *Co-operative Savings & Loan Ass'n v. Green*, 5 Idaho, 660, 51 Pac. 770, this court, speaking through Justice Sullivan, says: "Substantial compliance with the requirements of the law in making assessment is all that is necessary. If property is subject to taxation, it cannot escape through some technical failure of the officer to perform his duty, unless it has actually misled the party to his injury."

The appellant not being in a position to question the regularity of the passage of the amendatory acts under which the tax sale was held and the certificate and deed issued, and the law having been substantially complied with, and it appearing that the appellant has in no way been misled, we are clearly of the opinion that he should not escape the provisions of the law as to the taxation of his property and the divestment of title thereunder. The law having been substantially complied with, and the sale of 1896 for the delinquent taxes for 1895 being valid, the court committed no error in holding that the plaintiff had been divested of his title to said property.

The judgment of the lower court will be affirmed with costs.

AILSHIE, C. J., and SULLIVAN, J., concur.

STATE ex rel. THOMPSON v. BOARD OF
DENTAL EXAMINERS OF WASH-
INGTON et al.

(Supreme Court of Washington. Jan. 15, 1908.)

PHYSICIANS AND SURGEONS — DENTISTRY —
PRACTICE—REGULATIONS.

3 Ballinger's Ann. Codes & St. § 3025 [Pierce's Code, § 4467], requiring any person desiring to practice dentistry to take an examination before the state board of dental examiners, and providing that no person shall be eligible for such examination unless he presents a diploma from some dental college, is not invalid on the ground that the requirement for both diploma and examination is unreasonable, the right to determine what requirements must be met by an applicant being within the exclusive province of the Legislature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Physicians and Surgeons, § 1.]

Appeal from Superior Court, King County;
R. B. Albertson, Judge.

Mandamus by the state, on the relation of E. G. Thompson, against the Board of Dental Examiners of Washington and others, to compel the issuance of a license to practice dentistry in the event relator successfully passes an examination. From a judgment of dismissal, relator appeals. Affirmed.

John R. Parker and Edwin J. Brown, for appellant. Walter M. Harvey, for respondents.

CROW, J. E. G. Thompson, as relator, made application to the superior court of King county for a writ of mandamus to compel W. A. Fishburn, C. S. Irwin, F. R. Fisk, H. B. Brand, and E. B. Edgars, the State Board of Dental Examiners, to examine him touching his qualifications to practice dentistry in the state of Washington, and to further compel such board to issue to him a license to practice dentistry in the event that he successfully passes such examination. The defendants interposed a demurrer to his affidavit, which was sustained by the trial court. Thereupon the relator declined to plead further, and an order of dismissal was entered, from which he has appealed.

It is not necessary to state the allegations of the affidavit upon which the appellant based his application for the writ, as the only defect sought to be reached by the demurrer was appellant's failure to allege that when he filed his application, paid his fee, and presented himself for examination, he also presented to the respondents his diploma from some dental college in good standing, with satisfactory evidence of his rightful possession of the same. It is not contended by the respondents that appellant's affidavit is defective for the want of any other allegation, and for the purposes of this case it is conceded that he has no such diploma. Section 3025, 3 Ballinger's Ann. Codes & St. (section 4467, Pierce's Code), provides that: "Any person or persons seeking to practice dentistry in the state of Washington * * * after the passage of this act shall file his or

her name, together with an application for examination, with the secretary of the State Board of Dental Examiners, and at the time of making such application shall pay to the secretary of the board a fee of twenty-five dollars, and to present him or herself at the first regular meeting thereafter of said board to undergo examination before that body. No persons shall be eligible for such examination unless he or she shall be of good moral character and shall present to said board his or her diploma from some dental college in good standing and shall give satisfactory evidence of his or her rightful possession of the same. * * * The appellant's only contention is that the provision of the above section requiring him to present his diploma as a condition precedent to taking the examination is unconstitutional and void. He has alleged that he has sufficient skill, learning, and experience to enable him to pass any reasonable or proper examination and fit him for the practice of dentistry. He does not question the right of the state to regulate the practice of dentistry, and thereby protect the public from ignorant and incompetent persons who may wrongfully and fraudulently announce themselves as qualified and skillful practitioners. In fact, he substantially concedes that the Legislature may, by reasonable enactments, provide appropriate regulations under which only such persons as are competent may be authorized to practice. Appellant's apparent position is that, while a valid statute might be enacted requiring him to either pass an examination or present a diploma from some dental college in good standing, it cannot compel him to do both without invading his constitutional rights. In other words, he contends that, if he has, as admitted by the demurrer, sufficient skill and knowledge to fit him for the practice, and is able and willing to pass the examination, he cannot also be required to present a diploma to the board as a condition precedent to being permitted to take such examination. The statute makes the same requirements of all applicants for examination. No favored or preferred classes are created or recognized. An applicant who holds a diploma must also pass the examination. Rightful possession of his diploma does not of itself authorize him to practice, or entitle him to a license. The requirement for both diploma and examination as a test of knowledge and skill is not such an unreasonable or arbitrary one as to invalidate the statute. The right to determine what requirements must be met by an applicant is within the exclusive province of the Legislature. This statute was considered in the case of *In re Thompson*, 30 Wash. 377, 78 Pac. 899, in which it was attacked as unconstitutional, and sustained by this court. Without further discussion, we now adhere to the ruling then made. The appellant contends that case is not in point on the question now presented, but we fall

to see any substantial distinction in the principles involved.

The judgment is affirmed.

HADLEY, C. J., and ROOT, FULLERTON, and MOUNT, JJ., concur.

JOHNSON v. GREAT NORTHERN LUMBER CO.

(Supreme Court of Washington. Jan. 20, 1908.)

1. APPEAL—VERDICT—CONCLUSIVENESS.

A verdict, approved by the trial court, will not be disturbed as against the testimony of a witness not directly contradicted by facts on the face of the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3948-3950.]

2. MASTER AND SERVANT—INDEPENDENT CONTRACTOR—EXISTENCE OF RELATION.

Evidence held to support a finding that an individual was not an independent contractor and the employer was liable to an employé for injuries resulting from the individual's negligence.

Appeal from Superior Court, Skagit County; George A. Joiner, Judge.

Action by Gus Johnson against the Great Northern Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Kerr & McCord, for appellant.

FULLERTON, J. The respondent brought this action to recover for personal injuries, received by him while in the employ of the appellant, and which he alleges were caused by the negligent acts of persons for whose acts the appellant is responsible. The undisputed evidence is that the appellant was engaged in the operation of a sawmill, and that the respondent was one of its employés; that the appellant desired to enlarge its mill, and employed one Veratt to excavate some earth and rock that were in the way of the installation of some additional boilers; that Veratt undertook to remove the rock by blasting, and in so doing fired a blast without notice to respondent and while respondent was in the mill adjoining engaged in his usual occupation; that the blast threw great quantities of the broken rock into the air, some of which came down through the roof of the mill and struck the respondent, severely and permanently injuring him. The appellant defended on the ground, among others, that Veratt was an independent contractor, and that the negligence which caused the respondent's injury, if any negligence there was, was Veratt's negligence, for which Veratt alone is responsible, and for which the appellant is not liable. The appellant's superintendent testified that he made the contract for removing the rock with Veratt, and that the contract was to the effect that Veratt should do the work on his own responsibility, being responsible to the appellant only for its results. At the conclusion of the case the appellant challenged the sufficiency of

the evidence, and moved the court to discharge the jury and enter judgment in favor of the appellant. The challenge and motion were denied, and the cause was submitted to the jury under an instruction to the effect that if they found that Veratt was an independent contractor the appellant was not responsible for any injury occurring because of his negligent acts. The jury returned a verdict in favor of the respondent for \$3,000, on which judgment was afterwards entered, and this appeal was taken from the judgment so entered.

The appellant contends that there was no contradiction, either directly or indirectly, of the evidence on its part tending to show that Veratt was an independent contractor, and that in consequence the court erred in submitting the question to the determination of the jury, and that it is entitled for that reason to a reversal of the judgment by this court, with a direction to the court below to enter judgment in its favor. The appellant does not complain that there was any error in the court's instruction defining an independent contractor. On the contrary, it quotes the instruction in its brief in full, and expressly states in its comment thereon that it correctly states the law. It bases its claim of error entirely on the fact that its evidence on this particular point was wholly uncontradicted. But it seems to us that, if we concede that the appellant's witness did testify to facts sufficient to show that Veratt was an independent contractor, and that there is nothing on the face of the record that directly contradicts him, it still would be going too far for this court to reverse the cause, and direct a judgment in favor of the appellant.

There still remains the question of the credibility of the witness. This was a question peculiarly within the province of the lower court and the jury to determine. They had the witness before them. They could observe his conduct upon the witness stand, his apparent frankness or lack of frankness, and his demeanor generally. These matters are not depicted in the record, and this court is without opportunity to know how far the witness' credibility was affected by them. When, therefore, the trial judge and the jury both find that his evidence was not sufficient to overcome the case made by the respondent, this court ought not to interfere with their finding. But we think the record itself discloses matters that suggest, to say the least, the improbability of the witness' story. The contract as related by the witness was singularly incomplete. The contract provided that the appellant should furnish the powder, the tools, and such helpers as Veratt might require in the performance of the work at its own cost and expense, and fixed Veratt's compensation at a given sum, yet it placed no limitation whatever on the quantity of powder, the character of the tools, or the number of helpers Veratt might lawfully exact under it. It provided also that Veratt might hire and dis-

charge his helpers, but was silent as to the wages he might lawfully contract on the appellant's behalf to pay them. It may be that in a contract of this nature a reasonable limitation would be implied as to the matters not expressly stipulated for, but this does not meet the point. The lack of agreement in matters so essential tends to impeach the good faith of the contract. It leads to the conclusion that it was either a mere subterfuge to avoid liability on the part of the appellant, or that it was an afterthought on the part of the witness. Veratt was dead at the time of the trial, but it is in the record that he had no very high regard of the obligation he assumed by virtue of the contract. He worked on the job at most only a day and a half before the accident, and quit the morning after.

But it is needless to discuss the matter further. The judgment should be affirmed, and it will be so ordered.

HADLEY, C. J., and RUDKIN, MOUNT, and CROW, JJ., concur.

McCART v. RACINE WOOLEN MILLS, BLAKE & CO.

(Supreme Court of Washington. Jan. 17, 1908.)

APPEAL—CONTENTS OF RECORD—AFFIDAVITS.

An appeal from an order quashing service of summons, the order being based on conflicting affidavits, must be dismissed, where the affidavits are not taken to the Supreme Court by a bill of exceptions or a statement of facts as required by statute; it being insufficient to have the affidavits certified by the clerk as a part of the transcript and to procure a certificate of the judge below that the affidavits were presented to, and examined and passed upon, by the court at the hearing of the motion to quash.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2372-2374.]

Appeal from Superior Court, Spokane County; Miles Poindexter, Judge.

Action by Thomas McCart against the Racine Woollen Mills, Blake & Company. From an order quashing the service of summons, plaintiff appeals. Appeal dismissed.

S. P. Domer, for appellant. Henley & Kelam, for respondent.

PER CURIAM. This is an appeal from an order quashing the service of summons. The notice to quash was heard on affidavits which accompanied the motion, affidavits in answer thereto, and affidavits in reply to the answering affidavits. The respondent moves to dismiss the appeal. The motion must be granted. This court has repeatedly held that it cannot review a question of fact, based upon affidavits, unless the affidavits are brought before the court by the method provided by law for bringing evidence into this court. This was not done in this case. The appellant caused the affidavits to be certified by the clerk as a part of the transcript, and procured a certificate of the judge certifying that the affidavits were "presented to the

court, and examined, and passed upon by the court at the hearing of said motion," but this does not comply with the statute. The statute requires that evidence be brought into this court by a bill of exceptions or a statement of facts. *Jacobson v. Lunn*, 16 Wash. 487, 48 Pac. 237; *State v. Anderson*, 20 Wash. 193, 55 Pac. 39; *Chevalier & Co. v. Wilson*, 30 Wash. 227, 70 Pac. 487; *Anderson v. McGregor*, 36 Wash. 124, 78 Pac. 776; *Soder v. Adams Hardware Co.*, 38 Wash. 607, 80 Pac. 775; *Taylor v. Modern Woodmen of America*, 42 Wash. 304, 84 Pac. 867.

The appeal is dismissed.

RENARD et al. v. CITY OF SPOKANE.

(Supreme Court of Washington. Jan. 20, 1908.)

1. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS — SPECIAL ASSESSMENTS — OBJECTIONS—SCOPE—REVIEW.

Objections to a special assessment for street improvement, that the improvement made differed materially from that petitioned for, and that the wives of the petitioners did not sign with their husbands where community property was involved, affected only the regularity of the proceedings in ordering the improvement, and the regularity of the assessment, and not the jurisdiction of the city council to order the improvement or levy the assessment, and could not be reviewed, unless proper written objections were filed, as required by Laws 1901, p. 240, c. 118, § 2.

2. SAME—RIGHT OF APPEAL—LIMITATION.

The right of appeal from a special assessment for street improvement is purely statutory, and is limited to those who have filed objections to the assessment roll before the city council, as required by Laws 1901, p. 240, c. 118, § 2.

3. SAME — PROTEST TO PROPOSED IMPROVEMENT.

A protest, filed with a city council against a proposed improvement nearly two months before the assessment roll was filed with the city clerk, could not be considered as objections to the assessment roll, required to be filed before the roll is confirmed by the city council by Laws 1901, p. 240, c. 118, § 2, in order to authorize a review of such objections by the court, nor were oral objections made at the hearing available for that purpose, the statutory provision requiring written objections being mandatory.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Special assessment proceedings by the city of Spokane against Charles W. Renard and others. From an order of the city council confirming the assessment, objectors appealed to the superior court, where the assessment was sustained, and objectors appeal. Affirmed.

Hamblen, Lund & Gilbert, for appellants. J. M. Geraghty and Alex. M. Winston, for respondent.

RUDKIN, J. On the 11th day of July, 1903, property owners on Spofford avenue, in the city of Spokane, petitioned the city council for the improvement of that avenue between certain points by grading, parking, and sidewalk. The petition contained the following specification as to the character of the

work: "The grade through the rock cut on said Spofford avenue to be made 30 feet wide, 20 feet between curb, and 5 feet on each side of sidewalk, the grade to be put as far south as property line." On February 2, 1904, the city council, purporting to act on this petition, passed an ordinance creating an assessment district, approving plans and specifications directing the letting of a contract for the work, and levying an assessment to defray the expenses thereof. On the 8th day of April, 1904, certain property owners on the avenue, including the appellants herein, filed a protest with the city council against the improvement of the street in accordance with the plans prepared by the city engineer, for the reason that the plans provided for a driveway 40 feet in width through the rock cut, instead of 30 feet as called for by the property owners' petition, and for the further reason that the cost of the improvement was not to exceed \$3,600, whereas the estimated cost of the proposed improvement was \$5,307.90. The assessment roll on which the present appeal is based was filed with the city clerk on the 23d day of May, 1904, notice of the filing was published on May 26, 1904, and the time for hearing objections fixed for June 28, 1904. The ordinance confirming the assessment roll was approved September 20, 1904, and thereupon the appellants here appealed to the superior court. The two objections urged in that court were that the improvement made differed materially from the improvement petitioned for, and that the wives of the petitioners did not sign with their husbands where community property was involved. The court confirmed the assessment, and from its judgment in that regard the present appeal is prosecuted.

At the threshold of the proceeding the appellants are met with the objection that there is nothing before this court for review, for the reason that the appellants filed no written objections to the assessment roll before the city council, as required by section 2 of the act of March 16, 1901 (Laws 1901, p. 240, c. 118). That section provides as follows: "Whenever any assessment roll for local improvements shall have been prepared as provided by law, charter or ordinance of any city of the first class, and such assessment roll shall have been confirmed by the council or legislative body of such city after due and proper notice to the property owner as provided by law, charter or ordinance so that said owners of property may have a reasonable opportunity to object to or protest against any assessment the regularity and correctness of the proceedings to order said improvement, and the regularity, validity and correctness of said assessment cannot in any manner be contested or questioned in any proceeding whatsoever by any person not filing written objections to such roll, prior to the same being confirmed, as aforesaid, and at such time or times as may be prescribed by the charter or ordinance." It seems

manifest that the objections now urged go to the regularity and correctness of the proceedings in ordering the improvement and to the regularity, validity, and correctness of the assessment, and cannot be reviewed by the courts, unless proper written objections were filed. *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444; *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197; *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742; *Ferry v. Tacoma*, 34 Wash. 652, 76 Pac. 277; *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686; *Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632.

It may be, as contended by the appellants, that objections going to the jurisdiction of the city council to order the improvement or levy the assessment are not waived by failing to file written objections, but the objections under consideration go merely to the regularity of the proceedings in ordering the improvement, and are not of a jurisdictional character. But if we are in error in this, nevertheless the right of appeal in these cases is purely statutory, and is limited to those who have filed objections against the assessment roll before the city council. Manifestly the protest filed with the city council against the proposed improvement nearly two months before the assessment roll was filed with the city clerk cannot be considered as objections to the assessment roll, and the oral objections made at the hearing were utterly insufficient in both form and substance. Furthermore, inasmuch as the written objections are made the basis of the hearing before the city council and in the courts, the requirement of the statute that they shall be in writing is mandatory.

The judgment of the court below must therefore be affirmed.

HADLEY, C. J., and CROW, DUNBAR, ROOT, and MOUNT, JJ., concur. FULLERTON, J., concurs in the result.

(48 Wash. 362)

McOWEN v. SEATTLE ELECTRIC CO.

(Supreme Court of Washington. Jan. 24, 1908.)

NEW TRIAL—EXCESSIVE VERDICT—REMISSION.

Where a verdict in an action for injuries was excessive, the court was justified in granting defendant a new trial, unless plaintiff consented to a substantial remission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 324-329.]

Appeal from Superior Court, King County; John B. Yaker, Judge.

Action by Charles J. McOwen against the Seattle Electric Company. A verdict having been returned for plaintiff, the court granted a new trial, unless plaintiff would remit all sums in excess of \$6,544, and from the order granting a new trial he appeals. Affirmed.

Casey & Casey and Graves, Palmer & Murphy, for appellant. Hughes, McMicken, Dovell & Ramsey, for respondent.

PER CURIAM. This was an action to recover damages for personal injuries resulting from a collision between two street cars operated by the defendant company. The amount of the damage to which the plaintiff was entitled was the only issue in the case. The jury returned a verdict in his favor in the sum of \$25,544; but on motion of the defendant the court granted a new trial, unless the plaintiff would remit from the verdict all sums in excess of \$6,544. The plaintiff refused to remit, and a new trial was ordered. From this order the plaintiff has appealed.

Taking the view of the testimony most favorable to the appellant, both as to the extent of his injuries and as to the impairment of his earning capacity, we are convinced that the verdict of the jury was excessive, and that the court was amply justified in granting a new trial, unless a substantial remission from the verdict was made. In view of a retrial of the case, we deem it improper to determine at this time whether the verdict as reduced by the trial court was too large or too small, and refrain from expressing any opinion on that question; but, finding no error in the record, the judgment is affirmed.

PETERSON et al. v. WEIST et al.

(Supreme Court of Washington. Jan. 20, 1908.)

VENDOR AND PURCHASER — BONA FIDE PURCHASER—RESERVATIONS—NOTICE.

Where defendants, on purchasing certain land in controversy, had notice of a reservation of the timber from recitals of a deed under which they claimed, and from other sources, they were not entitled to rely on a recital in such deed as to the time within which the owners of the timber were required to remove the same, which was much shorter than that specified in the contract of sale reserving the timber, but were bound to make inquiry with reference thereto, and were therefore charged with notice that the owners of the timber were not required to remove within the time specified in the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 474-494.]

Appeal from Superior Court, Cowlitz County; W. W. McCredie, Judge.

Action by Gustav Peterson and others against F. Weist and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

M. A. Langhorne and Forney & Ponder, for appellants. Thos. N. Strong, for respondents.

RUDKIN, J. Some time prior to the 11th day of February, 1897, John Baxter and wife agreed to convey the premises now in controversy to T. J. Johnson and Samuel Strom, in consideration of the sum of \$450 to be

thereafter paid, reserving, however, all timber growing on the land. On February 11, 1897, Baxter and wife sold all the timber reserved, except the cedar, to A. C. Mowrey, allowing 12 years from date of sale for the removal of the timber. On December 16, 1901, Baxter and wife, having received payment of the purchase price, conveyed to Johnson and Strom their deed containing the following reservation clause: "Saving and reserving therefrom all the timber of every kind and character now thereon, except cedar, reserving also the right to pass over the premises wherever necessary to remove the timber herein reserved; possession to be given of the timber and roads when A. C. Mowrey's time is up upon the timber; viz.: 3 years from Feb. 10, 1902." Johnson, one of the grantees named in the above deed, conveyed to the plaintiff Alex Peterson on June 3, 1902, and Strom, the other grantee, to the plaintiff G. V. Peterson on March 28, 1906. The defendants are the officers and employees of the successor in interest of Mowrey and wife in the timber contract. The deed from Baxter and wife to Johnson and Strom was filed for record February 13, 1906; the deed from Johnson to Alex Peterson on January 9, 1903; the deed from Strom to G. V. Peterson on September 19, 1906; and the timber contract from Baxter and wife to Mowrey and the assignment thereof on February 23, 1903. The present action was brought to enjoin the defendants from removing timber from the land under the Mowrey contract. The only issue in the case was whether the plaintiffs were bona fide purchasers for value and without notice of the sale of the timber, or rather of the time allowed for its removal. The court below found that at the time of their purchase the plaintiffs had full notice and knowledge of the sale of the timber and of the time allowed for its removal, and entered judgment dismissing the action. From this judgment, the plaintiffs have appealed.

The judgment appealed from is manifestly right. "It is a well-settled rule that, where a purchaser has knowledge or information of facts which are sufficient to put an ordinarily prudent man upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property in question, the purchaser will be held chargeable with knowledge thereof, and will not be heard to say that he did not actually know of them. In other words, knowledge of facts sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed." 23 Am. & Eng. Ency. Law (2d Ed.) p. 495. Mann v. Young, 1 Wash. T. 454; Wickham v. Sprague, 18 Wash. 466, 51 Pac. 1055; Deering v. Holcomb, 26 Wash. 588, 67 Pac. 240, 561; Rattelmiller v. Stone, 28 Wash. 104, 68 Pac. 168. Here the appellants had notice of the reservation of the timber from

the recitals in the deed through which they claimed and from other sources, but claim they had no notice of the time allowed for its removal, except the notice conveyed by the recital in the Baxter deed, which was three years from February 10, 1902. If they had no notice of the time allowed for the removal of the timber, it was solely because they made no inquiry. They could not blindly rely on the statement of their vendors (Foster, Neville & Co. v. Stallworth, 62 Ala. 547), and they made no inquiry from any other source. In fact, they made no inquiry of their vendors, but relied on the recital contained in the deed transmitted to them through the mail. We think the court was amply warranted in finding that the appellants had actual notice of all of the facts, including the time allowed for the removal of the timber, but the recital in the deed under which they claimed was sufficient of itself to excite inquiry, which, if followed up, would lead to notice.

There is no error in the record, and the judgment of the court below is affirmed.

HADLEY, C. J., and FULLERTON, CROW, and MOUNT, JJ., concur. DUNBAR and ROOT, JJ., not sitting.

McMILLAN v. WALKER et al.

(Supreme Court of Washington. Jan. 20, 1908.)

1. JUDGMENT—AS EVIDENCE OF TITLE.

Where, in unlawful detainer, plaintiff claimed title through conveyances from one adjudged the owner thereof in an action involving title, and through a mortgage foreclosure, and the proceedings in either action vested the legal title in plaintiff, without barring equities of defendant, the records in the actions were admissible, though defendant was not a party to the actions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1233.]

2. ADVERSE POSSESSION—PAYMENT OF TAXES.

A remote grantor, under whom plaintiff claimed, was the owner of the legal title until April, 1906. He attained his majority in February, 1901. Defendant claimed under a purchase from a third person in 1880, but his evidence was insufficient to establish any claim in the property. He failed to prove that he had paid any taxes on the premises. *Held*, that defendant's plea of the 10-year statute of limitations was not supported.

Appeal from Superior Court, Lincoln County; W. T. Warren, Judge.

Action by H. H. McMillan against Chas. W. Walker and others. From a judgment for plaintiff, defendant Chas. W. Walker appeals. Affirmed.

J. T. Mulligan and Martin & Willson, for appellant. Neal, Sessions & Myers, (H. A. P. Myers, of counsel), for respondent.

RUDKIN, J. This was an action of unlawful detainer commenced under section 5549. Ballinger's Ann. Codes & St. In the abstract appended to the complaint the plaintiff de-rails his title as follows: (1) By patent

from the United States to Alice Sutherland; (2) by decree of the superior court of Lincoln county in an action entitled Edmund Sutherland v. Alice Sutherland, adjudging that the plaintiff, Edmund Sutherland, was the owner of said premises, and that the defendant, Alice Sutherland, had no right, title, or interest therein; (3) by deed from Edmund Sutherland and wife to Joseph Sessions; (4) by deed from Joseph Sessions and wife to the plaintiff herein; (5) by sheriff's deed, executed to the plaintiff herein, on foreclosure of a mortgage given by Alice Sutherland on the 23d day of September, 1890. The answer consisted of a denial of the plaintiff's title, and pleas of the 10-year statute of limitations, the 7-year statute of limitations, and fee-simple title in the defendant Walker. At the close of the testimony the court below discharged the jury, and directed a judgment in favor of the plaintiff. From that judgment, the defendant Walker has appealed.

The appellant first contends that the court erred in admitting in evidence the records in the mortgage foreclosure, and in the action of Sutherland v. Sutherland, above referred to, because he was not made a party to either of said actions. In so far as the mortgage foreclosure is concerned, we deem it sufficient to say that the appellant claimed under paramount title, and was neither a necessary nor proper party to that action. The proceedings in either action were ample to vest the legal title in the respondent, and no claim is made that the judgments barred or cut off any claims or equities of the appellant. The respondent having shown a clear legal title, the judgment of the court below is free from error, unless the appellant established one or more of his affirmative defenses. The plea of the 10-year statute of limitations is disposed of in what was said by this court in May v. Sutherland, 41 Wash. 609, 84 Pac. 585, involving this same land. Edmund Sutherland, under whom the respondent claims, was the owner of the legal title until the 2d day of April, 1906. He did not attain his majority until the 28th of February, 1901, and until that date the 10-year statute of limitations did not commence to run. The appellant utterly failed to prove that he paid any taxes whatever on the premises. He testified that he tried to keep the taxes up, and that Mr. May paid them for quite a while during the hard times, at his request; but there was no evidence upon which the court or jury could find that taxes had been paid by the appellant, or at his request, for any year or series of years. The testimony of the appellant tending to show that he purchased the property from Alice Sutherland in the year 1890 was contradictory and evasive. It was utterly insufficient to establish any claim or title in real property, and the court below properly so ruled. The record in this cause shows that the title to this land has been in litigation for more than 16 years. As soon as one claimant is defeated another turns up

asserting some claim under a defendant in some former action. We fully agree with the court below that this litigation should end, at least until some more substantial and meritorious claim is asserted against the property.

The judgment of the court below is affirmed.

HADLEY, C. J., and CROW and ROOT, JJ., concur. MOUNT and FULLERTON, JJ., not sitting.

(48 Wash. 307)

STATE v. SERIGHT.

(Supreme Court of Washington. Jan. 17, 1906.)

1. CRIMINAL LAW — DISMISSAL OF PROSECUTION FOR DELAY—TIME FOR MOTION.

The right to have a criminal prosecution dismissed because the information was not filed within 30 days after accused was bound over to answer, under the statute providing that, if an information be not filed or indictment found against a person held for crime within 30 days after the order holding the person is made, the court must order the prosecution dismissed, etc., is waived, if not exercised before or at the time accused is called upon to plead, and the motion to dismiss comes too late when made at the beginning of the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1297-1304, 1375.]

2. INDICTMENT AND INFORMATION—DISMISSAL FOR FAILURE TO FILE—EFFECT—FILING NEW INFORMATION.

The dismissal of a prosecution because of failure to file an information within 30 days after accused had been held to answer, as is expressly provided by statute, does not operate as a bar to another prosecution for the same offense, nor does a discharge compel the prosecuting officer to commence anew before a committing magistrate, but he may file an information in the court before which accused was bound over, compelling him to appear at once upon the dismissal of the original proceeding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 156.]

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Edna Seright was convicted of aiding and assisting a person to commit rape, and appeals. Affirmed.

Nuzum & Nuzum, for appellant. R. M. Barnhart and A. J. Laughon, for the State.

FULLERTON, J. The appellant was informed against, tried, and convicted for aiding and assisting one John Grim in the commission of the crime of rape. From the sentence pronounced against her she appeals. It appears that the appellant was first arrested on October 17, 1906, on a warrant issued by a committing magistrate. An examination was held on the charge on October 17, 1906, at which time the magistrate found that there was reasonable cause to believe her guilty of the crime charged, and bound her over to answer to the superior court of Spokane county whenever the same should be prosecuted, ordering her to enter into a recognizance with sufficient sureties for her

appearance therein in a penal sum named, and stand committed until such recognizance was furnished. She did not enter into the recognizance, and was committed to the county jail. An information was filed against her in the superior court on January 5, 1907. At that time she was brought before the court, arraigned on the information, and asked if she was ready to plead thereto. Thereupon she pleaded not guilty, and the cause was set down to be tried on January 14, 1907. On that day the court continued the cause until January 17, 1907. On January 17th, she filed a motion asking that the cause be dismissed because the information was not filed against her within 30 days after she had been held to answer. The motion was denied, whereupon a trial was had, with the result before stated. The ruling of the court on the motion to dismiss constitutes the only error assigned on this appeal.

The statute relating to persons held to answer to a criminal charge provides that, if an indictment be not found or an information filed against a person so held within 30 days after the time the order holding the person is made, "the court must order the prosecution dismissed, unless good cause to the contrary be shown." It is the appellant's contention that the failure to find an indictment or file an information within the time prescribed subjects the prosecution to a dismissal whenever a motion is made therefor, no matter at what stage of the case, or what proceeding may have intervened between the filing of the indictment or information and the time of the notice, unless the state at the time the motion is made shows good cause for the delay. But we think this not the true meaning of the statute. Unquestionably a person bound over to answer to a criminal charge may, after 30 days from that time, have the proceedings dismissed on motion, if no indictment is found or information filed against him, unless good cause for the delay be shown, and this right continues until the actual finding of the indictment or filing of the information, and it may be that the right exists when the defendant is called upon to plead to an indictment found or information filed after the 30 days, but the right is waived, if not exercised before or at the time he is so called upon to plead. This follows from the nature and purpose of the statute itself. It is manifest that its sole purpose was to procure for the accused a speedy trial, to enable him to compel the prosecuting officer to proceed against him within the time fixed, or else dismiss the proceedings brought against him. But a dismissal under such circumstances does not operate as a bar to another prosecution for the same offense, nor would a discharge compel the prosecuting officer to commence anew before a committing magistrate. On the contrary the prosecuting attorney may file such an information in the court before which he was bound over to appear at once upon the dismissal of the origi-

nal proceeding without violating any of the accused's rights. There would be little reason, then, in holding the statute mandatory in the sense that the original lapse entitled the defendant to a dismissal at any stage of the proceedings he might ask for it. If he can exercise the right just before the trial, so he may during the trial, and after a verdict of the jury finding him guilty. This would be to give the statute an effect directly opposite to that the Legislature intended it should have. It would make it a means of delaying the final disposition of the case, when it was intended to hasten that event.

The motion, therefore, came too late, and the court did not err in refusing to grant it. The judgment is affirmed.

HADLEY, C. J., and RUDKIN, MOUNT, CROW, ROOT, and DUNBAR, JJ., concur.

LANHAM et ux. v. WENATCHEE CANAL CO.

(Supreme Court of Washington. Jan. 20, 1908.)

1. WATERS — IRRIGATION — CONTRACTS — CONSTRUCTION.

Under an agreement by which defendant sold to plaintiffs a perpetual right to use a certain amount of water from defendant's irrigation system, and plaintiffs were to have the right to raise such part of the amount of water conveyed by pump or otherwise as they might desire for the purpose of irrigating part of their land lying above the grade of defendant's main canal, plaintiffs were not entitled to water from the ditch of another company in which defendant was a stockholder for the purpose of irrigating that part of their land.

2. SAME — PAROL LICENSE — RIGHT TO REVOKE.

The fact that plaintiffs were permitted to take water from the ditch owned by the other company until they could arrange to pump water from defendant's canal would not prevent defendant from revoking the permission which was granted as a mere accommodation, even if it amounted to a parol license.

3. INJUNCTION — TEMPORARY MANDATORY INJUNCTION — NECESSARY CONDITIONS.

If a mandatory injunction may issue at all before final hearing, it is only where plaintiff's right to the relief is clear and certain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 4.]

Appeal from Superior Court, Chelan County; R. S. Steiner, Judge.

Action by Z. A. Lanham and wife against the Wenatchee Canal Company for a mandatory injunction requiring defendant to deliver water to plaintiffs' land through a certain ditch. From an order granting a temporary mandatory injunction, defendant appeals. Reversed.

Reeves & Reeves, for appellant.

RUDKIN, J. On the 1st day of June, 1904, the defendant corporation entered into a certain water-right agreement with the plaintiff Z. A. Lanham whereby the defendant transferred and sold to said Lanham a perpetual right to the use of water from the irrigation system of the defendant company, consisting

of main and lateral canals and other works in Chelan county, to the amount of $\frac{38}{100}$ of one cubic foot per second, from April 15th to October 31st of each year, commencing with the 1st day of June, 1904, for the purpose of irrigating a certain 38-acre tract of land owned by the plaintiffs and for domestic purposes incident thereto. It appears that about 18 acres of this land is situated above the level of the appellant's main canal, and is not susceptible of irrigation therefrom by gravity flow. In view of this fact doubtless the water-right agreement contained the following provision: "It is understood and agreed that the purchaser is to have the right to raise such part of the amount of water herein conveyed by pump or otherwise as he may so desire, for the purpose of irrigating that part of the above-described land lying above the grade of the main canal of the said company." The present action was instituted on the 15th day of May, 1907, praying for a mandatory injunction requiring the defendant to deliver water to the plaintiffs' land through a certain ditch known as the "Settler's Ditch," pursuant to the terms of said water-right agreement. Upon a hearing had the temporary mandatory injunction was granted as prayed, and from that order the present appeal is prosecuted.

From the affidavits filed at the hearing in the court below it satisfactorily appears that the "Settler's Ditch" is owned by a corporation other than the appellant, and that the appellant is only a stockholder therein. This ditch forms no part of the appellant's irrigation system, and is not embraced within the contract under which the respondents claim. It appears, however, that the appellant, as a matter of accommodation, permitted the respondents to take water from the settler's ditch to irrigate that portion of their land that could not be irrigated by gravity flow from the appellant's main canal, until such time as the respondents might arrange to pump water from the main canal for that purpose. The court below, as appears from its certificate, was of opinion that the respondents were not entitled to the relief sought under the provisions of the contract upon which the action was brought, but that, inasmuch as the respondents had been permitted to take water from the settler's ditch under a parol license, it would be unjust and inequitable to permit a revocation of that license, without notice, under the circumstances. We are of opinion that the court below was clearly right in its conclusion that the water-right agreement did not entitle the respondents to the water claimed by them through the settler's ditch, on the showing made at the preliminary hearing; but, however unjust and inequitable it might seem to revoke a parol license, granted as a mere matter of accommodation, the appellant was clearly within its rights when it did so, and the court was powerless to prevent it.

If a mandatory injunction may issue at all

before final hearing, it is only where the plaintiff's right to the relief is clear and certain. 22 Cyc. 743. In this case the respondents' right to the relief sought was not only not clear and certain, but on the contrary we think the appellant was within its legal rights when it revoked the parol license, if any existed, and refused longer to furnish water where there was neither a legal nor moral obligation requiring it so to do.

The order of the court below is therefore reversed.

HADLEY, C. J., and FULLERTON, CROW, DUNBAR, and MOUNT, JJ., concur. ROOT, J., concurs in the result.

HOFFMAN et al. v. DICKSON et ux.

(Supreme Court of Washington. Jan. 22, 1908.)

APPEAL—DETERMINATION—MODIFICATION—INADVERTENT ERROR.

Where a contract provided for a deed of general warranty to a certain vacant lot, and in an action for specific performance the trial court found that one-half the cost of certain party walls were incumbrances thereon, which could not be removed, and ordered specific performance, but the decree by apparent inadvertence recited that the purchasers were entitled to a deed of general warranty "subject to the liens for one-half the cost of constructing both of said party walls," upon sustaining the decision of the lower court the decree will be modified by striking out the quoted expression.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4483-4497.]

On petition for rehearing. Denied.

For former opinion, see 92 Pac. 272.

PER CURIAM. Since the opinion was filed in this cause, and pending a petition for rehearing, we have discovered certain words used by the trial court in its decree which were not observed by us before the opinion was filed. The decree recites that appellants are entitled to a deed of general warranty "subject to the liens for one-half of the cost of constructing both of said party walls." In affirming the judgment the possible legal effect of the quoted words was overlooked by us, since the matter had not been called to our attention. We stated in our opinion that appellants are entitled to a deed with covenants of general warranty, that being what was specified in the contract. Such should unmistakably be the provision of the decree. The quoted words must have been used in the decree by a mere inadvertence, inasmuch as the record shows that the trial court found one-half the cost of the party walls to be incumbrances. The contract does not call for a warranty deed subject to any incumbrances. The reason the trial court did not require the present removal of the liens was because, for reasons stated in the main opinion, they are not now removable. The persons who may be entitled to the payment when the walls shall be used, if they are ever used, cannot now be ascertained. Re-

spondents must therefore comply with their contract, and deliver a general warranty deed; but they cannot comply with the contract by delivering a warranty deed, which is expressly made subject to the incumbrances.

We do not believe that the trial court intended the legal effect which the words used may import, and we have not understood that respondents so contend. But that no controversy may arise as to the true meaning of the decree it should be modified by striking out the words above quoted. In all other respects the judgment is affirmed, the petition for rehearing is denied, and the cause is remanded for the purpose of said modification.

COX v. DICKIE et al.

(Supreme Court of Washington. Jan. 15, 1908.)

1. CORPORATIONS—SUBSCRIPTION TO STOCK—ACTIONS TO ENFORCE LIABILITY—DEFENSES—ESTOPPEL.

In an action by the receiver of a corporation to enforce under order of court unpaid stock subscriptions for the benefit of creditors, it was no defense that defendants contracted with the corporation to purchase the stock at half its par value, or that fraudulent representations induced the subscriptions, or that there was no full subscription to the capital stock, or that the corporation was defectively organized, defendants being estopped to set up such defenses.

2. SAME—NOTICE—PROOF.

Under 1 Ballinger's Ann. Codes & St. § 4262, relating to the calling in of subscriptions to corporate stock, and providing that in all cases notice of each assessment shall be given to the stockholders personally or by publication in some newspaper published in the county in which the principal place of business of the company is located, constructive notice may be substituted for personal notice; and proof, in an action by the receiver of a corporation to enforce under order of court unpaid stock subscriptions, that the court directed notice by publication and by mail, that a notice was published as required by the order, and that a letter containing a copy of the notice was mailed to each of the stockholders, was sufficient on the question of notice.

3. SAME.

Where the receiver of a corporation was by order of court directed to collect by suit from the stockholders the balance of the unpaid stock held by them, it was not necessary to bring a separate action against each stockholder, there being no statute requiring it.

4. SAME.

Subscribers to stock of a proposed corporation were liable thereon, though the corporation was organized under a different name from that at first selected; it appearing that the subscriptions were intended for, and in fact were, subscriptions to the corporation organized.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by E. B. Cox, as receiver of the Washington Food Company, against J. P. Dickie and others. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

H. R. Clise, for appellant. Ira Bronson, D. B. Trefethen, and Shank & Smith, for respondents.

MOUNT, J. This action was brought by the appellant, as receiver of the Washington Food Company, against a large number of defendants, upon their unpaid stock subscriptions in that company. The cause was tried to the court without a jury, and findings were made to the effect that the Washington Food Company was not legally incorporated, because the articles of incorporation were not executed and filed as required by law, and the capital stock was not fully subscribed; that the defendants subscribed for their stock believing that there was no indebtedness against the corporation; and that the amount paid for the stock, being one-half the par value thereof, was the limit of liability thereon, because the stock was represented to be, and was, denominated "treasury stock, fully paid and nonassessable." For these reasons the action was dismissed. The receiver has appealed from the order of dismissal.

The facts in the case are substantially as follows: In the year 1903 certain of the defendants, desiring to organize a company for the manufacture of breakfast foods in the city of Ballard, called public meetings in that city, wherein the advisability of organizing such a company was discussed. After several of these meetings it was decided to incorporate such a company, and the persons who were to act as trustees thereof were elected at one of these meetings. The name of the corporation first adopted was the "Honeyed Flake Food Company." Subscriptions for the capital stock thereof were solicited and made under that name; but later on, or about December 23, 1903, it was decided to incorporate under the name of the Washington Food Company, and articles of incorporation were prepared, executed, and acknowledged under that name. These articles were executed in triplicate, one copy filed in the auditor's office of King county, where the principal office was located, one copy sent to the Secretary of State at Olympia, and the other was kept by the company. These articles were not exact copies, because some of the copies contained more names of incorporators than others. More than three of the same persons, however, executed all of the copies. The articles provided that the capital stock of the company was \$100,000, divided into 2,000 shares of the par value of \$50 each. The stock was not fully subscribed, and subscriptions were being taken therefor both before the articles were filed and afterwards. Each person subscribing for stock was required to pay \$25 per share in cash, with the agreement that the stock was thereby fully paid and nonassessable. After certain subscriptions had been made, and at a public meeting attended by stockholders and others, the trustees were instructed to purchase a site and let a contract for the erection of a building thereon, which the trustees did. Subsequently the building was completed, and machinery purchased, and the same put into operation. During all this

time subscriptions for stock were being made on terms as above stated, the total subscriptions amounting to 917 shares. In the erection of the building and operation thereof the company became largely indebted, and on December 28, 1904, the appellant was appointed receiver of the property and effects of the corporation by the superior court of King county. The receiver qualified, and, after exhausting the assets of the corporation, there was still about \$7,000 of indebtedness due the creditors of the corporation. Thereupon the superior court by order directed the receiver to collect by suit from the stockholders the balance of the unpaid stock held by them, and to publish a demand therefor in the Seattle Post-Intelligencer, and to mail a copy of such demand to each of the stockholders at his post-office address, as shown by the books of the company. This was done, and afterwards this action was begun.

The defense is based upon the points stated in appellant's brief as follows: (1) The stock was purchased bona fide as treasury stock at a fixed value; (2) fraudulent misrepresentations induced the subscriptions to stock, there being no sufficient circumstances to create an estoppel or waiver; (3) no full subscription to the capital stock of the company; (4) trust fund theory not applicable to this case, since there is no showing that the creditors relied on the stock subscriptions; (5) defect of organization of the company; (6) no notice of call for stock subscriptions; (7) this suit should have been instituted as a separate proceeding against the stockholders instead of being made a joint action; (8) there should be no liability against those whose names appeared in the Honeyed Flake Food Company subscription list; (9) the receiver should have sued for only so much of the unpaid subscription as was necessary to pay for the debts of the company; (10) all of the stockholders should have been made parties defendant under the court's order. The first five of these defenses may be considered together. It must be remembered that this is not an action by the corporation to enforce collection of subscriptions for stock or its contracts with its subscribers, but is an action brought by a receiver under order of the court to enforce such subscriptions for the benefit of creditors. As between the corporation itself and the stockholders all these defenses would probably be good, but as between the stockholders and the creditors of the corporation another rule prevails. *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415. In such cases "it is no defense to a suit by a creditor to recover his debt out of an unpaid subscription that the defendant was induced to subscribe to the stock by fraudulent misrepresentations of the agent of the corporation, or by an agreement which the corporation had failed to carry out, or that the corporation was irregularly organized, or organized for an illegal purpose, or has been

dissolved; nor can a stockholder set up informalities in the issue of the stock, if the corporation has the power to create it, though he may show that the stock is void as having been issued in excess of the limit imposed by the charter." 26 Am. & Eng. Enc. of Law (2d Ed.) p. 1011. See, also, 10 Cyc. pp. 244 and 249; *Mitchell v. Jordan*, 36 Wash. 645, 79 Pac. 311; *Cole v. Satsop Railroad Company*, 9 Wash. 487, 37 Pac. 700, 43 Am. St. Rep. 858. Under this rule the trial court was clearly in error in basing the judgment of dismissal upon the facts found as stated above. Such facts, if true, did not constitute a defense in this action, because the stockholders were estopped to say that the corporation was not a legal one, or that they had a contract with the corporation to purchase its stock at 50 per cent. of its par value, or that they subscribed for its stock believing the company was not in debt. The receiver in this action represents the creditors. *Mitchell v. Jordan*, supra.

Respondents also contend that there was no personal notice of a call for stock subscriptions, and that for this reason the judgment must be sustained. The statute provides: "In all cases notice of each assessment shall be given to the stockholders personally, or by publication in some newspaper published in the county in which the principal place of business of the company is located." Section 4262, 1 Ballinger's Ann. Codes & St. It was held by this court in *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1080, that the notice required by this section applies to assessments made by the court against stockholders; but neither the statute nor the decision in *Elderkin v. Peterson* requires personal notice. Constructive notice by publication may be substituted for personal notice. The proof in this case shows that the court ordered the receiver to collect the unpaid subscription, and directed notice by publication and by mail. The receiver testified that such notice was given, that he had a notice published as required by the order, and that he mailed a letter containing a copy of the same to each of the stockholders as directed by the order. It is true that a large number of the defendants testified that they did not receive such letter, or know of the publication; but actual personal notice was not required. The proof was therefore sufficient upon the question of notice.

Respondents next contend that a separate action should have been brought against each stockholder. It is true this court held in *Elderkin v. Peterson*, supra, that the receiver may bring separate actions in cases like this; but we have no statute requiring separate actions in such cases, and, since each defendant in this case was at liberty to make his separate defense, no prejudicial error can be based upon the fact that a large number of defendants were joined in this action. In fact, the form of the action adopted here

was beneficial to the defendants by reason of the saving of costs.

It is also contended by the respondents, and especially by respondent Crossett, who appears by separate counsel and separate brief, that there is no liability against those who subscribed for stock on the Honeyed Flake Company subscription list. But the facts show conclusively that the Honeyed Flake Company and the Washington Food Company were the same company. It was intended to give the company the former name; but that idea was abandoned, and the latter name chosen as being the more appropriate, and the subscription given to the Honeyed Flake Company was intended for and in fact was a subscription to the company, which was incorporated as the Washington Food Company. The mere change in the name did not release the subscribers.

In view of the rule that the receiver might have brought a separate action against each stockholder, it is unnecessary to notice the remaining points presented by respondents. For the reasons above stated, the judgment of the trial court is reversed, and the cause remanded, with instructions to enter judgment against each of the defendants as requested by appellant at the time of the trial.

HADLEY, C. J., and CROW and DUNBAR, JJ., concur. FULLERTON, RUDKIN, and ROOT, JJ., took no part.

PERKINS v. PEIRCE et al.

(Supreme Court of Washington. Jan. 31, 1908.)

1. APPEALS—PARTIES—JOINDER.

Where after judgment against the members of a firm one of them appealed and stated in his brief that his codefendant joined in the appeal, but no notice of such joinder and no appeal bond or brief was filed on behalf of such other partner, the appeal as to him would be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3126, 3127.]

2. PARTNERSHIP—CONTRACTS—MEMBERS—INDIVIDUAL LIABILITY.

Where a member of a firm employed plaintiff to perform certain services for it, such member was individually liable for the services performed, whether the partnership existed, or whether the contracting member had authority to make the contract on behalf of the firm.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by John N. Perkins against John Peirce and another. From a judgment for plaintiff, defendant Fred T. Evans appeals. Affirmed.

Jerold Landon Finch, for appellant.

RUDKIN, J. This action was instituted against the defendants as copartners to recover for services performed by the plaintiff, at the instance and request of the defendants, in procuring options for certain timber lands, and in placing the defendants

in communication with the owners thereof, to the end that deeds might be obtained therefor. Trial was had before the court without a jury. The court found that the defendants were copartners as alleged; that on the 21st day of March, 1905, they employed the plaintiff to procure options on certain timber lands in Clallam county, agreeing to divide with him the difference between the price paid per quarter section and \$1,800, which was modified to \$1,600 per quarter section on October 28, 1905; that the defendant Evans in entering into the contract of employment acted for himself and his codefendant Pelrce; that pursuant to his contract of employment the plaintiff obtained options on five quarter sections and one 80-acre tract at the agreed purchase price of \$1,000 per quarter section; that the defendants and their appointee obtained title to all of said lands; that the plaintiff has received nothing on account of his services in that behalf, and entered judgment accordingly. From this judgment, the defendant Evans has appealed.

He states in his brief that his co-defendant Pelrce joined in the appeal; but no notice of such joinder and no appeal bond appears in the record, and no brief has been filed. As to the appellant Pelrce, therefore, the appeal, if any, must be dismissed, and it is so ordered. Much of the argument of the appellant is addressed to the question of the existence of a partnership between himself and his codefendant Pelrce; but in so far as the rights of the appellant are concerned we do not deem that question material. The contract of employment was entered into and signed by the appellant, and whether there was a copartnership, or whether the appellant was authorized to act for or bind his codefendant, is not an issue on this appeal. The court found that the contract was entered into by the appellant and the respondent, that the respondent performed his part of the contract, and has not been paid the stipulated compensation for his services. These findings are sustained by the testimony, and the judgment against the appellant was proper, partnership or no partnership, the rights of the defendant Pelrce not being before this court. 15 Ency. Pl. & Pr. 960.

The judgment is therefore affirmed.

HADLEY, C. J., and FULLERTON, ROOT, DUNBAR, MOUNT, and CROW, JJ., concur.

STURGEON v. TACOMA EASTERN R. CO.
(Supreme Court of Washington. Jan. 28, 1908.)

1. MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURIES TO SERVANT—METHODS OF WORK—CUSTOMS.

It cannot be said, as matter of law, that a brakeman is negligent in attempting to board a moving train, where the testimony shows that such is the common custom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1080-1132.]

2. SAME—APPLIANCES—INSPECTION.

A railroad company cannot avoid liability to its employes by imposing on them the duty of inspection without affording a reasonable opportunity for the discharge of such duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 718.]

3. SAME—ACTIONS—QUESTION FOR JURY.

Plaintiff, a switchman for defendant railroad company, while switching a wood car attempted to board the moving car by taking hold of a crosspiece of the woodrack on the front of the car, and it broke, letting him fall to the ground. There was testimony showing it to be customary for brakemen to use the crosspiece for such purposes. *Held*, that the question whether defendant was negligent in not keeping the rack reasonably safe was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1015, 1020.]

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by Ben H. Sturgeon against the Tacoma Eastern Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

Burkey, O'Brien & Burkey, for appellant. E. M. Hayden and John A. Shackelford, for respondent.

RUDKIN, J. On and for some time prior to the 27th day of January, 1906, the plaintiff was in the employ of the defendant as a brakeman on one of its logging trains. Between the hours of 4:00 and 6:00 o'clock of the morning of the above date the train on which the plaintiff was employed stopped at Nelson's siding on the line of the defendant's road to take up some empty cars on a side track. There was a flat car partly loaded with wood in front of the empties which the train was about to pick up, and in order to reach the empties the engine was backed up and attached to this wood car. The wood car was next attached to the empties, and the train drawn forward onto the main track. The empties were then kicked back onto the main track, and the plaintiff turned the switch in order that the wood car might be returned to its original position on the side track. As he turned the switch the plaintiff signaled the engineer to back the train onto the siding, and, as the train approached him at a speed of from one to four miles an hour, he attempted to board the wood car for the purpose of setting the brake when the car reached its proper position on the siding, by placing his left hand and left knee on the drawhead and seizing one of the crosspieces of the wood rack with his right hand. The crosspiece thus seized was defective and gave way. In an effort to save himself the plaintiff attempted to throw himself clear of the train, but his left foot was caught and crushed. This action was brought to recover damages for the injury thus received. At the close of the plaintiff's case the court directed a nonsuit, and from the judgment of nonsuit the present appeal is prosecuted.

Under the facts thus presented two questions arise: (1) Was there testimony tending to show negligence on the part of the respondent? and (2) was the appellant guilty of contributory negligence as a matter of law? The respondent contends that the wood rack in question was not intended for use as a ladder by trainmen in boarding cars, but there was no testimony on this point. On the other hand trainmen of years of experience testified that it is customary, not only on the respondent's road, but on all railroads, for brakemen to board cars such as this in the identical manner in which the appellant attempted to board the car in question. If this custom prevailed and was known to the respondent, or should have been known by the exercise of reasonable diligence, it became its duty to make its wood racks reasonably safe for the purpose for which they were habitually used, regardless of the purpose they were originally intended to subserve. *Wallace v. Seaboard Air Line Ry. Co.*, 141 N. C. 646, 54 S. E. 399; *Dunn v. New York & N. H. Ry.*, 107 Fed. 666, 46 C. C. A. 546; *Babcock Lumber Co. v. Johnson*, 120 Ga. 1030, 48 S. E. 438.

There is some controversy between counsel with reference to the testimony relating to the condition of the crosspiece which gave way and caused the appellant's injury. While we must accept the record as certified to this court we are satisfied that the testimony on this point was not correctly reported. Sometimes counsel and the witness are made to refer to the "brake" on the car and sometimes to the "break" in the crosspiece. To a certain extent the testimony is unintelligible, but it is apparent that some of the testimony at least referred to the break in the crosspiece on the wood rack, and that the appellant testified that the break was an old one. From the entire record the jury would have been warranted in finding that it is customary for trainmen to use the crosspieces on the wood racks in boarding cars such as this in the manner in which the crosspiece in question was used by the appellant; that this custom was known to the respondent; that the crosspiece or wood rack was not reasonably safe for that purpose, and that its defective and unsafe condition could have been ascertained by the respondent by the exercise of reasonable diligence and proper inspection. Was the appellant guilty of contributory negligence? The respondent contends that he was for two reasons: First, in attempting to board a moving train in the manner in which he did; and, second, because he failed to inspect the car as required by the rules of the company. It certainly cannot be said as a matter of law that a brakeman is guilty of negligence if he attempts to board a moving train.

The testimony shows clearly that such is the common custom, and it is perhaps not going too far to say that the existence of such a custom is a matter of common knowledge. *Prosser v. Montana Central Ry. Co.*, 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814.

The rule of the company which imposed the duty of inspection on the appellant is as follows: "672 (a) Brakemen report to trainmaster, assistant superintendent, or superintendent, and obey the conductor, with those duties they will become familiar and assist in performing." Other rules impose the duty of inspection on conductors, and it is contended that the above rule imposes a like duty on brakemen. It must be apparent that a brakeman on a dark morning has but little opportunity to inspect cars while engaged in the discharge of his other duties, and a railroad company cannot avoid liability to its employes by imposing upon them the duty of inspection, unless a reasonable opportunity is given for the discharge of that duty. "A master cannot shift upon his employes his responsibility to them for injuries resulting from defects due to wear and tear, by devolving upon them the duty of inspection, unless they are given time and opportunity to make such inspection, as would reveal the defects. And this may be said to be the effect of the decisions. It is considered that such rules should receive a reasonable interpretation, and that the obligations of the servant should be determined with reference both to the character of the defect and to his ability to make an examination. Upon this basis, the validity of rules or agreements of the ordinary tenor, by which servants are obligated to examine appliances, may often be upheld. But if they are couched in terms which indicate a clear and absolute intention on the employer's part to impose a more extensive obligation upon the servant than is thus declared to be permissible, they will be treated—by most courts at all events—as an illegal attempt to subject the latter to the duty which is incumbent upon the former, of seeing that the plant is in a reasonably safe condition." 1 *Labatt, Master and Servant*, p. 1178. See, also, *Matchett v. C. W. & M. Ry.*, 132 Ind. Sup. 334, 31 N. E. 792; *Strong v. Iowa Central Ry. Co.*, 94 Iowa, 380, 62 N. W. 799; *Holmes v. Southern Pac. Ry. Co.*, 120 Cal. 357, 52 Pac. 652.

On the entire record we are of opinion that the question of negligence on the part of the respondent, and of contributory negligence on the part of the appellant, should have been submitted to the jury under proper instructions, and, for the court's failure so to do, the judgment is reversed, and a new trial ordered.

HADLEY, C. J., and DUNBAR and FULLERTON, JJ., concur.

PORT TOWNSEND SOUTHERN R. CO. v. NOLAN et al.

(Supreme Court of Washington. Jan. 31, 1908.)

1. EVIDENCE—OPINION EVIDENCE—MARKET VALUE—TESTIMONY OF OWNER—COMPETENCY.

Ownership alone does not render an owner of land a competent witness as to its value, if he is not familiar with its location, quality, or value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2217.]

2. APPEAL—REVIEW—HARMLESS ERROR.

Though the owner thereof might have been properly permitted to testify to the market value of his land, where his qualifications to do so were disputed, and its value was shown by a number of witnesses better qualified to testify thereto, the exclusion of evidence by the owner was not prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161–4170.]

3. SAME—DETERMINATION—AFFIRMANCE—REVERSAL NOT BENEFICIAL.

In condemnation proceedings to appropriate property occupied by a saloon, a judgment will be affirmed in spite of the exclusion of evidence of loss by reason of the saloon license being rendered valueless thereby, where the license expired pending appeal, and the owner enjoyed the full benefit thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4461.]

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Condemnation proceedings by Port Townsend Southern Railroad Company against Dennis Nolan and another. From a decree of appropriation, defendants appeal. Judgment affirmed.

Walter M. Harvey and Vance & Mitchell, for appellants.

RUDKIN, J. This is an appeal from a decree of appropriation in a condemnation case. But two errors are assigned: First, the refusal of the court to permit the appellant to testify to the market value of the property sought to be appropriated; and, second, the refusal to admit evidence of the loss sustained through the appropriation of the property by taking and rendering valueless the saloon license issued to the appellant by the town of Tenino. In support of the first assignment it is contended: (1) That the owner is always competent to testify to the value of his own property; and, (2) that in any event the appellant showed that he was duly qualified in this case. With the first contention we cannot agree. The owner who occupies his property, and is familiar with its character and the purposes for which it may be used, and to a greater or less extent with land values in the community, is a competent witness. But the owner may have acquired his property by devise or descent in a distant state or country, and know nothing of its location, quality, condition, or value, and in such cases it is idle to contend that he is competent to testify to its value, or to any other fact concerning

it. While, therefore, the owner may and often does occupy a different position towards his property than does a mere stranger, yet he must in all cases show at least some qualification before testifying to its value, and the difference between the qualifications required of the owner and of a stranger is one of degree only. On the showing made in this case we think the court might have permitted the owner to testify to the market value of the land taken; but the testimony as to his knowledge and qualification was extremely contradictory, and we are not prepared to say that the court abused the wide discretion which is necessarily vested in it by law. Furthermore the property sought to be condemned was a town lot. Its value depended largely upon its size and location, and the opportunities of the owner for knowing its market value were little if any better than those of any other person familiar with land values in the town. Seven or eight witnesses, whom the court deemed better qualified than the appellant, testified to the market value of the property in his behalf, and under such circumstances we do not think that the ruling of the court was prejudicial.

On the second assignment little need be said. The saloon license has expired by operation of law. The appellant has enjoyed the full benefit of it pending his appeal, and, should the judgment be reversed, the license could not become an issue on a retrial, or enter into the question of damages. As to that question the subject-matter of the controversy has ceased to exist, and no benefit could accrue to the appellant from a reversal of the judgment.

Finding no substantial error in the record, the judgment is affirmed.

HADLEY, C. J., and FULLERTON, ROOT, DUNBAR, MOUNT, and CROW, JJ., concur.

TAYLOR v. DEBRITZ et al.

(Supreme Court of Washington. Jan. 30, 1908.)

TAXATION—PAYMENT OF TAXES—OMISSION OF TAX OFFICERS.

Where plaintiff after purchasing certain land applied in good faith to the proper officer to pay the taxes thereon, and payment for one year was not made, because the taxing officer stated that there were no taxes unpaid or delinquent against the land except those which plaintiff had previously paid, a tax deed pursuant to a sale for taxes for the year for which the lands were in fact delinquent was void.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Z. B. Taylor against G. Debritz and another. From a decree for plaintiff, defendants appeal. Affirmed.

Ralph Simon, for appellants. Hayden & Langhorne, for respondent.

PER CURIAM. This was an action to set aside a tax deed, based on the foreclosure

of a delinquency certificate for the taxes of 1888. From a judgment in favor of the plaintiff, the defendants have appealed.

The testimony introduced at the trial showed, and the court found: "That after purchasing said land, beginning with the year 1889 and each and every year thereafter, plaintiff requested from the proper collecting officers of King county statements of the taxes due as well as the taxes delinquent against said land; that each and every year since the purchase of said land, beginning with the year 1889, the proper collecting officers of King county asserted and represented to the plaintiff by written and verbal statement that there were no taxes unpaid or delinquent against said land, except such taxes as this plaintiff had theretofore paid; that this plaintiff has paid the taxes on said land beginning with the taxes assessed for the year 1889 down to and including the taxes assessed for the year 1906." Considering a similar state of facts in the recent case of *Bullock v. Wallace* (Wash.) 92 Pac. 675, this court quoted the following from 27 Am. & Eng. Ency. Law (2d Ed.) p. 755: "If the owner of land, or a party having an interest therein, in good faith applies to the proper officer for the purpose of paying the tax thereon, and payment is prevented by the mistake or fault of such officer, * * * the attempt to pay is considered, in most jurisdictions, as the legal equivalent of payment in so far as to discharge the lien and bar a sale for nonpayment;" and said: "The facts, we think, require the holding that the foreclosure was unauthorized in law, that the sale and deed thereunder were void, and that appellant was not divested of her title thereby." To the same effect, see *Loving v. McPhail* (Wash.) 92 Pac. 944.

On the authority of the above cases the judgment in this case must be affirmed, and it is so ordered.

WILSON v. McMILLAN.

(Supreme Court of Washington. Jan. 30, 1908.)

EXECUTORS AND ADMINISTRATORS—SALES— CONFIRMATION—SETTING ASIDE ORDER.

There is an irregularity in the obtaining of an order confirming a sale of real estate in probate proceedings, approximating constructive fraud on the estate, so as to authorize the setting aside thereof, where, pending objections by the heirs to confirmation of the sale, accompanied by an offer of M. to bid 10 per cent. advance in case of resale, this offer was withdrawn by M., and confirmation obtained by the purchaser, without notice to the executor or heirs when higher bids were available.

Appeal from Superior Court, Lincoln County; W. T. Warren, Judge.

Proceedings between W. A. Wilson and H. H. McMillan, executor of Martha J. Holburte, deceased. From an order, said Wilson appeals. Affirmed.

W. A. Wilson, pro se. H. A. P. Myers, for respondent.

93 P.—34

ROOT, J. This is an appeal from an order setting aside the confirmation of a sale of real estate made in a probate proceeding. The record shows that the sale of the property involved was first advertised for June 16, 1906, but, there being no bidders, the sale was postponed until June 23, 1906. At the sale the property was bid in by the appellant for \$1,000, he being the only bidder. On June 30, 1906, the executor made his return, setting forth among other things "that the sum of \$1,000 is much less than the value of said property, but the undersigned was unable to get any other bid for the same," and recommending the confirmation of the sale. Thereupon some of the heirs of the deceased objected to the confirmation, and with their objections a written offer by one H. N. Martin was filed, wherein he agreed in case of a resale to bid at least 10 per cent. over and above the \$1,000, and pay the expense of such resale. The matter was continued from time to time until October 24, 1906, when Martin requested permission to withdraw the objections and his offer to bid over \$1,000 at a new sale. The request was granted, and the bid and objections were withdrawn. The appellant then, without notice to the respondent or his counsel, presented an order of confirmation to the judge of the court, who signed the same. The executor, immediately upon learning of this, moved to vacate said order, as it had been made without his knowledge, and at a time when he was able to secure a larger sum for the property. This motion was granted, and it is from this order that the present appeal is prosecuted.

It is contended by appellant that the order of confirmation could not be set aside by the trial court in the absence of a showing of fraud or irregularity in the obtaining thereof, and that none such appears in this instance. We think there was an irregularity, and one which would approximate constructive fraud upon the estate. The "upset" bid interposed by Martin would naturally lead the executor and heirs to believe that no confirmation of the sale was to be had. When this was withdrawn, and an order of confirmation taken without any notice to the executor, and at a time when higher bids were available, we think the condition of affairs existed which justified the trial court in vacating the order of confirmation thus made. Ofttimes probate proceedings, or numerous steps therein, are largely ex parte, and considerable latitude is accorded by law to the court which has supervision of such matters, to the end that the best interests of the estate may be subserved.

Finding no error in the action of the court in making the order appealed from, the same is affirmed.

HADLEY, C. J., and CROW and DUNBAR, JJ., concur; FULLERTON AND MOUNT, JJ., did not sit.

AMES v. FARMERS' & MECHANICS' BANK.

(Supreme Court of Washington, Jan. 20, 1908.)

1. BANKS AND BANKING—DEPOSITS—RELATION BETWEEN BANK AND DEPOSITOR—EVIDENCE.

In an action to hold defendant, a bank, having its chief place of business at S., liable for deposits in a bank at C., on the ground that the C. bank was conducted by defendant, an advertisement of the C. bank stating that it was a branch of the S. bank, published at the instance of H., who had immediate charge of the C. bank, is competent evidence that the C. bank was a branch of defendant, in connection with evidence that it was mailed directly to defendant at its home office, that the affairs of defendant were largely left with its executive officers in the immediate charge of the banking business, and that the C. bank was organized by the authority of defendant's vice president, who placed H. in charge thereof.

2. SAME.

In an action to hold defendant bank for deposits in the C. bank, on the ground of its being a branch of defendant, plaintiff offered in evidence an application for a bond to secure the deposits of public funds in the C. bank, and the bond executed pursuant thereto, the application being made in the name of defendant, and signed by S. as its vice president, and by C. as its cashier, and reciting that the C. bank was controlled by defendant, and that defendant held itself responsible for it, and the bond, executed by both banks as principals, reciting such control of the C. bank by defendant; and, though no previous authority from defendant's board of directors to such officers to sign such papers was shown, such officers were shown to be largely charged with control of its affairs, and it was otherwise shown that its president had practically the same knowledge of such matters as they had. *Held*, that the evidence was admissible; it being for the jury to say whether defendant's board of directors, by the exercise of reasonable and ordinary diligence, which they were bound to exercise, should not have known the facts.

3. SAME.

So under such circumstances letters written to defendant on letter heads of the C. bank, conspicuously stating that it was a branch of defendant, and letters written by and to defendant's officers, on their face having some bearing on the subject, are admissible for what they are worth on the question of the C. bank being a branch of defendant.

4. APPEAL—REVIEW—RECORD.

Where a part of the writing under which plaintiff claims as assignee was detached and excluded as improper, the segregation being at the instance of defendant, and there is enough in the record to show assignments supporting plaintiff's right to sue, but the excluded part is not in the record, it cannot be said that it was error to admit a part of the writing.

5. TRIAL—INSTRUCTIONS—NECESSITY.

There was no error in refusing to charge on defendant's so-called affirmative defense, in an action against defendant bank to recover deposits made in the C. bank, on the ground that such bank was a branch of defendant, such defense being the mere statement that plaintiff, with the assignors of his claims, had been in possession and control of the assets of the C. bank, and that no part thereof had ever come into the possession of defendant or its agents; the whole controversy raised by the complaint and denials thereto being whether defendant had all the time been in possession through its agents, so that the affirmative matter raised no new issue, and it not only not being capable of being treated as intended for purposes of set-off, as defendant in no way admitted a liability,

but the evidence not showing the value of assets, and it being conceded by plaintiff that whatever assets of the C. bank remained should be applied to reduce the judgment against defendant.

6. BANKS AND BANKING—DEPOSITS—ACTIONS BY DEPOSITOR—INSTRUCTIONS.

An instruction in an action against the S. bank for deposits made in the C. bank that one is liable to the same extent by subsequent ratification that he would be by precedent authority, and that, if the jury should find that any officer of defendant bank purported to start or open a bank at C., and to do business on behalf of defendant, representing that it was a branch of defendant, and that defendant, through its officers or stockholders became aware thereof, and failed within a reasonable time to repudiate said things, then defendant, by and through its officers and stockholders, is presumed to have ratified such things, and, if ratified, will be bound thereby, does not authorize the finding of a ratification on mere constructive knowledge, but on knowledge coming to defendant through its officers or stockholders.

7. APPEAL—REVIEW—RECORD.

The court's finding on exceptions to plaintiff's cost bill cannot be reviewed; the record showing merely that after a hearing and after being fully advised the court denied the exceptions, and there being nothing in the statement of facts showing what evidence was before the court at such hearing, or what matters or facts were considered by the court in reaching its conclusion, and the parties not agreeing as to such matter.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by A. A. Ames against the Farmers' & Mechanics' Bank. Judgment for plaintiff, and new trial denied. Defendant appeals. Affirmed.

Merritt, Oswald & Merritt, for appellant.
H. M. Stephens, for respondent.

HADLEY, C. J. This is an action to recover the balance of unpaid bank deposits. The complaint states 104 causes of action representing the claim of the plaintiff as a depositor on his own account, and also those of 103 other depositors assigned to the plaintiff for the purposes of suit. The complaint avers that the defendant, Farmers' & Mechanics' Bank, is a corporation under the laws of this state, having its principal place of business in Spokane, and that it is authorized by its articles of incorporation to do a general banking business in as many places as it may determine to carry on such business. It is alleged that the defendant also did a general banking business at Cheney in Spokane county from the 5th day of July, 1904, to the 6th day of July, 1906; that the business so done at Cheney was transacted under the name of "Farmers' & Merchants' Bank." In the first cause of action it is alleged that from time to time the plaintiff deposited with the defendant, through its officers and agents doing business at Cheney, various sums of money, and that on the 6th and 7th days of July, 1906, the plaintiff had on deposit with defendant at Cheney, and the defendant then owed the plaintiff, the sum of \$772.20, which remains unpaid; that on said

July 7th the defendant refused to pay to plaintiff said sum or any part thereof, and still refuses so to do; that on said date the defendant purported to close its doors and business at Cheney. Similar allegations are made as the basis of the other causes of action, including also allegations as to the assignments to plaintiff. Judgment is prayed for the sum of \$10,745.03, with interest. By stipulation it was agreed that one answer should be treated as a separate answer to each of the causes of action. The answer denies that the defendant did a banking business at Cheney, admits that it did a general banking business at Spokane, but denies any indebtedness on account of the matters set forth in the complaint. The cause was tried by a jury, and a verdict was returned in favor of plaintiff for the sum of \$10,004.66. Judgment was entered for the amount of the verdict and for costs. Defendant moved for a new trial, which was denied, and it has appealed.

There is but one designated assignment of error in the brief, which is that the court erred in overruling the motion for a new trial. Many separate points are discussed in argument as included within the one assigned as error. We will now consider the points which are specifically argued in the brief. An advertisement of the bank at Cheney was published in the Cheney Free Press, a newspaper published at Cheney. It was published at the instance of a Mr. Henning, who had immediate charge of the bank at Cheney. Henning, respondent claims, acted as the agent of appellant, but appellant denied his agency. The advertisement was as follows:

"The Farmers' & Merchants' Bank, Cheney, Wash.

"(Branch of the Farmers' & Mechanics' Bank of Spokane. Capital, \$50,000.)

"To the Public: We have opened for business in our temporary location opposite the post office, and respectfully invite your patronage. Even if you have no business to transact, we shall be pleased to have you call and get better acquainted with us.

"Very truly yours,

"A. H. Henning, Cashier.

"General Banking Business. Bank Drafts and Money Orders. Interest Paid on Time Deposits."

It will be observed that the advertisement states that the bank at Cheney is a "branch of the Farmers' & Mechanics' Bank of Spokane." It was offered in evidence by respondent, and was admitted with the understanding that it was competent evidence as bearing upon the fact that the bank at Cheney was a branch of appellant, if the advertisement was brought to the attention of appellant, and with the further understanding that it would be followed with other evidence showing that it was brought to appellant's attention. The publisher of the newspaper after-

wards testified that he mailed the paper, postage prepaid, to the appellant at Spokane. The argument is made that the advertisement was no more than the declaration of one who claimed after the transaction to have been an agent. We think, in view of the whole evidence, it was not incompetent. The evidence tended to show that the affairs of the bank were by a course of dealing largely left with the executive officers in the immediate charge of the banking business. The testimony without doubt showed that the bank at Cheney was organized by the authority of Mr. Swanson, vice president of appellant, and that Mr. Henning was by him placed in charge. The publication in the paper was a direct assertion to the public that the bank at Cheney was a branch of appellant; and when it appeared that the paper containing the advertisement was mailed directly to the appellant at its home office, it was for the jury to say under all the circumstances whether appellant had knowledge of its contents. The same was true of an advertising circular, which contained a similar statement, and to which objection was also made. That this circular was received at appellant's Spokane bank was testified by Swanson, but he did not say that he knew that other officers saw it.

A depository bond and the application to the surety company therefor were admitted in evidence over appellant's objection. The bond was made to secure the treasurer of the city of Cheney who had selected the bank at Cheney as a depository for public moneys. The application was made in the name of appellant, and was signed by Swanson as appellant's vice president, and by Mr. Clancy as its cashier. It contained the following statement: "This application made to secure bonds for purpose of protecting against loss all moneys deposited in Farmers' & Merchants' Bank of Cheney, Washington, a private institution controlled by this bank, and this bank holding itself responsible for said bank." The bond, executed in pursuance of the application, was executed by both banks as principals, and by Fidelity & Deposit Company of Maryland as surety, and contained the following recitals: "Whereas, the Farmers' & Merchants' Bank of Cheney, Washington, is controlled by the Farmers' & Mechanics' Bank of Spokane, Washington; and whereas said Farmers' & Merchants' Bank has been selected by said A. L. Ames, treasurer of the city of Cheney, Washington, as a depository for public moneys coming into his hands as said treasurer; and whereas, by reason of the Farmers' & Mechanics' Bank of Spokane, Washington, controlling and directing the Farmers' & Merchants' Bank of Cheney, Washington, it is deemed proper that the Farmers' & Mechanics' Bank of Spokane, Washington, join as a co-principal in this bond to said A. L. Ames, treasurer of the city of Cheney, Washington." We think it was not error to admit these exhibits. It is

contended that the application and bond were admitted without showing any authority of appellant to Swanson and Claney to execute them. It is true that previous authority from the board of directors was not directly shown; but the exhibits did show knowledge on the part of two of the active executive officers of the bank that the bank at Cheney was being held out as a branch of appellant, and that the treasurer of the city of Cheney, who was about to become a depositor of public funds, so understood it. With this knowledge on the part of two such active officers who, as the evidence tended to show, were largely charged with the control of the bank's affairs, it was for the jury to say whether the course of dealing of appellant was such as showed that the knowledge of these officers became, under the circumstances, the knowledge of appellant. It was also shown that the president of appellant possessed practically the same knowledge upon the subject as that of the vice president and cashier. Without doubt the patrons of the bank at Cheney must have understood from its beginning that it was a branch of appellant, and the evidence shows that such transactions were had between the two banks as may well be said to have indicated such a relationship. It was therefore for the jury to say whether appellant's board of directors, by the exercise of reasonable and ordinary diligence, should have known the facts. It was the duty of the directors to exercise such diligence in the premises. In *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49, the court said: "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than from time to time to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." See, also, *Coolidge v. Schering*, 32 Wash. 557, 73 Pac. 682; *Rattlemiller v. Stone*, 28 Wash. 104, 68 Pac. 168.

Numerous other objections were made to the admission of testimony in the way of letters written by appellant's officers, and of letters addressed to them. What has been hereinbefore said applies to that testimony. Upon its face it at least had some bearing upon the subject in hand. Letter heads of letters sent from the bank at Cheney to appellant contain the statement in a conspicuous way that the one bank was a branch of the other. A letter written by appellant's cashier related to the lease of the premises

occupied by the bank at Cheney. All this evidence was admissible for whatever value it possessed, and it was for the jury to pass upon the questions of knowledge and authority as heretofore stated.

Objection was made to the introduction of the writing under which respondent claims as assignee of the other claimants. It is urged that a part of the writing was detached and excluded as improper, and that it was error to admit only a part of it. The detached part is not in the record, and we cannot determine whether it was properly excluded or not. The record shows that the segregation of parts of the writing was at the instance of appellant. There is sufficient in the record to show assignments supporting respondent's right to sue.

Appellant complains that the court did not instruct the jury concerning what it calls its affirmative defense. That defense was the mere statement that respondent, together with his assignors, had been in possession and control of the assets of the bank at Cheney, and that no part thereof had ever come into the possession of appellant or its agents. The whole controversy raised by the complaint, and denials thereto, was whether appellant had all the time been in possession through its agents. The affirmative matter, therefore, raised no new issue. It could not be treated as intended for the purposes of set-off, for appellant in no way admitted a liability against which there could be a set-off. Moreover the evidence did not show the value of the assets so that the jury could make application thereof by way of set-off. It was shown that a dividend payment had been made from the assets upon deposits, and it is conceded by respondent that whatever remains by way of assets should be applied to reduce the judgment against appellant; but it is contended that the possession of the assets is held for appellant by agents of the latter, and under the issues the finding of the jury would seem to establish such fact. The court, therefore, did not err in refusing to instruct as to the so-called affirmative defense. The court instructed the jury in effect that one is liable to the same extent by subsequent ratification that he would be by precedent authority; that if they should find that any officer of appellant purported to start or open a branch bank at Cheney, and to do business on behalf of appellant, representing that it was a branch bank of appellant, and that the appellant, through its officers or stockholders thereafter became aware thereof, and failed within a reasonable time to repudiate said things, then it, by and through its officers and stockholders, is presumed to have ratified such things, and, if ratified, it will be bound thereby. It is contended that the doctrine of ratification or acquiescence, based upon constructive knowledge, was repudiated by this court in *Heinzerling v. Agen* (Wash.) 90 Pac. 262. We think the instruction in question, when considered as a whole,

does not authorize the finding of a ratification upon mere constructive knowledge, but that it is rather based upon the theory of knowledge which may have come to the appellant itself through its officers or stockholders, and it was for the jury to find whether such knowledge came to appellant through the source mentioned. Considering all the instructions together, we do not think the jury were misled, and we believe no prejudicial error was committed either in giving or in refusing to give requested ones.

Appellant excepted to respondent's cost bill as filed in the trial court, and supported the exceptions by counsel's affidavit that the facts stated in the exceptions were true. The record shows that after a hearing, and after being fully advised in the premises, the court denied the exceptions. There is, however, nothing in the statement of facts showing what evidence was before the court at that hearing, or what matters and facts were considered by the court in reaching its conclusion. We cannot therefore review the court's finding upon that subject. It is true appellant's counsel say that no affidavits were filed except the one above mentioned, but respondent's counsel says that additional statements and matters were taken into consideration by the court at the hearing. With such dispute existing the certificate of the trial court is necessary to inform this court what facts were considered.

We think it was not error to deny the new trial, and the judgment is affirmed.

MOUNT, CROW, and ROOT, JJ., concur.
DUNBAR and RUDKIN, JJ., not sitting.

SPOKANE STAMP WORKS v. RIDPATH.
(Supreme Court of Washington. Jan. 29, 1908.)
INJUNCTION—ACTIONS FOR INJUNCTION—EVIDENCE—BURDEN OF PROOF.

A defendant leased a room on the ground floor of his hotel to plaintiff. Held that, in an action to enjoin defendant from removing a post which extended up through the floor and supported certain noisy and jarring machinery, the evidence as to the understanding between plaintiff and defendant being conflicting, the burden of proof is on plaintiff to establish that it was maintaining and operating the machinery by authority of the defendant.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by the Spokane Stamp Works against William M. Ridpath. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with instructions to dismiss the action.

Henley & Kellam, for appellant. John O. Kleber, for respondent.

PER CURIAM. The subject-matter of this action may be understood by reference to the facts stated and discussed in *Ridpath v. Spo-*

kane Stamp Works, decided by this court January 17, 1908. It was held by the trial court in that case that the testimony offered by the plaintiff was not sufficient for the jury, and a nonsuit was granted. This court held that the testimony concerning the operation of the stamp machinery upon the premises showed upon its face the existence of a nuisance in a building that was chiefly used as a hotel, and such as the owner had a right to have abated. It was held that the trial court erred in granting the nonsuit, and the cause was remanded, with instructions to proceed with the trial. The parties are reversed in this action. The stamp works company brought this suit against the owner to restrain him from removing the upright log or the piece of timber extending from the ground in the basement up through the first floor, and upon which the stamp falls as the result of operating the machinery, and also to restrain him from cutting the power wires leading to the machinery. A permanent injunction was granted, and the owner has appealed.

Testimony was introduced by both parties in this case, and, after having read the record thereof, we are convinced that the facts show the maintenance by respondent of a nuisance upon appellant's premises. The written lease between the parties gives no leave to maintain any such noisy and jarring machinery, and the claim of right to maintain it, is based merely upon alleged oral conversations said to have occurred, some before and some after, the execution of the written lease. The evidence, however, convinces us that the owner at no time correctly understood what would be the effect of this machinery in its operation, and that he, from the beginning and at all times, expressly protested against the installation of appliances that would be noisy, or that would in any manner disturb the occupants of the hotel. He was, however, led by respondent's agents to believe that the appliances they were installing would not have such effect, and while he warned them that noisy machinery would not be tolerated, yet he did not absolutely object to the installation of this particular machinery. We think the evidence shows that, by the use of the log and power for operating the stamp thereon, respondent is using and affecting the premises in a manner never contemplated by the owner, and to which he never consented. There was conflict in the evidence; but the burden was upon respondent to establish by a preponderance of the testimony that it was maintaining and operating this machinery by authority of the owner, having in view all the peculiar phases of its operation and the effect thereof. This we think respondent has not done, and, inasmuch as the action is triable de novo here, we so find.

It was therefore error to grant respondent an injunction, and the judgment is reversed, and the cause remanded, with instructions to dismiss the action.

GAULT v. BRADSHAW.

(Supreme Court of Washington. Jan. 25, 1908.)

1. APPEAL—REVIEW—IMMATERIAL QUESTIONS.

Where the court directed a verdict, the rulings on the admission of evidence, none of which excluded evidence throwing light on the main issue, were immaterial.

2. BROKERS—COMMISSIONS—WHEN EARNED.

An owner listing his property for sale at a fixed price with a real estate broker, with knowledge that the latter on procuring a purchaser will charge a commission, is liable for the commission when the broker procures a purchaser to whom a sale is made at the fixed price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 65-74.]

Appeal from Superior Court, Kittitas County; H. B. Rigg, Judge.

Action by B. A. Gault against G. R. Bradshaw. From a judgment for plaintiff, defendant appeals. Affirmed.

O. O. Felkner, for appellant. Hovey & Hale, for respondent.

FULLERTON, J. The respondent brought this action against the appellant to recover the sum of \$1,250 claimed to be due as a commission for the sale of certain real and personal property made on September 16, 1904. After issue had been joined a trial was entered upon before the court and a jury at the conclusion of which the court on the respondent's motion directed a verdict in his favor on the ground that there was no substantial dispute on any material question of fact, and that the facts warranted a recovery on the part of the respondent. From the judgment entered on the directed verdict, this appeal is taken.

The appellant assigns errors on the ruling of the court made while passing upon the admissibility of evidence, but since no evidence was excluded which would throw light on the main issue, the questions become immaterial, in view of the action of the court in instructing a verdict; this on the principle, so often stated by us, that on trials had before the court without a jury the erroneous admission of evidence is not ground in itself for a reversal of the judgment.

On the principal question, whether or not there was a substantial dispute in the evidence, we think the court committed no error. It is undisputed that the appellant listed his property for sale with the respondent, who was a real estate broker, at a fixed price, and that the respondent told the appellant that he would charge him a 5 per cent. commission if he found a purchaser who would take the property at the price named. It is undisputed also that the respondent did find such a purchaser, that he sent the purchaser to the appellant, and that the appellant sold the property to the purchaser at the price he had named to the respondent. The appellant sought to escape liability by contending that he did not agree to pay the commission asked by the respondent,

and that, although he made no reply when the respondent told him he would charge a commission, he did not thereby intend to consent to agree to pay any commission; but to make a contract the assent to this part of the agreement did not have to be expressed. By listing the property with the respondent for sale, learning the respondent's terms, and afterwards accepting the fruits of the respondent's exertion an implied promise to pay the charge arose, and the appellant cannot now escape liability by saying that he did not intend to make such an agreement. He should have made known his reservation at the time the statement was made to him. It is too late to make it known for the first time after the respondent had performed on his part, and he had received the benefits of such performance.

But without examining the evidence further, we think it justified the conclusion of the trial court. The judgment will, therefore, stand affirmed.

RUDKIN, MOUNT, DUNBAR, and ROOT, JJ., concur. HADLEY, C. J., and CROW, J., took no part.

DONALDSON et al. v. WINNINGHAM et al.

(Supreme Court of Washington. Jan. 30, 1908.)

1. INSANE PERSONS — ADJUDICATION OF INSANITY AND GUARDIANSHIP PROCEEDING — RELATION.

In an action involving the validity of an order to defendant's guardian to sell her land, it was improper to consider the proceeding in which she was adjudged insane and committed to a state hospital, since the validity of the order appointing the guardian depends in no manner upon the validity of the previous adjudication of insanity, no fraud or conspiracy being charged.

2. JUDGMENT—COLLATERAL ATTACK.

On suit against a former owner to recover property, or to quiet a title acquired at a judicial sale, a cross-complaint by the former owner attacking the validity of the order or judgment under which the sale was made is a direct and not a collateral attack on such order or judgment, though mere errors or irregularities not going to the jurisdiction may only be corrected on a direct appeal, or, in the case of a sale by an insane person's guardian, by an appropriate proceeding brought within one year after the disability is removed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 961-965.]

3. INSANE PERSONS—APPOINTMENT OF GUARDIAN—NOTICE—NECESSITY.

Service of notice of the application for the appointment of a guardian upon the insane person, and upon the person having his care, custody, and control, as expressly required by Act March 16, 1903 (Laws 1903, p. 242, c. 130), is jurisdictional, and if no such notice is served, all subsequent proceedings are void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, § 51.]

4. HOMESTEAD—DECLARATION—NECESSITY FOR FILING.

There can be no homestead right in property acquired since the adoption of Act March 30, 1895 (Laws 1895, p. 109, c. 64), unless a

declaration of homestead is executed and filed as expressly required by such act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 60.]

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by T. J. Donaldson and another against John W. Winningham and another. From a judgment for plaintiffs, defendants appeal. Reversed, and new trial ordered.

J. H. Allen and M. M. Winningham, for appellants. H. E. Foster, for respondents.

RUDKIN, J. The defendants acquired the property in controversy on the 2d day of January, 1902, and occupied the same as their home until the 10th day of January, 1905. On the latter date the defendant Maggie M. Winningham was adjudged insane by the superior court of King county and committed to the Western Washington Hospital for Insane at Fort Steilacoom. On the 2d day of March, 1905, the defendant John W. Winningham was appointed guardian of the person and estate of the defendant Maggie M. Winningham by the same court. On the 18th day of May, 1905, the defendant John W. Winningham for himself and as guardian of the person and estate of his codefendant Maggie M. Winningham conveyed the property to one William Winningham pursuant to an order of the superior court made and entered in the guardianship matter, and William Winningham in turn conveyed to the plaintiffs. The present action was instituted by the plaintiffs to quiet their title as against the Winnings. The court made findings and granted judgment according to the prayer of the complaint, and the defendants have appealed therefrom.

The appellant Maggie M. Winningham by cross-complaint attacked the regularity and validity of the insanity proceedings, as a result of which she was adjudged insane and committed to the hospital for the insane; the regularity and validity of the guardianship proceedings, and the regularity and validity of the order of sale, on the above grounds, and on the further ground that the property was a homestead. The respondents contend that the cross-complaint was a collateral attack on the orders or judgments in the insanity and guardianship proceedings. We may say here that the insanity proceedings have no place in this record. The superior court has jurisdiction to appoint guardians for insane persons wholly independent of its jurisdiction to commit to hospitals for the insane, and the validity of the order appointing the guardian depends in no manner upon the validity of the previous adjudication of insanity. If fraud or conspiracy were charged, a different rule might apply, but no such claim is advanced here. Is this a collateral attack on the guardianship proceedings? We think it is settled by the decisions of this court that, where an action is brought against the former owner to recover proper-

ty or quiet a title acquired at a judicial sale, a cross-complaint by such former owner attacking the validity of the order or judgment under which the sale was made is a direct and not a collateral attack on such order or judgment. *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 204; *Krutz v. Isaacs*, 25 Wash. 566, 66 Pac. 141; *Northwestern & P. H. Bank v. Ridpath*, 29 Wash. 687, 70 Pac. 139. We do not mean by this that mere errors or irregularities not going to the jurisdiction of the court may be inquired into under such a cross-complaint; for these can only be corrected on a direct appeal, or in a case such as this by an appropriate proceeding instituted by the insane person within one year after the disability is removed. But the jurisdiction of the court to make the order under which the sale was made may be inquired into; and the service of notice of the application for the appointment of a guardian upon the insane person, and upon the person having the care, custody, and control of such insane person, as required by the act of March 16, 1903 (Laws 1903, p. 242, c. 130), is jurisdictional, and if no such notice was served, all subsequent proceedings are null and void. *State ex rel. Lowary v. Superior Court*, 41 Wash. 450, 83 Pac. 726.

This in our opinion is the only jurisdictional question raised by the cross-complaint or the offer of proof. The question of the sale of a homestead does not arise in this case. While it was held in *Curry v. Wilson* (Wash.) 87 Pac. 1065, that there was no authority in law for the sale or mortgage of the homestead of an insane person in this state prior to the passage of the homestead act of March 30, 1895 (Laws 1895, p. 109, c. 64)—and there is no pretense that the provisions of that act were complied with here—yet in the case of *Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046, it was held that there is no homestead right in property acquired since the passage of the act of 1895, supra, unless the declaration of homestead is executed and filed as therein provided. The property in controversy was acquired since the passage of that act, and the appellants concede that no declaration of homestead was executed or filed.

This disposes of all of the assignments of error; and for the error in excluding testimony tending to show that no notice of the application for the appointment of a guardian was given or served the judgment is reversed, and a new trial ordered. If on a retrial it should appear that no such notice was given or served, the court will take an accounting between the parties and enter judgment quieting title in the appellants on such terms as may be equitable. If it shall appear that such notice was in fact given, judgment will go for the respondents.

HADLEY, C. J., and FULLERTON, DUNBAR, MOUNT, CROW, and ROOT, JJ., concur.

RANKIN v. BLAINE COUNTY BANK.

(Supreme Court of Oklahoma. Jan. 21, 1908.)

1. EVIDENCE—PAROL—PARTIES TO CONTRACT—PRINCIPAL AND AGENT—CONTRACT BY AGENT—ACTION BY PRINCIPAL.

A principal may maintain an action on a written contract made by his agent in his own name, and evidence may properly be admitted to show that the principal was the real party in interest, notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2112.]

2. BANKS AND BANKING—INSOLVENCY—DEPOSITS—COLLATERAL.

Where a bank borrows money from another bank, and authorizes its cashier in his own name to pledge promissory notes taken in the name of the cashier, but belonging to the borrowing bank, as security for the loan, and the loaning bank fails, having on deposit money belonging to the borrowing bank in excess of the amount borrowed on the pledged promissory notes, the borrowing bank may institute suit in its own name against the receiver of the failing bank for the recovery of the promissory notes pledged, and in such suit, upon proper allegation and proof, is entitled to the return of the notes, and to have the sum borrowed on them set off against the amount on deposit.

(Syllabus by the Court.)

Error from District Court, Logan County; J. L. Pancoast, Judge.

Action by the Blaine County Bank against George C. Rankin, receiver of the Capitol National Bank of Guthrie. Judgment for plaintiff, and defendant brings error. Affirmed.

Flynn & Ames, for plaintiff in error. Dale & Blerer, for defendant in error.

KANE, J. This is an action brought by the Blaine County Bank, a corporation, against J. A. Willoughby, receiver of the Capitol National Bank of Guthrie, Okl., for the return of certain promissory notes deposited by the Blaine County Bank with the Capitol National Bank as collateral, to secure loans made by the Capitol National Bank to the Blaine County Bank. Since the cause was filed in this court, George C. Rankin, as receiver, was substituted as plaintiff in error, in lieu of Mr. Willoughby.

The plaintiff in error states the facts in his petition below, as follows: "That during the time said Capitol National Bank was engaged in the banking business said plaintiff deposited with said bank, at various times, sums of money, and that at the date said Capitol National Bank failed and closed its doors it had on deposit in said bank, to the credit of plaintiff, the sum of \$11,914.89, and on said date also had with said Capitol National Bank the following described notes, to wit: [Here follows description of notes.] Plaintiff states that said notes were placed with the Capitol National Bank under an arrangement and agreement with one Charles E. Billingsley, at that time president of said bank, as security for money advanced to and placed by the Capitol National

Bank to the credit of plaintiff herein; that at the time, to wit, April 4, 1904, when said Capitol National Bank ceased doing business, said above-described notes were held by the said Capitol National Bank to secure an advancement made by said last-named bank to the plaintiff bank in the sum of \$3,224.25, which sum of money had theretofore been so advanced and placed to the credit of said plaintiff bank upon the books of the Capitol National Bank, and which said sum of money made and constituted a part of the \$11,914.89, which the plaintiff bank had on deposit with said Capitol National Bank at the time said Capitol National Bank ceased doing business; and at the time said notes above described were placed in said Capitol National Bank it was agreed by and between the Blaine County Bank, plaintiff herein, and Charles E. Billingsley, as president of the Capitol National Bank, that said notes should be returned to the plaintiff herein as the same became due and payable, and when so returned charged to the account of plaintiff herein upon the books of said Capitol National Bank. Plaintiff alleges that when said Capitol National Bank failed, and the defendant receiver had been appointed and qualified to take charge of the assets of said Capitol National Bank, plaintiff demanded of said receiver a return of said notes so left in said Capitol National Bank, as aforesaid, and that the amount thereof, to wit, the sum of \$3,224.25, be charged against the deposit, which said plaintiff had in said Capitol National Bank at the time it failed and ceased doing business, which demand has been by the receiver refused, and said receiver has failed to comply with the demand of plaintiff, and is threatening to, and will, if not restrained, attempt to collect the said notes from the makers thereof, greatly to the injury and detriment of plaintiff."

The following, taken from the statement of defendant in error, in its brief, fairly states the details of the arrangement between the banks, as shown by the evidence: "These notes had been taken by the Blaine County Bank in the name of Ed. S. Wheelock, who was then acting as the cashier of the Blaine County Bank, and had been sent to the Capitol National Bank under a certain arrangement and agreement between the officers of the Blaine County Bank and the Capitol National Bank, whereby the Capitol National Bank was to advance, for the benefit of the Blaine County Bank, the face value of the notes at an agreed rate of interest—at 8 per cent. per annum—during the time such advancements were to run. Under this arrangement the Capitol National Bank advanced the money to Ed. S. Wheelock. Ed. S. Wheelock immediately transferred it to the Blaine County Bank."

The following is a further statement of the facts in relation to these notes taken from the brief of plaintiff in error: "Five

of the notes in question are payable to the order of Ed. S. Wheelock at the Blaine County Bank, and are indorsed 'payment guaranteed, Ed. S. Wheelock.' The remaining four notes are payable to the order of Ed. S. Wheelock, cash, and are likewise indorsed 'payment guaranteed, Ed. S. Wheelock.'

These notes, it seems from the evidence, represented loans made by the Blaine County Bank to some of its customers out of the funds of the bank. The plaintiff in error, defendant below, tried his case on the theory that, at the time of the suspension of the Capitol National Bank, the Blaine County Bank had no right, title, or interest in and to the notes; that the notes were then, and are now, the property of the Capitol National Bank; that the Capitol National Bank purchased them from Ed. S. Wheelock, and they came into the hands of the receiver as part of the assets of the bank. The court submitted the question of the ownership of the notes to the jury, and the jury found as follows: "We, the jury in the above-entitled cause, do, upon our oaths, find that the notes in controversy in this cause were placed in the Capitol National Bank as security for loans and advancements to the plaintiff." Thereupon the court rendered judgment in favor of the plaintiff, from which judgment the defendant appealed to this court.

It is practically conceded by counsel for both parties, if evidence was properly admissible for the purpose of proving that the Blaine County Bank was the owner of the paper and pledged it to the Capitol National Bank as collateral for a loan made by the Capitol National Bank to the Blaine County Bank, that said Blaine County Bank is entitled to the relief it prays for in its petition. But counsel for plaintiff in error, to avoid this conclusion, contends that: "(1) The court erred in refusing to receive evidence as to the general custom of banks in rediscounting negotiable paper. (2) The court erred in submitting special interrogatories to the jury, because such interrogatories called for conclusions from the jury and not for facts. (3) The court erred in rendering judgment in favor of the defendant in error, because (a) the promissory notes in question and the indorsements thereon show that such notes were the property of Ed. S. Wheelock at the time of their transfer to the Capitol National Bank, and the court had no power to take into consideration parol evidence for the purpose of changing, varying or contradicting such instruments; (b) such judgment was not based upon any general verdict of the jury."

There seems to be no serious contention as to the agreement entered into between the two banks. Wheelock and Billingsley substantially agree in their statement of facts, no matter how much they may differ from each other in their conclusions of law. Evidence of a custom alone, unsupported by any other evidence, certainly could not properly

be admitted to upset this undisputed contract between the parties authorized to act for the two banks. If such evidence was admitted, it would not join an issue of fact sufficient to send the case to the jury, or justify the court to find contrary to the otherwise uncontradicted testimony supporting the contract. In the case at bar there really was no issue of fact joined by the evidence to be submitted to the jury. The court probably should have taken the case from the jury; but the mere fact that it presented a certain question to the jury, and the jury made a finding that was entirely consistent with the undisputed evidence, does not, to our mind, constitute prejudicial error, if error at all. If the evidence on this point was properly admitted, the court or the jury could possibly come to no other conclusion than the one the jury arrived at, and whether the finding was a finding of fact or a conclusion of law it could in no way injure the plaintiff in error. There being no issue of fact joined by the evidence, it must necessarily follow that a verdict in this case, either special or general, was not necessary, and the record in this court may be examined as though no jury had been impaneled and sworn.

We now come to the assignment of error that reaches the merits of the case: "The court erred in rendering judgment in favor of the defendant in error, because the promissory notes in question and the indorsements thereon show that such notes were the property of Ed. S. Wheelock at the time of their transfer to the Capitol National Bank, and the court had no power to take into consideration parol evidence for the purpose of changing, varying, or contradicting such instruments." We have examined all of the authorities cited by the parties to this suit on the point raised by this last assignment, and believe that the principles governing this case are fairly deducible from them. The doctrine that parol evidence is not admissible to vary the legal import of a written agreement as a general proposition of law is well settled. But counsel for defendant in error argue they are not seeking to vary or change the terms of the promissory notes in question, but are only seeking to show who the principal was in the transactions carried on in relation to them by Ed. S. Wheelock and the Capitol National Bank; that Ed. S. Wheelock, in these transactions, was acting for the defendant in error, and that a principal may maintain an action on a written contract made by his agent in his own name; and that evidence may properly be admitted to show that the principal is the real party in interest, notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol evidence. This contention seems to be well supported by the decisions. "The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the

rule of the law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction. But the agent who binds himself will not be allowed to contradict the writing by proving that he was contracting only as agent, while the same evidence will be admitted to charge the principal. 'Such evidence [says Baron Park] does not deny that the contract binds those whom on its face it purports to bind; but shows that it also binds another, by reason that the act of the agent is the act of the principal.'" *Ford v. Williams*, 21 How. (U. S.) 287, 16 L. Ed. 36. Applying the rule above laid down to the case at bar, it would seem that the Capitol National Bank might have sued Wheelock on the notes, and that Wheelock would not be allowed to contradict the writing by proving that he contracted only as agent; but while this evidence would be inadmissible in the suit against Wheelock, it would be admissible to charge the principal, if the Capitol National Bank brought suit on the notes against the Blaine County Bank.

It seems clear, from an analysis of the foregoing case, that the receiver of the Capitol National Bank might have brought suit against either Wheelock or the Blaine County Bank, and that in the event suit was brought against the Blaine County Bank parol evidence would have been admissible to show that the Blaine County Bank was liable as principal. Why does not the same rule apply in this case where the Blaine County Bank brings suit to recover possession of the notes? We think it does, and it was not error for the court below to admit such evidence.

The only remaining question in the case is the right of the Blaine County Bank to have the amount it owed the Capitol National Bank on these notes set off as a credit in its favor against the amount the Capitol National Bank, at the time of its failure, owed the Blaine County Bank. On this proposition the case of *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059, is strongly in point. The facts in the case of *Scott v. Armstrong*, supra, as stated by Mr. Chief Justice Fuller, are briefly as follows: "No. 53 was an action brought by David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio, against Levi Scott and the Farmers' & Merchants' State Bank, in the Circuit Court of the United States for the Southern District of Ohio, upon a promissory note of \$10,000, dated at Cincinnati on June 6, 1887, payable ninety days after date, at said Fidelity Bank, with interest after maturity at the rate of 8 per cent. per annum, signed by Scott and indorsed by the Farmers' Bank to the order of the Fidelity Bank. The defendant Scott was the cashier of his codefendant, and pleaded that he signed the note

for the accommodation of the banks under an agreement that he should not be looked to for its payment. The Farmers' Bank made the same averments as to Scott, and pleaded a set-off to the amount of \$8,809.94, as arising on certain facts, in substance as follows. That the Fidelity Bank lent the Farmers' Bank the \$10,000 at a discount at the rate of seven per cent. per annum, for ninety days, under an agreement that the money so borrowed, less the discount, should be placed to the credit of the Farmers' Bank on the books of the Fidelity Bank; that the note in suit was executed accordingly, dated and discounted on June 6, 1887, and the proceeds, \$9,819.17, were placed to the credit of the Farmers' Bank, upon the books of the Fidelity Bank, to meet any checks or drafts of the Farmers' Bank, and to pay the note when it became due; that afterwards, and before June 20th, the Farmers' Bank drew against the deposit the sum of \$1,009.23, and the balance, \$8,809.94, remained to the credit of the defendant to meet the note, and was so to its credit at the time the receiver was appointed; that upon the maturity of the note and before suit was brought defendant tendered to the receiver the sum of \$1,190.06, the balance due on the note; and that the tender had since that time been kept good, and the money was now brought into court." On the above state of facts, which are, substantially, the same in principle as the facts in the case at bar, the court held that Scott and the Farmers' & Merchants' Bank did not have a legal right to a set-off, yet equity would afford that relief.

The Oklahoma Code of Civil Procedure abolishes the distinction between actions at law and suits in equity, requires all actions to be brought in the name of the real party in interest, and permits all defenses, counterclaims, and set-offs, whether formerly known as legal or equitable, to be set up therein, and the court entertaining such actions may give all the relief, either legal or equitable, the parties show themselves entitled to. It then does no violence to our practice or procedure to hold that where a bank borrows money from another bank and authorizes its cashier in his own name to pledge promissory notes, taken in the name of the cashier, but belonging to the borrowing bank, as security for the loan, and the loaning bank fails, having on deposit money belonging to the borrowing bank in excess of the amount borrowed on the pledged promissory notes, the borrowing bank may institute suit in its own name against the receiver of the failing bank for the recovery of the promissory notes pledged, and in such suit, on proper allegation and proof, is entitled to the return of the notes, and to have the sum borrowed on them set off against the amount on deposit.

Counsel for plaintiff in error, in their reply brief, state that, "All of the issues in this case are settled by a decision of the Supreme

Court of the territory of Oklahoma in the case of Willoughby v. Ball, 18 Okl. 535, 90 Pac. 1017." We think there are a good many points of difference in the two cases. Mr. Justice Burwell, who wrote the opinion in Willoughby v. Ball, 18 Okl. 535, 90 Pac. 1017, distinguishes it from Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 38 L. Ed. 1069, and we are of the opinion that this part of Justice Burwell's opinion also points out the difference between Willoughby v. Ball and the case at bar. Willoughby v. Ball, supra, was a suit commenced by Ball, president of the Bank of Meridian, in his individual capacity, alleging that the Capitol National Bank of Guthrie closed its doors and ceased to do business on or about April 4, 1904; that on or about March 12, 1904, the plaintiff Ball, representing the Bank of Meridian, borrowed from the Capitol National Bank the sum of \$2,000 due April 12, 1904, for which he executed his promissory note, which drew 2 per cent. per annum, and the proceeds of the loan were placed to the credit of the Bank of Meridian, and were never withdrawn from the Capitol National Bank; that the plaintiff was authorized by the board of directors of the Bank of Meridian to make this loan in his own name. That the fact that the loan was not made for the benefit of Ball, but for the benefit of the Bank of Meridian, was made known to Mr. Billingsley, the president of the Capitol National Bank, at the time the loan was made. That on April 12, 1904, eight days after the Capitol National Bank failed, the Bank of Meridian requested the national bank examiner, who was then in charge of the Capitol National Bank, to charge said note of Ball's to the account of the Bank of Meridian, canceling said note and surrender the same, and that the Bank of Meridian had on deposit, at said time, with the Capitol National Bank, the sum of \$2,975.25, but that the bank examiner refused to make said charge and surrender said note. The petition then prays for a cancellation of the note, and that the account of the Bank of Meridian and the amount of the note be offset against it. The defendant, as receiver, entered his appearance and filed an answer, which was a general denial, and a cross-petition praying for judgment against Ball on the note. The Bank of Meridian, although it entered its appearance, filed no pleadings in the case. The plaintiff Ball then filed a reply which was a general denial, and then pleaded affirmatively as a defense to the cross-petition of the defendant on the note the agreement between him and the Capitol National Bank wherein it was understood that the loan was to the Bank of Meridian and not to Ball. The court held that the foregoing statement of facts did not constitute a cause of action in favor of Ball against the receiver, and that an objection to the introduction of evidence should have been sustained, mainly, for the reason that the petition shows on its face that Ball was not

the real party in interest. Discussing this branch of the case, Justice Burwell says: "The Bank of Meridian, although made a party to the suit, has filed no pleading and asked for no relief. Under the plaintiff's own allegations in his pleadings the deposit in the Capitol National Bank was not his, but was due to the Bank of Meridian."

The above quotation clearly shows that the reason that the Supreme Court held that the demurrer should be sustained to Ball's evidence was that Ball, although he was an officer of the Bank of Meridian, could not, in his individual capacity, claim a set-off for it against the receiver; but that the ruling of the court would have been different if the suit was brought in the name of the Bank of Meridian, as this one is brought in the name of the Blaine County Bank, is clearly gathered from another statement by Mr. Justice Burwell in the Ball Case: "Although he may be interested in the bank, he cannot protect its right in an action in his individual name; if it is true that the debt is due from the Bank of Meridian and not from Ball, and it desires that its balance in the Capitol National Bank be set off against the debt represented by the note, it must ask for such relief. Every action or defense must be prosecuted in the name of the real party in interest, and where one having a legal right sits indifferently by, and fails to enforce it, a stranger will not be permitted to do so for him." In relation to Ball's rights under proper pleading and proof, the court held that, "While a principal debtor may set off a debt due from the plaintiff to him in an action against him and his surety jointly, the surety cannot do so on his own motion, unless he shows the insolvency of his principal, and his inability to obtain a relief either in an action brought by him, or as a defense to an action on the note; and, even then, the principal debtor should be made a party to the suit."

In the case at bar the Blaine County Bank is prosecuting its own suit against the receiver, and it desires that the amount it owes the Capitol National Bank be set off against its deposit, and asks for such relief. The court is of the opinion that it is entitled to the relief prayed for, and, finding no material error in the proceedings of the court below, it follows that the judgment of the court below must be affirmed. It is so ordered. All the Justices concurring, except HAYES, J., who was disqualified, not sitting.

(20 Okl. 11)

HARDING v. GARBER, Judge.

(Supreme Court of Oklahoma. Dec. 28, 1907.)

1. APPEAL — REVERSAL — REMAND — PROCEDURE BELOW.

A mandate from a superior court to an inferior court that reverses an order setting aside a decree of foreclosure, and that directs an order to be made in the foreclosure proceeding that will permit G., one of the defendants therein, to appear, plead, and defend, but that will not disturb the possession of H., who in the

opinion of the court from which the mandate is issued is a mortgagee in possession, does not deprive the inferior court of jurisdiction to appoint a receiver, when legal grounds therefor exist.

2. MORTGAGES—FORECLOSURE—MORTGAGEE IN POSSESSION—RECEIVER.

A mortgagee in possession may be divested of possession by appointment of a receiver, when it appears that the mortgagee is irresponsible, or that the rents and profits will be lost or be in danger of loss, or that the mortgagee is committing waste upon or materially injuring the premises.

3. MANDAMUS—WHEN LIES.

The writ of mandamus does not lie from a superior court to an inferior court to control its judicial action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 62-65.]

(Syllabus by the Court.)

Application of Daniel W. Harding for writ of mandamus to M. C. Garber, judge of the district court of Garfield county. Writ denied.

Relator's petition, after omitting caption and exhibits, is:

"The relator, Daniel W. Harding, represents and shows to this court: That on, to wit, the _____ day of _____, 1896, one John Romig held a mortgage on the east half of the northeast quarter of section eighteen (18), in township twenty-two (22) north, of range six (6) west of the Indian meridian, in Garfield county, Okl. T. That the apparent legal title to said land was at the time in one Myrtle Gillett. That said mortgage became in default, and said Romig brought suit to foreclose said mortgage in the district court of Garfield county, Okl. T., and cause proper service by publication to be made on Myrtle Gillett, the apparent owner of said land. That said Romig obtain judgment in said court foreclosing his said mortgage. That said land was sold under the judgment of said court to said John Romig, and the sale duly confirmed, and sheriff's deed executed and recorded, and said Romig then went into possession of said land. That the record of all said proceedings in said court are regular. That thereafter John Romig sold and conveyed said land to the relator, Daniel W. Harding, who immediately went into possession of said land, and has continued in absolute and exclusive possession of said land down to the date of filing this application. That this relator bought said land, relying upon the record in said cause, and without any knowledge of adverse claims to said lands, based upon any matters debors the record in said cause, and this applicant paid full value for said land in good faith, and has, since entering the possession of said land, permanently improved the same, paid taxes, effected insurance and repairs amounting in the aggregate to over \$7,000. That afterwards, and during the year 1898, Myrtle Gillett appeared in said district court and filed her motion in the cause of Romig v. Myrtle Gillett (in which the mortgage was

foreclosed, and the land sold to Romig as aforesaid) to set aside foreclosure, judgment, and all proceedings had thereunder, for the alleged reason that the said judgment was void because she, as defendant in said action, was a resident of Oklahoma at the time service by publication was obtained on her in said action as a nonresident. That upon said motion said court entered an order setting aside foreclosure, judgment, and all proceedings had thereunder, and ordered this applicant forthwith dispossessed from said land because said court held said judgment was void. That this applicant duly appealed from said order to the Supreme Court of Oklahoma, and that court, on consideration of said appeal, affirmed the order of the lower court in all things. That from the decision of said Supreme Court this applicant appealed to the Supreme Court of the United States, and that court, in the month of November, A. D. 1902, upon consideration of the appeal of this applicant, reversed the judgment of the Supreme Court of Oklahoma in words and figures as follows, to wit: 'The decision of the Supreme Court of Oklahoma will be reversed, and the cause remanded to that court, with instructions to set aside the order of the trial court, and to direct the entry of one which without disturbing the possession of Harding will give to the appellee the right to appear, plead, and make such defense as under the facts of the case and the principles of equity she is entitled to.' A full and complete copy of said mandate is hereto attached as Exhibit A, and made part hereof. That upon said mandate this court issued its mandate to the trial court, to wit: The district court of Garfield county, Okl. T., directing said trial court to set aside the judgment in foreclosure, and to enter an order allowing Myrtle Gillett to appear, plead, and make such defense as under the facts of the case and the principles of equity she may be entitled, 'and that the possession of Daniel W. Harding to the land in controversy be not disturbed, pending said proceedings, and that his rights and interests in the premises be determined in said cause.' A full and complete copy of said mandate is hereto attached, and made a part thereof, marked 'Exhibit B.' That upon said mandate the district court entered its order allowing Myrtle Gillett to plead. A copy of said order is hereto attached and made part hereof as Exhibit C. That in pursuance of said order Myrtle Gillett appeared in said court and filed her pleading, alleging that she had sold all her interest in the land to George P. Rush and Bruce Sanders, and that her only interest in the matter was a vendor's lien of \$250. That Rush & Sanders held the equity of redemption in and to said land; asked that they be made parties; asked that an accounting be taken of the rents and profits received by Harding, and that they be applied on the payment of the mortgage of Romig; alleged that Harding was a mortgagee in possession.

Rush & Sanders filed a motion to be made parties. This motion the lower court overruled. This applicant and John Romig each moved for judgment on the pleadings, and the lower court sustained said motions. A copy of said judgment is hereto attached, and made part hereof as Exhibit D. That thereafter Myrtle Gillett appealed from said judgment to the Supreme Court of Oklahoma, and that court reversed the judgment of the lower court, rendering judgment on the pleadings, and to make Rush & Sanders parties, and to proceed further in accordance with said opinion. That from this judgment of the Supreme Court of Oklahoma this applicant appealed to the Supreme Court of the United States, and said court dismissed said appeal because the decision of the Supreme Court of Oklahoma was not a final decision, and did not fix the substantial law of the case. That the mandate of the Supreme Court of Oklahoma, based on the order of the United States Supreme Court dismissing the appeal of this applicant, was filed in the district court of Garfield county, Oklahoma, on or about the 31st day of May, 1907. That said cause now stands for trial under the several mandates of the Supreme Courts. That no judgment has ever been rendered in said cause on the pleadings of Myrtle Gillett or her grantees, Rush & Sanders, nor has any accounting ever been taken or any trial had, nor has said cause ever been set for trial. That notwithstanding these facts the said George P. Rush and Bruce Sanders gave this applicant notice that they would present their application for the appointment of a receiver in said cause to take possession of said land and collect the rents and profits thereof, to preserve the same pending the trial. That said application for a receiver was presented to Hon. M. C. Garber, judge of said court, on the 10th day of June, 1907, upon the said application for a receiver, and the answer of the relator to said application, and the demurrer of said applicants to all that portion of relator's answer which pleaded and set out the mandate of the Supreme Court of the United States, and the mandate of this court, to the effect that relator's possession should not be disturbed pending the trial.

"Relator alleges that said Judge M. C. Garber sustained a demurrer to his plea that said mandate protected him in his possession until after said trial, and refused to consider said mandates. Relator further says that the further hearing of said application was by said judge continued until June 20, 1907, and on said date said judge did appoint a receiver in this cause to take possession of said land and collect the rents and profits thereof (a certified copy of said order is hereto attached as Exhibit E), and your relator alleges that unless this court grants a writ of mandamus to compel said judge to obey said mandates, and desist from disturbing the possession of this relator pending the

trial in this cause, said judge will enforce the appointment of said receiver, and dispossess this relator, based on his decision that said mandates do not prohibit him from appointing a receiver and taking possession of said land pending said hearing. Your relator alleges that he has no adequate remedy at law by which he can compel said lower court to obey said mandates; but relator alleges that a receiver has been appointed in violation of said mandates, and he has no other remedy than by the mandate of this court, enforcing its mandate.

"Wherefore applicant prays that a peremptory writ of mandamus issue, directed to Hon. M. C. Garber, compelling him to obey the mandate of this court, and not disturb the possession of the applicant by appointing a receiver or otherwise, and to vacate the order appointing said receiver, and all proper relief."

To relator's petition respondent interposed a general demurrer, and upon relator's petition and respondent's demurrer case is submitted to this court.

It is necessary to an understanding of this action that a brief history of the litigation out of which it has grown be given. This action grows out of a suit brought in the district court of Garfield county on the 11th day of March, 1896, by John Romig against Don A. Gillett and Myrtle Gillett, to recover a judgment against Don A. Gillett for \$749, with interest and attorney's fees, and to foreclose a certain mortgage, executed by Don A. Gillett to John Romig upon real estate situated in Garfield county, Okl., to secure said indebtedness. On the 18th day of December, 1896, judgment was rendered by the court in favor of John Romig for the amount sued for and foreclosing the mortgage. Sale of the land was afterwards made under the decree of foreclosure, and confirmed by the court. At the sale John Romig, the plaintiff in the action, and the mortgagee under the mortgage foreclosed, became the purchaser of the land involved. On the 9th day of March, 1897, John Romig sold said premises to Daniel W. Harding, the relator in this action. Subsequently, on the 17th day of March, 1898, Myrtle Gillett filed her motion to set aside the judgment and decree of foreclosure upon different grounds, which are not necessary to be repeated here. The court sustained the motion of Myrtle Gillett to vacate the judgment of foreclosure and order her restored to the possession of the premises of which she had been wrongfully dispossessed. From this judgment plaintiffs Romig and Harding appealed to the Supreme Court of Oklahoma Territory. The Supreme Court of Oklahoma affirmed the judgment of the trial court. John Romig and Daniel W. Harding v. Myrtle Gillett, 10 Okl. 186, 62 Pac. 805. From this judgment Romig and Harding appealed to the Supreme Court of the United States. The Supreme Court of the United States reversed the decree of the Supreme Court of

Oklahoma, and remanded the case to that court, with directions to set aside the order of the trial court, and to direct the entry of an order which, without disturbing the possession of Harding, would give the appellee Myrtle Gillett the right to appear, plead, and make such defense as under the facts of the case and the principles of equity she was entitled to. *John Romig and Daniel W. Harding v. Myrtle Gillett*, 187 U. S. 111, 23 Sup. Ct. 40, 47 L. Ed. 97. A mandate was issued from the Supreme Court of the United States to the Supreme Court of Oklahoma, in obedience to which the Supreme Court of Oklahoma issued its mandates to the district court of Garfield county. Certified copies of these mandates are attached as exhibits to relator's petition in this action, and contain respectively the language quoted in relator's petition. The district court of Garfield county, with James K. Beauchamp sitting as judge, in obedience to the mandate of the Supreme Court of Oklahoma, on the 1st day of June, 1903, made an order vacating and setting aside the judgment and decree of foreclosure made in the case by that court on the 18th day of December, 1896, and permitting Myrtle Gillett to appear, plead, and defend. A copy of this order is attached to relator's petition in this action. On December 1, 1903, Myrtle Gillett entered her appearance in the original action in the district court of Garfield county, and filed an answer and cross-petition. Subsequently Daniel W. Harding, the grantee of Romig, filed an answer on cross-petition to the answer and cross-petition of Myrtle Gillett. After various answers and cross-petitions and replies thereto had been filed, Romig and Harding moved the court for judgment on the pleadings, which motion was by the court sustained, and the decree of foreclosure rendered by that court on the 18th day of December, 1896, in favor of Romig against the Gilletts, was reinstated, confirmed, and ratified. This judgment on the appeal of Myrtle Gillett to the Supreme Court of Oklahoma was reversed. *Gillett v. Romig et al.*, 17 Okl. 324, 87 Pac. 325. From this judgment of the Supreme Court of Oklahoma appeal was taken by Romig and Harding to the Supreme Court of the United States, which appeal was dismissed by that court. George P. Rush and Bruce Sanders, who had become the grantees of Myrtle Gillett, and who had become interpleaders in the original action pending in the district court of Garfield county on the 10th day of June, 1907, made application to the respondent in this action for an order appointing a receiver in said action to take charge of the land in controversy, and collect the rents and profits therefrom. On the 20th day of June, 1907, respondent, as judge of the district court of Garfield county, granted the application, and made an order appointing a receiver as prayed for.

Relator alleges that under the language of

the Supreme Court of the United States, quoted in his petition as follows: "The decision of the Supreme Court of Oklahoma will be reversed, and the case remanded to that court, with instructions to set aside the order of the trial court, and to direct the entry of one, which, without disturbing the possession of Harding, will give to the appellee the right to appear, plead, and make such defense as under the facts in the case and the principals of equity she is entitled to," and under the language of the mandate of the Supreme Court of Oklahoma quoted in his petition as follows: "* * * and that the possession of Daniel W. Harding to the land in controversy be not disturbed pending said proceedings, and that his rights and interest be determined in said cause"—the respondent was without jurisdiction to make the order made by him on the 20th day of June, 1907, appointing a receiver, and that said order is in violation of the mandates of the Supreme Court of Oklahoma, and of the Supreme Court of the United States.

Moore & Moore and Buckner & Buckner, for relator. C. G. Hornor, H. G. Sturgis, and James W. Steen, for respondent.

HAYS, J. (after stating the facts as above). The principal question presented to this court by the pleadings before it is whether the respondent, as judge of the district court of Garfield county, under the mandates of the Supreme Court of the United States, and of the Supreme Court of Oklahoma, directing that an order be made by the trial court in the principal case, which, without disturbing the possession of Harding, would give to the appellee Myrtle Gillett the right to appear, plead, and make such defense as under the facts in the case and the principles of equity she was entitled to, had jurisdiction to hear the application for or make an order appointing a receiver to take possession of the land and premises in controversy.

Counsel for relator contends that the mandates of the Supreme Court of the United States and of the Supreme Court of Oklahoma fix the status of the relator in the principal action, pending the final termination thereof; that the effect of said mandates is to give the relator a final judgment for the possession of said land and premises, pending the final termination of the original action; and that his status thus fixed cannot be changed prior to that time, and that until such termination of said action he has by virtue of said mandates possession of said land and premises as the owner thereof, not subject to the control of any court. In determining what was presented to and decided by a court, it is proper to look both to the opinion and mandate of the court. *Guadalupe Thompson, Administratrix, et al. v. Maxwell Land Grant & Railway Co.*, 168 U. S. 451, 18 Sup. Ct. 121, 42 L. Ed. 539. In which case the court said: "We take judicial notice of

our own opinions; and, although the judgment and mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered, and what has become settled for future disposition of the case." The mandate of the Supreme Court of the United States from which relator quotes in his petition contains this further language: "You therefore are hereby commanded that such action and further proceedings be had in said cause in conformity with the opinion and decree of this court. * * *". Mr. Justice Brewer, who delivered the opinion of the court, in discussing the rights of Harding, who was one of the appellants before the court, said: "Harding, as the grantee of a purchaser at a foreclosure sale, stands in the shoes of the mortgagee. *Bryan v. Brasius*, 162 U. S. 415, 16 Sup. Ct. 803, 40 L. Ed. 1022. As shown by the opinion in that case and cases cited therein a mortgagee, who enters into possession, not forcibly, but peaceably, and under authority of a foreclosure proceeding, cannot be dispossessed by the mortgagor, or one claiming under him, so long as the mortgage debt remains unpaid." If, in determining what was decided by the Supreme Court of the United States, and if, in construing its mandate, we consider in connection therewith, as we should, the opinion of the court, it appears that it was decided by that court that the order of the trial court setting aside the judgment and decree of foreclosure, and directing that Harding be dispossessed of the premises, should be vacated, and that such order should be made as would protect the rights of both parties, an order that would give Myrtle Gillett an opportunity to appear, plead, and defend in the foreclosure proceedings, to do which, would require that the judgment and decree of foreclosure be opened; but that since Harding had come peaceably into possession of the mortgaged premises as the grantee of the mortgagee, who was the purchaser under the foreclosure proceedings, his rights, pending the final termination of the action, were those of a mortgagee in possession, and as such should be protected. It is our opinion that it was the intention of the Supreme Court of the United States by its mandate to protect, and that its mandate and the mandate of the Supreme Court of Oklahoma do protect, Harding only in that possession which the Supreme Court of the United States said under the conditions Harding had, which was the possession of a mortgagee. This is the construction that has been given to the judgment and opinion of the Supreme Court of the United States by the Supreme Court of Oklahoma. *Gillett v. Romig et al.*, 17 Okl. 324, 87 Pac. 325.

The mortgagee in possession holds the estate as a mere trustee for his indemnity. He must perform the duties of his trust. He must apply the rents and profits for the purpose of the mortgage, and must treat the

property as a provident owner would. A court of equity will compel him to perform these duties of his trust. It is a general rule of law that the mortgagee, or his grantee, who has come peaceably into possession of the mortgaged property, cannot be dispossessed of same so long as the mortgage debt remains unpaid; but if it appears that the mortgagee is irresponsible, or that the rents and profits will be lost or be in danger of loss, or that the mortgagee is committing waste upon or materially injuring the premises, a receiver may be appointed. 20 Amer. & Eng. Enc. of Law (2d Ed.) 1008; 2 *Pingrey on Mortgages*, § 1796; *Boston & Providence R. R. Co. v. Railway Co.*, 12 R. I. 220. The judgments and mandates of the Supreme Court of the United States and of the Supreme Court of Oklahoma protect Harding, pending the termination of the principal action, only in that possession which he had, which, under the opinion the Supreme Court of the United States, was the possession of a mortgagee. As long as Harding discharges the duties of his trust, he should be protected in that possession; but from the authorities cited, supra, it is seen that the possession of a mortgagee may be divested when it appears that the mortgagee is irresponsible, or that the rents and profits will be lost or be in danger of loss, or that the mortgagee is committing waste upon or materially injuring the premises, and that a receiver may be appointed.

An application for the appointment of a receiver in the principal action now pending in the district court of Garfield county, containing allegations for the appointment of a receiver on the grounds above mentioned, would be such an application as the court would have jurisdiction to hear, and the act of the court in granting or refusing the same would be a judicial act. The application for the appointment of a receiver presented to respondent is not before this court, and in the absence of the same it will be presumed that it contained legal grounds to warrant the action of the court.

The writ of mandamus does not lie from a superior court to an inferior court to control its judicial acts, or its exercise of judicial discretion. *Merrill on Mandamus*, 32.

It is the opinion of the court that respondent's demurrer to relator's petition should be sustained, and the writs of peremptory mandamus denied, and it is so ordered. All the Justices concurring.

ALBERTI v. MOORE et al.

(Supreme Court of Oklahoma. Jan. 21, 1908.)

1. MECHANICS' LIENS — STATEMENT — AMENDMENT.

Where, in an action foreclosing a subcontractor's or materialman's lien, in which the original statement filed inaccurately states the name of the party sought to be charged, and erroneously describes the property intended to be subjected to the lien, the court in the exercise of its discretion, and in the furtherance of

justice, may allow such lien claimant to file an amended statement, and foreclose the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 275-278.]

2. SAME—PERSONAL JUDGMENT.

A subcontractor, materialman, or workman, between whom and the owner there is no privity of contract, and in whose favor no direct liability has been imposed upon the owner, is not entitled to a personal judgment against the owner. The judgment rendered should be a personal one against the original contractor, and a decree establishing a lien and ordering the sale of the real estate or other property, as in other cases of sales of real estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 632-634.]

3. SAME—PARTIES.

An employé of a subcontractor or materialman, who filed a lien against the property improved, and who in a suit brought by his principal to foreclose his own lien is made a party, but is not served with process, files no pleading, and makes no appearance either personally or by counsel, is not in court, and the court has no such jurisdiction as will warrant it in awarding a judgment in his favor.

4. SAME—JUDGMENT OVER AGAINST CONTRACTOR.

The owner of a lot, who makes an agreement with a firm of contractors to construct a building thereon for a specific sum, and who under the terms of the contract pays them therefor within 60 days of the time when the last material is furnished, and whose property is, in a suit, subjected to a subcontractor's or materialman's lien, is entitled, in the same action, to recover a judgment against the contractors for the full amount of the judgment, interest, and costs, recovered by such subcontractor or materialman, and established as a lien against his property.

(Syllabus by the Court.)

Error from District Court, Kay County; Bayard T. Hainer, Judge.

Action by O. H. P. Moore and others against George Alberti. Judgment for plaintiffs, and defendant brings error. Modified.

This is an action brought in the district court of Kay county, Okl. T., for the purpose of foreclosing a mechanics' lien on lot 13, in block 33, in the town of Newkirk, Okl., property of George Alberti, plaintiff in error. The material facts out of which this controversy grows are as follows: August 1, 1898, George Alberti entered into a written contract with John H. Pierce and Jesse Thomas, under which they agreed to build on the said lot a stone building, contractors therein furnishing all materials, and to construct it for a stipulated price. Under this agreement the structure was erected, and the price agreed upon, with the exception of \$27.81, was paid by Alberti to Pierce and Thomas. Thereafter, and on September 27, 1898, there was filed in the office of the clerk of the district court of Kay county a mechanics' lien statement, wherein Joseph Alberti was charged as debtor to O. H. P. Moore and J. H. Helms, partners, for materials furnished in erecting a two-story building on lot 13, block 15, town of Newkirk, Kay county, Okl. T., from August 15, 1898, to September 20, 1898, consisting of the balance due on 84 cords and 49 feet of stone at \$3.65 per cord, \$274.80. Notice of

this lien seems to have been served upon George Alberti, plaintiff in error, on September 27, 1898. On October 3, 1898, there was filed in said office a mechanics' lien of Jesse Anderson, in which was claimed the sum of \$80.40 against lot 13, block 33, town of Newkirk, Okl. T. No notice of this lien appears to have been served, and in the subsequent proceedings Anderson filed no pleading, nor did he appear in court either in person or by attorney. On the 13th day of February, 1899, O. H. P. Moore and J. H. Helms, as partners, filed their petition against Joseph Alberti, defendant, pleading the contract between Alberti and Pierce and Thomas for the construction of the building, praying for judgment against the defendant for the sum of \$274.80, with interest thereon at the rate of 7 per cent. per annum from September 20, 1898, and for the foreclosure of their mechanics' lien above mentioned. Summons was issued to Joseph Alberti, and served upon George Alberti, who entered his appearance, and filed as answer a general denial, and the case came on for trial on the 30th day of March, 1899. Parties, plaintiff and defendant, introduced their evidence and rested, whereupon the court ordered that all lien claimants and contractors interested in the subject-matter of this action should be made parties defendant. Whereupon plaintiffs asked leave to amend their petition and to file an amended statement of their lien claim, which was granted, and to which the defendant excepted. On April 10, 1899, the plaintiffs virtually began a new action, but entitled their pleading filed an amended petition, in which there was made defendants George Alberti, John H. Pierce, Jesse Thomas, and Jesse W. Aldridge. In this petition it was pleaded that plaintiff Moore had succeeded to all the interest of the partnership of Moore and Helms in the contract for stone used in the construction of the stone building; that the defendants George Alberti, John Pierce, and Jesse Thomas had agreed to pay said plaintiff the sum of \$3.65 per cord for the stone furnished; that there was then due and owing from the defendants Alberti, Pierce, and Thomas to plaintiff a balance of \$274.80, for which, against all of them, he asked judgment. Moore also, in accordance with the rule of the court, filed an amended lien statement, and prayed that the lien be foreclosed against the premises involved. Summons was issued and served on all the defendants except Aldridge. John Pierce filed separate answer, setting up the contract for the erection of the building, and alleging that he and the defendant Jesse Thomas had a verbal agreement by which said Thomas agreed to furnish the stone for \$3.65 per cord, and that he had been fully paid for the same, and that Thomas had no other or further interest in the contract. He then denied all the other allegations in plaintiff's petition, and asked to be discharged, with costs. George Alberti filed his answer alleging that he was the own-

er of lot 13, in block 33, in the town of Newkirk, Kay county, Okl. T., and that the only contract he entered into regarding the construction of the building on said lot was by and between himself, John Pierce, and Jesse Thomas, and that under the terms of said contract, the said Pierce and Thomas were to furnish all materials required for the consideration of \$726, all of which sum had been paid with the exception of \$27.81, which was paid into court for the use and benefit of the party entitled thereto, and praying that in the event judgment be rendered against his property that he recover judgment against John H. Pierce and Jesse Thomas for the amount thereof, with his costs. Jesse Thomas for his answer admitted the signing of the contract, but denied that he was in any way indebted to defendant George Alberti. Upon the issues thus framed, a jury being waived, the cause came on for hearing on September 9, 1899, before the court, who, after hearing all of the evidence, rendered a judgment in favor of plaintiff O. H. P. Moore, and against the defendant George Alberti, for the sum of \$193, and his costs, and a judgment in favor of Jesse W. Aldridge and against George Alberti in the sum of \$80.40, and for his costs, and decreed the said judgment a first lien on the premises above described, foreclosing the same, denying the prayer of Alberti's answer for judgment against Pierce and Thomas, or either of them, and providing that John Pierce and Jesse Thomas recover their costs against said Alberti. On September 13, 1899, Alberti filed his motion for new trial, and on its presentation the court modified the judgment, assessing the amount of plaintiff's recovery in the sum of \$145.20, and Jesse Aldridge's recovery in the sum of \$59.57, overruling the motion as to the balance of the judgment, to which exception was saved by Alberti, and the case brought to this court for review.

W. S. Cline and Ira A. Hill, for plaintiff in error. Virgil H. Brown, J. L. Roberson, and McGinnis & Woodson, for defendants in error.

DUNN, J. (after stating the facts as above). Under our statutes, and the facts as developed in this case, Moore occupies the position of a materialman, and is entitled to a lien by virtue thereof. He furnished the stone to Pierce and Thomas with which they constructed the building, and which, under their contract, they were bound to furnish for the sum agreed upon with Alberti. Section 651, c. 66, Code Civ. Proc. St. Okl. 1893, sets out the conditions under which Moore could obtain a lien against the building or property on which such material was used: "Any person who shall furnish any such material or perform such labor under a subcontract with the contractor, or as an artisan or day laborer in the employ of such contractor, may obtain a lien upon such land

from the same time, in the same manner, and to the same extent as the original contractor, for the amount due him for such material and labor; and any artisan or day laborer in the employ of such subcontractor, may obtain a lien upon such land from the same time, in the same manner, and to the same extent as the subcontractor, for the amount due him for such material and labor, by filing with the clerk of the district court of the county in which the land is situated, within sixty days after the date upon which material was last furnished or labor last performed under such subcontract, a statement, verified by affidavit, setting forth the amount due from the contractor to the claimant, and the items thereof as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a description of the property upon which a lien is claimed; and by serving a notice in writing of the filing of such lien upon the owner of the land; Provided, that if with due diligence the owner cannot be found in the county where the land is situated, the claimant, after filing an affidavit setting forth such facts, may serve a copy of such statement upon the occupant of the land, or if the land be unoccupied, may post such copy in a conspicuous place upon the land or any building thereon. Immediately upon the filing of such statement the clerk of said court shall enter a record of the same in the docket provided for in section six hundred and fifty of this act, and in the manner therein specified: Provided, that the owner of any land affected by such lien shall not thereby become liable to any claimant for any greater amount than he contracted to pay the original contractor; but the risk of all payments made to the original contractor shall be upon such owner until the expiration of the sixty days hereinbefore specified; and no owner shall be liable to an action by such contractor until the expiration of said sixty days, and such owner may pay such subcontractor the amount due him from such contractor for such labor and material, and the amount so paid shall be held and deemed a payment of said amount to the original contractor." The foregoing section is the one under which Moore attempted to act when he filed his lien in the office of the clerk of the district court against Joseph Alberti instead of George Alberti, and running the lien upon lot 13, in block 15, instead of lot 13, in block 33. The notice served misspelled the name of Alberti, and it was addressed to Joseph instead of George, and, in addition thereto, likewise gave the wrong description of the property involved. When the suit was brought Joseph Alberti was made defendant, summons was issued to him, and served upon George Alberti, who answered by a general denial. On hearing the cause the errors of the lien statement developed, and the court, on considering the matter, permitted the making and filing

of an amended lien statement correcting the error made in the original. To this action the defendant excepted, and his first specification of error is directed to this point.

Section 653, c. 66, St. Okl. 1893, provides: "Any lien provided for by this act may be enforced by civil action in the district court of the county in which the land is situated. * * * The practice, pleading, and proceedings in such action, shall conform to the rules prescribed by the Code of Civil Procedure as far as the same may be applicable; and in case of action brought, any statement may be amended by leave of court in furtherance of justice as pleadings may be in any matter, except as to the amount claimed." In addition to this, section 139, c. 63, St. Okl., provides that: "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, or correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case." These sections, taken together, in our judgment, give ample authority to the court in the exercise of its discretion to allow the amendment to be made. The plaintiff in error, Alberti, under the contract which he had made with Pierce and Thomas, was in no wise prejudiced by this amendment. In carrying out the contract that he had made for the construction of his building he had paid out prior to the expiration of the 60 days provided for in section 651, c. 66, Okl. St., practically all of the money due on this contract. This it will be seen from the same section he did at his peril; and this money would have been paid out as it was without reference to whether Moore's lien statement was accurate or inaccurate, for it was paid prior to the filing thereof, so that as the amendment in no wise changed the position of plaintiff in error he has no right to complain. The court committed no error in allowing the amended statement to be filed. The statute is a remedial one, and should be liberally construed to effect its purpose. *El Reno Electric Light & Telephone Co. v. W. R. Jennison*, 5 Okl. 759, 50 Pac. 144. Where in an action foreclosing a subcontractor's or materialman's lien, in which the original statement filed inaccurately states the name of the party sought to be charged, and erroneously described the property intended to be subjected to the lien, the court in the exercise of its discretion, and in the furtherance of justice, may allow such lien claimant to file an amended statement, and foreclose the same. This conclusion disposes of plaintiff's first and fifth assignments of error.

Plaintiff's second and third assignments of error both raise the question of the legality of the personal judgment rendered in favor of Moore and Aldridge against plaintiff in error for the amount found due on their

claims. In these objections the court agree.

There was no privity of contract between Moore and Aldridge and Alberti. The owner of the premises (Alberti) had engaged Pierce and Thomas to furnish everything and do the constructing agreed on in the contract. This is consented to be the fact by all parties to this controversy, so Moore and Aldridge were not entitled to a personal judgment against Alberti. "A subcontractor, materialman, or workman between whom and the owner there is no privity of contract, and in whose favor no direct liability has been imposed upon the owner, is not entitled to a personal judgment against the owner." 27 Cyc. 436, and cases cited. There exists no such privity between a materialman or a subcontractor as will permit him to take a personal judgment for the amount of his debt against the owner. The party or parties with whom he contracts are the original contractors, and they alone as between the two are personally responsible to him. By authority of the statute, and this only, he is permitted to subject the property improved to the payment of his claim, but he can do this only in a suit, as provided in section 653, c. 66, St. Okl. 1893, et seq., in which such original contractor is a party defendant and it is essential before he can enforce his lien against the property that he first secure against the original contractor a judgment for the amount which he seeks to have levied on the property. Our statutes provide that: "In actions of this character, all persons whose liens are filed as herein provided, and other incumbrances shall be made parties." The Court of Appeals of Colorado, in the case of *Estey v. Hallack & Howard Lumber Company*, 4 Colo. App. 165, 34 Pac. 1114, in passing upon a case similar to this, citing the case of *Davis v. Lumber Company*, 2 Colo. App. 381, 31 Pac. 187, says: "*Davis v. Lumber Co.*, supra, is conclusive of this case. The necessity of making the contractor a party is carefully examined, and discussed fully. The court said: 'It has been often held that the contractor was an indispensable party to the action. With this we agree, and adjudge that the contractor is not only a proper, but a necessary and indispensable, party against whom a debt must be established as the foundation of the decree for the foreclosure of the lien.' This conclusion is well sustained by authority. See *Phil. Mech. Liens*, art. 397; *Vreeland v. Ellsworth*, 71 Iowa, 347, 32 N. W. 374; *Kerns v. Flynn*, 51 Mich. 573, 17 N. W. 62; *Sinnickson v. Lynch*, 25 N. J. Law, 317; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. The conclusion is founded on principle and sound legal logic. No privity of contract exists between the owner and the subcontractor. The contractor is the primary debtor. If the amount could be collected from him, there would be no resulting claim against the property of the owner. The claim against the property is secondary,

ancillary. Not only must there be a primary judgment against the contractor, but there must be an adjudication or settlement of the amount due subcontractors—matters of which the owner can have no knowledge whatever—and, in order to fix the amount for which subcontractors could charge the property, an adjudication or accounting between the owner and the contractor is indispensable." Pierce and Thomas contracted to erect a building for plaintiff in error for a specific sum. They required stone to carry out their contract. Moore furnished this stone. They became indebted to him therefor, and by complying with certain requirements the statute gave Moore by reason of these facts a lien against Alberti's lot and building; but it is a right to subject the property improved to the payment of the debt, not a right to a personal judgment against the owner. "The lien given by the statute to materialmen is neither a *jus in re*, nor a *jus ad rem*, but simply a right to charge the property affected by it with the payment of the particular debt, in preference and priority to other debts, on compliance with the requisitions of the statute; and it is inchoate until perfected by the rendition of a judgment in rem in the mode pointed out by the statute." *Porter & Co. v. Miles*, 67 Ala. 130; 27 Cyc. 430, and cases cited. Furthermore, section 654, c. 66, St. Okl. 1893, provides: "Where such action brought by a subcontractor, or other person not the original contractor, such original contractor shall be made a party defendant, and shall at his own expense defend against the claim of every subcontractor, or other person claiming a lien under this act, and if he fails to make such defense the owner may make same at the expense of such contractor; and until all such claims, costs and expenses, are finally adjudicated, and defeated or satisfied, the owner shall be entitled to retain from the contractor the amount thereof, and such costs and expenses as he may be required to pay." By this it will be seen that our statute precludes the idea of a personal judgment being taken by a subcontractor or materialman against the owner on the foreclosure of a lien filed by them. The judgment rendered should be a personal one against the original contractor, and a decree establishing a lien and ordering the sale of the real estate or other property, as in other cases of sales of real estate. St. Okl. 1893, c. 66, § 656.

Exception is taken to the judgment rendered in favor of Jesse W. Aldridge in the sum of \$59.57. Aldridge, as appears from the evidence, was employed by Moore to haul the stone used in the building at \$1.65 per cord. Moore had agreed to furnish it for \$3.65 per cord. Moore owed Aldridge personally for the hauling of this stone, and filed claim for the same with his original and amended statements. Aldridge filed a mechanics' lien statement in his own behalf for the amount,

but his action was not a waiver of his claim against Moore, nor did it relieve Moore of its payment. His remedy was cumulative. He could do both. "The mechanics' lien is a creature of the statute. It exists on certain conditions, independent of any special contract. It is unknown to the common law, and is a cumulative remedy, which may be concurrently pursued in connection with the ordinary actions for the collection of debts." *Henry Ehlers, Adm'r, v. S. T. Elder*, 51 Miss. 495. "Filing the claim does not create, but simply establishes, the lien. It changes an inchoate and defeasible right to a lien into a fixed and definite incumbrance. * * * A mechanic who files a claim for lien does not thereby release his debtor from personal liability. So, to, a subcontractor, to whom the contractor has given an order on the owner, may still enforce his rights under such order after he has filed his claim." *Bolsot on Mechanics' Liens*, 496. *Phillips on Mechanics' Liens*, § 9, says: "It is a cumulative remedy which may be concurrently pursued in connection with the ordinary actions for the collection of debts." See, also, 27 Cyc. 432, and cases. Aldridge had a right to file the mechanics' lien statement, and also the right to proceed against Moore for the amount of his debt. On the order of the court he was, on March 30, 1899, made a defendant, but he was not served with summons, nor did he appear or plead in any manner, nor was he present at the trial, either personally or by counsel. Moore asked judgment for the amount which he owed Aldridge, and was entitled to it. Aldridge not being in court was neither entitled to a judgment in his favor, nor would he be liable for one against him. The court had no jurisdiction to render either. Moore, on the other hand, was entitled to recover the money due Aldridge, as he had agreed to pay him, and owed him the amount.

The remaining question in this case is the right of plaintiff in error to be subrogated to the rights of Moore as against the original contractors, Pierce and Thomas, and while we find no adjudicated case in which the specific question here involved has been decided, the general principle applies that: "Subrogation takes place where one pays a debt which another was justly liable to pay, and the payment is made to discharge the property of the person paying from an incumbrance." *Lowrey v. Byers*, 80 Ind. 443; *Davis et al. v. Schlemmer, Adm'r*, 150 Ind. 479, 50 N. E. 373; *Albert Cole, Respondent, v. Robert Malcolm, Impleaded, etc.*, Appellant, 66 N. Y. 363; *Bolsot on Mechanics' Liens*, § 263; *Phillips on Mechanics' Liens*, § 260. In the case of *Davis et al. v. Schlemmer, Adm'r*, 150 Ind. 478, 50 N. E. 375, the court says: "The right of subrogation is not founded upon contract, expressed or implied, but upon principles of equity and justice, and is broad enough to include every instance in

which one party, not a mere volunteer, pays a debt for another, primarily liable, and which in good conscience and equity should have been paid by the latter. *Spaulding v. Harvey*, 129 Ind. 106, 109, 28 N. E. 323, 13 L. R. A. 619, 28 Am. St. Rep. 176; *Huffmond v. Bence*, 128 Ind. 131, 137, 27 N. E. 347; *Sidener v. Pavey*, 77 Ind. 241; *Gerber v. Sharp*, 72 Ind. 553, 556-558; *Rooker v. Benson*, 83 Ind. 250, 256; *Kyner v. Kyner*, 6 Watts (Pa.) 221; *Harnsberger v. Yancey*, 33 Grat. (Va.) 527; *Miller v. Winchell*, 70 N. Y. 438; *Mathews v. Alken*, 1 N. Y. 595; *Lewis v. Palmer*, 28 N. Y. 271; *Stevens v. Goodenough*, 26 Vt. 676; *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647; *Darst v. Thomas*, 87 Ill. 222; *Greenwell v. Heritage*, 71 Mo. 459; *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40; *Sheldon on Subrogation*, §§ 1, 11." From the foregoing it will be seen that Alberti is entitled to be subrogated to all the rights of Moore as against Pierce and Thomas, whose debt he has, by virtue of this lien against his property, been compelled to pay.

The plaintiff in error makes a further contention in his brief objecting to the amount of recovery allowed Moore, and calls attention to the different payments alleged to have been made. In view of the fact that this was twice pressed upon the attention of the trial court, and that court modified its judgment, we cannot, in consideration of the uncertain and conflicting statements in reference thereto, enter into this domain of speculation, as the lower court manifestly had better opportunities to determine this accurately than we have.

This defense urged by John Pierce in his separate answer, in which he pleads that he and Jesse Thomas took the contract to construct the building, and that they had a verbal agreement by which Thomas agreed to furnish the stone to erect the building, is one which cannot avail him in this controversy. His remedy is against Thomas.

The cause is accordingly remanded to the district court of Kay county, with instructions to set aside the judgment heretofore rendered, and enter one for O. H. P. Moore against John Pierce and Jesse Thomas for the sum of \$204.77, with interest thereon at the rate of 7 per cent. per annum from September 20, 1898, and for his costs, decreeing \$176.96 thereof a first lien upon lot 13, block 33, in the town of Newkirk, Kay county, Okl., and the said lien be foreclosed and the said lot sold as in other cases of the sales of real estate, and out of the proceeds thereof paying, first, the costs of this proceeding, second, the amount of judgment herein rendered, and the balance, if any, be paid to plaintiff in error, George Alberti, and enter judgment in favor of George Alberti, plaintiff in error, against John Pierce and Jesse Thomas, defendants in error, for the sum of \$176.96, with interest thereon at the rate of 7 per cent. per annum from September 20, 1898,

and for the costs of this proceeding, including all costs of foreclosure and sale of the property herein involved. All the Justices concurring.

GOODWIN et al. v. BICKFORD.

(Supreme Court of Oklahoma. Jan. 21, 1903.)

1. COURT—RULES OF COURT—COSTS ON APPEAL.

The district court of the territory of Oklahoma has no power to impose a rule requiring that a party appealing a cause from the probate court to the district court shall deposit with the clerk of the district court five dollars for costs of the clerk, and that a failure to do so within 20 days after the transcript of the trial court is deposited with the clerk shall be ground for dismissal of the appeal.

2. APPEAL—RECORD—RULES OF TRIAL COURT.

The rules of a trial court are part of the record of every cause tried thereat.

3. SAME—ERRORS APPARENT OF RECORD.

Errors apparent upon the judgment roll or record of a cause will be considered by this court, although no exceptions were taken thereto in the trial court.

(Syllabus by the Court.)

Error from District Court, Canadian County; C. F. Irwin, Judge.

Action by Will Carlton Bickford against John A. Goodwin and others. Judgment for plaintiff. Defendants bring error. Reversed and remanded.

On July 1, 1903, the defendant in error filed his petition in the probate court of Canadian county, alleging, among other things, that he is the adopted son and only heir at law of Mary E. Hortop, who died on or about the 7th day of April, 1903, and that he is entitled to letters of administration upon her estate, and praying that such letters be issued to him. On the 2d day of July, 1903, John A. Goodwin, one of the plaintiffs in error, filed his petition in the probate court of Canadian county, alleging, among other things, the death of Mary E. Hortop, and that Cynthia Rosenberger, Emma J. Masters, Nellie C. Bickford, Mrs. E. Carson Mason, James Dexter, and Mrs. — Walker are heirs at law of the decedent, and praying that letters of administration on the said intestate estate be issued to him. On the 14th day of July, 1903, the two petitions were heard together, and the court adjudged the defendant in error to be the adopted son of Mary E. Hortop, granted the prayer of the petition, appointed him administrator of the estate, and ordered the letters of administration thereon issued to him accordingly. Thereupon the plaintiff in error appealed to the district court of that county. Afterwards, on August 25, 1903, the defendant in error filed a motion to dismise the appeal of plaintiff in the district court, and assigned as his reasons therefor six grounds. On December 1, 1903, the court granted plaintiff leave to file a new and sufficient appeal bond. On December 4, following, plaintiff filed an af-

affidavit in support of their motion resisting the motion to dismiss the appeal, and time to file a counter affidavit was extended until December 9th. On December 9th, as shown by the journal entry, the appeal was dismissed "for failure of the plaintiff to properly perfect his appeal by compliance with rule 14 of this court."

M. D. Libby, for plaintiffs in error. Geo. S. Pearl and J. G. Lowe, for defendant in error.

HAYES, J. (after stating the facts as above). Only one question is presented by the petition in error and argued by counsel for plaintiffs in error in their brief, and that is: Did the court err in dismissing the appeal for the failure of the plaintiffs in error to comply with rule 14 of that court, by making a deposit of five dollars to apply on the cost of the clerk of the district court, within the time prescribed by said rule? The portion of rule 14 affecting this case is: "That in all cases appealed from a lower court to the district court of this district, the appellant shall, within twenty days from the time the papers in such appealed case shall have reached the office of the clerk of this court, deposit with such clerk the sum of five dollars, to apply on costs of clerk in the district court, and the appellee shall, prior to the first day of the next term of the district court of the county in which such appeal arose, deposit with the clerk for costs the sum of three dollars. No appeal shall be placed on the docket of this court until the appellant shall have made the deposit herein provided for. Should the appellant fail to make deposit for the costs as herein required the appellee may pay the costs made in the district court on such appeal, together with the costs of docketing and dismissal, and such appeal shall, on motion of the appellee, be dismissed for failure to prosecute." On August 25, 1903, appellee in the district court filed his motion to dismiss the appeal for failure of appellants to make the deposit as required by said rule 14. On the 7th day of December following, after the expiration of the 20 days provided for in rule 14, appellants deposited with the clerk of the district court five dollars. Plaintiffs in error in their brief assign as reasons why the action of the district court should be reversed that the dismissal of the appeal by the court was an abuse of legal discretion, and that the court had no power to prescribe said rule 14 requiring said deposit for costs, and that, on failure to comply with it, the appeal should be dismissed.

We shall consider the second reason assigned first; for, if it is well founded, it will not be necessary to consider the first reason assigned. It is a well-settled principle of law that courts, independent of any statutory provision, have the inherent power to make rules for the regulation of their practice and busi-

ness, but they can make no rule that contravenes a statute or the law of the land. *Prindeville v. People of the State of Illinois*, 42 Ill. 217; *August Fisher v. National Bank of Commerce*, 73 Ill. 34; *Thomas Purcell v. Hannibal & St. Joseph Railroad Company*, 50 Mo. 504; *United States v. James G. Swan et al.* (D. C.) 77 Fed. 473. It cannot be said that, in imposing costs and prescribing rules governing their collection, in the practice of a court a different rule from the one announced above applies, or that a court has control over the same superior to the legislative department of the government, and that a court may make a rule governing the same in conflict with the statute, because courts had no power at common law to impose costs, and such power exists only when authorized by statute, and a court in prescribing rules relative to the costs authorized by statute to be imposed by it cannot, in doing so, contravene a statute. *Maggie E. Bradford v. Southern Railroad Company*, 195 U. S. 243, 26 Sup. Ct. 55, 49 L. Ed. 178. The Legislature of the territory of Oklahoma has provided a procedure governing an appeal from the judgment, decree, or order of the probate court, to the district court. Chapter 18 of the statutes of 1893, being the chapter on "Probate Procedure," contains the following provisions:

"1483. An appeal may be taken to the district court from a judgment, decree, or order of the probate court: First, granting or refusing, or revoking letters testamentary, or of administration, or of guardianship."

"1487. The appeal must be made: First—by filing a written notice thereof with the judge of the probate court, * * * and, second—by executing and filing within the time limited, * * * such bond as is required in the following sections. It shall not be necessary to notify or summon the appellee or respondent to appear in the district court, but such respondent shall be taken and held to have notice of such appeal in the same manner as he had notice of the pendency of the proceedings in the probate court."

"1495. The judge of the probate court must, within ten days from the filing of the notice of appeal, and the giving of the required bond, cause a certified copy thereof and of the judgment, decree, or order, or specific part thereof appealed from * * * to be transmitted to the clerk of the district court of the county or judicial subdivision, to be filed in his office, and the appeal may be heard and determined at any day thereafter by said court, at any general special or adjourned term; and if the appellant make no appearance when the case is called for trial, or otherwise fail to prosecute his appeal, the respondent may, on motion, have the appeal dismissed. * * *"

"1500. Such appellate court may award to the successful parties the cost of the appeal, or it may direct that such costs abide the event of a new hearing, or of the subsequent proceedings in the probate court. In either

case, the costs may be made payable out of the estate or fund, or personally by the unsuccessful party, as directed by the appellate court, or, if no such direction be given, as directed by the probate court."

By these provisions and other sections of the chapter quoted from, the Legislature of the territory of Oklahoma has provided a complete procedure for perfecting an appeal from the probate court to the district court, and has prescribed in detail the things necessary to be done. These provisions of the statute were, on March 3, 1891, c. 543, § 17, 26 Stat. 989, ratified by Congress (Supp. Rev. St. vol. 1 [2d Ed.] p. 929). *Wetz v. Elliott et al.*, 4 Okl. 618, 51 Pac. 657; *Decker v. Cahill*, 10 Okl. 251, 61 Pac. 1101. Put, aside from any virtue or power these provisions may have received from the act of Congress approving them, they are valid enactments of the territorial Legislature. Congress, in establishing a government for the territory of Oklahoma, divided the government into three branches—executive, legislative and judicial. In defining the powers of these different branches of the government it provided: "That the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." It is true that Congress granted, by the organic act, some legislative powers to the Supreme Court; but the subject upon which it could legislate are clearly defined and limited, and matters therein specified as subjects upon which the court can legislate do not include the subjects of the provisions of the statutes cited, *supra*. It has been the practice of Congress, in establishing governments for territories, to commit to the Territorial Assembly the matter of providing for the manner of taking and perfecting appeals. *James Hornbuckle v. John Toombs*, 18 Wall (U. S.) 648; 21 L. Ed. 966. In this case Mr. Justice Bradley, in speaking for the court, says: "Whenever Congress has proceeded to organize a government for any of the territories it has merely instituted a general system of courts therefor, and has committed to the Territorial Assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdictions of the several courts. * * * From a review of the entire past legislation of Congress on the subject under consideration, our conclusion is that the practice, pleadings, and forms and modes of proceedings of territorial courts, as well as their respective jurisdictions, subject, as before said, to a few expressed or implied conditions in the organic act itself, were intended to be left to the legislative action of the Territorial Assemblies, and to the regulations which might be adopted by the courts themselves." The Legislature of the territory of Oklahoma had power to enact laws regulating the procedure in the courts of the territory and prescribing

the manner of taking and perfecting appeals from the inferior courts to the superior courts. *Territory of Oklahoma v. W. A. Stroud*, 6 Okl. 106, 50 Pac. 265; *Chas. W. Bailey and Harry Plummer McCool v. Territory of Oklahoma*, 9 Okl. 461, 60 Pac. 117.

The plaintiffs in error and the defendant in error have cited the cases of *Dooley v. Foster*, 5 Kan. 269, and *Coleman v. Newby*, 7 Kan. 83. Defendant in error insists that the decisions in these cases support the theory of his case. A close examination of *Dooley v. Foster* will disclose that the court in that case did not decide whether the district court had power to make the rule in question or not. That case was determined upon the theory that the appellee had waived the requirements of the rule in controversy. Justice Valentine, in rendering the opinion in the case, said that he announced the opinion of the court without considering whether the rule in question was valid or invalid. In the case of *Coleman v. Newby*, *supra*, no opinion of the majority of the court was given, except a statement made by Justice Brewer affirming the action of the trial court. We cannot infer otherwise than that the majority of the court in that case reached its opinion by deciding that the rule in controversy was not in conflict with the statute of Kansas governing appeals from justices of the peace to the district court. For the court to have held that the district court had power to make a rule contravening the statute would have been against the great weight of authorities. In the case at bar the Legislature of the territory of Oklahoma has, by statute, prescribed in detail how an appeal shall be taken from the probate court to the district court and perfected. It has said that a written notice thereof and a bond must be filed with the probate judge; that within 10 days thereafter a certified copy of certain documents must be transmitted by the probate judge to the clerk of the district court to be filed in his office, and that it shall not be necessary to notify or summon the appellee in the case; that the case may be heard at any time during the next general or special term of the court after the appeal has been transmitted to the clerk's office to be filed; and that, if the appellee make no appearance when the case is called, the appeal may be dismissed. We could hardly conceive of a statute that could prescribe more specifically the detailed requirements necessary to perfect an appeal, and how the same shall be disposed of; but it does not require that any deposit for cost shall be made in order to perfect the appeal. On the contrary, it is specifically provided that after the appeal has been transmitted by the probate judge to the district clerk, to be filed in his office, without even a summons or notice to defendant in error, the case may be heard at any day of any general or special term of the court, and that if, when the case is called, appellant does not appear, the same may be

dismissed on motion of the appellee. There is nothing in this statute that will permit the construction that anything else than what is mentioned therein is required to be done, or may be required to be done, by the court before the appeal is perfected; and under the language of the statute, when the appeal has been perfected, it may be heard at any general or special term of the court. Any rule of the court requiring additional things to be done by the appellant than those prescribed by the statute herein quoted would contravene the statute and would be invalid.

The case of *Cunningham v. Quinn*, 12 Colo. 473, 21 Pac. 488, was a petition to the Supreme Court of Colorado for a writ of mandamus to compel the respondent (Quinn), who was the county judge and acting as county clerk, to accept and file a certain appeal bond and notices of appeal upon the relator's paying the legal fees therefor. Under the rule of the county court, which was as follows: "The clerk of this court may require a party appealing from the judgment or order of this court to the district court, or Supreme Court, that he or she or they pay all accrued costs before taking any further steps in the case," respondent Quinn refused to file the appeal bond and notices unless all accrued costs were first paid by relator. Notwithstanding the statute of Colorado contained a provision that gave the officers of the court the right to collect their legal fees in advance, the court, in awarding the writ of mandamus, said: "The right of appeal from the county courts to this court is also a statutory right, and that statute provides the manner in which such appeal may be perfected, and no rule of court can deprive a party of this right, or impose additional burdens as conditions precedent to its exercise. Under the statute a party praying for an appeal is required to file a bond 'in a reasonable sum sufficient to cover the amount of the judgment appealed from and costs, conditioned for the payment of judgment, costs, interest, and damages in case the judgment shall be affirmed'; but we know of no statute by which he may be required to pay the accrued cost in the case at the time of perfecting the appeal, and in the absence of such statutory authority, the right of the clerk to impose such a condition cannot be maintained."

The case of *Wescott v. Eccles*, 3 Utah, 261, 2 Pac. 525, is a case commenced in a justice court in the territory of Utah. From a judgment against the appellant he appealed to the district court. After appellant had complied with all the requirements of the statute for perfecting his appeal; the justice before whom the case was tried deposited the files of the case with the clerk of the district court, but the appellant failed to file the transcript from the justice's docket and all papers accompanying the appeal with the clerk of the district court within 30 days before the commencement of the term of court, and to perfect the appeal within the first 2

days of the term as was required by rule of the court. The district court, on motion of the appellee, dismissed the appeal because of appellant's failure to comply with said rule of the court. The Supreme Court of the territory, in reversing the judgment of the district court, said: "When the appellant has complied with the statutory requirements, it then becomes the duty of the justice to transmit the papers to the clerk of the district court, and when they are received by him, they are filed whether he ever indorses the filing on them or not. 'A paper is said to be filed when it is delivered to the proper officer.' Bouv. Law Dic. tit. 'File.' We do not propose to discuss the power of the district court to make rules for its government. It is not necessary to the decision of this case. It is proper, however, to state that no court can by rule deprive a party of a right which is given to him by statute. * * * The decision of this court is placed upon the ground that the appellant having fulfilled all the requirements of the law in order to perfect his appeal, his right to a trial in the district court, so far at least as concerns this motion, had become absolute, a right given by the statute of which he could not be deprived by rule of court. * * *" The same doctrine is announced by the court in the case of *City of Pekin v. M. C. Dunkelburg*, 40 Ill. App. 184.

The Supreme Court of Utah, in the case of *Salt Lake City v. Redwine*, 6 Utah, 335, 23 Pac. 756, held that the district court had power to prescribe a rule such as was held in the case of *Wescott v. Eccles*, supra, could not be prescribed by the district court; but the court in the case of *Salt Lake City v. Redwine* distinguishes very clearly that case from the case of *Wescott v. Eccles* by saying that, in holding that the court had such power, its opinion was based on the fact that the court derived such power from a general statute of Utah, which had not been enacted at the time the opinion was rendered in the case of *Wescott v. Eccles*. The court clearly held that its power in that case to prescribe such a rule was derived from a statute.

If the district court of Oklahoma had been vested with such power by act of Congress, it then probably could be contended that the Legislature was without power to enact such statute; but we have not been able to find any such act of Congress, and from the opinion cited, supra, it is seen that the Legislature of the territory of Oklahoma had power to prescribe by statute procedure in the courts of the territory of Oklahoma. It is therefore our opinion that the district court of Canadian county in dismissing the appeal of plaintiffs in error committed error.

But defendant in error insists that this appeal should be dismissed for the reason that no exception was taken by the plaintiffs in error to the order of the district court in dismissing their appeal. The transcript of the record contains the order of the district

court dismissing the appeal and rule 14 of that court. In the order of dismissal it is specifically stated by the court that the appeal was dismissed "for failure of the plaintiff to properly perfect his appeal by a compliance with rule 14 of this court." The ground upon which the order or judgment of dismissal was made having been made a part of the judgment of the district court, this court cannot assume that the trial court may have acted upon a different ground. *Holland v. Great Northern Ry. Co.*, 93 Minn. 373, 101 N. W. 608. Rule 14 was certified by the lower court as a part of the record, and properly so, for the rule of a trial court is a part of the record in every case tried therein. *Walla Walla Printing & Publishing Co. v. Budd et al.*, 2 Wash. T. 336, 5 Pac. 602.

It has been repeatedly held by the Supreme Court of the territory of Oklahoma that it would review and correct errors that were apparent upon the judgment roll or record of the case, although no exceptions had been taken thereto. *Territory v. Caffrey*, 8 Okl. 193, 57 Pac. 204; *Caffrey v. Overholser*, 8 Okl. 202, 57 Pac. 206; *Kellogg v. School District No. 10*, 13 Okl. 285, 74 Pac. 110.

It is therefore the judgment of this court that this cause be reversed and remanded, with instructions that the order of the trial court dismissing the appeal be set aside, and the appeal reinstated. All the Justices concurring.

STATE v. MCGOWAN.

(Supreme Court of Montana. Jan. 25, 1908.)

1. INFORMATION—REQUISITES IN GENERAL.

Under Pen. Code, § 1832, providing that an information must contain a statement in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended, the knowledge of what was intended must be capable of being drawn from the language employed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 177-179, 202, 203.]

2. SAME—SURPLUSAGE.

Where an information is sufficient without certain words therein, the words may be treated as surplusage and disregarded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 311-315.]

3. HOMICIDE—INFORMATION—SUFFICIENCY.

Allegations sufficient for a common-law indictment for murder are sufficient for an information under the statute, defining murder as the unlawful killing of a human being with malice aforethought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 192, 193.]

4. SAME—INFORMATION—SUFFICIENCY.

In an information for murder, which charged that the defendant at a certain place and time made an assault on deceased with a shotgun, which was loaded and by defendant held in both his hands, "he the said [defendant] did then and there feloniously * * * shoot off and discharge at and upon the [deceased]," and by thus striking the deceased, inflicting wounds of which deceased died, *held*, that the omission of the word "which" from the beginning of the

quoted clause, so that there was no allegation that the gun was discharged, did not invalidate the information, as the entire quoted clause was surplusage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 215-223; vol. 27, Indictment and Information, §§ 311-315.]

5. CRIMINAL LAW—EVIDENCE—HARMLESS ERROR.

Where, in a homicide case, there was no denial of the killing, and the defense was insanity, the admission in evidence of the shells taken from the gun of accused after he had delivered it to an officer was not substantially erroneous as against the objection that the shells had not been properly identified, where a witness had testified that the shells produced were those taken from the gun, but were not in the same condition as when taken from the gun, where the court expressly permitted counsel for accused to examine the witness whether the shells were in the same condition as when taken from the gun.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3137-3143.]

6. SAME.

In a homicide case, the error in excluding evidence that decedent was known by another name than that alleged in the information was harmless, where a witness testified that decedent was known by another name.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3146.]

7. SAME—MISCONDUCT OF PROSECUTING ATTORNEY.

Where, in a homicide case, the county attorney in good faith asked a witness the question whether decedent had, a short time before the killing, charged accused with larceny, and the court sustained an objection to the question and instructed the jury to disregard it, the conduct of the county attorney was not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1693.]

8. WITNESSES—IMPEACHMENT—LAYING OF PROPER FOUNDATION.

Where, in a homicide case, a witness for accused testified to acts of decedent and the wife of accused while at the hotel of the witness, and the witness on cross-examination denied having told the county attorney that she knew nothing about the case, or about decedent and defendant's wife, except that they came there often for supper, but stated that she had told the county attorney that she knew nothing about the case that would help the state, and that, if she said that accused was jealous of decedent and that there was nothing wrong between decedent and accused's wife, she did not remember it, a proper foundation was laid for the admission of evidence that the witness made the statements that she denied making or denied having any remembrance of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1233-1242.]

9. CRIMINAL LAW—EXCLUSION OF EVIDENCE—OFFER OF EVIDENCE—SUFFICIENCY.

Where, in a homicide case, an officer testifying for the state stated that he was not friendly with decedent, an objection to a question, asked on cross-examination, whether the officer had had a warrant for the arrest of decedent which he had not served, was properly sustained, in the absence of any showing of the presumed reason for withholding the service of the warrant in such a way that the court might intelligently rule thereon.

10. HOMICIDE—EVIDENCE—ADMISSIBILITY.

Where, in a homicide case, the issue was whether accused had been rendered insane by reason of deceased having been intimate with the wife of accused, it was competent to inquire into the relations existing between accused and

his wife as bearing on the probability of accused becoming crazed by the misconduct of decedent and the wife.

11. CRIMINAL LAW—HARMLESS ERROR—LANGUAGE OF COURT.

Where, in a homicide case, defended on the ground that accused had become insane by reason of decedent and accused's wife having maintained intimate relations, the evidence showed that accused and his wife maintained separate establishments, and had divided a part of the property, and had arranged to divide the balance after a specified time, the language of the court, in designating the arrangement as a contract of separation, though technically incorrect, was not ground for reversal.

12. HOMICIDE — INSTRUCTIONS — MISLEADING INSTRUCTIONS.

An instruction, in a homicide case, that if the jury found that accused murdered decedent, and they did not find him guilty of murder in the first degree, they should find him guilty of murder in the second degree, defined as the unlawful killing of a human being with malice aforethought, either express or implied, where the killing is not done deliberately, was not erroneous for failing to state that the word "murder" must be construed to mean the offense defined in the Code.

13. SAME.

An instruction, in a homicide case, that a person, to be criminally responsible, must have intelligence and capacity to have a criminal intent, and that the questions are whether at the time of the killing accused had the mental capacity to entertain "a criminal act," and whether he entertained it, is not erroneous for using the word "act," instead of the word "intent," in the quoted phrase, especially where the court in other instructions distinguished between act and intent.

14. CRIMINAL LAW—INSTRUCTIONS—INVASION OF PROVINCE OF JURY.

An instruction, in a homicide case, that if the jury believed that accused "committed the crime" with which he was charged, etc., he was guilty, was not erroneous for using the word "crime," as the word did not convey to the jury the idea that the court was of the opinion that defendant was guilty of the crime charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1731.]

15. SAME.

It is necessary for the trial court, in instructing the jury in criminal cases, to refer to the nature of the accusation made by the state against accused, and the use of the phrase "the crime of which he is accused" is appropriate.

16. HOMICIDE—INSTRUCTIONS.

An instruction, in a homicide case, authorizing a conviction on the jury finding that accused was mentally capable of choosing either to do or not to do the acts constituting the crime, and of governing his conduct in accordance with such choice, though they should believe that he was not entirely sane, was not prejudicial to accused.

17. SAME—EVIDENCE — SUBMISSION OF ISSUE OF MANSLAUGHTER.

On a trial for homicide, defended on the ground of insanity, evidence held not to require the submission of the issue of manslaughter.

18. CRIMINAL LAW — INSTRUCTIONS—DEGREE OF OFFENSE.

The rule that, where the evidence warrants it, the court must instruct on every offense included in the crime charged, applies to cases where the trial court has a reasonable doubt about the propriety of such instruction, in which event the instruction should be given; but where the evidence does not warrant it, and

the court has no reasonable doubt about it, the instruction should not be given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1923-1927.]

Appeal from District Court, Teton County; J. E. Erickson, Judge.

Daniel McGowan was convicted of murder in the second degree, and he appeals. Affirmed.

J. G. Blair, O. D. Gray, and J. W. Freeman, for appellant. Albert J. Galen, Atty. Gen., and E. M. Hall, Asst. Atty. Gen., for the State.

SMITH, J. The above-named defendant was convicted in the district court of Teton county of the crime of murder in the second degree, and from a judgment of conviction and an order denying his motion for a new trial he has appealed.

The first contention of his counsel is that the information does not state facts sufficient to constitute a public offense, and is not direct and certain as to the particular circumstances of the offense sought to be charged. These questions were raised by demurrer in the court below. The charging part of the information reads as follows: "That the said Daniel McGowan, of the county of Teton, on the 18th day of March, A. D. 1906, at the county of Teton, in the state of Montana, in and upon one Charles Arnold, then and there being, did feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought make an assault with a certain shotgun, which then and there was loaded with gunpowder and leaden bullets, and by him, the said Daniel McGowan, had and held in both his hands, he, the said Daniel McGowan, did then and there feloniously, willfully, deliberately, premeditatedly, and with his malice aforethought shoot off and discharge at and upon the said Charles Arnold thereby, and by thus striking the said Charles Arnold with the said leaden bullets inflicting on his back mortal wounds, of which said mortal wounds the said Charles Arnold died on the 18th day of March, A. D. 1906, in the county of Teton, state of Montana. And so the said Daniel McGowan, in the manner and form aforesaid, did feloniously, willfully, deliberately, premeditatedly, and with his malice aforethought kill and murder the said Charles Arnold," etc. It will be observed that the charge is not expressly made that the shotgun was shot off and discharged at and upon the body of Charles Arnold, and this is the point made by the defendant. It is evident that the pleader omitted the word "which" between the word "hands" and the word "he." The information being so drawn, it becomes necessary to analyze the charging part thereof, in order to determine whether or not the statutory requirements have been complied with. Section 1832 of the Penal Code provides that an information must contain a statement of the facts constituting the offense, in ordinary and concise language, and

in such manner as to enable a person of common understanding to know what is intended. This statute embodies two provisions: (1) There must be a "statement in * * * language," and (2) that statement must be so framed as to enable a person of common understanding to know what is intended. Now, we apprehend that, although a person of common understanding may know what is intended to be charged, that knowledge must be based upon the language employed; otherwise, the statute is not satisfied. In this case we undertake to say that a person of common understanding would know that the defendant was charged with murder in the first degree. The defendant is therefore presumed to have had that knowledge, and he was in no way prejudiced by the peculiar phraseology of the information. But, unless the pleader employs language embodying the charge intended to be made, he falls short of compliance with the statute; otherwise, the defendant would be charged by mere inference, which may not be done.

Recurring, then, to the information, and omitting certain parts thereof, we find that defendant is accused of the crime of murder as follows: "That the said Daniel McGowan, on the 18th day of March, 1906, * * * at the county of Teton and state of Montana, in and upon one Charles Arnold, then and there being, did feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought make an assault with a certain shotgun, which then and there was loaded with gunpowder and leaden bullets, and by him, the said Daniel McGowan, had and held in both his hands, * * * thereby and by thus striking the said Charles Arnold with the said leaden bullets inflicting on his back mortal wounds, of which said mortal wounds the said Charles Arnold died on the 18th day of March, 1906." We have omitted these words: "He, the said Daniel McGowan, did then and there feloniously, willfully, deliberately, premeditatedly, and with his malice aforethought, shoot off and discharge at, and upon, the said Charles Arnold." Is it permissible, under the rules of criminal pleading, to omit the foregoing? It will not be contended that the words last quoted mean anything standing alone, because there is no allegation there that McGowan discharged any weapon at Arnold. We are to inquire, then, whether in construing the information we are allowed to treat them as surplusage, and whether without them the information charges murder. Section 1842 of the Penal Code provides that no information is insufficient by reason of any defect or imperfection in matter of form which does not tend to prejudice a substantial right of the defendant upon its merits. If the information, without the words last quoted, sufficiently charges murder, then those words may be treated as surplusage, and disregarded. *State v. Phillips*, 36 Mont. —, 92 Pac. 299; *State v. Mitten*, 36 Mont. —, 92 Pac. 969.

The words that we have in mind to disregard involve simply an attempt to state the manner in which the shotgun was used in the assault. There is no allegation that the gun was discharged. In the case of *Ray v. State*, 108 Tenn. 282-293, 67 S. W. 533, 556, the court said: "It is insisted that the indictment is too vague as to the manner in which the deceased was killed, because, under the language used in the indictment, he might have been scared to death, which would not be murder in the first degree, or he may have been beaten to death. We think the language is broad enough to convey the idea of a battery. The indictment in this case charges that the prisoner, 'with a certain dangerous weapon, to wit, a gun, which he in his hands then and there had and held, in and upon the body of one Gene Prentiss feloniously, willfully, deliberately, and premeditatedly, and with malice aforethought did make an assault upon the body of said Gene Prentiss, and did then and there unlawfully, * * * by the means and in the manner aforesaid, kill and murder the said Gene Prentiss, against the peace and dignity of the state.' The charge that the defendant did then and there kill and murder him implies battery, and is sufficient. It is true that murder must be committed by an act applied to or affecting the person either directly, as by inflicting a wound, or indirectly, as by exposing the person to a deadly agency or influence, from which death ensues. *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. The working upon the fancy of another, or treating him harshly or unkindly, by which he dies of fear or grief, would not constitute this offense. *State v. Turner*, Wright (Ohio) 20. At common law it was only necessary to charge that A. B., on a certain day and year, feloniously, willfully, and of his malice aforethought, did kill and murder one C. D. * * * In an indictment for murder in the first degree, it is not necessary to state in so many words that the pistol was loaded with powder and ball, or that the wound was made with the ball; nor is it necessary to charge that the wound was inflicted with a particular weapon." See, also, 21 Cyc. 845. In the case of *Alexander v. State*, 3 Heisk. (Tenn.) 475, it was held that an indictment for murder which did not specify the weapon used was good. The court said: "The assault recited is not the gravamen of the charge. That is only inducement to the real charge, which is that of killing and murdering; and, as the assault was followed by killing and murder as its consequence, it is not necessary to state the weapon with which the assault was made or the killing consummated." The information in the case at bar is much more specific in its allegations than was the indictment in the case last cited. The Supreme Court of Georgia has decided that, in an indictment for murder by shooting with a pistol, it is not necessary to aver that the pistol was loaded with gunpowder

and a leaden ball, or that the fatal wound was inflicted with a ball. *Peterson v. State*, 47 Ga. 524.

Murder, in this state, is the unlawful killing of a human being with malice aforethought. Allegations sufficient for a common-law indictment for murder are sufficient for an information under the statute. *Territory v. Stears*, 2 Mont. 824; *State v. Lu Sing*, 84 Mont. 31, 85 Pac. 521. We are of opinion that this information is sufficient to enable a person of common understanding to know what was intended to be charged therein, that that knowledge may be derived from the language employed, and that the defendant was in no wise prejudiced in any of his rights by the peculiar wording thereof or the employment of words unnecessarily inserted therein.

The next contention urged is that the court erred in admitting in evidence a certain shotgun shell, taken by the witness Connelly from the defendant's gun after the defendant had delivered the gun to a deputy sheriff. After the witness had testified that the shells produced at the trial were the same shells taken from the gun, defendant's counsel objected to the admission in evidence of one of them "as not properly identified," and he now argues that it was not shown that the shell was in the same condition as when taken from the gun. That point was not incorporated in his objection, and was only raised by counsel after the shell had been admitted in evidence and the county attorney was about to pass it to the jury, and then only by the statement of counsel as follows: "We object, as the shell is not in the same condition, and may not be the same shell he has testified to." We think there is no merit in the contention, especially in view of the fact that the court expressly stated at the time that, if defendant's counsel so desired, they might examine the witness on the subject, of which privilege they did not see fit to avail themselves. On cross-examination the witness stated that the shell was not in the same condition as when he saw it the night of the shooting; but no further questions were asked him concerning it, and the matter was allowed to rest there. We see no substance to the controversy, viewed from any standpoint, especially in the light of the fact that the defendant did not go upon the witness stand, there was no denial of the killing, and the defense was insanity.

Defendant complains that he was not allowed to prove by the witnesses Stewart and Duffy that the deceased went by, and was known by, another name than Charles Arnold. Even though this ruling of the trial court may have been error, which we do not decide, no harm was done, because the witness Cook testified that Arnold was also known by the name of Webber.

The county attorney asked the witness Lea the following question: "Did you have a conversation with Mr. Chas. Arnold a few

months, or a short time, before he was shot, in which he accused McGowan of the crime of grand larceny?" The court not only sustained the defendant's objection to the question, but instructed the jury to disregard it in arriving at their verdict. There was no persistence on the part of counsel for the state in propounding incompetent questions, and it does not appear from the record that any effort was made to convey information to the jury through the medium of irrelevant interrogatories. Rather, the question appears to have been propounded in good faith; counsel urging that it was competent as bearing upon defendant's motive in killing deceased. The court, with abundance of caution in the protection of defendant's rights, told the jury not to consider the question, and we think no prejudice resulted.

On the part of the defense there was testimony tending to show that the deceased, for some time prior to his death, had maintained illicit relations with the defendant's wife, and had frequently been discovered in her company under such circumstances as to leave no doubt that they were together for the purpose of sexual intercourse. Certain witnesses also testified that the deceased had attempted to hire them to kill the defendant. All of these matters were communicated to the defendant prior to the homicide. It appeared, also, that for some time prior to the killing of Arnold Mrs. McGowan and her three children lived at the town of Cut Bank, in Teton county, while the defendant lived on his ranch, some miles from the town, only coming to the house occupied by his wife every Saturday, when he would stay over Sunday, and sometimes two or three days longer. A witness, Mrs. Cook, testified for the defendant as to certain acts of the deceased and Mrs. McGowan while at the hotel of the witness at Cut Bank. On cross-examination she said: "I didn't tell Mr. Cole (the county attorney) that I knew nothing about this case whatever, or about Arnold and Mrs. McGowan, except that they came there often for supper. I told him I knew nothing about this case that would help the state. If I said at that time that Mrs. McGowan had said to me that Dan was jealous of Charley, but there was nothing wrong between them, I don't remember it." In rebuttal, over defendant's objection, the county attorney testified that Mrs. Cook did make the statements that she denied making or having any remembrance of. It appears that the proper foundation was laid for these impeaching questions, and that the subject-matter was material. We find no error in the ruling of the court on this objection.

Robert S. Stewart, a deputy sheriff, testified for the state, and in the course of his testimony stated that he was not very friendly with Arnold. Thereupon defendant's counsel asked him: "Is it not a fact that for some time previous to March 17th you had a warrant for his arrest which you did not

serve?" The court sustained an objection to the question, and the ruling is assigned as error. Assuming that it was proper to inquire as to the feeling of the witness for or against either the defendant or the deceased, still this question, in itself, did not show to the trial court that the answer would bear upon that subject, and the court properly ruled thereon. Had the defendant placed the same construction upon the inquiry that he now does, he should either have amended his question by incorporating therein the presumed reason for withholding the service of the warrant, or have made an offer of proof covering the point in such a way that the court might intelligently rule thereon.

The state, also in rebuttal, proved, identified, and offered in evidence a paper writing, reading as follows: "Cut Bank, Mont. Dan McGowan, of Cut Bank, Montana, a rancher, and Elisa McGowan his wife, of Cut Bank, Montana, have agreed together, at Cut Bank, Mont., on this 12th day of December, 1905, and do hereby promise and agree to and with each other, as follows: Dan McGowan, in consideration of the promise and mutual agreement made by Elisa McGowan, does hereby grant, bargain, and sell all of his interest in the following described personal property to wit: [Here follows description of certain cattle and horses, and also one wagon and set of double harness.] And Elisa McGowan, for and in consideration of the above agreement, does hereby sell, assign, and transfer all her interest in the following described personal property, to wit: [Here follows description of certain other cattle and horses and one wagon and team harness.] It being further agreed by and between the parties above mentioned that Elisa McGowan is to have the use of their house in Cut Bank, and that Dan McGowan is and agrees to allow Elisa McGowan 10 dollars for the support of the children she has in her care each month for a period of five months, and after that period a further agreement is to be made by and between Dan McGowan and Elisa McGowan as to the dividing of the balance of their joint personal property and improvements." The writing bears the following certificate of acknowledgment, signed by a notary public: "On this 12th day of December, 1905, before me, the undersigned, a notary public in and for the county of Teton, personally appeared Dan McGowan and Elisa McGowan and acknowledged to me that they did agree to the foregoing division of the personal property as set forth in the foregoing agreement and that is their own free and voluntary act." In overruling defendant's objection to this paper the court said: "I think I will let it go to the jury. It shows that they were living under this contract of separation. That might throw some light upon the question to the jury whether or not the defendant was sane or insane. I think, taken with all the other evidence, it is perhaps competent." It is now contended that the remark of the court, in

characterizing the document as a contract of separation, was prejudicial to the defendant. The paper was also objected to as incompetent rebuttal evidence; but we see no force in the objection. The issue being tried was whether the defendant had been rendered insane by the assault of the deceased upon the sanctity of his domestic relations. It was certainly competent to inquire as to how intimate and sacred those relations were in fact, as bearing upon the liability or probability of defendant's becoming crazed by their destruction; and in view of the fact that the testimony shows that defendant and his wife maintained separate establishments—had, in fact, divided a part of their personal property, and arranged to divide the balance after five months—we find no prejudice to the defendant in the remark of the court, even though the paper was not technically a contract of separation.

Defendant complains of a part of instruction No. 10. It reads thus: "If you find from the evidence beyond a reasonable doubt that the defendant murdered Charles Arnold, and you do not find him guilty of murder in the first degree, you should find him guilty of murder in the second degree. Murder in the second degree is the unlawful killing of a human being with malice aforethought, either express or implied, where the killing is not done deliberately, or with some degree of coolness, or in any one of the ways specified in the definition of murder in the first degree." It is said that the jury should have been told in the same instruction that the word "murder" must be construed to mean the offense defined in the Code, as set forth in other instructions. We think it would be a sad commentary upon our jury system and upon the intelligence of the good citizens of Teton county if we should hold that there was any possibility that this jury did not understand that the defendant was being tried for the crime set forth in the information and as defined by the court, and we therefore refuse to so hold.

Instruction No. 24 is objected to. It reads as follows: "You are instructed that in order to be criminally responsible a person must have intelligence and capacity to have criminal intent and purpose, and if his mental powers are so deficient that he has no will, or no conscience, or no controlling mental power, or if, from the overwhelming violence of mental disease, his intellectual power is for the time obliterated, so that he has not the power or volition to choose to do right and refrain from doing wrong, he is not criminally responsible; the questions to be determined being whether, at the time of the killing, he had the mental capacity to entertain a criminal act, and whether, in point of fact he did entertain it." It will be observed that in the latter part of the instruction the court inadvertently used the word "act," instead of the word "intent." We cannot imagine that the defendant was in any way

prejudiced by this instruction, reading all of it. The jury must have known that the court referred to the intent with which the act was committed. The court in other instructions repeatedly referred to the intent of the defendant as shown by the evidence, as distinguished from the mere act of killing, and told them that in every crime there must exist a union or joint operation of act and intent. It would serve no useful purpose to quote these instructions, as no complaint is made of them. We are satisfied that the giving of this instruction was not reversible error, and that, as the same reads, it did defendant no harm.

Defendant complains of instruction No. 25, which reads as follows: "You are instructed that if, from all the evidence in the case, you believe beyond a reasonable doubt that the defendant committed the crime of which he is accused in manner and form as charged in the information, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable of choosing either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty, under the law, to find him guilty, even though you should believe from the evidence that at the time of the commission of the crime he was not entirely and perfectly sane." It is said that, instead of the word "crime," the court should have employed some such word as "homicide." The defendant's counsel maintain that the use of the word "crime" conveyed to the jury the notion that the court was of opinion that the defendant was guilty of the crime charged against him. While cases may, and sometimes do, arise in which the use of the word "crime" might possibly be construed by the jury as indicating that the court had formed the opinion that the necessary elements of the offense had already been proven against the defendant on trial, we do not think that situation obtained in this case. It is necessary for the trial court, in instructing the jury, to refer to the nature of the accusation made by the state against the defendant, and we think the use of the phrase first employed in this instruction, to wit, "the crime of which he is accused," was appropriate, and that the jury must have understood that the words "of which he is accused" qualified the word "crime" all through the instruction. Counsel also suggest that the words "even though you should believe from the evidence that at the time of the commission of the crime he was not entirely and perfectly sane" are, to quote the language of their brief, "wrong and prejudicial to the rights of the defendant." The use of this language is expressly approved in *State v. Peel*, 23 Mont. 358-368, 59 Pac. 169, 75 Am. St. Rep. 529.

The last assignment of error set forth in the brief of defendant's counsel relates to the failure of the court of its own motion to sub-

mit to the jury the question whether the defendant was guilty of manslaughter. No request was made for such an instruction. So far as the evidence shows, there had been no meeting between defendant and deceased for several days prior to the shooting. Arnold was shot in the back, through the glass of a window of a hotel, while he was sitting quietly at the dining table waiting for food to be served to him. Soon after the occurrence the defendant admitted to several witnesses that he did the shooting. One witness said to him that it was a dirty trick to shoot a man in the back, to which remark defendant replied that he could not take a chance with this man; that he was afraid to. He also told the deputy sheriff that he "got the son of a gun"; and to the witness Woods he said, "I have killed him, and I am not sorry for it." The entire defense was devoted to the question of defendant's mental condition. Under these circumstances, we do not think the court would have been justified in instructing the jury with reference to manslaughter. The defendant was either guilty of murder, or not guilty by reason of insanity. The only effect of an instruction on manslaughter would have been to give the jury an opportunity to return a compromise verdict, probably meaningless from any logical standpoint, and simply a sort of "splitting the difference" between those jurors who thought the defendant guilty and those who were in favor of acquittal. Such a verdict neither does justice to the defendant nor the state. As was said by this court in *State v. Shadwell*, 26 Mont. 58, 66 Pac. 508, whenever the evidence warrants it, it is the duty of the court to instruct the jury upon every offense included in the crime charged. This rule applies to cases, should any arise, where the trial court has a reasonable doubt about the propriety of such instruction, in which event the instruction should be given. It naturally follows that, where the evidence does not warrant and the court has no reasonable doubt, such instruction should not be given, as the giving would only tend to confuse the jury and obstruct the ends of justice.

The record in this case shows that the defendant had a fair and impartial trial. The judgment and order appealed from are therefore affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

McINTOSH v. JONES et al.

(Supreme Court of Montana. Feb. 1, 1908.)

1. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANTS—MASTER'S LIABILITY.

In the absence of a statute to the contrary, a master is not liable to one servant for injury caused by the negligence of another servant in the same common employment, unless the negligent servant was the master's rep-

representative, or the master was negligent in employing or retaining him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 352.]

2. SAME—MASTER'S DUTY.

A transfer company owes the duty to one employed by it in moving pianos, etc., to exercise ordinary care in selecting a helper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 336.]

3. SAME—SELECTION OF FELLOW SERVANT.

An employé of a transfer company cannot recover from his employer for injury caused by a fellow employé negligently releasing a piano which they were moving downstairs, where all the ability required of the negligent employé was strength and ordinary intelligence, which he possessed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 336.]

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

Action by Edgar McIntosh against John O. Jones and another, partners under the firm name of the Jones Transfer Company. From a judgment for plaintiff against defendant John O. Jones, and an order denying a new trial, defendant John O. Jones appeals. Reversed, and new trial ordered.

John J. McHatton, for appellant. Maury, Templeman & Hogevoll, for respondent.

SMITH, J. The above-entitled action was instituted in the district court of Silver Bow county to recover damages for personal injuries received by plaintiff through the negligence of a fellow servant. Plaintiff and his fellow servant were engaged in moving a piano. Plaintiff in his complaint alleges: "That the defendant sent the said man and employed him to assist the plaintiff, either knowing him to be lacking in all skill in and about the said business, or negligently failed to find out whether the said man had any skill in and about the said business or not. That, while moving said piano, * * * the plaintiff and said man * * * working together, the said man negligently let go the piano when the plaintiff was under the same, and when the said man, if he had been (a) skillful man at this business, could have held the said piano off of the said plaintiff, and by and through the negligence of said man * * * in thus letting go negligently of the said piano, and through the negligence of the said defendants in either knowing the said man to have no skill at the work, or in negligently failing to find out if he had any skill or did not have any skill, the piano fell upon the plaintiff," and injured him. It is further alleged: "That until the said man * * * negligently let go of the piano * * * plaintiff did not know that he was lacking in skill and believed him to be in all respects a skillful and experienced man at the trade of moving pianos, * * * for which the defendants had employed him to work, and the plaintiff relied, when going to work with said man, upon the defendants that they would and did furnish him with a good and skillful

and experienced fellow servant in and about the said work." For answer defendants first denied each and every allegation of the complaint, and thereafter set forth certain affirmative matters, not necessary to be considered in deciding the case, except to this extent: First. The answer contains an allegation "that, while the plaintiff and said man were attempting to move the piano, they did, through their own fault and lack of skill and attention, allow the same to fall upon the plaintiff." Second. It is therein set forth that plaintiff was injured "through his own lack of care in handling the piano, and that he knew all of the facts and circumstances surrounding the attempt to remove the same and the capacity of said man who was assisting him, and that he voluntarily assumed all risk of injury which might result therefrom, and that he himself contributed to his own injury, in that it was, in part, through his own fault that said piano was allowed to slip and fall upon his leg; that the said man who was assisting plaintiff in moving the piano was negligent therein, and that he was a fellow servant with the plaintiff, and that his negligence, together with that of the plaintiff, combined to bring about said accident and injury, and that plaintiff assumed all danger and risk of injury by reason of the employment of said man or any negligence or lack of care upon his part." The replication admits that the man who was assisting plaintiff in moving the piano was negligent therein, and was a fellow servant of plaintiff, but denies every other allegation of the answer. The trial resulted in a verdict in favor of plaintiff and against defendant J. O. Jones for \$3,025, and from a judgment entered thereon and an order denying a motion for a new trial that defendant appeals. Many errors are assigned, but it will not be necessary to notice all of the specifications.

Plaintiff testified as follows, in part: "I worked for Jones for about two years prior to my injury, doing all kinds of transfer work, moving furniture, machinery, pianos, and so forth. Men ought to be experienced to move heavy freight and pianos, and should understand their business in order to be successful and not get hurt. * * * It takes experience and a long time for an ordinary man to become ordinarily skillful at that trade. * * * On the 14th day of June, 1905, in the morning, I was instructed to go down and unload a car load of furniture. Mr. Jones told me in the morning to employ another man, and go down there and unload this car load of furniture. So I did so. We worked the forenoon, and at noon Mr. Jones came to me and said, 'Mack, I want to take that man away from you that worked with you in the forenoon,' and he says, 'I will get you another man.' * * * and we went down after dinner, and we had a load of furniture in the car, such as chairs. This new man that Mr. Jones got me and I went down; so we went down there, and had this

small load and unloaded it and came back to the city; and before we struck the stand Mr. Jones and his son, who stood on the sidewalk, * * * said to me, 'There is a piano at the Munroe School'; said for me to take this man and move the piano because they were overstocked with work that day, so I did so, according to instructions. We went to the place where the piano was, and * * * put the piano on this truck and rolled the piano to the brim of the stairs, and, of course, I went ahead of the piano and this here fellow. I told him to take the hind end of the piano, and, when I got ready, I said, 'Break the piano over, and be very careful, as we are in a dangerous place,' and he broke it over. While we two were moving the piano, this man acted all right so far as I could see. When we started the piano down the steps, he just merely let go of it, and I was ahead of it, and I couldn't hold it as she broke over. * * * It never landed on the stairs, and shot right ahead. If he had had hold of it until it got over the stairs, we would have had a purchase on it and could have held it. * * * A man of experience in the position in which the other man was as the piano was going over the top step would have had hold of the handles and held back for all his might. By so doing he would have checked the speed, and he and I could both have held the piano and taken it down safely. * * * I judge the piano weighed somewhere in the neighborhood of 800 pounds. * * * When the piano came forward, my limb got underneath the piano truck, and the piano slid down the steps on my limb, and tore my foot off, and bruised my leg and broke some bones. My leg was taken off there, about four or five inches below the knee." On cross-examination he testified: "I started myself and went down the street to see if I could locate a man. I could not locate one suitable for me, so I came back and told Mr. Jones I couldn't get a man. * * * Then Mr. Jones went out for five or ten minutes, and he brought back a man about the same height as myself, fair, and a strong, robust-looking fellow, who weighed 170 pounds, I should judge. He was a stout-looking man. From outward appearances, he seemed to be a capable man, and he was sober, and I thought he was all right, judging from his appearance. While he was helping me to move this load of furniture, he was all right; didn't show any lack of intelligence for work of that kind. I had moved pianos before, quite a number of them. * * * I did not make any objection to moving the piano with this man. I was relying on Mr. Jones. I was satisfied when I started out with him that he was all right and reliable for the doing of that work. * * * Up to the time he let go of the piano, he acted as a man of intelligence, and had done everything in a proper way towards moving the piano, as far as I could judge. Prior to the time we began the operation of the piano, and during the time we were putting the piano

on the truck, I told him that that was a dangerous operation—the moving of the piano—as we came downstairs, and I had warned him to be careful, and up to that time he had acted as though he was endeavoring to comply with my request."

Respondent's counsel suggest that appellant has not complied with rule 10 (82 Pac. ix) of this court, in that his brief does not state where in the transcript the judgment can be found, and does not state the questions involved on the appeal, as directed by the rule. We find on page 6 of the brief the statement that the judgment may be found at page 23 of the transcript, and a copy of the judgment is there set forth. We think the statement of the case presents the questions involved substantially in compliance with the rule. At the close of plaintiff's case the defendants moved for a nonsuit, on the grounds, among others, first, that the complaint does not state facts sufficient to constitute a cause of action; second, that there was no evidence that the man who assisted plaintiff was an incompetent or unskillful man to engage in such work, and, if he was incompetent, the plaintiff either knew it or had reason to know it, and assumed the risk; third, that the evidence fails to show that the man engaged with plaintiff was unskillful, unfit, or incompetent for the work in which he was engaged, and fails to show that the defendants were lacking in the exercise of ordinary care in the selection and employment of said man; and, fourth, that, if plaintiff was injured through the act of the other man, it was a single act of negligence, and did not establish incompetence or lack of skill. This motion was overruled as to the appellant J. O. Jones. We think the motion should have been granted as to him, and our reasons may be stated generally, without taking up, in detail, the different grounds of the motion.

It is a settled rule of law, where not changed by statute, that a master is not bound to indemnify one servant for injuries caused by the negligence of another servant in the same common employment as himself, unless the negligent servant was the master's representative. 2 Labatt, Master and Servant, § 470. While the reason for and origin of the foregoing rule are matters of dispute among courts and law-writers, the rule itself is not doubted. But the doctrine that a servant cannot maintain an action for injuries caused by the negligence of a co-servant has always been conceded to be subject to an exception in cases where negligence on the master's part in employing or retaining in his employ the delinquent co-servant is shown. 2 Labatt, Master and Servant, § 480. Judge Bailey, in his work entitled "Master's Liability for Injuries to Servant" (page 47), states the exception to the rule thus: "The master must exercise due and reasonable care in the selection of his servants, with reference to their fitness and competency." And on page 55: "The presumption is

that the master has exercised proper care in the selection of the servant. It is incumbent upon the party charging negligence in this respect to show it by proper evidence." In the case at bar the plaintiff raises no question as to the relations existing between him and his helper. It is admitted that they were fellow servants engaged in a common employment. The allegation which we shall consider is that defendants did not exercise ordinary care in selecting a reasonably competent man to assist the plaintiff. It is true that the defendants alleged in their answer that, "while the plaintiff and said man were attempting to move said piano, they did, through their own fault and lack of skill and attention, allow the same to fall upon and crush the plaintiff's ankle and foot." But the phrase "lack of skill," used in this connection, must be construed to refer to the act of negligence testified to by the plaintiff, and it was evidently so treated at the trial.

The first question to be decided is: What measure of care was required of the defendants in the selection of a man to assist in moving a piano? And in this connection it may be remarked that, if any particular degree of skill is required in moving a piano, that skill, in this case, was furnished by the plaintiff himself. He was the expert in the business, if we may be allowed that expression. He knew how to move pianos, had been engaged for two years in the work, and undertook to instruct the new man as to what was required of him. Those instructions were simple. The assistant was to take the hind end of the piano and be very careful. If these instructions had been followed, the helper would have taken hold of the handles, and held back "with all his might." Plaintiff testified that it requires some skill to move a piano and some experience to acquire that skill. Concede that. Plaintiff himself supplied the skill and experience. All that was required of the helper was strength. That he apparently possessed. McIntosh says he was a strong, robust, and stout-looking fellow, weighing about 170 pounds, apparently sober and intelligent. The duty rested upon defendants to exercise ordinary care in the selection of the helper, in view of the nature of the work to be performed. The work required of the assistant was of an ordinary character, not essentially different from any other heavy laborer's work. It was not "hazardous," as distinguished from "ordinary." A physical inspection of the man was all that was necessary to show his competency, unless he was mentally deficient; and McIntosh says he was not. Indeed, the plaintiff does not claim, in his testimony, that the helper was incompetent. These are his words: "While we two were moving the piano, this man acted all right so far as I could see. When we started the piano down the steps, he just merely let go of it." No inquiry on the part of Jones would have disclosed the fact that the man

would neglect to obey McIntosh's orders. A single, exceptional act, like this, will not prove a servant incompetent. It may be permissible to prove a single act of negligence as bearing upon the question of incompetency of the servant, or, at least, as bearing upon defendant's knowledge of the employé's conduct. The courts differ on this question, and we have no occasion to decide it here. But a single act of negligence, committed after the hiring and without the knowledge of the master, cannot possibly charge the master with lack of ordinary care in selecting the servant. Perhaps this case illustrates the principle of the master's nonliability for the negligent act of a fellow servant as aptly as any case could. It involves just such an act of negligence, on the part of a co-servant, as the master is not liable for, provided he has exercised ordinary care in the selection of the co-servant.

In the case of *Harvey v. New York C. & H. R. R. Co.*, 88 N. Y. 481, the court said: "He [the negligent employé] was a man of but 56 years of age, and there is no suggestion that he was not possessed of ordinary intelligence. The duties of a switchman are not complicated or difficult, and there can be no doubt that on the day in question he was entirely competent to perform the duties imposed upon him. It appears from his own evidence that his failure to close the switch on the day in question did not arise from any inability on his part to perform the work he was set to do, but that such failure was the result of sheer inattention and carelessness on his part." And it was held that his employer was not liable for his failure to close a switch, resulting in the death of a fellow servant. This language is employed by the Supreme Court of New York, in the case of *Burke v. Syracuse, B. & N. Y. R. R. Co.*, 69 Hun, 21, 25, 23 N. Y. Supp. 458, 460: "Upon the occasion of the injuries no duty rested upon Clark [a crossing tender] to open the switch. His act in raising the ball and breaking the main track was voluntary, thoughtless, and mistaken. Nothing appears in the case showing that he had not physical power to perform all the acts and duties required of him at the station, or that he was not mentally fit for the position assigned to him by the defendant. * * * The observations made by the learned counsel for the respondent seem appropriate and pertinent where he says: 'The defendant could not make a psychological examination of Clark, or delve into the secret recesses of his brain to ascertain whether, at some future period, he would for an instant become the prey of a delusion and work destruction. It was no more bound to anticipate this unnatural occurrence than it would have been the act of Clark, had he in a moment of temporary aberration drawn a pistol and killed the plaintiff's intestate.'" See, also, *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338; *Huffman v. Chicago, R. L. & P. Ry. Co.*, 78 Mo. 50; *Couch v. West-*

ern Coal Co., 46 Iowa, 17; and, also, Hatt v. Nay, 144 Mass. 188, 10 N. E. 807; Frazier v. Pennsylvania R. R. Co., 38 Pa. 104, 80 Am. Dec. 467. There is no evidence in this case which warranted the jury in finding that any act of neglect on the part of the appellant contributed in any manner to produce the injury to plaintiff.

The judgment and order appealed from should be reversed and a new trial ordered.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J.,
concur.

(33 Utah, 196)

BOWMAN v. OGDEN CITY.

(Supreme Court of Utah. Jan. 9, 1908.)

1. APPEAL—TRANSFER OF CAUSE—TIME OF TAKING APPEAL.

Under the statute providing that an appeal may be taken within six months from entry of the judgment, an appeal may be taken within six months after the overruling of a motion for a new trial, made within the time allowed by law.*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1895.]

2. SAME—REVIEW—PRESUMPTIONS—SUFFICIENCY OF EVIDENCE.

It will be presumed that the evidence was sufficient to support the verdict in the absence of a showing that the bill of exceptions contains all the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2911-2915, 3673.]

3. SAME—RECORD—BILL OF EXCEPTIONS—SUFFICIENCY OF CERTIFICATE.

A bill of exceptions was a transcript of the official stenographer's notes, with his certificate that it contained a full transcript of all the evidence. Counsel for respondent accepted service of the transcript, as and for the bill of exceptions, and indorsed thereon that they had no amendments to propose. The bill was thereupon allowed by the court "as a true and correct bill of exceptions." Held that, though the court in the certificate of settlement did not expressly state that the bill contained all the evidence, yet it by necessary implication certified to the truth of the statement of the stenographer that the bill contained all the evidence.††

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2918-2925.]

4. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—ACTIONS FOR INJURIES—NOTION OF INJURY—WAIVES OF DEFECTS.

Defects in a claim presented to a city council under *Seas. Laws 1903, p. 12, c. 18*, in that it was not verified and did not sufficiently describe the extent of claimant's injury, were waived, where the city council did not decline to consider the claim because not properly made out, but acted on it.

5. ACCORD AND SATISFACTION—WHAT CONSTITUTES.

Where one having a personal injury claim against a city having presented the same receives a payment on account thereof, there being no express agreement that it shall be in satisfaction either in full or in part of the claim, the presumption is that it was intended as full recompense for the injury, barring a subsequent action for the same injury.

*Snow v. Rich, 22 Utah, 123, 61 Pac. 336; Felt v. Cook (Utah) 87 Pac. 1092.

†† Mitchell v. Jensen, 20 Utah, 346, 81 Pac. 165.

6. SAME—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to overcome the presumption that a sum paid by a city to one who had presented a personal injury claim against it was in full satisfaction of the claim.

7. SAME.

Where a personal injury claim against a city is only partially allowed, claimant cannot accept the part allowed, knowing that the rest has been rejected, and then recover in an action for the part rejected, in the absence of an agreement that the acceptance of the allowance shall be regarded as payment only of the part allowed, and that the city is not discharged from the part rejected.

8. MUNICIPAL CORPORATIONS—CONTRIBUTORY NEGLIGENCE—CARE REQUIRED OF TRAVELER.

A traveler is required to keep a reasonable lookout for defects and dangers which are known to attend particular places, and to make such use of his faculties as will enable him to discover obvious dangers in a highway or sidewalk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1673.]

9. SAME.

A traveler who has knowledge of a defective condition of such a character as renders a walk so unsafe that it cannot be prudently used is guilty of negligence in attempting to use it, if the defect can easily and without substantial inconvenience be avoided by going around it or taking a safer way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1677.]

10. SAME.

It was not negligence per se for a traveler, who knew of a ridge about eight inches above the level of the walk left by filling in an excavation, to attempt to cross it while it was dark.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1673-1677.]

11. SAME.

That a traveler attempted to cross over a ridge about eight inches above the level of the sidewalk left by filling in an excavation, without thinking of it or the danger, which he knew, was not negligence per se.†

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1754-1756.]

Appeal from District Court, Second District; J. A. Howell, Judge.

Action by John Bowman against Ogden City. Judgment for plaintiff, and defendant appeals, and plaintiff moves to dismiss. Motion to dismiss denied. Reversed, and remanded for a new trial.

Jno. E. Bagley, for appellant. Richards, Rolapp & Pratt, for respondent.

STRAUP, J. Plaintiff brought this action to recover damages for personal injuries alleged to have been sustained by the negligence of the defendant. An excavation was made across a sidewalk in Ogden city for the laying of water or sewer pipes. After the pipes had been laid the excavation was filled. The surface was left in a rounded condition, and was raised about eight inches above the level of the walk. This condition existed for about one week prior to the accident. It is alleged that the plaintiff, in the nighttime, while walking along the walk, and being

† Dwyer v. Salt Lake City, 19 Utah, 535, 57 Pac. 535.

wholly unaware of the obstruction, struck or stubbed his toe against it, and was thrown to the ground. The answer contained a general denial, pleas of contributory negligence and accord and satisfaction, and allegations that the plaintiff failed to present a verified claim in compliance with the statute. A trial before the court and jury resulted in a verdict for the plaintiff, which was rendered on the 12th day of December, 1906. On the same day, a judgment was entered on the verdict in favor of the plaintiff, from which the defendant has prosecuted this appeal. On the 15th day of December the trial court granted the defendant 10 days' additional time in which to serve and file a notice of intention to move for a new trial. On the 21st day of December the defendant served and filed such a notice. The motion was overruled February 12, 1907. On July 6, 1907, the defendant served and filed a notice of appeal. The statute provides that notice of a motion for new trial must be filed within 5 days after the rendition of the verdict, but that the time may be extended by the court; that an appeal may be taken within six months from the entry of the judgment. The plaintiff has moved to dismiss the appeal because not taken in time. It is argued that an appeal can only be taken within six months from the entry of judgment, and not within six months from the overruling of a motion for new trial, and that the appeal was not taken within such time. The motion for new trial was filed within time. It has been repeatedly held by this court "that a judgment is not final while a motion for new trial, made within the time allowed by law, is pending and undisposed of, and that an appeal taken and perfected within six months from the date of the overruling of the motion for a new trial is taken in time." *Snow v. Rich*, 22 Utah, 123, 61 Pac. 336, and cases there cited; *Felt v. Cook* (Utah) 87 Pac. 1092. The motion to dismiss is denied.

A further question requires consideration before passing to the merits of the case. It is claimed by the respondent that the bill of exceptions does not contain all the evidence. To properly review the principal errors assigned, the bill should show that it contains all the evidence; for, in the absence of such a showing, it will be presumed the evidence was sufficient to support the verdict, the court justified in overruling the defendant's motion for nonsuit, and in refusing the defendant's request to direct a verdict in its favor. The bill of exceptions is a transcript of the official stenographer's notes containing the testimony of the witnesses by questions and answers, exhibits, and records of the city council. To the transcript so furnished by the stenographer is attached his certificate "that the foregoing 112 pages contain a full and correct transcript of all the testimony and other evidence adduced in said cause, and all the objections and exceptions of counsel and rulings of the court

thereon, except only the impaneling of the jury, which is not included herein." Counsel for plaintiff accepted service of this transcript as and for the bill of exceptions, and indorsed thereon, "we have no amendments to propose to the foregoing, and consent that the same may be presented for settlement without further notice." The bill was thereupon settled and allowed by the court in the following language: "The foregoing bill of exceptions in the above-entitled cause is hereby settled, allowed, and signed by me as a true and correct bill of exceptions in this case." While the court, in the certificate of settlement, did not say in express language that the bill contains all the evidence, yet such expression was not essential, if the statement that the bill contains all the evidence otherwise sufficiently appears on the face of the bill. If counsel proposing the bill had, at the conclusion of the statement of the evidence, written the words, "the above is all the evidence in the case," and the court had as here certified that the foregoing "is true and correct," the certificate of the court would as necessarily imply the correctness of such statement as the correctness of the evidence set forth, or any other statement contained in the proposed bill. So, too, when the bill contains the statement made by the official stenographer that the foregoing pages "contain a full and correct transcript of all the testimony and other evidence adduced in said cause," the court, in certifying that the foregoing was true and correct by necessary implication, certified to the truth and correctness of such statement. This is not so because it was certified to by the stenographer, but for the reason that the court declared such statement true and correct, as well as every other statement contained in the proposed bill. We are no more authorized to assume such statement was not declared true and correct by the court and to disregard it than to disregard any other statement contained in the bill. We are therefore of the opinion that the bill affirmatively shows that it contains all the evidence in the case. *Mitchell v. Jensen*, 29 Utah, 346, 81 Pac. 165.

The first assignment of errors presents questions relating to the presentation of plaintiff's claim, and with respect to an accord and satisfaction. The evidence bearing thereon shows: The accident occurred on the 10th day of December, 1906. On the 21st day of the same month the plaintiff sent the following unverified written communication to the city council of Ogden city: "On December 10th going to work between Adams and Washington on Twenty-Third St. I was throwing by a high ridge left by covering by a pipe and was found insensible by Vic. Hestmark and taken home unconscious because of falling and striking the ridge with head. There are others been hurt, but not so bad. I think it is not just I should lose work and suffer pain because of others carelessness or the city's. I wish to hear from

you what you will do." The communication was referred to the law committee, who, on the 2d day of March, 1904, reported to the city council that they found the obstruction referred to; that the said Bowman was an elderly man and with no means of support other than his daily labor; that the injuries sustained by the fall caused him to lose three days time; and recommended that he be paid the sum of \$5. The report was adopted by the council, and approved by the mayor on the 24th day of March. The plaintiff also put in evidence the following excerpts, taken from the minutes of the city council:

"Dec. 21, 1903. The petition of Mr. John Bowman for reparation of injuries received by falling over a high ridge left in the street by covering a pipe was referred to the law committee."

"Mar. 21, 1903. The law committee recommended that the sum of \$5 be paid to John Bowman for personal injuries sustained by fall due to an obstruction on sidewalk. On motion of Mr. Craig the report was adopted."

A warrant for \$5 was issued to the plaintiff on the 28th day of March, 1904. He received it, cashed it, and kept the money. When he received the warrant he gave a receipt. The receipt was not put in evidence. He further testified, on his direct examination, that he received information that there was a warrant of \$5 for him, and that he went to the City Hall and got it; that the resolutions and the action taken by the city council were not shown him; that he had a talk with a Mr. Chambers, a member of the city council, but couldn't say whether it was before or after he got the warrant. He testified several times that he understood the warrant was for the time lost by him, and that one of the councilmen said to him the warrant "was for the time I had lost. The \$5 was for the time I had lost work"—but each time the testimony was stricken by the court. On cross-examination he was asked to state the conversation had with Chambers. He said: "I spoke to him about the \$5 in regard to the \$5, and I understood it was for the time that was lost." Further questions were asked him, and answers were made thereto as follows: "Q. You told him you had lost 2½ days' work? A. Yes, sir. Q. You told him you wanted the council to pay you \$5? A. They allowed \$2 a day for the time I lost. Q. You told Mr. Chambers it would be satisfactory if the city council paid you that. A. Never did. Never said such a thing that I am aware of. * * * Q. Did you talk to other city councilmen about it? A. No, sir. Q. Only with Mr. Chambers? A. To tell you the real truth, you know, I never expected I would be taken down the way I was, else I would have made complaints heavier than I did. But I am one of that kind, and I am a well-known character of that kind. I wouldn't have been

after the city if it hadn't been very slow looking after me in time of sickness."

He further testified that he was laid up a few days, and then went back to work until he took sick in April following, at which time he consulted a doctor. He then was asked questions, and made answers as follows: "Q. Isn't it true that when you believed you were injured worse than you thought you were then you thought you would go after the city council for more money? Isn't that right? A. When I believed I was getting worse, it was time to look out for something if possible. Q. And that is the reason you went after the city council? A. Because the accident happened. Q. But you didn't say anything to the city council after they gave you the \$5 until you commenced suit. A. No; I didn't say anything to anybody. Q. Now, if you hadn't got sick in April, you wouldn't have brought this suit? A. Well, I don't know. I didn't like to bother them so much; but when I was cut short of income and such like, I thought it was time to look after it, when I knew very well where the complaint came from." On re-direct he was again asked to state the conversation had with Chambers, and he answered: "Why, that conversation was: I went and asked him about what was the intention of the \$5, and he said it was for the work I had lost at the time." But he was unable to say whether it was before or after he received the warrant.

Mr. Chambers, for the defendant, testified that four or five days after the accident the plaintiff came to him and said that he had been injured by falling over a raise in the sidewalk, and that he thought the city was responsible; that he should receive his days' wages, which were a dollar and a half; and that he had lost three days. The witness told him that so far as he was concerned he would be in favor of giving him \$5, and told him to present his claim to the city council. About a month or six weeks after the claim was allowed and paid the plaintiff called at his house and told him that he was then suffering from the effects of the fall, and thought that he should receive something more for his injuries. He told plaintiff that he did not have anything more to say about it, for when the amount was allowed he did not think anything more would result in the matter. Plaintiff told him that he did not know he was injured as badly as he was, and that he would file suit. The witness told him he had to use his own judgment about that. The testimony of this witness is not denied by plaintiff, except as appears in his testimony already referred to.

From this evidence it is contended, on the part of the defendant, that it was entitled to a directed verdict, on the grounds that the plaintiff failed to present a sufficient and proper claim, and that the plaintiff settled for and was paid in full of all demands. On

the other hand, the plaintiff contends that the settlement and payment were only for the time lost by plaintiff, and not for the personal injuries sustained by him, and that he was entitled to have the question submitted to the jury as one of fact. The trial court adopted the views of plaintiff, and instructed the jury as follows: "The court charges you that, if you find from the evidence that upon the presentation of plaintiff's claim for damages to the city council of Ogden city he was allowed and paid both for his personal injuries and loss of time, and that he received such allowance in full payment for both his personal injuries and loss of time, then the court charges you that he is not entitled to recover in this action; but the court charges you that if you find from the evidence that he was allowed and paid only for his loss of time and wages, and not for his personal injuries, and that the city complied with the plaintiff's acceptance of the amount allowed him on condition that the same was to be accepted in full satisfaction for all injuries received, then the plaintiff is entitled to be compensated for the physical injury, pain, suffering, and sickness resulting therefrom in this action," provided they found the defendant guilty of negligence. Chapter 19, p. 12, Sess. Laws 1903, provides that claims of this character must be presented to the city council in writing, signed by the claimant or his agent, properly verified, and describing the time, place, cause, and extent of the damage or injury, and if the city council shall refuse to hear or consider a claim because not properly made out, notice thereof must be given the plaintiff and sufficient time allowed him to have the claim properly itemized and verified. The plaintiff's claim was not properly made out as provided by the statute in several particulars, principally because it was not verified, and the extent of his injury or damage not sufficiently described. The city council, however, did not decline to consider it, nor to investigate the facts, because the claim was not properly made out. On the contrary it treated the claim, and acted upon it, as though it had been in full compliance with the statute. In such case the defects of the claim presented were waived, and were not thereafter available as a defense to the action. But on the ground that the settlement and payment were in satisfaction of plaintiff's claim, a verdict ought to have been directed for the defendant. Plaintiff's cause of action was for a single tort, and all the damages resulting therefrom were required to be reserved and recovered in one suit. In the presentation of his claim the plaintiff was not at liberty to split his demand. He could not present a claim only for a part, and, if it was allowed, accept it, and then present another claim for another part. The fair meaning of plaintiff's claim as presented by him is that it was a presentation of his entire demand. We think it was so intended by him. As such it was received

and acted on by the defendant. From the action taken by the city council it is very clear that the payment made was intended by it to be in full of all demands. When it allowed and tendered plaintiff \$5, in the absence of any showing to the contrary, he must be held to know that such allowance was in full, or an allowance in part and a rejection in part, and when he accepted the amount tendered it must be presumed that the payment was in full satisfaction of his entire claim. The plaintiff, having a cause of action against the defendant, unliquidated with respect to amount, for personal injuries claimed to have been caused by its negligence, and having presented a claim for his damage or injury as he was required to do, and having received from the city a stated sum of money on his claim, there being no express agreement that it should be in satisfaction either in whole or in part of the cause of action, the presumption is that it was intended by the parties as a full recompense for the injury, and operates as an accord and satisfaction, barring a subsequent action to recover damages for the same injury. *Hinkle v. Minneapolis & St. L. Ry. Co.*, 81 Minn. 434, 18 N. W. 275; *Canton Coal Co. v. Parlin, etc., Co.*, 215 Ill. 244, 74 N. E. 143, 106 Am. St. Rep. 162; *Anderson v. Standard Granite Co.*, 92 Me. 429, 43 Atl. 21, 69 Am. St. Rep. 522.

If the payment was intended by the parties not to be in settlement of all, but only in part, of plaintiff's demand or claim, it was incumbent on him to show it. We have excerpted from the record all the evidence bearing upon this question. We think it wholly insufficient to overcome the presumption. There is no evidence in the record sufficient to support a finding that the payment was intended by the parties to be only for the time lost by plaintiff, and not for his entire demand. It appears from the plaintiff's own testimony that the minds of the parties did not meet on such a proposition. True he testified that he understood the payment was only for such purpose (which testimony was stricken by the court), and that a councilman told him, either before or after he received the warrant, that the \$5 was for the work he had lost at the time. But it is not shown that the councilman had authority to bind the city by such a statement. Furthermore the statement made is very far from showing an agreement that the payment was only to be in recompense for the time lost, and that all other matters were left open for future determination and settlement. It is not inconsistent with, nor does it overcome, the presumption referred to, but is entirely consistent with the contention that the councilman regarded the few days' time lost the only damages sustained by plaintiff. The plaintiff could not present a claim, and, if allowed as to time lost, and rejected as to damages for injury to the person, accept the portion allowed, knowing that the rest had been rejected, and then recover in an action.

for the portion rejected, in the absence of an express agreement between himself and the defendant that the acceptance of the allowance should be regarded as payment only of the part allowed, and that the defendant was not discharged nor released from the part rejected or disallowed. Such an agreement has not been shown. If the plaintiff was dissatisfied with the allowance, he was required either to forego the portion rejected, or submit his claim as a whole to the courts. He cannot be permitted to accept that part which is to his advantage, and make the other a subject of litigation. If his claim was only partially allowed, as he claims it was, he was required to accept the part so allowed in satisfaction of his whole claim, or litigate it as an entirety. *Yavapai County v. O'Neil*, 3 Ariz. 363, 29 Pac. 430; *Ingram v. State, etc., Commission*, 4 Idaho, 139, 36 Pac. 702; *Board of Com'rs v. Seawell*, 3 Okl. 281, 40 Pac. 592; *Zirker v. Hughes*, 77 Cal. 235, 19 Pac. 423; *Brick v. County of Plymouth*, 63 Iowa, 462, 19 N. W. 804.

There is evidence tending to show that the plaintiff, when he presented his claim and received the warrant, did not know his injuries were as serious as later they appeared to be. Appellant has very forcibly urged that such fact alone is not sufficient ground to avoid the settlement. We need not inquire into such matter, for no controversy as to an avoidance of the settlement has arisen. Neither by pleading or otherwise did the plaintiff below, nor does he here, seek to avoid the settlement on such or any other ground. The only controversy which has arisen with respect to the settlement relates to its terms, and involves the question whether the plaintiff settled only a part or the whole of his demand.

The defendant further contends: That the plaintiff was guilty of contributory negligence. For a week before the accident the plaintiff usually passed along the walk where the raised condition was once or twice a day in going to and from his work. That he observed the height of the raise, and one time remarked that it was a "slovenly job." That at the time of the accident, early in the morning and when dark, he came along at a pretty fair walk, and stubbed his toe against the raise and fell. He further testified that at the time "I never thought about it (the obstruction). If I had thought about it, it would not have happened, perhaps. But a man's mind is not always on such objects as that. * * * I knew it was there, but a man has not always his memory with him. * * * I did not see the mound of earth at the time I stumbled. I did not mind much about it. I tumbled, and I didn't know nothing more." The plaintiff was 79 years of age, but, as stated by him, rather spry for one of his age. It is claimed that the plaintiff was guilty of negligence in raising the sidewalk with knowledge of the de-

fect. It is undoubtedly the law that one is required to keep a reasonable lookout for defects and dangers which are known to attend particular places, and that one is bound to make such use of his faculties as will enable him to discover obvious dangers in a highway or sidewalk. And if a traveler has knowledge of a defective condition of such a character as renders the walk so unsafe that it cannot be prudently used, he is guilty of negligence in voluntarily attempting to travel upon it, if the defect could easily and without substantial inconvenience be avoided by going around it or taking a safer way. But the defect here was not such as would or should have turned a prudent traveler off from the walk to seek a better route. Going upon a sidewalk known to be defective or out of repair is not of itself negligence, unless the defect is of such a character that a reasonably prudent person should not have attempted to use the walk. The rule is well stated in the case of the City of Bedford v. Neal, 143 Ind. 425, 41 N. E. 1029, 42 N. E. 815, in the following language: "The appellee knew all about the defect in the sidewalk when she entered upon it the last time in the dark, whereby she received her fall and injury. It is true that it is settled law in this court that, because one has knowledge that a highway or sidewalk is out of repair or even dangerous, he is not therefore bound to forego travel upon such highway or sidewalk. [Citing numerous cases.] But the doctrine to be extracted from these cases is that the person with knowledge of the defect or danger must, in attempting to pass, exercise care proportionate to the known danger to avoid injury. And as a consequence the appellee in the case before us, having knowledge of the defect and unsafe condition of the sidewalk when she entered upon it the last time in the dark, she was required to exercise more care than she would have been required to exercise had she been ignorant of the defect, or there had been no defect and the time had been daylight." (Citing cases.) Nor is the fact that plaintiff did not have the defect in mind at the time of the accident conclusive on the question. In the case of Doan v. Town of Willow Springs, 101 Wis. 112, 76 N. W. 1104, it was said: "Nor was it error for the court to instruct the jury that the fact that the plaintiff had driven over the highway at the point in question with knowledge of its defective and dangerous condition was not conclusive in law that he was guilty of contributory negligence. True the plaintiff testified that he was not thinking when the accident occurred; that he did not know why, but he just happened not to be thinking; that any man was liable to go along the road without thinking of a bad place therein. Within the repeated rulings of this court, this would not have been sufficient to justify the court in taking the case from the jury." To the same effect is the case of Dwyer v. Salt

Lake City, 19 Utah, 525, 57 Pac. 535, where it is said: "Although the respondent had previous knowledge of the condition of the sidewalk and embankment, and undertook to cross the embankment on a dark night, and momentarily forgot about it, yet such knowledge, undertaking, and forgetfulness were not conclusive evidence of such contributory negligence as would bar recovery." We are of the opinion that the question of contributory negligence was one of fact for the jury.

Because of the error pointed out, the judgment is reversed, and the cause remanded for a new trial, costs to appellant.

MCCARTY, C. J., and FRICK, J., concur.

MANTI CITY SAVINGS BANK v. PETERSON et al.

(Supreme Court of Utah. Jan. 10, 1908.)

1. CONTRACTS—ORAL CONTRACTS—CONSTRUCTION—QUESTIONS FOR COURT AND JURY.

Where the terms of an oral contract are precise and explicit, the language clear and unequivocal, and there is nothing doubtful or ambiguous about it requiring explanation by resorting to extraneous circumstances, the court should leave to the jury merely the question of its existence, as testified to, and not the question of its effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 767-770.]

2. TRIAL—INSTRUCTIONS—MATTERS NOT IN ISSUE.

The giving of an instruction as to estoppel, the question of estoppel not being raised by the pleadings or evidence, is error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587-612.]

3. REPLEVIN—MISLEADING INSTRUCTIONS.

Where defendants leased sheep to T., and T. mortgaged them and sheep belonging to himself to plaintiff, an instruction in replevin therefor after the death of T., that plaintiff as mortgagee of T. succeeded to his rights of ownership and possession in the sheep on default in the conditions of the mortgage, and for the purpose of enforcing such rights plaintiff enjoys the same rights, both of ownership and possession, which T. had, while unobjectionable, if by it the court meant to, and did only, say that plaintiff succeeded to whatever ownership T. had and to his right of possession arising from such ownership, might have been understood by the jury, when read in connection with the succeeding instruction, which, even if correct, had no proper place in the case, that any contract in relation to the running of sheep between T. and defendants in force at T.'s death would not be terminated by his death alone, but would remain in force, and its obligations would have to be performed by his executor or administrator, who also would receive the benefits thereof for the estate, to mean that, as T. was given the right of possession of the sheep under the leases or contracts between him and defendants, plaintiff, under its mortgage, also had such a right of possession, to which extent it was misleading and erroneous: T.'s right under his lease being personal to him and not assignable, without consent of the lessors.

4. CONFUSION OF GOODS—EFFECT—TENANCY IN COMMON.

Where leased sheep are intermingled with the sheep of the lessee, and so incapable of

identification, the lessors and lessee, as to the flock, become tenants in common.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Confusion of Goods, § 10.]

5. TENANCY IN COMMON—MORTGAGES.

A mortgage of sheep in which the mortgagor has an interest as tenant in common passes such interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, § 138.]

6. SAME—ACTION BETWEEN CO-TENANTS—REPLEVIN.

While the general rule against a tenant in common maintaining replevin against his cotenant for his individual interest in the common property does not obtain where the property is alike in quality and value, and readily divisible by measurement or weight, and his part is wrongfully detained, and the action is necessary for maintenance of his rights, yet he must show the existence of all these conditions.

Appeal from District Court, Seventh District; F. Erickson, Judge.

Action by the Manti City Savings Bank against Niels Peterson and others. Judgment for plaintiff. Defendants appeal. Reversed, and remanded for new trial.

See 86 Pac. 414.

J. W. Cherry, E. Hansen, and Thurman, Wedgwood & Irvine, for appellants. W. D. Livingston and Willard Hanson, for respondent.

STRAUP, J. This is an action of replevin. On December 5, 1902, one Peter Thompson gave a mortgage to the plaintiff on 1,600 head of stock sheep to secure the payment of a promissory note for \$1,594.16 payable August 1, 1903. The note and mortgage evidenced a renewal of a loan theretofore made by plaintiff to Thompson. Peter Thompson was engaged in the business of running sheep and farming. He died August 2, 1903. No part of the note had been paid. The mortgage contains a provision giving the mortgagee the right to take possession of the sheep on default of payments or breach of the mortgage covenants. The sheep described in the mortgage were "stock sheep marked with two upper bits in the left ear and an upper bit and under bit in the right, and branded with a 'T' wool brand on the back." On September 2d, the sheep then being in the possession of the defendants, the plaintiff demanded possession, which was refused. It then commenced this action, and the sheriff, under the order of seizure, took possession of 2,160 head of sheep marked as described in the mortgage, and delivered them to the plaintiff. The defendants, in their answer, denied plaintiff's ownership and right of possession, and alleged ownership and right of possession in themselves of 2,163 head of sheep, marked as described in the mortgage. The case was tried before the court and a jury. A verdict was rendered in favor of plaintiff. The defendants appeal.

The plaintiff gave evidence showing the execution and delivery of the note and mortgage, and nonpayment of the note; that

Peter Thompson, at the time of his death, was in the possession of about 2,900 head of sheep; that about 2,163 head, including increase, were marked as described in the mortgage; a demand on, and a refusal by, the defendants to give possession; and that the plaintiff sold of the sheep so taken from the defendants and out of the herd 2,141 head, in satisfaction of the mortgage. The defendants gave evidence that of the 2,900 head of sheep in the possession of Peter Thompson at the time of his death something over 2,000 head belonged to them, and which had been leased to him by them. With respect to the number owned by the defendant Fisher he testified that he first leased sheep to the deceased in 1897; that in 1901 he leased 387 head to him; and that the terms of the lease were evidenced by a writing, signed and delivered by the deceased, as follows: "Ephraim, Utah, October 1st, 1901. This certifies that I have leased and received of O. J. Fisher of Ephraim, Utah, three hundred and eighty-seven head of stock sheep for one year, and agree to pay to said C. J. Fisher ten head of sheep increase on each one hundred, also one and one-half pounds of wool on each head for the lease and use of said sheep. Said 387 sheep, together with the ten on each hundred increase when returned to said C. J. Fisher, to be an average of all the sheep in my herd, and to be received by him or delivered to him within thirty miles of Ephraim, Utah, on October 1st, 1902; said sheep to be separated from my herd in presence of said C. J. Fisher or a representative duly authorized by him to receive them. [Signed] Peter Thompson." He further testified that the contract was renewed in the fall of 1902; that he had received the wool rentals, but not any sheep, from the deceased; that in the fall of 1903 he was entitled to and owned 468 head in the herd; that the deceased was to have the care and management of the sheep and pay the taxes on them, but that he was not to sell any of them without his permission; that the sheep and their increase were to be marked with Peter Thompson's mark (the same mark described in mortgage), and that the sheep were to be mixed with Thompson's sheep; and that the witness could not identify his sheep nor distinguish them from the rest of the herd.

The defendant Niels Thompson testified: That he leased sheep to the deceased commencing in 1896 on the same terms as testified to by defendant Fisher, but that his lease was verbal. Each year they had a settlement and determined the number of sheep belonging to him. In the fall of 1901 he had 832 head. In 1902 a settlement was had, and he had 915 head, and in 1903 he was entitled to and owned about 1,000 head.

The defendant Albert Thompson testified that he also leased sheep to the deceased commencing in 1896 upon terms similar to those of the other defendants; that at the end of each year a settlement was had; that

in 1901 he leased 489.2 head, which was evidenced by a writing, signed and delivered to him by the deceased, as follows: "Ephraim, Utah, October 1, 1901. This certifies that I have 489.2 sheep on shares belonging to Albert Thompson, for which I agree to pay $1\frac{1}{2}$ pounds of wool and 10 sheep increase per hundred, the sheep when delivered to be at or near Ephraim, Utah, and to be an average of my herd. [Signed] Peter Thompson." He further testified that in the fall of 1902 the contract was renewed.

The defendant Caroline Linberg testified that she leased sheep to the deceased under the following terms:

"Ephraim, Utah, July 6, 1897.

"This certifies that I have 21 head of sheep on shares belonging to Caroline Linberg and agree to pay $1\frac{1}{4}$ lbs. of wool per head and one increase on ten head. Received said sheep October 1, 1896, from Ezra Madsen.

"[Signed] Peter Thompson.

"Sheep due October 1, 1898, 25.4 and to be kept one year for ten increase per hundred and $1\frac{1}{4}$ pounds of wool per head. Sheep due October 1, 1899.

"[Signed] Peter Thompson.

"Sheep due October, 1900, 30.74 head, to be kept one year from October 1900, at above terms.

"[Signed] Peter Thompson.

"Ephraim, July 1, 1902.

"Have 87.19 head of sheep in herd of Caroline Linberg. Due October 1, 1902, and if left in herd to be on above terms, one in ten increase and one and one-half pounds of wool.

"[Signed] Peter Thompson."

The defendant Johnson testified that he leased sheep to the deceased commencing in 1896 on the same terms as those of the other defendants; that the contract was renewed each year; that in the fall of 1902 the deceased had 176 head of sheep, and in the fall of 1903, 193 head.

All of the defendants testified that they received the wool rentals but no sheep from the deceased; that the sheep leased by them were mingled with Peter Thompson's sheep, and were marked with his mark for convenience and identification. The defendants also introduced in evidence book entries made by the deceased, and accounts kept by him between the defendants and himself from 1896 to 1901. Among others were the following:

"Oct. 1, 1901. Albert Johnson. Sheep on shares: 160.9."

"Oct. 1, 1901. N. Thompson. Sheep on shares: 915."

"Oct. 1, 1901. Albert Thompson. Sheep on shares: 489.2."

"Oct. 1, 1901. C. J. Fisher. Sheep in herd: 820. John Lindberg 27.95."

The defendants further testified that they had no knowledge or notice that the deceased had given a mortgage on the sheep.

The case was here on a former appeal upon substantially the same facts. 30 Utah, 475, 86 Pac. 414, 116 Am. St. Rep. 862. On the

first trial, which was before the court, all the evidence of the defendants as above set forth was stricken on the theory that, as the identical sheep leased by them to the deceased were not to be returned, and were not capable of identification, the transactions were to be regarded as sales, and not as bailments or as creating a tenancy in common, and that the title of the sheep passed to the deceased, and he therefore conveyed mortgage title to the plaintiff, who thereafter became entitled to the possession of them. In so ruling and in striking the evidence we held the court erred, for which, among other reasons, the judgment was reversed, and the cause remanded. On a retrial of the case, the court instructed the jury as follows: "The defendants assert title to the sheep in controversy in this action, and each of them claim to have delivered certain sheep to Peter Thompson before the execution of plaintiff's mortgage, upon the terms that Thompson was to run them and allow a certain percentage of increase and pay a certain amount of wool each year as rent, and return the original number, with the increase added, at the termination of the lease, and that for convenience the sheep were all to be marked with Peter Thompson's mark. You are instructed that if you find from the evidence that the defendants did deliver any sheep to Peter Thompson upon those terms, the title to any such sheep would remain in the defendants, unless you find from the evidence that the parties to the transaction intended the contract as a sale and not a lease. In order to determine the right of possession in this action you should determine the intention of the contracts, whether verbal or in writing, between the defendants and Peter Thompson, the mortgagor of the plaintiff. In so doing you may consider all the circumstances attending the making of the same and the effect given to them by the parties thereto. If you find from the evidence that it was the intention of the parties to the respective contracts to pass the title to the sheep therein described to Peter Thompson, then such contracts are contracts of sale, and they give the ownership and also the right of possession of said sheep to Peter Thompson. If, on the other hand, you find that the intention of the parties was not to pass the title of said sheep to Peter Thompson, but that the delivery of the same to him, if there was ever such a delivery, was merely for the purpose of ranging and caring for the same, then such contracts are contracts of bailment, and do not give the right of ownership to Peter Thompson." By these instructions the court permitted the jury to determine whether the deceased and the defendants, by the terms of their contracts, intended to pass the title of the sheep to the deceased, or whether they intended them as mere contracts of bailment. It was in effect casting the duty on the jury to determine whether the contracts were contracts of sale or bailment. In this we think the court erred.

Upon this question the case of *Spragins v. White*, 108 N. C. 449, 13 S. E. 171, is very pertinent. There an action was brought to recover the price of shoes sold. The defendant testified that, after having a conversation with the plaintiff's representative, he "agreed to buy a bill of shoes upon his promise to have them in Aulander in two weeks. Without this promise I would not have taken the goods. I had a contract to fill within two weeks. Plaintiff sent me an invoice of the goods and shipped them." The trial court there charged the jury: "If you should believe that this agreement and bargain were made, then you must inquire and determine what was meant and understood by it by the parties making it. Did it mean that the plaintiffs were to insure at all events the delivery by the transportation company of the goods in two weeks, and that in failure of such delivery in two weeks the sale was to be void at the option of the defendant, and he might return the goods to plaintiffs? If so, plaintiffs are not entitled to recover. But if it meant that plaintiffs were to use all due diligence in forwarding the order, in packing and shipping the goods by the common carrier, and plaintiffs did all these things, then plaintiffs are entitled to recover the bill and interest, as before stated." In reviewing the charge, the appellate court, in quoting from *Young v. Jeffreys*, 20 N. C. 361, said: "Where a contract is wholly in writing, and the intention of the framers is by law to be collected from the document itself, then the entire construction of the contract, that is, the ascertainment of the intention of the parties as well as the effect of that intention, is a pure question of law, and the whole office of the jury is to pass on the existence of the alleged written agreement. Where the contract is by parol, that is, oral, the terms of the agreement are of course a matter of fact, and if those terms be obscure, or equivocal, or are susceptible of explanation from extrinsic evidence, it is for the jury to find also the meaning of the terms employed; but the effect of a parol agreement, when its terms are given and their meaning fixed, is as much a question of law as the construction of a written agreement." It was there further stated that, if there be no dispute as to the terms of oral contracts, and they be precise and explicit, it is for the court to declare their effect, and in such case the rule is the same as if the contract were in writing. To the same effect is *Gassett v. Glazier*, 165 Mass. 473, 43 N. E. 193.

The terms of the contracts here were necessarily to be ascertained from the evidence. Some of the contracts were in writing. Others were oral. But in all the terms were precise and explicit; the language used, clear and unequivocal. There was not anything doubtful or ambiguous about them which required explanation by resorting to extraneous circumstances. It was the duty of the court to instruct the jury that, if they found the

existence of the contracts as testified to by the defendants, the effect of such contracts did not constitute a sale of the sheep; that the title did not pass to the deceased (Savings Bank v. Peterson, 30 Utah, 480, 86 Pac. 414, 116 Am. St. Rep. 862, and cases there cited); and that he, as against the defendants, could not, without their consent, give a binding mortgage upon the sheep which he had received and held under the terms disclosed by such contracts.

The court further charged the jury: "You are instructed that, as a general rule of law, Peter Thompson could not, by his mortgage, convey to the plaintiff a better title to the sheep in controversy than he himself may have had; or, in other words, no one without title can convey a title to any property and defeat the claim of the rightful owner. But under some circumstances the owner of property is estopped to assert his title to such property against an innocent purchaser or mortgagee for value, and in such circumstances the rights of innocent third parties do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the acts of the real owner, which preclude him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear vested in the party making the mortgage or other conveyance. In other words where one of two innocent persons suffers from the wrong of a third person, he must suffer by the wrong who puts it in the power of the wrongdoer to cause the loss." This charge should not have been given. Neither the pleadings nor the evidence raised a question of estoppel. It was not alleged, nor was it proven, that the defendants had knowledge of the execution of the mortgage, or that they misrepresented or concealed any fact with respect to their title or ownership, or that they induced the giving of the mortgage, or that the plaintiff in any particular was misled or deceived by any act or conduct on their part or by anything said or done by them. The giving of the instruction may well have led the jury to believe that there was evidence in the case upon which they were at liberty to find that the defendants were estopped from asserting their title or right of possession to the sheep.

The court also instructed the jury (No. 13) as follows: "You are instructed that the plaintiff herein, as mortgagee of Peter Thompson, succeeded to his rights of ownership and possession in the sheep in controversy upon default of the conditions of the mortgage under which the plaintiff claims its right of possession, and for the purpose of enforcing and defending such rights the plaintiff enjoys the same rights, both of ownership and possession, which Peter Thompson had." And (13a) as follows: "I instruct you that any contracts in relation to the running of sheep between Peter Thompson and any of the defendants in

force at the time of Peter Thompson's death would not be terminated by reason of his death alone, but the same would remain in force and effect, and the obligations thereof would have to be performed by his executor or administrator, who also would receive the benefits of such contracts for and in behalf of said estate." If by instruction No. 13 the court meant to, and did only, say that the plaintiff succeeded to whatever ownership the deceased had, and to his right of possession arising from such ownership, the instruction would not be open to criticism. But when it is read in connection with 13a the jury might well have understood it to mean that, inasmuch as the deceased was given the right of possession of the sheep under the contracts or leases between him and the defendants, the plaintiff, under its mortgage, also had such a right of possession. To that extent the instruction was misleading and erroneous. The only right of possession which the plaintiff had was dependent upon its mortgage, and upon the title and ownership of the deceased. It was entitled to the possession of whatever sheep the deceased owned and was mortgaged to it by him. It was not, however, entitled to the possession of any sheep which the defendants had leased to him. Because the deceased was in possession of the defendants' sheep under the terms of the leases, the plaintiff, by virtue of its mortgage, did not succeed to such a right of possession. The leasing of the sheep by the defendants to the deceased was personal to him. His right thereunder was not assignable to a third party without the consent of the defendants. *Lewis v. Sheldon*, 103 Mich. 102, 61 N. W. 269; *Randall v. Chubb*, 46 Mich. 311, 9 N. W. 429, 41 Am. Rep. 165. His right of possession, depending upon the leases, ended with his death. It was wholly unnecessary to inform the jury as to what rights possessed by the deceased would, or would not, be succeeded to by his executor or administrator, as was done in instruction No. 13a.

Furthermore, we very much doubt the correctness of the law as therein stated. While the administrator undoubtedly succeeded to whatever interest the deceased had in and to the sheep, yet it would seem the leases, being personal with the deceased, and calling for his personal care and attention, ended with his death, and that the administrator would not be authorized, against the consent of the defendants, to step into the shoes of the deceased and run the sheep as he might have done had he lived. Edwin Booth's administrator might quite as well have claimed the right to play Hamlet under a part-performed contract of his intestate, or the executor of James Whistler to paint an unfinished painting of his testator. If the testimony of the defendants concerning the leases and the number of sheep leased by them to the deceased is believed and found to be true, then the deceased at the time of his death had in

his possession something like 2,100 head of sheep—the exact number we do not undertake to say—belonging to the defendants. The remainder of the herd of 2,900 head of sheep belonged to the deceased. If the sheep which the defendants had leased were mixed with the sheep of the deceased so as to be incapable of identification, the deceased and the defendants, as to the herd, became tenants in common. Whatever interest the deceased as such tenant in common had in and to the herd the plaintiff succeeded to under its mortgage. Generally one tenant in common cannot maintain replevin against his co-tenant for his individual interest in the common property. Such undoubtedly is the rule where the common property consists of a specific chattel or a single piece of property, as was the case in *Hill v. Seager*, 3 Utah, 379, 3 Pac. 545, or where the things in their nature are so far indivisible that the share of one is not susceptible of delivery without the whole. But it has been frequently held that the rule should not obtain in a case where the intermingled property is alike in quality and value and readily divisible by measurement or weight. It has been quite generally held that tenants in common, or persons who are separate owners of articles stored in mass, such as corn, wheat, coal, logs, etc., each article being of like nature and quality with the others, may have replevin for his proportionate part of the intermixed chattels if the same is wrongfully detained and the action is necessary for the maintenance of his rights, subject to deductions for any loss or waste properly falling to his share while the property remained in mass. 20 Am. & Eng. Ency. Law, 493, and cases; *Shinn on Replevin*, § 183, and cases.

If the testimony of the defendants is true, and the sheep were intermingled and incapable of identification, they and the plaintiff at the time of its demand were tenants in common, but before it was entitled to maintain the action it was necessary to show that the property was alike in quality and value; was easily divisible; that the defendants asserted ownership to the entire herd, or attempted to remove or convert the common property, or otherwise wrongfully held it antagonistic and hostile to the rights of the plaintiff; that they refused, on plaintiff's demand, to deliver; and that the action was necessary for the maintenance of plaintiff's rights. When such is shown it is entitled to the possession of whatever interest the deceased, as tenant in common, had in and to the herd at the time of his death. It is entitled to no more. It in no event was entitled to the possession of the interests which the defendants, or either of them, had in and to the herd.

The judgment of the court below is therefore reversed, and the cause remanded for new trial. Costs to appellants.

McCARTY, C. J., and FRICK, J., concur.

BROWN v. SALT LAKE CITY.

(Supreme Court of Utah. Jan. 9, 1908.)

1. MUNICIPAL CORPORATIONS—PRESENTATION OF CLAIMS—CONDITION PRECEDENT.

The presentation to a city of claims against it, when required by statute stipulating that no action shall be brought on a claim against a city unless the same has been presented to the council thereof, is a condition precedent and unless done no recovery can be had.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1897.]

2. SAME.

An action against a city by a mother for the death of her minor son, through the negligence of the city in failing to guard the entrance to a conduit constructed and maintained by it as a part of its waterworks system, is not based on a claim within the statute providing that claims arising out of defective streets, sidewalks, etc., or for negligence of the city with respect thereto, or claims arising out of transactions with the city, shall be presented to the council, or no action thereon can be maintained, and the presentation to the city of a claim for damages for the death of the son is not necessary to the maintenance of the action.

3. SAME.

The statute providing that claims against a municipality for damages arising from a defective street or sidewalk, or through the negligence of the municipality in respect to any street or sidewalk, shall be presented within a specified time after the happening of such injury or damage, etc., does not include damages for negligent death.

4. SAME—TORTS—EXERCISE OF GOVERNMENTAL POWERS.

A city maintaining a waterworks system supplying water to its inhabitants for domestic use at established rates, and furnishing water for fire protection and irrigation free of charge, does not do so in its governmental capacity, though so far as it furnishes water for fire protection it acts in its governmental capacity, and it is liable to the same extent as any private owner would be.*

5. SAME.

A city maintained a system of waterworks, supplying water to its inhabitants for domestic use at fixed rates, and furnishing water for fire protection and irrigation free of charge. It maintained a conduit which was not used in the distribution of water for pay, but it was a part of the system and necessary thereto. The water flowing through the conduit was used for irrigation. *Held*, that the city was liable for an accident occurring in the conduit to the same extent that a private owner would be.

6. NEGLIGENCE—USE OF PROPERTY—CARE AS TO PERSONS INVITED.

An owner owes the duty of reasonable care for the safety of a person coming on his premises by invitation, express or implied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 42–44.]

7. SAME—TRESPASSERS—PLACES ATTRACTIVE TO CHILDREN.

Though an owner need not as against an adult intruder or licensee maintain his premises in a reasonably safe condition, yet he must on placing something on his premises which is easily accessible, and which is alluring to children, exercise reasonable care for their safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 55.]

8. MUNICIPAL CORPORATIONS—NEGLIGENCE—QUESTION FOR JURY.

Whether a city failing to guard the entrance into a conduit maintained by it as a part

**Ogden City v. Waterworks & Irrigation Co.*, 28 Utah, 25, 76 Pac. 1069.

of its waterworks system was negligent and liable for the death of a child passing into the conduit with other children to play, *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1800.]

9. APPEAL—VERDICT—CONCLUSIVENESS.

The Supreme Court can neither disturb a verdict on conflicting evidence which would support a verdict either way, nor where there is doubt as to whether the jury should have found a particular act constituted negligence or otherwise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

10. MUNICIPAL CORPORATIONS—INJURY TO PERSON ON MUNICIPAL PROPERTY—CONTRIBUTORY NEGLIGENCE.

In an action by a mother for the negligent death of her minor child about eight years of age, while playing in an unguarded conduit maintained by a city as a part of its waterworks system, the question of the contributory negligence of the mother and the child *held*, under the evidence, for the jury.

Appeal from District Court, Third District; T. D. Lewis, Judge.

Action by Lettie A. Brown against Salt Lake City. From a judgment for plaintiff, defendant appeals. Affirmed.

Ogden Hills and H. J. Dininney, for appellant. Dey & Hoppaugh and E. A. Walton, for respondent.

FRICK, J. The plaintiff brought this action to recover damages for the death of her son, a lad about eight years of age, alleged to have been caused through the negligence of the defendant in failing to guard the entrance into a certain waterway or conduit constructed and maintained by it. The pleadings require no special attention. The allegations of the complaint were sufficient to admit proof of all the facts hereinafter stated, and the answer set forth all the matters in defense referred to in this opinion. The evidence coming from both sides fairly tends to establish the following facts: The city, in September, 1904, and for many years prior thereto, owned and maintained a system of waterworks together with a source of water supply which came from the mountains lying to the north and east of the city. It furnished water to the inhabitants for domestic purposes through a system of pipe lines, and for the water so used it collected pay in accordance with established rates. It also, through the same pipes, furnished the inhabitants water for fire protection, for which no special charges were made. It also, by means of open ditches and laterals, distributed, without charge, certain water among the inhabitants for irrigation purposes. One source of water supply came through what is known as "City Creek," which enters the city from the north and flows in a southwesterly direction through the northwesterly part of the city, and finally empties into the Jordan river west of the corporate limits. City Creek, like all mountain streams, has considerable fall, and the water flows rather swiftly and with considerable force. Some dis-

tance north of the city dams are placed across the stream, and by means of gates and weirs the water is forced into pipe lines for distribution. In the low-water season all the water is forced into these pipes, and none flows down the creek below the intake of the pipes; but in the spring and early summer months there is more water in the creek than the pipes will carry, and, when such is the case, the surplus flows down the stream through the city as stated above. In case of heavy rains, or when the tanks are flushed, or if for any reason water is not wanted in the pipes, it is likewise permitted to flow down the creek. This flow of water through the creek in its natural state has a tendency to erode or wash away the banks of the stream, and, to prevent this, the city, in 1891 or 1892, constructed a conduit or underground waterway of solid masonry 5½ feet in diameter on the inside, and cylindrical in form. The entrance to this conduit was immediately east of the east margin of State street. From there the conduit passed under ground to the corner of State and North Temple streets, thence west along and under that street to the west margin of Main, or West Temple, street, at which point it terminated. The water thence flowed in an open stream to the Jordan river. The entire length of the conduit was 915 feet. At a point 628 feet from the entrance the Jordan Canal, which was also underground, emptied its water into the conduit. The conduit, by reason of its sharp turns, was quite dark on the inside. There was one place about 225 feet from the entrance where, by means of a covered manhole, a little natural light came through into the conduit. Below this point the remainder of the distance was dark, except when the gates were up at the west end. These gates, however, were usually down; for the reason that the water at that point, by means of them, was diverted into irrigating ditches to the north and south. It may be stated, therefore, that the conduit represented a practically dark cavern or tunnel for a distance of about 400 feet below the manhole referred to, and to the point where the Jordan Canal entered it. Along the east margin of State street the city had constructed a tight board fence, and this fence was continued on the north bank of the stream, and also on the south bank, for some little distance up the stream, and beyond the entrance to the conduit. There were two passage ways leading from the street, one on the north of the entrance, the other to the south. Immediately across the street from the entrance, and a little north of west, a large school building was erected, at which a large number of children attended during the school year. This school was opened to the public early in September, 1904. About five years before the latter date the city placed strong bars of iron vertically across the entrance, which were fastened at the top by means of clamps to another bar of iron

placed horizontally across the top of the entrance. The lower ends of the vertical bars were driven into the bed of the stream. The spaces between the bars were $5\frac{1}{2}$ inches at the top and 6 inches at the bottom. One of these bars in some way became loose at the top and was shifted against another so that the space between the two bars was such that boys, or even adults, could pass into the conduit. For a number of years the boys in the neighborhood, which was somewhat thickly settled, in playing around the entrance of the conduit in the bed of the stream during the dry or waterless season, would enter the conduit and play "jail" or "train" therein. Some time during the year 1903 different delegations of citizens living near the entrance of the conduit went before the city council and complained of the condition of the entrance, and called the council's attention to the danger to which the boys were exposed. An employé of the city, who for some years had charge of the entrance of the conduit, testified that he saw some boys in the conduit, drove them out, and replaced and fastened the bar. On numerous times thereafter he saw the boys about the entrance, found the bar again misplaced, and replaced it, but did not fasten it, nor have it fastened. There is no evidence, however, that Marcus Brown, the deceased, or any of the boys who testified at the trial, was ever driven from the conduit or warned by an employé of the city, or any one in its behalf, to keep out of it. During the early part of September, 1904, after the fall term of the school had opened, Marcus Brown, the son of the plaintiff, without her knowledge or consent, entered and played in the conduit with quite a number of other boys. On the evening of the 21st day of that month he was last seen in the conduit about 6 or half past 6 o'clock. He could not be found that night, but the next morning his body was found at the west gate of the conduit. The water from the Jordan Canal entered the conduit in large volume, and with considerable force, and, while it could not be seen in the conduit, it, on account of the loud noise from rushing into the conduit, could be heard for some little distance before reaching it. The inference is that Marcus Brown either went into the water, or in some way fell into it and met death. Marcus was a bright boy, and above the average in intelligence and physical development for boys of his age. It developed at the trial that the boys had a lantern which they used in playing in the conduit, and by means of the light obtained from it they would go down to where the water rushed in from the Jordan Canal; that they had been doing this for a period of about three years; and that the bar was in its displaced condition for about a year before the accident occurred. The plaintiff had moved into the neighborhood about four months before the accident, and did not know anything about the conduit. During the spring or high water season the conduit

required the constant attention of one man to remove the floating débris in the stream, which, if not removed, would cause the entrance to be clogged, and the water to back up in the stream. During the dry season it required no special guarding nor attention. We have stated the foregoing facts in detail, so that all questions raised by counsel, and discussed in the opinion, may be better understood. Upon substantially the foregoing facts the court submitted the case to a jury. A verdict was returned in favor of plaintiff. From the judgment entered upon the verdict, this appeal is taken.

The defendant requested the court to direct a verdict in its favor, which the court refused to do. While numerous errors are assigned, all that are important may be considered upon the alleged error based upon the refusal of the court to direct a verdict. The reasons argued by counsel why a verdict should have been directed in this case may be stated as follows: (1) That the plaintiff at no time, nor in any manner presented a claim to the city council as required by the statutes of this state; (2) that the city conducted its system of waterworks, of which the conduit was a part, in a governmental capacity; (3) that if it be held that the city conducted its system of waterworks in its corporate capacity merely, then, under the undisputed facts, the city is not shown to have been guilty of any negligence to warrant a recovery as matter of law; (4) that if such negligence existed on the part of the city, then both the boy and his mother were guilty of contributory negligence as matter of law; and, further, that the boy was a trespasser, and as to such a person the city was not liable for mere passive negligence.

Referring to the first reason stated, the record discloses that the plaintiff neither alleged nor proved the presentation of a claim to the city council. Counsel for the city assert that she was required to allege and prove such presentation as a condition precedent to her right of recovery. The statute in force at the time of the accident, so far as material, provides as follows: "All claims against a city or town for damages or injury alleged to have arisen from the defective, unsafe, dangerous or obstructed condition of any street, alley, cross-walk, sidewalk, culvert or bridge of any city or town, or through the negligence of the city or town authorities in respect to any such street, alley, cross-walk, sidewalk, culvert or bridge *shall within ninety days after the happening of such injury or damage* be presented to the city council, * * * in writing, signed by the claimant or by some authorized person, properly verified, describing the time, place, cause and extent of the damage or injury; and no action shall be maintained against any city * * * for injury to person or property, unless it appears that the claim for which the action was brought was presented to the council as aforesaid, and that the council * * * did

not, within ninety days thereafter, audit and allow the same. Every other claim against the city * * * must be presented to the city council * * * within one year after the last item of the account or claim accrued." (*Italics ours.*) The section following provides, in substance, that it should be a sufficient bar to any action against a city that any claim mentioned in the preceding section had not been presented to the city council in the manner and within the time specified. Under these provisions it is asserted that the claim upon which this action is based should have been presented to the city council, and as no allegation nor proof of such presentation was made there is no right of action. Is this contention sound? It has been frequently held that, under statutes similar to the foregoing, the presentation of claims falling within the provisions of such statutes is a condition precedent, and unless presented no recovery can be had. We have no disposition to modify the rule so announced, or depart from it. Does the claim in question here come within the provisions of the section above quoted? We think not. It will be observed the claims that require presentation are of two kinds: (1) Claims arising out of defective or obstructed streets, alleys, cross-walks, sidewalks, culverts or bridges, or for negligence of the city authorities with respect thereto; (2) claims consisting of various items of account or otherwise that may arise out of transactions with the city, and not arising in tort. This seems manifest from the language used with respect to the character of the claims that must be presented to the city council under the second class mentioned in the statute. It seems reasonably clear to us that, in view of the case of *Dawes v. City of Great Falls*, 31 Mont. 9, 77 Pac. 309, the claim in this case does not belong to the class last above noticed. Does it come within the first class? It is not a claim which arose out of any matters specially enumerated in the first class. Those are limited to defects in, or the obstructed condition of, streets, alleys, cross-walks, sidewalks, culverts or bridges. All these pertain to places and things which the city is bound by law to maintain in a reasonably safe condition, and the statute makes it liable for a neglect of duty with respect thereto. The claim in question does not come within this class. It is one which arose out of the defective condition of the city's property, which is owned and maintained in its corporate capacity merely, and over which it had dominion the same as any property owner. Moreover, the language of the statute does not cover such a claim. A claim included within the statute is one pertaining to a personal injury or damage to property, and must be presented "within ninety days after the happening of such injury or damage." In an action to recover damages for negligently causing the death of one a presentation of a claim is not re-

quired, for the right of action does not arise until the injury results in death. While the injury may be said to be the cause of death, the injury without death would not give a right of action such as we are now considering. If we should assume a case where the injury did not result in death until the ninety-first day after the injury, or thereafter, no claim could be presented at all, for the reason that the time runs from the date of injury, and not from the time the full consequences resulting therefrom are known. The words "or damage" relate to the damages that arise immediately out of the injury to the party or to his property, and not to such as may be sustained by a third person as a secondary result, although caused by the original injury. The statute must receive a reasonable construction, and such as will make it possible to present a claim. If, therefore, a claim may not arise until the time has elapsed in which it must be presented, the statute should not be held to apply, unless the language used therein permits of no other construction. We are firmly of the opinion that it was not the intention of the Legislature to include within the statute secondary claims or damages arising out of death, which are suffered by third parties by reason of such death. This view, we think, is amply sustained by the authorities. *McKelgue v. Janesville*, 68 Wis. 50, 31 N. W. 291; *Pye v. Mankato*, 38 Minn. 536, 38 N. W. 621; *Moran v. City of St. Paul*, 54 Minn. 279, 56 N. W. 80; *Dawes v. City of Great Falls*, 31 Mont. 9, 77 Pac. 309; *Maylone v. City of St. Paul*, 40 Minn. 406, 42 N. W. 88. The cases cited by counsel for the city to the contrary are all based upon statutes, the terms of which are much broader than our own. In many states all claims must be presented before action can be maintained; in other states, like Utah, claims need be presented only in specified instances. An examination of the authorities will disclose that, where specific matters are mentioned in a statute for which a claim must be presented as a condition precedent to a right of action, claims arising out of matters not so mentioned are excluded and require no presentation before an action may be maintained. The claim in the case at bar falls clearly within the latter class, and therefore the court did not err in refusing to direct the jury as requested upon this ground.

Recurring now to the second reason advanced by counsel for the city, namely, that the city owned and conducted its waterworks in a governmental capacity, and for that reason is not liable, we think, under the authorities, it is likewise untenable. It may be conceded, for the purposes of this discussion, that, in so far as the city provides apparatus and water for fire protection, it acts in a governmental capacity. The city, however, was not required to assume the duty of furnishing its inhabitants water for all uses and purposes. When it acquired property, and

constructed the system of waterworks for that purpose, however, it did so voluntarily, and with a view of deriving revenue therefrom. It, therefore, acquired, owned, and conducted its water system and the property connected therewith, except as stated above, as any other private corporation or owner would, and is liable in like manner and to the same extent as such owners would be. Mr. Thompson, in his Commentaries on the Law of Negligence, vol. 5, § 5788, clearly shows that it is optional with a municipal corporation whether it will assume certain duties or exercise certain powers or not, and that it cannot be called to account in any way for not assuming or exercising them. After stating the law in this regard, the author proceeds to state the rule in case the duties are in fact assumed, and the power is exercised, as follows: "But if it [the city] undertakes to open, improve, or grade the highway, street, or sidewalk, dig the sewer or drain, build the bridge, construct the culvert, open the park, plant the shade trees, light the street or bridge, erect the public building, or waterworks, or wharf, or pier, or dock, and its officers and agents do the work negligently or unskillfully, or negligently suffer it to get out of repair, and in consequence of such negligence or unskillfulness and not in consequence of the mere fact that the work was done, damage accrues to a private person, he may maintain an action against the city therefor." The rule with regard to the liability of municipal corporations is stated in conformity with the foregoing quotation in 20 Am. & Eng. Ency. Law (2d Ed.) 1205. The distinction with respect to the liability of a municipal corporation to provide water and apparatus for fire protection and in the ownership and control of waterworks for general purposes is clearly pointed out by the Supreme Court of Minnesota in the case of *Miller v. Minneapolis*, 75 Minn. 132, 77 N. W. 788. The following well-considered cases clearly demonstrate that the waterworks system of the city and the property connected therewith are not owned, maintained, nor operated in a governmental capacity, and the text as quoted from Thompson, supra, is illustrated and applied therein: *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871; *Galveston v. Posnainsky*, 62 Tex. 127, 50 Am. Rep. 517; *Wilkins v. Rutland*, 61 Vt. 336, 17 Atl. 735; *Lloyd v. Mayor*, 5 N. Y. 374, 55 Am. Dec. 347; *City of Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114; *Briegel v. Philadelphia*, 135 Pa. 451, 19 Atl. 1038, 20 Am. St. Rep. 885; *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; *Ogden City v. Waterworks & Irrigation Co.*, 28 Utah, 25, 76 Pac. 1069. Nor does it make any difference that the conduit in which the accident occurred was not a part of the waterworks system which was used in the distribution of water to the inhabitants for pay. It was still a part of the

system, and a necessary part thereof. That the water flowing through the conduit was used for irrigation without charge to the user makes no difference. When the city assumed the right of conducting the water and of distributing it, it was required to exercise the same degree of care with respect to the maintenance and use of property devoted to that purpose as any private owner would have been. *City v. Babbitt*, 8 Tex. Civ. App. 432, 28 S. W. 702; 2 Dillon on Mun. Corps. (4th Ed.) § 980. We are of the opinion that the court committed no error in refusing to direct a verdict for the city upon this ground.

The third ground upon which the city based its request for a directed verdict in its favor is one that is not entirely free from difficulty with respect to the law, nor is it free from doubt with regard to the sufficiency of the facts to sustain the verdict. The trial court submitted the case to the jury upon the doctrine announced in what are termed the "turntable" cases. *Railroad Co. v. Stout*, 17 Wall. (U. S.) 657, 21 L. Ed. 745, *Keffe v. Milwaukee, St. P. Ry.*, 21 Minn. 207, 18 Am. Rep. 393, and *Barrett v. So. Pac. Co.*, 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186, may be classed as some of the leading cases upon that subject, and as presenting a fair illustration of the principles upon which the doctrine of the turntable cases rests. Since the first of the foregoing cases was decided, a large number of states have followed the doctrine therein announced, and it has become so generally known and recognized by both bench and bar that it is not deemed necessary to cite or refer to the numerous cases wherein the doctrine is illustrated and discussed. In some states, however, namely, Massachusetts, New Hampshire, New York, and, perhaps, a few others, the doctrine has not been adopted by the courts. In some states where the doctrine prevails the courts have sought to limit its application to open and dangerous machinery and appliances. Of this class *Sullivan v. Huidekoper*, 27 App. D. C. 154, 5 L. R. A. (N. S.) 263, *Overholt v. Veiths*, 93 Mo. 422, 6 S. W. 74, 3 Am. St. Rep. 557, *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915, and *Stendal v. Boyd*, 73 Minn. 53, 75 N. W. 735, 42 L. R. A. 288, 72 Am. St. Rep. 597, are fair examples. The more recent adjudications, however, seem to apply the doctrine of the turntable cases to artificial structures and things other than machinery, when such structures and things are in themselves dangerous and are alluring or attractive to children of immature judgment and discretion. This class is well illustrated by the following, among other, cases: *City of Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114; *Brinkley Car Works & Mfg. Co. v. Cooper*, 60 Ark. 545, 31 S. W. 154, 46 Am. St. Rep. 216. A large number of cases of each class might be cited in which the various grounds upon which the courts rest their decisions are stated, but the foregoing cases are deemed sufficient

as illustrative of each class. In this connection, however, we desire to present a quotation from the opinion of Chief Justice Beatty, found in the case of *Peters v. Bowman*, 115 Cal. at page 356, 47 Pac. at page 590, 56 Am. St. Rep. 106, which briefly and clearly states the grounds upon which the cases last above referred to are based. He says: "The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon, to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different."

If the doctrine of the turntable cases is to be adopted in this jurisdiction—and we think it should be—it seems to us that it should be applied in accordance with the principles laid down by Chief Justice Beatty. We are not unmindful of, nor do we underestimate, the difficulty that may arise in the application of the doctrine to all kinds of cases and under all circumstances. Neither are we willing to relax the general rule of law which permits owners of property to use it in accordance with their own judgment and to place upon the surface, or otherwise, structures, machinery, and appliances in such manner and to such extent as to them may seem proper and necessary, or convenient in the conduct of their own affairs. So long as such use, whatever it may be, does not interfere with nor injure another's property, or in some way interfere with his personal or property rights, the law does not, and cannot, interfere. As against mere intruders or licensees, the owner need not maintain his premises in a reasonably safe condition; but as to those who come upon them by invitation, express or implied, he owes the duty of reasonable care for their safety. That is the general rule, and to depart from it in favor of adult persons would cast a burden upon the ownership and dominion of private property which would be intolerable. But is this right of dominion and use really invaded when an exception is made in favor of children of immature judgment and discretion? We have already pointed out that, as to adults or children who may come upon another's premises either by express or implied

invitation, the law imposes the duty upon the owner to exercise reasonable care for their safety. If, therefore, the owner places something upon his premises which is easily accessible to children, and which is alluring and attractive to their childish propensities, and excites their curiosity and desire for play, it, in effect, amounts to an implied invitation to them to come upon the premises. If in connection with the attractiveness the thing is inherently dangerous to a child of immature judgment, it may well be that the owner of premises may, under particular circumstances, be held liable for his neglect of duty to the child going thereon by reason of such allurement. It is true that a child has no greater legal right to intrude upon another's premises than has an adult; but duties may, and, under particular conditions, do, arise, even in favor of adults who are exposed to danger at places where they have no legal right to be. While a child may know that it ought not to go on another's land, it cannot resist the childish instincts that lead it to inspect and play with what is attractive. It is wholly unmindful of the danger, and has little, if any, real appreciation of the consequences that may come from its acts. These propensities and instincts are known to all, and hence must be guarded against by all. It is no answer to say to a child: "This property is mine. I can do with it as I please so long as I do not interfere with another's personal or property rights. You are a mere intruder. I have not infringed upon your rights. Therefore you have no claim upon me." The question in such a case is, has the owner made his property so attractive as to allure children? Did he leave the attractive thing so that it was easily accessible to them? And did it expose them to uncommon and peculiar dangers? These, as a general rule, are questions of fact for a jury to pass on. We are aware that there are some courts that severely criticize the doctrine when applied in this class of cases.

It is urged that the rights of property cannot be burdened or curtailed in this way. Moreover, it is said by some courts that to follow the doctrine to its logical conclusion leads to absurdity; that if it is applied to one instrumentality, it should be applied to all; and that this would lead to holding owners of property liable, if a child were attracted by a wheelbarrow, a plow, a fruit tree, and many other common implements and objects. But this does not follow. All of these things are common. Neither are they specially attractive nor dangerous. That some may attract and be of some danger it is true. But it is not an uncommon danger, and not such as must be guarded against. As to all such and like things no court would permit a recovery as matter of law. This is well illustrated in the case of *Harris v. Cowles*, 38 Wash. 331, 80 Pac. 537, 107 Am. St. Rep.

847, where the Supreme Court of Washington refused to permit a child to recover for an injury received by it while playing with a revolving door. But it is otherwise with respect to unusual dangers and specially attractive things such as are artificial and uncommon—such as are pointed out by Chief Justice Beatty in the case quoted from. Indeed that case is a practical illustration of the extent of the rule. A recovery was denied in that case upon the ground that, while the pond or pool of water in question was artificially produced, and while it was alluring and attractive, it was no more so than a natural pond would have been, and because it was not practical to guard against bodies or streams of water. It is, however, pointed out that, if the thing is artificial, uncommon, attractive, and dangerous, and may, with reasonable effort and expense, be guarded and made reasonably safe, then the duty to make it so may not be disregarded, and the jury, under all the facts and circumstances of a particular case, may so find. It seems to us that these principles underlie the doctrine of the turntable cases, and if that doctrine is sound—and we think it is—it should not be limited to turntables and machinery of like character. To so limit it, in effect, applies one standard of care to one kind of dangerous things, and a different standard to another equally attractive and equally dangerous, which is placed upon premises and there maintained under similar circumstances and conditions. We are unwilling to either promulgate or adopt such a rule. We are constrained to hold, therefore, that the doctrine of the turntable cases should be applied to all things that are uncommon and are artificially produced, and which are attractive and alluring to children of immature judgment and discretion, and are inherently dangerous, and where it is practical to guard them without serious inconvenience and without great expense to the owner. Applying this doctrine to the facts of this case, is the city liable?

The trial court (whose instructions are generally well considered), in an exceptionally full and explicit charge, directed the jury's attention to the particular matters that they were required to find in order to return a verdict for the plaintiff. Among other things the court specially emphasized that before they could find for the plaintiff they must find from the evidence that the inside of the conduit was attractive and dangerous; that the danger relied on by the plaintiff arose out of the flow of water into the conduit from the Jordan Canal some 628 feet distant from the entrance of the conduit; and that the officers and agents of the city, in the exercise of reasonable care and prudence, should have foreseen that the inflow of such water was dangerous, and that some such injury might be occasioned to the boys, or some of them, entering into the conduit and playing therein. The jury, with all the facts and

circumstances before them, found all these in favor of the plaintiff. We have no hesitancy in saying that, if the facts were for us to pass upon, we should be forced to arrive at a conclusion different from that reached by the jury; for it would be quite difficult for us to see how the officers of the city, as reasonably prudent men, should have foreseen that boys would go down a dark passage way of over 600 feet in length, nearly 400 feet of which was totally dark, and play therein, and that, although they did so, they would go or fall into the water coming into the conduit from the Jordan Canal. And if childish instincts induced them to resort to the conduit to play "jail" or otherwise, one would naturally assume that they would instinctively avoid going into the dark passage way to the length of nearly two ordinary city blocks. In the statement herein made that, were we permitted to pass on the facts and determine the question, not as matter of law but of fact, we would arrive at a conclusion different from that found by the jury, the Chief Justice authorizes us to say that he is not prepared to say that, if he were a trier of the fact, he would find in favor of the defendant on the question of negligence (upon this question he expresses no opinion); but that he is, however, clearly of the opinion that the facts amply justified the court in submitting the question of negligence to the jury. In this connection it must, however, be said that the entering into and playing in the conduit by the boys continued for quite a number of years; that the employés of the city knew the boys were doing so; that the city council, about a year before the accident, was advised, by delegations of citizens living in the neighborhood, of the actual conditions; and that the defendant knew, or ought to have known, that the boys, in view of their familiarity with the conduit, might lose their native fear and might finally go and continue to go to the point of danger, as the testimony disclosed they did. Notwithstanding all this, in view of all the facts and circumstances, as triers of the facts, the majority of this court would still be impelled to hold that the accident could not reasonably have been anticipated by ordinarily careful and prudent men. But is the question so clear and free from doubt that reasonable men cannot differ upon it? May not reasonable men, in considering all the facts and circumstances, arrive at different conclusions? The mere fact that the men who passed upon the facts have found against the city upon this point is not conclusive. But such a finding always requires a close scrutiny of the record to ascertain whether or not there may not be some inferences arising out of the particular facts upon which reasonable men may draw different conclusions. While the mere finding is not conclusive that there is evidence in support thereof, nor conclusive that all reasonable men should agree with it or dissent

therefrom, it presents a question that merits a most careful consideration; and after giving it such consideration, and after much reflection, we have been forced to the conclusion that we cannot say as a matter of law that there is no evidence which reasonably tends to support the verdict. We cannot say that all reasonable men ought to have declared a result different from that reached by the jury. To authorize this requires a clear case, and not one where there is a serious doubt. The jury in some cases may misjudge the facts. Courts might do likewise. Members of the court may arrive at different conclusions even upon undisputed facts. While we are satisfied that the facts present what may be termed a "border-line case," and upon them a majority of this court should find for the city, yet we are equally well satisfied that the facts and circumstances, together with all the inferences that may be deduced therefrom, do not leave it so clear that we have a right to say, as matter of law, that the findings of the jury are wholly unsupported. In this regard we are also required to give some weight to the judgment of the trial court in sustaining the verdict by overruling the motion for a new trial. If we should interfere with the verdicts in all doubtful cases simply because upon the evidence we would have arrived at an opposite conclusion, then the proposition would be reduced to this: In any doubtful case, if we agreed with the findings of the jury, we would approve the verdict, but if we did not, we would set it aside. If we have no authority to do this in cases where there is a strong conflict in the evidence, which would support a verdict either way, what greater right have we to do so in a case where there is doubt as to whether the jury should have found a particular act or omission to act, or particular conduct, to have constituted negligence, or otherwise? We, therefore, cannot disturb the verdict upon this ground.

The last question presented, namely, that of contributory negligence upon the part of the mother and the deceased, was peculiarly a question of fact for the jury. The instructions upon this question were full and clear, and in accordance with the law upon the subject.

The question that the boy was a trespasser, and therefore no recovery can be had, was involved in the third proposition discussed, and needs no further consideration.

There are other questions presented, but no error as to any of them is perceived; nor are they of such character or importance as to require discussion.

In view of what we have said, it follows that the judgment should be, and it accordingly is, affirmed, with costs to plaintiff.

McCARTY, C. J., and STRAUP, J., concur.
83 P.—37

(77 Kan. 761)

SHEETS v. HENDERSON.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. NEW TRIAL—SUBMISSION OF CAUSE.

Where a case is submitted to the court on an agreed statement of facts alone, there can be no new trial; the decision involving only a question of law.

2. APPEAL—CASE-MADE—TIME FOR MAKING AND SERVING.

The filing of a motion for a new trial, when no new trial is necessary, does not extend the time for making and serving a case-made for appeal.

Error from District Court, Atchison County; B. F. Hudson, Judge.

Action by Elizabeth L. V. Sheets, executrix, against C. B. Henderson. There was a judgment for defendant, and plaintiff brings error. Dismissed.

Sheffield Ingalls, for plaintiff in error.
Jackson & Jackson, for defendant in error.

PER CURIAM. The case was submitted to the court, a jury having been waived, upon an agreed statement of facts, on the 2d day of June, 1906, and no other evidence was produced or offered. On the 16th day of the same month, the court having taken the case under advisement, judgment was rendered in favor of the defendant and against the plaintiff for costs. No order extending the time for making and serving a case-made for appeal was asked for or was entered by the court. A motion for a new trial, however, was filed within the time prescribed by statute, and this motion was heard and overruled November 14, 1906. A case-made was served within 10 days thereafter, and was settled and signed December 4, 1906. Held that, as there was no issue of fact tried, there could be no new trial of such an issue (*Darling v. A., T. & S. F. Ry. Co.* [decided November, 1907] 94 Pac. 202); also that, as the decision involved only the determination of a question of law, no new trial was necessary, and the filing of such motion did not extend the time for making and serving a case-made (*Wagner v. Railway Co.*, 73 Kan. 283, 85 Pac. 299). It follows that the judgment became final, and the court lost jurisdiction to settle and sign a case-made, on the expiration of 10 days after the rendition of the judgment.

The proceeding in error is dismissed.

(77 Kan. 76)

HALLOWAY v. ARKANSAS CITY MILLING CO.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. PRINCIPAL AND AGENT—UNAUTHORIZED ACT—RATIFICATION.

If an agent to sell goods report to his principal that he has made a sale for a price less than he is authorized to take, it is the duty of the principal to examine the report, and disaffirm the sale within a reasonable time or he will be held to have ratified it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 638-643.]

2. SAME.

The question of what is a reasonable time is one of fact and depends upon circumstances. In this case a delay of five months was unreasonable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 638-643.]

3. SAME—LIABILITY OF AGENT.

If a sale by an agent at a price below that which the principal has authorized be ratified, the agent is not liable to the principal for the difference between the authorized price and that at which the sale was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 665.]

(Syllabus by the Court.)

Error from District Court, Cowley County; C. L. Swarts, Judge.

Action by H. M. Holloway against the Arkansas City Milling Company. Judgment for defendant, and plaintiff brings error. Affirmed.

H. S. Rogers, for plaintiff in error. J. Mack Love and C. M. Wright, for defendant in error.

BURCH, J. The defendant, who resides at Arkansas City, gratuitously undertook to dispose of a car load of flour for the plaintiff, who resides at Larned, agreeing to confer with the plaintiff before closing a deal. The flour was in the possession of the United States Indian Agent at San Carlos, Ariz. An offer of \$2.50 per hundredweight was made for the flour by Brookner & Duncan of San Carlos. The defendant replied they could have the flour at \$2.75 per hundredweight, and requested an answer by telegraph. A copy of the letter to Brookner & Duncan was sent to the plaintiff. Brookner & Duncan telegraphed the defendant they could not use the flour, and the plaintiff was so advised. Some days later the plaintiff wrote the defendant as follows: "In regard to the San Carlos car will say while I think it an outrage to sell the flour at the price offered—\$2.50—it may be best to do so rather than try to move it. I wish you would proceed to place it and get the matter settled up." On February 23, 1904, the defendant wrote Brookner & Duncan as follows: "We received your telegram the other day, saying you could not use the car of flour at \$2.75 per bbl. Would say that we are handling this flour for the Keystone Mills at Larned, Kans., who made the shipment, and have no interest in it at present, except to try to see that they get a fair price for the flour. The price you offered us of \$2.50 would net the mill just about \$1.00 per cwt. for the flour, which was not the cost of the wheat when the flour was made, since which time wheat has advanced about 20 c. per bushel, which is equivalent to at least \$1.00 per barrel on flour, and we trust you can see your way clear to handle this flour at \$2.75 per barrel, which is very much less than the flour could be made for at this time. Please wire us at our expense if you can use it at \$2.75." On February

29th Brookner & Duncan wired the defendant as follows: "Accept flour at two seventy-five per barrel. Regular terms." On the same day the defendant wrote to Brookner & Duncan as follows: "We have your telegram of to-day, accepting the rejected flour at San Carlos at \$2.75 per barrel, and we have wired the Indian agent to deliver same to you." On the same day the defendant wired the Indian agent to deliver the flour to Brookner & Duncan, and mailed a copy of Brookner & Duncan's telegram and a copy of the letter to Brookner & Duncan, which elicited the telegram, to the plaintiff. In due course of mail these copies should have been, and it is not disputed were, received by plaintiff on March 1st or March 2d. On March 5th the Indian agent wrote to the defendant as follows: "According to request contained in your telegram dated February 29, 1904, I delivered to Brookner & Duncan 29,446 lbs. of rejected flour." On March 14, 1904, the plaintiff instructed the defendant to collect from purchasers of rejected flour including the Indian Department, O. F. Weldmeyer, and Brookner & Duncan, which they did. About the middle of August, 1904, on a settlement of accounts between the parties, the mistake in selling at a price per barrel instead of at a price per hundredweight was discovered. The plaintiff sued to recover for the difference, and judgment was rendered against him upon substantially the foregoing facts. It is claimed here that the judgment is erroneous.

That the act of the agent was negligent and wholly unauthorized cannot be questioned, but this fact does not establish liability. The agent was acting for its principal, and immediately notified the principal of its conduct. The principal then had the option of affirming or of repudiating the unauthorized act, and was called upon to do one or the other. Prompt action by the plaintiff might have averted loss. It is not certain but that delivery of the flour might have been prevented. The right to rescind was clear, since the letter to Brookner & Duncan containing the offer at a price per barrel disclosed upon its face that a mistake had been made, besides affording some notice that the defendant was not a general agent. It is said the plaintiff did not discover the mistake until months had passed. The agent, however, made a prompt statement of its conduct for the information of its principal, and it was the duty of the principal to examine the report, and determine whether or not he was satisfied, and would be bound. The law allows a reasonable time for this purpose, but in commercial transactions of this character a brief time is a reasonable time in the absence of special circumstances extending it. The letter reporting the sale to Brookner & Duncan was indubitably read as early as March 14th, and the plaintiff cannot be heard to say that, having examined his agent's report, he did not observe its contents. He had knowledge of the unauthorized sale shortly after it

was made. With such knowledge he made no attempt to disavow it, remained silent for some five months, and, according to the record, still has the proceeds in his possession. This being true, he ratified the transaction, and cannot now repudiate it. The principles involved are all fundamental in the law of agency.

The judgment of the district court is affirmed.

(77 Kan. 72)

SALINA IMPLEMENT & SEED CO. v. HALEY.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. SALE—BREACH OF WARRANTY—RETURN TO SELLER.

What is a reasonable time within which a purchaser should return a machine, sold to him on condition that he can return it if it does not meet the warranty and work satisfactorily, is ordinarily a question for the jury, where there is conflicting testimony on the proposition.

2. SAME—RETURN IN REASONABLE TIME.

While such purchaser, in order to rescind, is required to return the machine with reasonable promptness, after giving it a fair test and learning of its defects, the seller is not in a position to insist that there was unreasonable delay where the purchaser was induced to keep the machine for a time by assurances of the seller that he would put it in working order, and by his attempts to do so if the machine is promptly returned after the last ineffectual attempt of the seller to make it work satisfactorily.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43. Sales, § 813.]

(Syllabus by the Court.)

Error from District Court, Ottawa County; R. R. Rees, Judge.

Action by the Salina Implement & Seed Company against W. E. Haley. Judgment for defendant, and plaintiff brings error. Affirmed.

H. O. Tobey, for plaintiff in error. J. L. King, for defendant in error.

JOHNSTON, C. J. On August 26, 1905, the Salina Implement & Seed Company, through its agent S. A. Dixon, sold a corn harvester to W. E. Haley, the price being \$125 if paid in cash and \$130 if notes promising payment in the future were given. Haley took the machine to his farm and undertook to operate it, and after using it more or less until September 4, 1905, he decided that it did not serve the purpose for which it was purchased, nor come up to the conditions of the warranty under which it was sold. The company, claiming that there was an unconditional sale, brought this action to recover the price of the machine, contending, also, that Haley kept the machine an unreasonable time—much longer than was necessary for a test of its working qualities—and also that when Haley complained of the machine Dixon demanded that if he was not satisfied he should return the machine, but that he had then refused to do so or to

rescind the contract, and by continuing thereafter to use the machine he waived any right he might have had to rescind the sale. There was proof, and plenty of it, tending to show that the sale was made under a warranty that it would do good work, and that Haley should take and test the machine by use until he was satisfied that it met the requirements of the warranty, and if it did not work to his satisfaction he could return it to the plaintiff. There was a conflict in the testimony as to the warranty, and also as to whether Dixon had requested Haley to return the machine if he was not satisfied with it, but the findings of the jury were that the machine was warranted to do good work but did not; that Haley was to run the machine until he was satisfied that it would work well before accepting it; and that if it did not work to his satisfaction he had the privilege of returning it to the company.

It is contended that the testimony of interested witnesses, and that which is most credible, shows that the sale was made without a warranty. The jury has decided what testimony is most worthy of credit, and its findings, based as they are on legal evidence, puts that question at rest. The principal contention is that the test of the machine was not honestly made, and that Haley kept and used it too long after discovering that it was unsatisfactory to justify a rescission of the contract and the return of the machine. It was the duty of Haley to give the machine a fair test, availing himself of such suggestions and assistance as the seller could render, and if it proved defective and unsatisfactory he was then entitled to rescind the contract and return the machine, providing it was done within a reasonable time. In speaking of the return of the machine in case it was found that the sale was made upon an agreement that if the machine did not prove satisfactory to Haley it might be returned, the court properly charged the jury that: "If in his honest judgment it did not so operate he would have a right to return the machine and cancel the contract, but, under such circumstances, it would be his duty to return the machine with reasonable promptness, after having used the machine for such a reasonable time as would be required to give the machine a fair test, and, if he failed to return the machine within a reasonable time after having discovered the defects, he will be deemed to have waived them, unless his delay in returning the machine and rescinding the contract was occasioned by the promises of the plaintiff to fix the machine so that it would work. In a transaction of this kind both parties are required to act in good faith, and neither can be permitted to take advantage of his own wrong."

What is a reasonable time within which to return property so sold, and accomplish a rescission, is a question of fact for the jury where there is supporting testimony. *Cookingham v. Dusa*, 41 Kan. 220, 21 Pac. 95.

Here, as we have seen, the trial of the machine was begun on Saturday, August 26th, and upon the following Tuesday Haley notified the agent that it did not work properly. On Wednesday Dixon sent his man to Haley's farm to adjust the machine, and, not succeeding, it was brought in to Dixon's store for repairs. Afterwards, Haley took it out and worked with it most of the time until Saturday, but as it would not bind satisfactorily he brought it back to Dixon for other repairs and adjustment. Dixon put on a new chain tightener, which it was hoped would remedy the defect. It would not work well, however, and on Monday, September 4th, Haley and Dixon took the machine to a blacksmith, who put on a new knotter for them. Again Haley tried the machine for a short time, but finding that the defects had not been overcome he abandoned any further tests, and turned the machine back to Dixon. Under the testimony it was a fair question for the jury whether the test was made in good faith, and whether under the circumstances the machine was returned within a reasonable time. It is true that Haley used the machine from time to time for more than a week, and actually cut considerable corn, but at no time did the machine properly bind the corn. At first Haley appears to have thought that the failure was due to the new paint and that after the machine was operated for a time it would do better work. Dixon appears to have proceeded on the theory that the defects could be remedied, as he made repeated efforts to repair the machine, which continued until it was finally returned to him. The plaintiff is hardly in a position to insist that the test was unreasonably long when it and its agent were assisting Haley in making the test until the last day, and holding out assurances that they could remedy the defects. It is fairly inferable that the delay in returning the machine was induced in great part by the assurances of Dixon that the machine could be made to work satisfactorily, and his continued efforts to adjust it. Since the machine was returned promptly after the last ineffectual attempt of plaintiff to adjust the machine and put it in working order, the plaintiff has no right to insist that the delay was unreasonable. There is nothing substantial in the objections to the rulings on the admission of evidence or to the instructions given by the court.

The judgment will be affirmed.

(77 Kan. 164)

BELKNAP HARDWARE CO. v. SLEETH
et al.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. WRIT OF ERROR—FINDINGS—REVIEW.

This court may re-examine the findings of the district court based entirely upon written and documentary evidence, when the case is presented here in practically the same aspect as in the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3905.]

2. EVIDENCE—PRESUMPTIONS—REFUSAL TO TESTIFY.

Where the deposition of a nonresident party is taken at the instance of the adverse party, the refusal of such witness to testify to material matters appearing to be within his knowledge, where no sufficient reason is given for such refusal, is the denial of a substantial right, and warrants the inference that the matter or information so withheld, would, if divulged, have been unfavorable to such witness, and of benefit to the party seeking it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 96.]

3. SAME.

Usually, fraud, if it exists, is disclosed by the condition of the parties, the details of the transaction, and the surrounding circumstances, and the presumption arising from the refusal of a party when examined as a witness, to give the material details of a transaction under investigation, within his knowledge, should be added to the facts and circumstances proven, in determining the good faith of such transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 96.]

(Syllabus by the Court.)

Error from District Court, Greenwood County; G. I. Alkman, Judge.

Action by the Belknap Hardware Company against Henry E. Sleeth and others. Judgment for defendants, and plaintiff brings error. Reversed.

This was an action in the nature of ejectment by the Belknap Hardware Manufacturing Company, to recover 320 acres of land, from Henry E. Sleeth and Jessie Sleeth, his wife, who claim to be the owners, and W. L. Jost and wife, tenants upon the land. The following undisputed facts appeared upon the trial: Ross Burget of Brookston, Ind., was engaged in the hardware business at that place until December 19, 1901, when he traded his stock for the land in question. The consideration named in the deed was \$6,400. Of this he paid \$1,000 in money, the remaining \$5,400 was the amount of the goods. At the time of this exchange he was indebted to various wholesale houses for goods purchased, among others to the plaintiff company of Louisville, Ky. On September 1, 1902, he made a mortgage upon the land to Henderson Burget, his father, purporting to secure an indebtedness of \$8,000. The plaintiff sued Ross Burget in a circuit court in Indiana, and on May 1, 1903, recovered a judgment for \$472.30 and costs, upon its claim for goods so furnished. On May 22, 1903, the plaintiff sued Burget upon this judgment in the district court of Greenwood county, attached this land, and caused constructive service to be made upon Burget; the first publication was June 11, 1903. Judgment was rendered in that action September 3, 1903, finding \$479.30 due to the plaintiff, and ordering the land so attached to be sold to satisfy that amount and the costs. Such further proceedings were had in that action that the lands were sold, the sale confirmed, a certificate issued, and on May 22, 1905, a sheriff's deed was executed to the plaintiff, conveying the land, and thereupon this action was commenced.

ed. Sleeth and wife claim to have purchased this land, and it was conveyed to them by a deed bearing date March 28, 1903, expressing a consideration of \$9,600—recorded in Greenwood county June 4, 1903. Ross Burget inspected this land about the time he purchased it, and rented it to Jost, and the latter remained in possession as tenant until January 1, 1904. Neither of the Sleeths ever saw the land. The rents were paid by Jost to Ross Burget, as the alleged agent of the Sleeths, and by such agent paid over to Henderson Burget, and credited on the mortgage. Jost had not accounted for the rents except to Ross Burget. On November 25, 1904, Ross Burget was adjudged a bankrupt in the proper court in Indiana, and was discharged from his debts as a bankrupt, May 18, 1906. The plaintiff company claims that the conveyance to the Sleeths was fraudulent and void, while they claim that it was a valid transfer. The action was tried without a jury, and judgment was rendered for the defendants. The plaintiff brings the case here for review.

Howard J. Hodgson, for plaintiff in error.
D. B. Fuller, for defendants in error.

BENSON, J. (after stating the facts as above). The only question in this case is whether the conveyance from Ross Burget to Henry E. Sleeth and wife was made in good faith, or whether it was fraudulent as to creditors. The evidence bearing upon this issue was written, consisting of depositions and documents; only one witness testified orally, and his testimony related solely to the value of the land. The case is presented here in about the same attitude as in the district court. While the findings of the trial court in such a situation are entitled to careful consideration, and in doubtful cases will turn the scale in favor of affirmance, still where all the material testimony is in writing, and the case is presented here in practically the same aspect as in the trial court, such findings are not absolutely controlling, and will not be sustained if clearly overborne by the weight of the evidence. *Robinson v. Melvin*, 14 Kan. 484; *Durham v. Carbon Coal & Min. Co.*, 22 Kan. 232; *Bank v. McIntosh*, 72 Kan. 603, 84 Pac. 535. The depositions consisted of the testimony of the defendant, Henry E. Sleeth, Ross Burget, his grantor, and, as Sleeth testified, his agent, and Henderson Burget the father of Ross Burget. The testimony of the last-named witness was however quite unimportant upon the issue tried. Thus it appears that the case was practically submitted on the depositions of the defendant and his agent. The admissions of a party are, as stated by Justice Brewer in *Durham v. Carbon Coal & Min. Co.*, supra, good against him.

In addition to the facts above stated the evidence disclosed that Ross Burget rented this land to Mr. Jost, who occupied it under such contract from March 1, 1902, until the

spring of 1905, and all rents were paid to Burget during that time after allowing credits for expenses and improvements. The Sleeths had no communications or dealings with the tenant whatever. Burget visited this land in February, 1903, and in March, 1903, made the deed to the Sleeths in Indiana, where they all resided. Henry E. Sleeth was a farm hand, working for Henderson Burget part of the time. He had no property except an unimproved town lot. He never saw the land and made no inquiries about it except of Ross Burget and Henderson Burget. He testified that he verbally appointed Ross Burget his agent to collect the rents, and that the rents were turned over to Henderson Burget to apply on the mortgage upon the land. He was not able to give a statement of rents so received and applied on the mortgage. The deed to Sleeth bears date March 20, 1903, and the depositions show that it was delivered April 15, 1903. The consideration expressed is \$9,600. Sleeth testified that he paid \$2,600 in cash some time in 1903, and assumed a mortgage of \$7,000 to Henderson Burget, and that this money was from the savings of wages and from gifts, but that the largest gift he ever received was \$50. He gave vague and indefinite testimony about doing business with banks, and when asked from which bank or either he had drawn the money he said: "It might have been drawn from either, but not all of it from either bank or any bank." In a later deposition he was asked, "Where did you have this money on deposit or in safety prior to the time you made payment to Mr. Burget?" His answer was: "I didn't have it on deposit." It does not appear that he sold the lot referred to to raise the money, and he gave no other explanation of the source from which he received it. He heard of the litigation affecting this land in the summer of 1903, but took no action in the matter. Ross Burget testified that he collected the rents and applied them on the mortgage down to the spring of 1905, and that the mortgage debt was reduced from \$7,000 to \$4,000, between April 15, 1903, to the spring of 1905, but that he made no payment thereon except the application of the rents, from which the cost of fencing and other expenses were deducted, but neither Sleeth nor Burget presented any account or statement of such rents or expenses, although repeatedly called for in their examination as witnesses. The land appears to have remained in the control and dominion of Burget down to the spring of 1905, when Sleeth himself made a lease upon it. During the two years between the date of the deed and that time, Burget had attended to the rents, improvements, and expenses, and applied the proceeds upon the mortgage exactly as he might have done had the deed not been made, except he says that he exhibited the statements, accounts of rents, etc., to Sleeth.

The evidence discloses a transaction of

such nature and with such circumstances as to challenge careful scrutiny to ascertain whether the conveyance was in good faith. It seems that Mr. Sleeth never visited this farm for which he claims to have paid \$2,600 cash, and agreed to pay \$7,000 more; that he made no inquiries of the tenant or of others in the locality; that he could not or would not disclose how he obtained the money; that his statements about having part of it in bank were contradicted by his later deposition; that he took no steps to protect his interest when informed that the property was in litigation; that his grantor was financially embarrassed, and soon became bankrupt; that he could not or would not give a statement of rents received and expenses paid; that the entire management down to the spring of 1905 was left with the grantor, even to the making and allowance for improvements; that without showing any money received except the rents for two years, less expenses and cost of improvements, the amount of which he refused to give, he had still reduced the mortgage by \$3,000, but would give no account of payments thereon; that the deed was dated in March, 1903, and yet no claim was made of any payment until April 15th; and that he refused to account for the delay in recording it. These are among the circumstances that demanded attention, and called for explanation.

A still more serious matter, however, is presented. Both Henry E. Sleeth and Ross Burget were twice examined touching these matters from which the foregoing facts appear. In the course of the examinations of Mr. Sleeth in December, 1905, as a witness for the plaintiff, the following appears in the record: "Q. Who occupied this farm at the time you received it? A. Mr. Jost. Q. State the nature of your contract with Mr. Jost? (Question objected to by defendant as incompetent, and on the advice of counsel witness refuses to answer.) Q. What accounting, if any, has Mr. Jost made to you; if any, so state? A. Made none, except through agents. Q. What agent or agents other than Mr. Ross Burget have you employed to look after the farm? (Defendant objects to question for the reason it is not proper examination in chief, and is not relevant or material, and witness is therefore advised not to answer.)" In his subsequent examination in August, 1906, appears the following: "Q. If you had any conversation with Mr. Ross Burget with reference to the purchase of this land prior to March 28th, 1903, you may so state, and what that conversation was. (Witness refuses to answer on advice of his counsel.) Q. If you disposed of any property for the purpose of raising the twenty-six hundred dollars purchase money, you may so state, what properties it were, and when disposed of. (Witness refuses to answer on advice of counsel.) Q. Who present[ed] you the note of eight thousand dollars which the

mortgage secured and what was the total amount of credit, set out on the note, with reference to the final accounting? (Witness refuses to answer on advice of counsel. The attorney for the plaintiff insists, and demands that the foregoing question be answered because of its materiality.) Q. Why do you know that all the rents and profits from this land has been applied on said note? (Witness refuses to answer on advice of counsel.) Q. If Ross Burget ever tendered to you a receipt or memoranda in his accounting to you as your agent, you may so state, and what the receipt or memorandum was? (Witness refuses to answer on advice of counsel.) Q. What compensation, if any, did you make to Mr. Ross Burget for his services as your agent? (Witness refuses to answer on advice of counsel.) Q. Upon what terms and conditions was this land renting for at the time you received the deed? (Defendant objects to the question. Witness refuses to answer on advice of his counsel.) Q. State how much credit has been given you on this note at the present time? (Witness refuses to answer.) Q. What terms and conditions did you authorize Mr. Burget to contract with Mr. Jost for the rent of this land? (The defendant objects to the question, and witness refuses to answer on advice of counsel.) Q. Explain why you did not forward the deed to Greenwood county, Kansas, for record immediately upon its receipt from Ross Burget? (Witness refuses to answer on advice of counsel.) Q. If Jessie Sleeth, your wife, paid no part of this purchase money, and had no other interest in the purchase of the land other than your wife, explain why the deed of conveyance was made to you and Jessie Sleeth jointly. (Defendant objects to the question and witness refuses to answer on advice of counsel.)" In taking the deposition of Ross Burget the plaintiff encountered like evasions and refusals in several instances.

In the course of these examinations Mr. Sleeth testified generally that he had acted in good faith and without fraud, and the pertinency of the foregoing question is apparent. He was the principal party defendant and a nonresident of Kansas. The Civil Code provides: "Any party to a civil action or proceeding may compel any adverse party or person for whose benefit such action or proceeding is instituted, prosecuted or defended, at the trial or by deposition to testify as a witness in the same manner and subject to the same rules, as other witnesses." The plaintiff therefore had a clear right to the evidence, not to such only as the witness felt inclined to give, but to all that was within his knowledge pertinent to the issue. He had no right to withhold such testimony "on the advice of counsel," or otherwise. This is now conceded, and counsel representing him on the trial and in this court (but not in the taking of the deposition) says, in his brief, regarding these strictures of op-

posing counsel, concerning such refusal: "No exception can be taken to the strictures of counsel in this regard. But he should remember that when he scores Sleeth's counsel he exonerates Sleeth. These depositions were taken about the time the news of the taking of the depositions of H. H. Rogers in New York in the Standard Oil investigation reached Indiana. The matter of objecting to testimony 'on the advice of counsel' was new, and Sleeth's counsel could not resist the temptation to try his hand at it. The temptation was very great to a young lawyer." This may explain the misconduct, but does not obviate the consequences. The fact remains that the defendant, in a proceeding in the action, wrongfully deprived the plaintiff of a substantial right. We are not advised what procedure is provided in the jurisdiction where the depositions were taken to compel a refractory witness to answer. We may suppose that it is ample, but the question remains, what effect should such conduct have in the consideration of a case where the successful party thus living beyond the jurisdiction of the court has refused to testify in a material matter in behalf of the opposing party? It must be conceded that the benefit of all reasonable presumptions arising from his refusal should be given to the other party. The conduct of a party in omitting to produce evidence peculiarly within his knowledge frequently affords occasion for presumptions against him. *Kirby v. Tallmadge*, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. Ed. 463. This rule has been often applied where a party withholds evidence within his exclusive possession, where the circumstances were such as to impel an honest man to produce the testimony. In this case the witness not only failed, but refused, to testify concerning material matters that must have been within his knowledge. In a case involving such contumacy of a party as a witness it was said: "It seems plain to us that there is a stronger presumption to be raised against a party in whose possession the facts must be, if they exist, by which suspicion would be removed, and all question as to the propriety of his conduct be set at rest, who stolidly refuses, without the suggestion of a reason, to aid the court in arriving at the truth." *Aragon Coffee Co. v. Rogers*, 105 Va. 51, 52 S. E. 843, 846. In that case the witness testified that he had given full value for the note in suit, but when called upon to explain the transaction, he met the inquiries with evasion, equivocation, and refusal to answer. "When a witness who evades cross-examination is the chief party in interest, or one who is plainly seeking to screen him, his testimony in his own favor ought to be disregarded when it needs explanation. It is to be presumed that, when a witness refuses to explain what he can explain, the explanation would be to his prejudice." *Heath v. Waters*, 40 Mich. 457, Syl. "It has been more than once said that the testimony in a case

often consists in what is not proved as well as in what is proved. Where withholding testimony raises a violent presumption that a fact not clearly proved or disproved exists, it is not error to allude to the fact of withholding, as a circumstance strengthening the proof. That was all that was done here." *Frick v. Barbour*, 64 Pa. 120. "The consciousness indicated by conduct may be, not an indefinite one affecting the weakness of the cause at large, but a specific one concerning the defects of a particular element in the cause. The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstances or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted. The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause. Ever since the case of the chimney sweeper's jewel, this has been a recognized principle." *Wigmore on Evidence*, § 285. The conduct of a party as a witness, and his refusal to give frank explanations of the transaction under investigation, are commented on by Mr. Justice Burch in *Flincke v. Bundrick*, 72 Kan. 182, 83 Pac. 403, 4 L. R. A. (N. S.) 820, where the reasonable inferences from evasions were drawn and applied.

A careful reading of the testimony of the defendant in error, contained in the two depositions, convinces us that the principles embraced in the foregoing quotations are applicable, and the natural inference is that the details and explanations called for and withheld would have shown the falsity of his claim that the transaction was in good faith, in view also of their inherent improbability, as evinced by his entire conduct. Little need be said about the like refusals of Ross Burget. He was the defendant's grantor, and both testified that he was the defendant's agent. His refusals were prompted by the same advice, and presumably were rooted in the same reason, and the same presumption must apply.

This was an action where the greatest liberality in the presentation of the evidence consistent with orderly practice ought to have been allowed. The transaction was in a distant state, and between persons whose interests were hostile to the plaintiff. Commenting upon such a situation, the Supreme Court of the United States has said: "Par-

ties contemplating a fraud frequently pursue such devious courses to conceal their designs, and resort to such subtle practices to mislead their unsecured creditors, that the fraud becomes impossible to detect, unless the door be swung wide open for the admission of all testimony having any possible bearing upon the question. Facts which to the court might seem of no pertinence and be rejected as having no legal tendency to show knowledge of the fraud might be considered by the jury as significant and indicative of a guilty participation. Even negative evidence may sometimes have a positive value." *Sonnentheil v. Moerlein Brewing Co.*, 172 U. S. 401, 410, 19 Sup. Ct. 233, 43 L. Ed. 492. "It is true, as contended, that honesty and fair dealing are presumed, and that one charging fraud must prove the same; but direct proof of a dishonest transfer of property can seldom be procured. 'A fraudulent purpose is known only to the parties to the transaction, and they do not hasten to tell it. As a rule, therefore, fraud is disclosed only by the condition of the parties, the details of the transaction, and the surrounding circumstances.'" *Cox v. Cox*, 39 Kan. 121, 17 Pac. 847.

The conditions of the parties and the details and circumstances of this transaction were all proper subjects of evidence, and the defendant having wrongfully refused to give such evidence ought not to profit thereby. The presumption against him arising upon such refusal must be added to all the facts and circumstances proven, and, upon the whole case thus presented, we are constrained to hold that the finding in favor of the defendant cannot be sustained.

Wherefore the judgment is reversed, and a new trial ordered.

(77 Kan. 765)

CARTER v. BOTTS et al.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. ADOPTION—PROCEEDINGS THEREFOR—VALIDITY.

Under Laws 1905, p. 264, c. 190, establishing juvenile courts, and providing in section 5 (page 267) that on the filing of a petition setting forth that a child is dependent, neglected or delinquent, the parents of the child, if living and their residence known, shall be notified of the proceedings, where the residence of the mother of a child was known at the time of the proceedings, and she was not notified, the proceedings were void for want of jurisdiction, and hence the probation officer was in no sense the child's guardian, could not bind the mother by his consent to an adoption, and the adoption proceedings were void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adoption, §§ 7-10, 18-21.]

2. HABEAS CORPUS—CUSTODY AND CONTROL OF CHILD.

A mother of high character who was well able to take care of her infant daughter was entitled to her custody, though parties who had attempted to adopt the child under proceedings subsequently declared void were in better pecuniary circumstances than the mother.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 84; vol. 37, Parent and Child, §§ 4-32.]

Original proceedings in habeas corpus by Patsy Carter against J. F. Botts and another. Writ allowed.

D. E. Henderson and L. A. Knox, for plaintiff. H. L. Burgess and J. R. Thorn, for defendants.

PER CURIAM. This is an original proceeding in habeas corpus, brought by a mother to obtain the custody of her daughter nine years old. The uncontested findings of fact made by a commissioner appointed to take the evidence leave little to be decided.

The findings are conclusive that the petitioner, Patsy Carter, has done nothing which would operate as a relinquishment or abandonment of her child to the respondents. The findings are further conclusive that the respondents knew very well where Patsy Carter lived at the time of the juvenile court proceedings. She was not notified, therefore the proceedings are void for want of jurisdiction. Laws 1905, p. 267, c. 190, § 5. This being true, the probation officer was in no sense the child's guardian, he could not bind her mother by his consent to an adoption, and the adoption proceedings are utterly void. It would seem that after the respondent J. F. Botts had taken the child, as he thought permanently, had assumed all the obligations of a parent to her, had undertaken to guard and keep her, to furnish her a home, supply her needs, nourish her and cherish her, he ought not to have sworn she was "destitute, homeless, abandoned, and dependent upon the public for support," branded her a waif and a stray, and procured a juvenile court judgment to that effect, especially when he knew a good home and a devoted mother were waiting for the child only a few miles away. Doubtless he is unlearned in the law, and does not understand the character of the proceeding; but it was in fact an outrageous attempt to prostitute a beneficent statute to fraudulent uses.

There remains only the welfare of the child to be considered. The court knows of no better custodian for a little girl than her mother, when the mother is of high character, well situated to take care of her, has proved her ability to rear a daughter, and bears for her children the full measure of a mother's love. The search for some one to stand "in loco parentis" is very brief when a capable, worthy, and affectionate mother, who has done nothing to impair her right, pleads for the privilege in respect to the child she bore. The better financial resources of the respondents cannot be allowed to turn the scale. Children born in mangers and in the humblest log cabins have been known to do well.

The initial misunderstanding between the contestants is greatly to be regretted. The respondents are accorded the highest praise in the findings of fact for their treatment of Ruth, and she would doubtless be safe with them. But the mother is shown to be equal-

ly well qualified to discharge every duty, and to bear every responsibility, and in such cases the mother-right, which has never been surrendered or forfeited, must prevail.

The custody of the child Ruth Botts is awarded to her mother, Patsy Carter, who also recovers her costs.

(77 Kan. 763)

BRADLEY v. PINNEY.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. PLEADING—COMPLAINT—AMENDMENT.

Where a petition on a note recited that a copy of the note was attached, marked "Exhibit A," but by mistake the original note instead of a copy was attached, plaintiff after answer was entitled to amend by striking the reference to a copy and inserting a recital that the original note was attached.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 653-675.]

2. LIMITATION OF ACTIONS—PLEADING — COMPLAINT.

Where plaintiff sued on a note before it was barred by limitations, an amendment of the complaint after limitations had run merely for the purpose of correcting a recital that a copy of the note was attached to the complaint as Exhibit A so as to allege that the original instead of a copy was attached did not state a new cause of action, and was therefore not barred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 543-547.]

Error from District Court, Stafford County; J. W. Brinkerhoff, Judge.

Action by Jay Pinney against Charles A. Bradley. From a judgment for plaintiff, defendant brings error. Affirmed.

Robert Garvin, for plaintiff in error. Frank J. Benscoter and T. W. Moseley, for defendant in error.

PER CURIAM. The action in the district court was upon a promissory note. The petition contained a recital that "a copy of said note is hereto attached, marked 'Exhibit A.'" By mistake the original note was attached instead of a copy. The defendant answered by a qualified denial of the execution of the note described. The plaintiff asked leave to amend, which was granted on payment of costs, and upon proof of the mistake or inadvertence of the attorney in attaching the original. The only amendment consisted in striking out from the recital the words "a copy of," and inserting the words "said original." Thereupon the defendant demurred to the amended petition on the ground "that it failed to state a cause of action, in that said amended petition shows on its face that the pretended cause of action is barred by the statute of limitations." This demurrer was overruled, and, the defendant electing to stand upon it, judgment was awarded against him for the amount due on the note. He complains of the allowance of the amendment, and of the order overruling the demurrer. Both were right. The court

might well have allowed the amendment, which was merely formal, without the imposition of terms. When the action was commenced it was not barred, although if it had been commenced at the date of the amendment it would have been too late.

The contention that the amendment should be treated as a new action is without merit, and the judgment is affirmed.

(77 Kan. 764)

HUDSON v. CONKLIN.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. QUO WARRANTO—RIGHT TO SUE—PRIVATE PERSONS.

That the incumbent was ineligible to accept or hold the office to which he was elected did not confer on a minority candidate any claim to the office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 41.]

2. SAME.

Where plaintiff had no title to the office of councilman of a city to which defendant was elected, he had no interest, personal or peculiar, to himself, which entitled him to challenge the incumbent's right to hold the office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 41.]

3. SAME.

A person having no interest in an office held by defendant different from other members of the general public could not maintain quo warranto to try defendant's title to the office, such proceeding being required to be brought by some officer authorized to appear for and represent the general public.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 41.]

Quo warranto by A. J. Hudson against C. E. Conklin. Writ dismissed.

Otto J. Briley, for plaintiff. H. P. Farrelly and T. R. Evans, for defendant.

PER CURIAM. Action in quo warranto brought by A. J. Hudson, who was a candidate for councilman of the city of Chanute, against C. E. Conklin, another candidate for the same office who received a majority of the votes cast, and is in possession of the office. The ground of contest is that Conklin was ineligible to accept or hold the office because he was not an owner of real estate within the city; but the ineligibility of Conklin, if it exists, does not give a minority candidate any claim to the office. Wood v. Bartling, 16 Kan. 109; Privett v. Bickford, 26 Kan. 52, 40 Am. Rep. 301. Since it is conceded that Hudson has no title to the office he has no interest, personal or peculiar, to himself, which warrants him in challenging the right of the incumbent to hold the office. Having no interest which differs from other members of the general public, he must leave the maintenance of the action, if there be grounds for one, to some one authorized to appear for and represent the general public. The proceeding must therefore be dismissed.

(77 Kan. 80)

ST. LOUIS & S. F. R. CO. v. MADDEN.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. NEGLIGENCE—ACTS OF INDEPENDENT CONTRACTOR.

It is a general rule that one who employs another to do a piece of work is not liable for the other's collateral negligence unless the relation of master and servant existed between them. The following exceptions to the general rule apply to and govern this case:

(a) Whenever an injury to a third party results from the failure of the employer to perform a duty which he owes to such party, he will not be permitted to avoid his liability by letting the performance of the work to another.

(b) One who has a piece of work to perform which in its nature is dangerous to others is under obligation to see that it is carefully performed so as to avoid such injury, and he cannot delegate the obligation to an independent contractor, and thus avoid his liability in case the work is negligently done to the injury of another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1241.]

2. RAILROADS—FIRES—NEGLIGENCE OF INDEPENDENT CONTRACTOR.

A railroad company let a contract to another to burn a fire guard along its right of way. Through the negligence of the contractor, the fire escaped his control and damaged the property of the plaintiff.

Held: (a) That the work was performed as a part of the operation of the railroad, and that the railroad company could not by delegating the work to an independent contractor avoid the liability placed upon it by statute. Gen. St. 1901, § 5923.

(b) That the work being of a character from which in the natural course of things injurious consequences to others might be expected to result, unless means were adopted to prevent such consequences, the railroad company was bound to see that measures were taken to prevent such injury, and could not avoid the obligation by letting the work to an independent contractor.

(Syllabus by the Court.)

Error from District Court, Butler County; G. P. Aikman, Judge.

Action by R. M. Madden against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

L. F. Parker, H. C. Sluss, and W. F. Evans, for plaintiff in error. T. A. Kramer, for defendant in error.

PORTER, J. In 1904 plaintiff in error entered into a contract with Isaac Gregory to burn the grass on a strip 300 feet wide on each side of its right of way in Cowley county for a distance of 7 miles. While engaged in burning the strip the fire escaped from his control, ran over the land of defendant in error, and destroyed the grass on the ground and the hay in stack. The owner of the land recovered a judgment against the railroad company for the amount of the damages and attorney's fees. The railroad company brings error.

The sole contention of the railroad company is that Gregory was an independent contractor, not an employé of the company, and, inasmuch as the relation of master and

servant did not exist, the company is not responsible for his negligence. The contract between the railroad company and Gregory was in writing, but was not put in evidence. It appears, however, that he had no other employment with the company, and the work was to be completed within a specified time for which he was to be paid the sum of \$12 per mile. He testified that he was his own boss; that he procured from the owners of adjacent lands their consent to enter thereon for the purpose of burning the fire guard. On the day the fire was set out there was a strong wind blowing in the direction of the land of plaintiff, and it was this which caused the fire to escape control. Gregory testified that he was ordered by the foreman of the section gang of defendant company to do the work that day; and that in pursuance of such order he set out the fire which caused the damage.

The single question to be determined, therefore, is whether under the circumstances of this case the railroad company is liable for the negligence of Gregory. The general rule is that the employer cannot be held responsible for the negligence of an independent contractor. The party injured must look to the person whose actual negligence caused the injury. *Kas. Cent. Ry. Co. v. Fitzsimmons*, 18 Kan. 34; *St. L., Ft. S. & W. R. Co. v. Willis, Adm'r*, 38 Kan. 330, 339, 16 Pac. 728; *Engel v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692; *Hexamer v. Webb*, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703; *Uppington v. City of New York*, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; *Wabash, St. Louis & Pacific Railway Company v. Farver*, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696. For additional authorities, see note to *Central Coal & Iron Co. v. Grider's Adm'r*, 65 L. R. A. 455. There are, however, numerous well-established exceptions to the general rule. One of these is said to be that, where the employer retains the right to exercise authority as to the manner and method in which the work shall be performed, he will be held liable for injuries to third parties the same as though the relation of master and servant existed between him and the contractor. With respect to this exception, the test most usually applied is not whether the owner actually exercised control over the work, but did he have the right to exercise direction or control? *Atlantic Transport Co. v. Coneys*, 82 Fed. 177, 28 C. C. A. 388; *Hardaker v. Idle District Council*, L. R. 1 Q. B. Div. 335; *Pickens & Plummer v. Diecker & Bro.*, 21 Ohio St. 212, 8 Am. Rep. 55; *Linnahan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287. Of course, the fact that the owner exercised control over the work during its performance would furnish some ground for the inference that he had reserved the right to do so by the terms of the contract itself. It is also apparent that in a case where the injuries resulted directly from his interference it would make no difference whether or not

the relation of master and servant existed, because, under such circumstances, he would be regarded as the principal tort-feasor. *Davie v. Levy & Sons*, 39 La. Ann. 551, 2 South. 395, 4 Am. St. Rep. 225; *Faren v. Sellers & Co.*, 39 La. Ann. 1011, 3 South. 363, 4 Am. St. Rep. 256; *Mahar v. Steuer*, 170 Mass. 454, 49 N. E. 741.

On precisely the same principles rests the exception to the general rule which was recognized in *Cloud County v. Vickers*, 62 Kan. 25, 29, 61 Pac. 391, that where the injury is caused by defective construction inherent in the original plan of the employer, or where defective plans and specifications for the work have been adopted by the employer, the latter is liable. Again, where the work to be done is in its nature dangerous to others, however carefully performed, the employer will be held liable; because it is incumbent upon him to foresee such danger, and to take precautions against it. *Atlanta Railroad Co. v. Kimberly*, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231, 234; *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Covington & Cincinnati Bridge Co. v. Steinbrock & Patrick*, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375. Nor is a person permitted to escape liability for his failure to perform a duty imposed upon him by law. This principle is true whether the duty arises by virtue of a statute as in *C. K. & W. R. Co. v. Hutchinson*, 45 Kan. 186, 25 Pac. 576, or where the duty is one imposed upon him by law. *Fowler v. Saks*, 18 D. C. 570, 7 L. R. A. 649. The cases illustrating the general rule and the numerous exceptions thereto may be found in a monographic note to *Covington & Cincinnati Bridge Co. v. Steinbrock & Patrick*, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375. See, also, extensive note to the case of *Central Coal & Iron Co. v. Grider's Adm'r*, 65 L. R. A. 455, and note to *Louisville & N. R. Co. v. Tow*, 66 L. R. A. 941.

Some of the exceptions we have noted above apply with more or less force to the present case. It is the contention that the railroad company made itself liable by directing that the work should be done at a time when a strong wind was blowing. It directed the work to be done on a certain day. Presumably this was in accordance with the contract. There was evidence showing that the fire escaped from the control of Gregory on account of the high wind, and that except for the order and direction of the foreman the fire would not have been set out on that day. The fire was set out on Monday; the order of the foreman was given on the Saturday before, and there was no reason to suppose at that time that Monday would not be a suitable day for the work. It is not reasonable to presume that when the foreman directed Gregory to begin the work on the following Monday it was the intention thereby to deprive him of the use of all discretion in the matter, or that the order meant that he should begin the work

on that day regardless of wind and weather. The right of the employer to exercise a limited control over the work without thereby destroying the independent character of the contract has been recognized by the courts in numerous cases. The rule seems to be well established that where the control reserved does not apply to the mode or manner of having the work done and does not in any way take the work out of the hands of the contractor it will not destroy the independent nature of the contract. *K. C. M. & O. Ry. Co. v. Loosely* (Kan.) 90 Pac. 990. In other words, the relation of master and servant is not to be inferred from the reservation by the employer of powers which do not deprive the contractor of his right to use his own methods in accordance with his contract. See cases cited in note to *Central Coal & I. Co. v. Grider's Adm'r*, supra. It would hardly be a safe rule to establish to say that the mere direction of an employer that he wanted the work done at a certain time should render him liable for injuries resulting to third parties unless it were shown that the injuries were such as might reasonably be expected to result from the giving of the order.

There are two exceptions, however, to the general rule relieving an employer from liability caused by the negligence of an independent contractor, which, in our opinion, govern this case, and take it out of the operation of the rule. Whenever an injury to a third party results from the failure of the employer to perform a duty which he owes to such party he will not be permitted to avoid his liability by letting the performance of the work to another. A familiar illustration is found in the law of master and servant. Where the master owes to the servant the duty of providing a safe place to work, or there is imposed upon him by the law any duty or obligation to the servant, he cannot by letting out the performance of the work to an independent contractor, escape liability for injuries to the servant, caused by his failure to perform the obligation. And it makes no difference whether the duty is imposed by statute or by the common law. *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Gray v. Pullen*, 5 B. & S. 970.

A railroad company is liable in damages to any person whose property is injured by fire caused by the negligent operation of its railroad. Our statute (section 5923, Gen. St. 1901) recognizes this common-law liability, and provides that in actions against railroad companies to recover such damages certain rules of evidence shall obtain. It also allows the person injured to recover a reasonable attorney's fee in prosecution of the action. Thus there is cast upon the railroad company an obligation to the owner of property injured by fire, caused by the operation of the railroad, which is in many respects different from the obligation resting upon an individual who negligently permits fire to es-

cape. This obligation is one which the railroad company cannot escape by farming out the contract for a part of the operation of its railroad to an independent contractor. In *Fowler v. Saks*, supra, the owner of a building who let a contract to repair his building, which required the taking down of a party wall, was held liable to the adjoining owner for damages resulting therefrom. It appeared in that case that there was a building regulation in the District of Columbia requiring the owner of a building taking down a party wall to respond in damages to the adjacent owner for any injuries occasioned thereby. In the opinion the court uses this language: "A party under an antecedent obligation to do a thing, or to do it in a particular way, cannot get rid of his responsibility by deputing it to somebody else." It was also said that the duty in that case rested upon defendant by operation of the common law aside from any building regulation, and was one which could not be delegated to an independent contractor. The object of burning the fire guard which caused the injury to plaintiff's property was to enable the railroad company to operate its railroad without injury to the property of others. The purpose for which the work was performed was the same a railroad company has in view when it provides screens and sparks arresters upon its engines. The work was therefore performed by the company in the operation of its railroad. Thus, in *Pound v. Port Huron & S. W. Ry. Co.*, 54 Mich. 13, 19 N. W. 570, the railroad company employed a contractor to grade its roadbed. Cattle escaped upon the right of way by reason of his failure to keep up the fences along the right of way. The company was held not to be released from its liability for the damage for the reason that the duty to keep its right of way fenced was imposed upon it by law.

The present case falls within another exception to the general rule which may be stated as follows: One who has a piece of work, the performance of which is in its nature dangerous to others, is under an obligation to see that it is carefully performed so as to avoid such injury, and he cannot delegate the obligation to an independent contractor, and thus avoid his liability in case the work is negligently done to the injury of another. That such is the law is settled by the weight of reason and authority. Thus, in *Bower v. Peate*, L. R. 1 Q. B. 321, 326, a leading case, Cockburn, Chief Justice, used the following language: "That a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it

be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted."

In *Hardaker v. Idle District Council*, L. R. 1 Q. B. Div. 335, the contractor was employed to construct a sewer for defendant. Owing to his negligence a gas main was broken, and gas escaped into the house where plaintiffs resided, causing injury to them and their property. Defendant was held liable because it owed a duty to the public, including plaintiffs, so to construct the sewer as not to injure the gas main, and it was said that this duty could not be delegated to another so as to relieve it from liability. To the same effect, see *Tarry v. Ashton*, 1 Q. B. Div. 314; *Dalton v. Angus*, L. R. 6 App. Cases, 740; *Storrs v. City of Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Water Co. v. Ware*, 16 Wall. (U. S.) 566, 21 L. Ed. 485; *Black v. Christchurch Finance Co.*, App. Cases, 48. *Corington & Cincinnati Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375, also a party wall case, was ruled the same way. In this case the court says: "The duty need not be imposed by statute, though such is frequently the case. If it be a duty imposed by law, the principle is the same as if required by statute." Citing *Bower v. Peate*, L. R. 1 Q. B. Div. 321. "It arises at law in all cases where more or less danger to others is necessarily incident to the performance of the work let to contract. It is the danger to others, incident to the performance of the work let to contract, that raises the duty, and which the employer cannot shift from himself to another, so as to avoid liability, should injury result to another from negligence in doing the work."

In *Circleville v. Neuding*, 41 Ohio St. 465, and *Railroad Company v. Morey*, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701, the same doctrine is declared. In the latter case the railroad company employed a contractor to do for it certain plumbing which involved the opening of the public highway for the purpose of laying a drain. Plaintiff, in the nighttime, fell into the ditch by the negligence of the contractor in not protecting it. The railroad company was held liable. It was stated in the syllabus, as follows: "One who causes work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employe of an independent contractor to whom he has let the work, without reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral and

flowing from the negligent act of the employé alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case the person causing the work to be done will be liable, though the negligence is that of an independent contractor." The same principle is also one of the grounds upon which the exception is predicated in *Fowler v. Saks*, supra. Indeed, authorities might be multiplied in support of the proposition that, where the work is inherently dangerous to others, the employer is under an obligation to see that it is carefully performed, and cannot escape the liability by the employment of an independent contractor. In the following cases, most of which involved damages occasioned by fires set out by contractors, the railroad company or employer was relieved of liability on the ground that the negligence was that of an independent contractor; but, so far as we have examined the cases, in none of them does it appear that the contractor was employed for the purpose of setting out fires as in the present case; the fires were either set out to facilitate the work of clearing the land or right of way or for some incidental purpose, and escaped through the negligence of the contractor or his employés: *Eaton v. European & North American Railway Company*, 59 Me. 520, 8 Am. Rep. 430; *Callahan v. Burlington & Missouri River R. R. Co.*, 23 Iowa, 562; *Burbank v. Bethel Steam Mill Co.*, 75 Me. 373, 46 Am. Rep. 400; *Woodhill v. Great Western Railway Co.*, 4 U. C. C. P. 449, 451; *Carroll v. Corporation of Plympton*, 9 U. C. C. P. 345; *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; *Gillson v. North Grey Railway Co.*, 35 U. C. Q. B. R. 475. In the last-mentioned case two of the judges dissented, and one of the questions involved was whether there was such an interference on the part of the employer as to destroy the independent character of the contract.

The case of *Wabash, St. Louis & Pacific Railway Company v. Farver*, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 606, is apparently opposed to this doctrine. There the railroad company was engaged in constructing a well from which to supply water for its engines. The running water interfered with the work, and the railroad company contracted with the owner of a small, portable, steam engine to pump the accumulating water in order to keep it out of the way. The plaintiff driving on the highway was injured by reason of his horses' fright at the engine. It was held that as the railroad company had no control over the use of the engine it was not liable. Upon examination, however, it will be found that the principles upon which the decision turned are not in conflict with the doctrine we are considering. Here was an independent contract to do something which might be said to be a part of the operation of the rail-

road; but obviously the question whether the work was a part of the operation of the road was unimportant, for the reason that the company owed no particular duty by statute or common law to the public or to the plaintiff. The work was not dangerous, nor did it constitute a nuisance. In the opinion it was said that the use of a portable steam engine for the purpose of pumping water in close proximity to a public highway was not necessarily a nuisance if the engine was used in the proper manner. Injury could only result from its negligent use. It was also remarked that the work was not of a character which imposed upon the employer any peculiar obligation to the plaintiff or others using the highway, and that if the employer had been under peculiar obligations to the person injured it would have been liable for a breach of that duty, regardless of the relation between the employer and the person whose negligence caused the injury. In other words, the company might let to an independent contractor the performance of work in connection with the operation of its road without necessarily becoming liable to third persons for the negligence of the contractor. It is only where the company owes some duty or obligation to the third party, placed upon it by statute or arising out of the peculiar nature of the work itself, which prevents it from escaping liability by an independent contract.

The general rule and the particular exception we are considering was well stated by Lord Blackburn in *Dalton v. Angus*, supra, in the following language: "Ever since *Quarman v. Burnett*" (6 M. & W. 499) "it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it." Let it be conceded that the burning of the fire guard was a part of the operation of the railroad, and the conclusion irresistibly follows that the defense of an independent contract is of no avail. The statute placed upon the company an additional and peculiar obligation to the owner of property injured by fire in the operation of its road; it is made liable, not only for all damage sustained, but for reasonable attorney's fees in an action brought to recover therefor. No obligation to pay attorney's fees rested upon an individual through whose negligence damages by fire

should result to the property of another; and in order to recover against the individual the plaintiff would be obliged to prove negligence, while the statute provides that where the action is brought against the company, and the fire was caused by the operation of the road, negligence is presumed as soon as these facts are shown.

We find no difficulty in determining that the work of burning the fire guard was a part of the operation of the road. The company could not, therefore, absolve itself from the liability by letting out the work to an independent contractor, for the reason that it owed to the plaintiff an obligation placed upon it by the law to respond in damages for all injuries by fire thus caused; and for the further reason that it employed a dangerous agency, which, in the experience of every one, required that precautions be taken to prevent damage to the property of others. Thus, a second duty was cast upon the railroad company not to cause the work to be done either directly by its employes or indirectly by a contractor, without seeing that precautions were taken to prevent the escape of fire and consequent injury to the property of plaintiff. Neither of these obligations or duties could be avoided by delegating the performance of the work to another.

It follows that the judgment must be affirmed.

(77 Kan. 119)

ATCHISON, T. & S. F. RY. CO. v. BILLINGS.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. INJUNCTION—MANDATORY INJUNCTION TO RAILROAD—BUILDING CATTLE GUARDS.

Where a railway company neglects for a long time to construct cattle guards where its road enters and leaves improved or fenced land, a mandatory injunction may properly issue commanding and compelling it to construct and maintain cattle guards, as the statute requires.

2. RAILROADS—FAILURE TO ERECT CATTLE GUARDS—DAMAGES.

The record of that branch of the case seeking a recovery of damages for losses already sustained examined, and it is held that there was no duplication of damages in the award made by the jury.

(Syllabus by the Court.)

Error from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Action by Lewis Billings against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

W. R. Smith, O. J. Wood, and A. A. Scott, for plaintiff in error. A. L. Billings, for defendant in error.

JOHNSTON, J. This action was brought by Lewis Billings against the Atchison, Topeka & Santa Fé Railway Company to recover damages resulting from the failure of the company to maintain proper cattle guards where the railway enters and leaves the fenced

fields of his farm, and also to enjoin the company from hereafter operating its road through the farm without completing the inclosures on his farm with cattle guards, as the law prescribes. As the railroad is constructed it intersects the fenced boundaries of Billings' farm of 533 acres at eight places. His land had been fenced and arranged for farming and stock raising, provision having been made for the rotation of crops and the handling of stock so that water, shade, and shelter were available. It was shown beyond cavil that the railway company neglected to maintain cattle guards at the intersection of the boundaries of Billings' farm for a period of two years prior to the commencement of this action. At some places there were no cattle guards of any kind for a time, and at other places unsuitable guards were maintained, which did not prevent stock entering his fields and passing from one field to another along the right of way. The verdict of the jury awarded Billings damages in the sum of \$410.50, made up of the following items: For labor expended in guarding cattle in 1903, \$34; for the guarding of cattle 60 days in 1904, \$60; for loss of pasturage, \$50; for diminished rental or usable value of the entire farm two years, 25 cents per annum per acre, amounting to \$266.50.

That Billings was entitled to some damages is not contested; but it is argued in behalf of the railway company that there is a duplication of damages in the verdict, and that the item of \$266.50 for depreciation in the rental value of the farm should be deducted. An examination of the testimony and findings, however, does not lead to the opinion that there was a double allowance for the same loss. In his petition Billings alleged and offered proof showing specific expenses or losses for watching cattle at particular times, made necessary by the openings which the railway company left in his fenced fields. The item of pasturage was apparently allowed for the complete loss of grass and fodder in particular fields which Billings was unable to use because of the absence of cattle guards at the intersections of his fences. The allowance of 25 cents an acre appears to be for depreciation and loss from the inability of Billings to use his farm as it was designed to be used, and the increased inconvenience and expense of carrying on the business in which he was engaged. The testimony is that his plans were deranged, and that his farm, which had been arranged and fenced to carry on a cattle business, was rendered unfit for that use, so that, instead of keeping and feeding from 200 to 300 head of cattle as before, he was compelled to practically abandon the business, and had only been able to handle about 20 head of cattle. For this depreciation and loss the jury allowed, on a per acre basis, \$266.50 for the period of two years. These items were pleaded separately. They were treated as separate and distinct losses in the testimony,

and the court in instructing the jury treated this depreciation of rental value as something wholly apart from the specific losses of guarding cattle as well as that arising from the loss of a particular pasture. Although complaining of the allowance of the item of \$266.50, the railway company does not ask for a reversal of the judgment because testimony was admitted on the basis that these items were distinct losses, nor that they were so submitted in charging the jury. All that is asked in behalf of the railway company is that the last item be stricken out. A reading of the record does not convince us that double damages were allowed for any loss arising out of the neglect of the company; and, considering the evidence as to the loss sustained in consequence of the company's neglect, the award is far from excessive.

It is next contended that the court was not justified in issuing a mandatory injunction. Upon the testimony it was found that the operation of the railroad through the Billings' farm, without cattle guards, and the railroad's persistent and long-continued neglect and refusal to close up the openings with cattle guards, after due notice, was a continuing nuisance. The decree of the court enjoins the company from continuing the nuisance, and commands it to keep and maintain proper guards at all points where the railroad enters and leaves the fenced lands of Billings. It is true, as contended, that the particular function of the remedy of injunction is to restrain and prevent rather than to command and compel, but there is unquestioned power in a court of equity to issue mandatory injunctions on proper occasions. It is a remedy to be sparingly exercised, one that is rarely granted until after a final hearing, and except in cases where the injury is irreparable, the remedy at law inadequate, or to prevent a multiplicity of suits. It has been granted where a railway company in constructing its road built an embankment which wrongfully diverted the running water from the land of a person through whose land the water naturally flowed before the road was built. It was contended there as here that the damages inflicted were measurable, and that the exigencies of the case were not such as to warrant the exercise of the mandatory power of a court of equity. This court, recognizing the rule that the remedy can only be employed in extreme cases, held that it was a proper occasion for issuing a mandatory injunction, and affirmed the decree compelling the opening of the waterway. *A., T. & S. F. R. Co. v. Long*, 46 Kan. 701, 27 Pac. 182, 26 Am. St. Rep. 165. A railway company has been compelled to perform the duty to receive and move the cars of another company. *Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co.* (C. C.) 84 Fed. 481. A consumer of gas, who had affixed a governor to a meter without the consent of the gas company, was commanded

to remove the same by a mandatory injunction. The act of attaching the governor to the meter belonging to another was designated as a trespass of such a character as to justify a mandatory order. *Blondell v. Consol. Gas Co.*, 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187. A patron of a natural gas company, who had contracted with the company to furnish a supply of gas to manufacture glass, and had expended much money in fitting his factory with appliances for using gas, was granted an injunction preventing the company from shutting off the supply, and also compelling it to restore the flow of gas as it existed before the wrongful interference and stoppage of the flow, and this on the ground that the loss was incapable of accurate adjustment. *Whiteman v. Fuel-Gas Co.*, 139 Pa. 492, 20 Atl. 1062. In *Scofield v. Railway Company*, 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846, an injunction was issued compelling a railway company to give a shipper equal facilities and rates such as were given to other more favored shippers, and it was issued largely upon the theory that to obtain relief at law would necessitate a multiplicity of suits. The writ has also been allowed to compel the removal of inclosures around public school lands, which it was held constituted a nuisance. *State v. Goodnight*, 70 Tex. 682, 11 S. W. 119. In *United States v. Brighton Ranch Co.* (C. C.) 26 Fed. 218, Judge Brewer held that an action of injunction is the appropriate remedy to compel the removal of a fence which had been erected on government land. The mandatory injunction was awarded, although it was conceded that the government had a right to proceed by an action of ejectment to remove the defendant from the occupancy of the land. It was remarked that, "whether the act of the defendant comes within the technical definition of purpresture, or that of a public nuisance, we are of the opinion that the government can come into a court of equity, and by its orders have an end put to this trespass on the public rights." Where one person built a wall partly projecting on the land of another, who applied to a court of equity to secure the removal of the wall, it was ruled that there was no plain and adequate remedy at law for the wrong, and that a mandatory injunction should issue requiring the offender to remove the structure. *Norton v. Elwert*, 29 Ore. 583, 41 Pac. 926. In *Wheeler v. Rochester & Syracuse Railroad Co.*, 12 Barb. (N. Y.) 227, a railroad company was proceeding to construct its road across the farm of Wheeler without providing such farm crossings as the law required, and the court held that the company should be enjoined from proceeding with the construction of the railroad without providing suitable crossings. It is not uncommon for courts of equity to grant writs, prohibitory in form, which are mandatory in character and effect. So it was said by the Vice Chancellor in *North of Eng. June. Railway Co. v. Clarence Railway Co.*, 1 Coll.

507: "That injunctions, in substance mandatory, though in form only prohibitory, have been and may be granted by the courts is clear. This branch of its jurisdiction is not fit to be exercised without particular caution, but certainly is one fit and necessary under certain circumstances." The foregoing are only a few of the many cases which might be cited wherein mandatory injunctions have been issued. Other examples which illustrate the circumstances under which the remedy may be employed are collated in the note to *Moundsville v. Ohio R. R. Co.*, 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

In this case it was developed that several years before the bringing of this action Billings had been compelled to bring another action, and had recovered damages resulting from the neglect of the railway company to maintain cattle guards at the intersections of his farm. Before bringing the present action he had given notice of the defects, and unsuccessfully endeavored to induce the agents and officers of the railway company to provide and maintain cattle guards. The opening of these gaps in his fields, and the operation of the railroad through them, without maintaining cattle guards, was contrary to the express provision of the statute, and a direct invasion of Billings' rights. It was a wrong of such a character, and had continued for so long a time, as to constitute a nuisance, and one which justified the issuance of a mandatory injunction. It is argued that in his petition the plaintiff did not designate the wrong as a nuisance, nor ask that the court declare it to be a nuisance. The allegations of the petition, however, describing the wrong and injury charged a course of conduct and such an invasion of the plaintiff's rights as would constitute a nuisance, and upon proof of the same the court was justified in the finding that was made. Apart from that finding the injury was of such a character that any other remedy would have been wholly inadequate, and under the authorities cited a mandatory injunction was an appropriate remedy. The statute, it is true, provides that, where a railway company neglects to maintain cattle guards, the injured party may recover damages from the wrongdoer; but it is plain that he cannot be adequately compensated in damages for the injury inflicted. For his protection many actions at law would be necessary, and in none of them could adequate compensation be recovered. In one sense the injunction restrains as well as commands. It restrains the railway company from operating its road through the plaintiff's fenced fields without closing the openings with cattle guards, and from continuing the nuisance. But of course it is substantially mandatory in character, and proceeds on the assumption that the company will continue to operate its road, and commands it to construct and maintain cattle guards during the time of operation. The

facts in the case furnish an example of one of the extreme cases which justify the issuance of a mandatory injunction.

The judgment of the district court will be affirmed.

(77 Kan. 196)

CHICAGO, R. I. & P. RY. CO. v. RALSTON.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. CARRIERS — INJURIES TO PASSENGERS — INSTRUCTION.

In an action to recover damages for injuries sustained while riding as a passenger in a caboose attached to a local freight train, an instruction which reads: "It is the duty of a railroad company transporting passengers on a freight train to exercise the highest possible degree of care and diligence to which such trains are susceptible, and a failure to use such degree of care is negligence on the part of the railway company," is erroneous, where no modification or explanation thereof is elsewhere given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1326-1337.]

2. SAME—CARE REQUIRED.

It is the duty of a railroad company when it carries passengers in a caboose or other car attached to a local freight train to use the highest possible degree of care and diligence in the protection of the safety of such passengers to which such train is susceptible considering its construction, equipment, and use as a carrier of freight.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1098.]

(Syllabus by the Court.)

Error from District Court, Reno County; P. J. Galle, Judge.

Action by W. H. Ralston against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

M. A. Low and Paul E. Walker, for plaintiff in error. Prigg & Williams, for defendant in error.

GRAVES, J. This action was commenced in the district court of Reno county July 21, 1905, by the defendant in error against the plaintiff in error, to recover damages for injuries sustained by him while a passenger in a caboose attached to a local freight train. On January 27, 1906, the plaintiff obtained judgment in the district court, and the defendant, as plaintiff in error, brings the case here for review.

The plaintiff in error complains of the trial court for refusing to give instructions to the jury which were requested by it, and for giving others to which it objected. The instruction specially objected to reads: "It is the duty of a railroad company transporting passengers on a freight train to exercise the highest possible degree of care and diligence to which such trains are susceptible, and a failure to use such degree of care is negligence on the part of the railway company." There is nothing in the entire charge of an explanatory nature by which the jury could properly interpret this instruction, or

correctly apply it to the facts being considered. This instruction is criticised as being misleading and erroneous, for the reason that the language used therein might easily be understood by the jury as a direction from the court to measure the care and diligence of the railroad company by a higher standard than the law requires. It is within the range of possibility to operate a local freight train quite smoothly and gently with little or no jolting or jarring; and, in the exercise of the highest possible degree of care and diligence as required by the court's instruction, it would be negligence on the part of the company not to operate its trains in that manner. To do so, however, would destroy the train's usefulness as a carrier of freight, and make passenger traffic thereon undesirable because of its lack of speed. It is not the purpose of the law to require railroad companies operating local freight trains on which passengers are carried to manage the train in a way to destroy or materially injure the principal business for which such a train is designed. Carrying freight is the chief purpose of local freight trains. They are constructed and equipped for that business only. In the conduct of such business it is necessary to start and stop often, to take in and set out cars, shift the train on side tracks, couple and uncouple cars, load and unload freight of all kinds, each of which takes time. These movements necessarily cause more or less jolting and jarring. All persons who ride as passengers in a caboose know this, and expect the delays, discomforts, and inconveniences which are unavoidable in the operation of such trains. In determining the degree of care and diligence required of railroad companies in the operation of trains of this character, these conditions should be recognized. We understand the rule to be that, when a railroad company carries passengers on its local freight trains as a business, it must use the highest possible degree of care and diligence of which such a train is susceptible in view of its construction, equipment, and use as a carrier of freight. To say that such a train shall be operated with the highest possible degree of care and diligence of which it is susceptible, without regard to the considerations named, places a duty upon the company operating such train which the law does not recognize.

The instruction given, and here criticised, was copied from the case of *M. P. Ry. Co. v. Holcomb*, 44 Kan. 332, 24 Pac. 467. The statement as a legal proposition is correct, but as used in that case the words "to which such trains are susceptible" were intended to include the conditions hereinbefore mentioned. The decision was made upon the authority of the case of *I. & St. L. R. R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898, and a large part of the opinion in that case was copied, adopted, and followed. A part of the opinion reads: "The terms in question do not mean all the care and diligence the hu-

man mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business; * * * but it does emphatically require everything necessary to the security of the passenger, * * * and reasonably consistent with the business of the carrier, and the means of conveyance employed." From this it will be seen that this court, in the case above mentioned, held as it does now that a railroad company, when carrying passengers on a local freight train, is held to the highest possible degree of care and diligence in the protection of the safety of its passengers, but when determining whether that duty has been performed or not, the nature of the train, its construction, equipment, its duties as a carrier of freight, and other circumstances necessarily involved in its operation should be considered. We conceive this to be the rule supported by the authorities generally: *Mo. Pac. R. R. Co. v. Holcomb*, 44 Kan. 332, 24 Pac. 467; *Railroad Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898.

In case of *Portuchek v. Wabash R. Co.*, 101 Mo. App. 52, 74 S. W. 368, the Supreme Court of the state of Missouri said: "A passenger on a freight train takes it with all the incidentals usual in the operation of such a train, and submits himself to the inconveniences, and assumes the perils ordinarily attending such method of transportation; but by consenting to carry passengers on such trains the responsibility of the railroad for their safe transportation is not restricted or lessened, and the same degree of care is required in the management of a freight train carrying passengers as in the operation of a train exclusively for passenger service. In the words of Justice Swayne, 'Life and limb are as valuable, and there is the same right to safety in the caboose as in the palace car.' *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 296, 23 L. Ed. 898. But in the language approved in many of the decisions upon the subject, from the composition of freight trains and the appliances necessary in their operation there cannot, in the nature of things, be the same immunity from peril in traveling by freight trains as there is by passenger trains. The primary purpose of such trains is the transportation of freight, and the equipments, therefore, are adapted to such business; and such of the traveling public as elect to journey by freight trains are charged with the knowledge of such fact. It is not to be expected that there will be the same exactness in drawing up to a station by a freight train as by a train devoted to passenger service; and precisely the same degree of care exercised in the operation of both may produce different results respecting the safety of the passengers from the dangers inseparably connected with the conduct of one train, and not with the other, and this the public presumably understands, and conducts itself accordingly, and such in-

herent hazards the passenger is held to assume in taking a freight train." In case of *Erwin v. K., Ft. S. & M. R. Ry. Co.*, 94 Mo. App. 289, 68 S. W. 90, is to the same effect.

In the case of *Olds v. N. Y., etc., Railroad*, 172 Mass. 77, 51 N. E. 451, it is said: "It is the duty of a carrier of passengers to exercise the utmost care consistent with the nature of the carrier's undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business. * * * If the business of a given line is the running of trains for freight with a car attached for passengers, the care required is such as ought to be exercised in running such trains."

In the case of *Railroad Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 315, it is said: "But it is insisted that the rule announced in these cases has no application here, for the reason that appellee, having voluntarily taken passage upon a freight train, assumed all risks incident to the operation of such train in the usual and ordinary manner in which such trains are managed and operated. Persons taking passage upon freight trains, or in a caboose or car attached to a freight train, cannot expect or require the conveniences, or all of the safeguards against danger, that they may demand upon trains devoted to passenger service, and are accordingly held to have accepted the accommodation provided by the company, subject to all of the ordinary inconveniences, delays, and hazards incident to such trains when made up and equipped in the ordinary manner of making up and equipping such trains, and managed with proper care and skill. The passenger has a right to presume that the train is thus made up and equipped, and that the cars, machinery, and appliances are not, of their kind, so materially defective as to increase the ordinary hazards of transportation by such trains. He may take the train or not at his option; and if he voluntarily selects such a train, he should be, and is, held to have accepted it in discharge of the liability of the carrier to provide a safer and better mode of conveyance, and to have assumed the risk and inconvenience incident to its proper management and operation. But, if a railway company consents to carry passengers for hire by such trains, the general rule of its responsibility for their safe carriage is not otherwise relaxed. From the composition of such a train, and the appliances necessarily used in its efficient operation, there cannot, in the nature of things, be the same immunity from peril in traveling by freight train as there is by passenger train; but the same degree of care can be exercised in the operation of each. The result in respect of the safety of the passenger may be wholly different because of the inherent hazards incident to the operation of one train and not to the other, and it is this hazard or peril arising from the negligence or want of proper care

of those in charge of it. Ordinarily carriers of passengers for hire, while not insurers of absolute safe carriage, are held to the exercise of the highest degree of care, skill, and diligence practically consistent with the efficient use and operation of the mode of transportation adopted."

In the case of *Dunn v. Grand Trunk Railway*, 58 Me. 197, 4 Am. Rep. 267, it is said: "Undoubtedly a passenger taking a freight train takes it with the increased risks and diminution of comfort incident thereto, and if it is managed with the care requisite for such trains, it is all those who embark in it have a right to demand. * * * That a passenger takes all the risks incident to the mode of travel, and the character of the means of conveyance which he selects, the party furnishing the conveyance being only required to adapt the proper care, vigilance, and skill to that particular means, for this, and this only, was the defendant responsible. The passengers can only expect such security as the mode of conveyance affords." See, also, *McGee v. M. P. Ry. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; *O. & M. Ry. Co. v. Dickerson*, 59 Ind. 322; *Whitehead v. St. L. & I. M. R. R.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409; *Dodge v. B. & B. Steamship Co.*, 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541.

The trial court may have given these instructions upon the supposition that the language used included all the conditions above suggested. In the case from which the instruction was taken the court doubtless so understood it. But we think as an instruction to a jury the language is misleading and likely to give the jury an erroneous idea of the law applicable to such cases when used without modification or explanation as was done in this case.

The judgment is reversed, with direction to grant a new trial, and proceed with the case in accordance with the views herein expressed.

(77 Kan. 46)

PIERCE v. ADAMS.

(Supreme Court of Kansas. Jan. 11. 1908.)

1. TAXATION—TAX SALE—REDEMPTION.

A landowner has three years from the day of sale, and any additional time which may elapse until the tax deed is executed, in which to redeem from a sale for taxes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1402.]

2. SAME.

If the tax deed be executed on the last day of the three-year period for redemption, the landowner has no additional time after that day in which to redeem.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1402-1405.]

3. SAME—VOID TAX DEED—RIGHTS OF GRANTEE.

Such a tax deed, although void on its face as a conveyance, vests in the grantee the lien for taxes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1630.]

4. SAME—REDEMPTION—TENDER.

After three years from the day of sale have elapsed, and the tax deed has been executed, a tender to the county treasurer of the amount necessary to redeem the land is unavailing to prevent the grantee from taking out a second deed to correct defects in the first one.

5. SAME—TAX DEED—SUBSEQUENT TAXES.

The clause in the statutory form for a tax deed relating to the payment of subsequent taxes by the purchaser should be inserted in a deed based upon a sale to the county and an assignment of the certificate, only when the purchaser has paid taxes subsequent to the assignment of the certificate.

6. SAME—CONTENTS OF DEED.

A tax deed which recites a sale to the county, and an assignment of the tax sale certificate, need not give a separate statement of the amount of taxes for each year, if there be more than one, which make up the consideration for the assignment. The statutory form merely requires that a gross sum, which equals the amount necessary to redeem, be stated.

7. SAME—IMPEACHMENT.

If the recitals of a tax deed which has been of record less than five years do not themselves impeach its validity, evidence is necessary to overthrow it. An assumption of something which may or may not be true will not be indulged to defeat it.

(Syllabus by the Court.)

Benson, J., dissenting.

Error from District Court, Meade County;
E. H. Madison, Judge.

Action by S. W. Pierce against H. G. Adams. Judgment for plaintiff, and defendant brings error. Affirmed.

Peters & Peters, for plaintiff in error.
Sutton & Scates and Albert Watkins, for defendant in error.

BURCH, J. The plaintiff commenced an action to quiet his title against two tax deeds. The first one was issued on September 4, 1904, the last day of the three-year period for redemption, and consequently was void on its face as an instrument conveying title. On May 22, 1905, the plaintiff tendered to the county treasurer the amount necessary to redeem, if redemption by payment to the treasurer were then permissible. On June 6, 1905, the tax deed holder procured a second deed to correct the defect in the other. Judgment was rendered for the tax deed holder, and the plaintiff prosecutes error.

The tender to the county treasurer was unavailing. Section 7662, Gen. St. 1901, reads as follows: "Any owner, his agent or attorney, may at any time within three years from the day of the sale, and at any time before the execution of the deed, redeem any land or town lot or any part thereof or interest thereon." This statute allows the landowner three full years from the day of sale within which to redeem, and as much additional time as may elapse before the deed is executed. In the case of *English v. Williamson*, 34 Kan. 212, 215, 8 Pac. 214, 215, it is said: "It will be seen from these quotations from the tax law that the owner of the land has, under any circumstances, at least 'three years from the day of sale,' and

'any time before the execution of the deed,' within which to redeem his land from the taxes." Here the plaintiff had the three years' time, which could not be diminished, but no additional time because the deed had been executed.

It is argued that, since the county clerk has no authority to issue a tax deed before the period of redemption expires, the deed was no deed, and the right to redemption was not cut off. The statute does not say that the owner may redeem within three years, and at any time before the execution of a valid deed, or before the execution of a deed good on its face, but simply at any time before the execution of "the deed." The deed which was issued cannot be ignored as a tax deed. It was not an absolute nullity. It was only void as a transfer of title. If the defendant had taken possession of the land under the deed, he would not have been a trespasser. In the case of *Cohen v. St. L., Ft. S. & W. R. Co.*, 34 Kan. 158, 166, 8 Pac. 138, 143, 55 Am. Rep. 242, it was said: "But even if void, still a person holding the possession of land under a void tax deed is not a trespasser, but may make improvements on the land, and may recover compensation from the paramount owner for such improvements under the occupying claimant law." In the case of *Redden v. Tefft*, 48 Kan. 302, 29 Pac. 157, the syllabus reads: "A tax deed, void upon its face, gives, under the statutes of this state, to a person in the possession of real estate thereunder, but who has made lasting and valuable improvements and paid taxes thereon, rights and equities." The decisions in *Stebbins v. Guthrie*, 4 Kan. 353, and *Smith v. Smith*, 15 Kan. 290, are of the same tenor. A tax deed, void on its face as a conveyance, is still sufficient to transfer the lien for taxes to the grantee. Such is the fair implication from the decisions in *English v. Williamson*, 34 Kan. 212, 8 Pac. 214, and *Cable v. Coates, Assignee*, 36 Kan. 191, 12 Pac. 931, both of which involved tax deeds issued before the three-year period of redemption had expired. The fact that the defect arises from a lack of power in some one of the tax officials does not affect the principle. The county treasurer has no authority to sell an undivided interest in land for delinquent taxes. Such a sale is invalid, and a deed showing such a sale is void on its face, and passes no title to the purchaser. *Corbin v. Inslee*, 24 Kan. 154. But such a deed carries with it a lien for the taxes. In *Auld v. McAllaster*, 43 Kan. 162, 23 Pac. 165, the syllabus reads: "A tax-title holder who seeks to recover the possession of an undivided half of three quarter sections of land by an action of ejectment against the original owner, and is defeated in such action, is entitled to be paid by the successful claimant the amount of the taxes, together with the proper charges, interest, and costs paid by him to procure his invalid tax deed. And such taxes, interest, costs, and charges are

a lien upon the land until they are paid by the owner, or some person liable therefor."

The tax deed must therefore be reckoned with. The county clerk could not by executing it diminish the three-year period for redemption; but after that time had elapsed, a tax deed having been executed, the treasurer could no longer receive the redemption money. The county no longer held the lien for taxes, and the tender should have been made to the defendant to forestall the execution of a second deed. "The holder of the tax deed was the proper party to receive the tender. The money was due to him. He had paid the county. No further duty was cast upon any county officer." *Herzog v. Gregg*, 23 Kan. 726. Of course, when the second deed was executed, all rights of the defendant merged in it. The second tax deed recited a sale to the county in 1900 for the taxes of 1899 for the sum of \$8.69. It further recited an assignment of the certificate of sale by the county clerk on February 28, 1903, for \$26.31, the cost of redemption at that time. The clause in the statutory form to be used when subsequent taxes have been paid was altogether omitted. The consideration for the conveyance was given as \$26.31, the taxes, costs, and interest due on the land for the years 1899, 1900, and 1901 "to the treasurer paid as aforesaid." No evidence was introduced to impeach the deed in any respect, and its validity is to be determined from what appears upon its face.

It is said the failure to fill the blanks in the omitted clause of the form makes the deed void, the argument apparently being that the subsequent taxes there mentioned are all those accruing after the sale. Such, however, is not the meaning of the form. The blank is left for the insertion of taxes paid by the purchaser subsequent to the assignment of the tax-sale certificate to him. There being no evidence that the purchaser in this case paid any taxes after he obtained the certificate of sale, there is nothing to show the clause was improperly omitted.

It is claimed the deed is void because it nowhere makes a separate statement of the amount of the taxes for the years 1900 and 1901, which entered into the consideration for the assignment of the certificate of sale. In this respect the deed follows the statutory form. The form makes no provision for a separate statement of the taxes for each year, which make up the consideration for the assignment of the certificate of sale. Only a gross sum, which equals the amount necessary to redeem at that time, is to be given.

It is further claimed the deed is invalid because the correct consideration is not stated. The plaintiff founds his argument upon an assumption that the taxes for 1899, 1900, and 1901 were practically the same in amount. There was no evidence to that effect, and consequently the deed is not proved to be incorrect. If the recitals of a tax deed

do not themselves impeach its validity, evidence is necessary to overthrow it. An assumption of something which may or may not be true will not be indulged to defeat it.

Finally, it is said the lien of the certificate of sale was lost before the second deed was executed. As already shown the lien was preserved by the first deed. Besides this the second deed was executed within four years from the date of sale, and hence, according to the statute, was in time. Gen. St. 1901, § 7714. But if the second deed had not been executed until after the four-year period had elapsed, the lien still would have been preserved. *Geer v. Thrasher*, 37 Kan. 657, 16 Pac. 94.

The judgment of the district court was correct, and is affirmed.

JOHNSTON, C. J., and MASON, SMITH, PORTER, and GRAVES, JJ., concurring. BENSON, J., dissenting.

(77 Kan. 92)

MAURER v. MILLER et al.

(Supreme Court of Kansas. Jan. 11, 1908.)

LIMITATION OF ACTIONS—COMMENCEMENT OF PROCEEDINGS—WILLS—CONTEST—INTERVENTION.

A proceeding to contest a will commenced within two years after probate inures to the benefit of a party who intervenes after the statutory period, and the statute of limitations is not available as a defense to the intervening petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 541.]

(Syllabus by the Court.)

Error from District Court, Miami County; Alpheus Lane, Judge pro tem.

Action by Jacob Miller against Margaret Standing and others. Harriet A. Maurer filed a petition in intervention. A demurrer to the petition was sustained, and intervener brings error. Reversed.

L. S. Harvey and Charles Maurer, for plaintiff in error. S. J. Sheldon, for defendant in error.

PORTER, J. On the 6th day of August, 1902, the probate court of Miami county probated the will of Jacob F. Miller, deceased, and appointed William Standing as executor. The will devised all of the testator's estate to William Standing, Addie Nichols, Josephine Savage, and John T. Haight in certain portions named therein. Afterward, on the 13th day of March, 1903, Jacob Miller, claiming to be one of the heirs at law of the deceased, brought this action in the district court to contest the will, claiming that the testator was of unsound mind and under the undue influence of defendants at the time the will was executed. The case has never been brought to trial, and is still pending in the district court. One of the defendants, William Standing, died, and the suit was revived. His widow as his sole heir and executrix, and

William Crowell, administrator de bonis non with the will annexed of Jacob F. Miller, deceased, were made defendants. While the suit was still undetermined, and on December 16, 1905, Harriet A. Maurer, plaintiff in error, filed in the action a motion to be allowed to intervene and set up her rights as an heir at law of Jacob F. Miller, deceased. This motion was allowed, and she filed her intervening petition. A demurrer was sustained to this, and afterward an amended intervening petition was filed in which she alleges that she is an heir at law of Jacob F. Miller, deceased, and interested in the subject-matter, and the rights, title, and interest of defendants in the action are adverse to her rights. She then sets up the same grounds for contesting the will that are alleged in the petition of Jacob Miller, the original plaintiff. She also alleges that she resides at Cedar Rapids, Iowa, and that she did not learn of the death of said Jacob F. Miller, the testator, nor of the pretended will, until two years after the will had been probated. The defendants in the action demurred to this intervening petition, on the ground that the statute of limitations requiring an action to contest a will to be brought within two years from the time the will is probated barred her cause of action. The court sustained the demurrer, and this is alleged as the sole ground of error.

The question is therefore sharply presented whether an action begun before the bar of the statute falls will inure to the benefit of a party who intervenes after the time when the action would be barred. In the brief of defendants in error, it is assumed that the ruling upon the demurrer was correct. No reasons are suggested or argument offered in support of it; and no authorities are cited upon the proposition. Plaintiff in error relies upon the case of *Lyons v. Berlau*, 67 Kan. 426, 73 Pac. 52, where a question somewhat similar was decided. That was an action to contest a will, and one of the devisees who was friendly to the testator afterwards joined in the suit to have the will annulled, and was not made a party until two years after the will was probated. It was held that the bringing in of such party was permissible, and that the prosecution of the action thereafter was not affected by the statute of limitations. In the present case it is conceded that the main action can still be prosecuted; the only contention being that the cause of action belonging to the intervenor is barred. There is no discussion of the question in the opinion in *Lyons v. Berlau*, and the only authority referred to is *Hucklebridge v. Railway Co.*, 66 Kan. 443, 71 Pac. 814. There the sole question decided is that, where an amendment simply adds the name of a party plaintiff and does not substantially change the claim of plaintiff, the statute is not available as a defense. The same doctrine was declared in *Service v. Bank*, 62 Kan. 857, 62 Pac. 670, where it is

said in the opinion: "If the substituted party had introduced a new claim and cause of action by the amendment against which the statute of limitations had then run, the defense would have been available." To the same effect see 25 Cyc. 1303, 1304, and cases cited. The principle declared by this court in the cases cited, *supra*, has a pertinent application to the present case. The intervenor sets up no new cause of action or claim against defendants, but relies upon the same grounds to defeat the will which were alleged in the original petition. To the same effect, see *Suber v. Chandler*, 36 S. C. 344, 15 S. E. 426; *Becnel v. Waguespack*, 40 La. 109, 3 South. 536. In 25 Cyc. 1301, it is said: "A suit brought before the bar of limitation is complete will inure to the benefit of one intervening after the time when but for the commencement of the suit the claim would be barred"—citing *Becnel v. Waguespack*, *supra*; *Foot v. O'Rourke*, 59 Tex. 215; *Field v. Gantler*, 8 Tex. 74. The two Texas cases referred to in the note are cited by plaintiff in error. Both were actions upon promissory notes, and the intervenor in each case claimed an interest in the note. It was held that, as the cause of action was not changed, the intervenor took the cause as he found it, and that the statute was no defense. The author of Cyc. further says in the same paragraph: "According to some decisions, however, intervention will not have this effect, when no privity of estate or community of interest exists between the parties." In the present case it is apparent that a community or privity of interest does exist between the intervenor and the other parties.

The law favors and our Code makes ample provision for the intervention of parties who have or claim an interest in the subject-matter of the controversy. Section 42, Code Civ. Proc.; Section 4470, Gen. St. 1901. A suit to contest a will is a proceeding in rem. The court acquires jurisdiction of the res, and its decree affects the interest therein of all parties who, in fact, have an interest in it. 17 A. & E. Enc. of Law, 185; *Coleman v. Martin*, 6 Blatchf. (U. S.) 119, Fed. Cas. No. 2,985. In the present case, if the decree finally entered should adjudge the will to be invalid, it would inure to the benefit of plaintiff in error. No decree the court could enter could fail to affect her rights. For this reason, she has the right to intervene and to prosecute the suit to its end, regardless of what the original plaintiff may do. Her right to recover does not depend solely upon his right to maintain the action. Pending the final determination, he may see fit to abandon the suit, or he may be found to have no right to maintain it for the reason that he is estopped by having accepted under the will, or some other obstacle may stand in the way of his maintaining the suit; but, if the grounds for setting aside the will alleged in his petition are established, the intervenor may upon the same grounds maintain the action. The

intervener takes the suit as he finds it. He is not permitted to change the form of the action or the issues, or to raise a new one. But his right to maintain the action after intervention "cannot be defeated by the dismissal of the plaintiff of the original suit, nor by the plaintiff's being nonsuited." 17 A. & E. Enc. of Law, 185.

A case squarely in point is *Bradford v. Andrews*, 20 Ohio St. 208, 5 Am. Rep. 645. There the proceedings to contest a will were commenced within the statutory time. Only a part of the persons interested were made parties, and it was held that the right of action was saved as to all who were ultimately made parties, notwithstanding some of them were not brought into the case until after the period of the statute of limitations had expired. In the opinion it is said: "The interest of the parties is joint and inseparable. Substantially this is a proceeding in rem, and the court cannot take jurisdiction of the subject-matter by fractions. The will is indivisible, and the verdict of the jury either establishes it as a whole or wholly sets it aside. To save the right of action, therefore, to one, is necessary to save it to all. The case belongs to that class of actions where the law is compelled either to hold the rights of all parties in interest to be saved or all to be barred. And it seems not to be quite well-settled law that the preference will in such cases be given to the right of action, and not to the right of limitation. The right to sue is a favored right, and it is guaranteed by constitutional provision, while the right of limitation generally meets with more or less disfavor." The commencement of the original suit within two years from the probate of the will inured to the benefit of the intervener, and the statute of limitations therefore furnished no defense to the intervening petition.

The judgment is reversed, with directions to overrule the demurrer.

(77 Kan. 149)

GREENTREE v. WALLACE, Sheriff.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. WRIT OF ERROR—DISMISSAL—INSUFFICIENT RECORD.

A motion to dismiss an error proceeding in this court will not be sustained, for the reason that the evidence is not brought up to show there was not an entire failure of proof of some other fact essential to appellant's recovery below, where it appears from the record that the lower court decided the case upon a certain theory of law applied to certain specific facts found which were decisive of its judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2013.]

2. REPLEVIN—WHEN LIES—PROPERTY IN CUSTODIA LEGIS.

Where intoxicating liquors and other property are seized upon a warrant issued upon the provisions of section 2494, Gen. St. 1901, and are held by the officer who served the warrant pending a hearing under section 2495, Id., the owner cannot maintain an action in replevin against the officer to recover the possession of

such property. The property is in the custody of the law, and must there remain until final action is had upon the complaint upon which the seizure was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, §§ 27–37.]

(Syllabus by the Court.)

Error from District Court, Mitchell County; R. M. Pickler, Judge.

Action in replevin by Harry Greentree against G. W. Wallace, sheriff. Judgment for defendant, and plaintiff brings error. Affirmed.

An information was filed by the county attorney in the district court of Mitchell county charging one Cleevellin and his wife with the crime of maintaining a common nuisance, in violation of the prohibitory liquor law, particularly describing the place. Also the information charged Cleevellin and wife with keeping large quantities of several specified kinds of intoxicating liquors in certain specified receptacles for the purpose of illegal sale. In short, all the usual and necessary averments in such an information were made for the arrest of the Cleevellins, and for a search of the premises, and for the seizure of the articles. A warrant was accordingly issued, and the Cleevellins were arrested, and the liquors and articles involved in this action were found on the premises, and taken and held by the sheriff. On August 12, 1905, the plaintiff in error filed his petition in replevin in the same court to recover from the sheriff, Wallace, the liquors and articles seized, alleging that he was the owner and entitled to the immediate possession thereof. The sheriff answered, setting up two defenses: First, a general denial; and, second, that the property was in the custody of the law. Attached as exhibits to the answer were copies of the information and warrant, with the return of the sheriff thereon, and also a copy of a notice issued by the clerk, August 11, 1905, for a hearing as to rights of property in the articles seized. To this answer Greentree replied by a general denial. Upon the issues thus formed a trial was had, of which the record recites: "A jury was waived by the parties, and the cause came on for hearing before the court. After hearing the evidence and the arguments of counsel and being fully advised in the premises, the court finds that the defendant herein was at the time the property described in plaintiff's petition was seized, and at the commencement of this action, sheriff of Mitchell county, Kan., and that at commencement of this action said property was in the custody of said defendant as said sheriff by virtue of a warrant duly issued out of this court in the case of *State of Kansas v. John W. Cleevellin and Caroline Cleevellin*. The said property consisted of 309 cases of bottled beer, 19 cases filled with empty bottles, and 2 cases partially filled with bottled beer. The said property was seized by the said defendant as such sheriff, and held by him at the com-

mencement of this action under the provisions of sections 2493, 2494, and 2495 of the General Statutes of 1901, and that the plaintiff had no right to question said warrant in this action. "It is therefore considered, ordered, and adjudged by the court that the plaintiff cannot maintain this action, and that this case be dismissed, and that the defendant have judgment for costs, assessed at \$——."

Kagey & Anderson, for plaintiff in error.
F. S. Jackson, Atty. Gen., J. E. Tice, Ira N. Tice (Coddling & Marshall, of counsel), for defendant in error.

SMITH, J. (after stating the facts as above). The defendant in error moves to dismiss the appeal here on the grounds that the court below found the issues in his favor upon evidence, and the evidence is not brought up; only a transcript of the record being here. In support of this motion it is said the court below found generally in favor of the defendant, and, for aught the record shows, the plaintiff failed to prove his alleged right of possession to the property; that all reasonable inferences should be indulged to support the judgment. Had the court simply found the issues in the case in favor of the plaintiff, this rule would be applicable. Not so in this case. The issues herein consisted of an assertion of the plaintiff of his right of possession and the unlawful detention of the property by the defendant. The defendant denied plaintiff's claims generally, and as a special defense asserted that his possession of the property was as an officer of the law, on the order of the court; that the property was in custodia legis, and in support thereof exhibited the court files in the case of *State of Kansas v. Cleavelin et al.* The finding and decision of the court is based entirely upon this special defense, and, as the plaintiff in error makes no contention that the facts upon which this defense was based were not supported by the evidence, he had no occasion to bring up the evidence. The motion to dismiss is overruled.

The question remaining, which determines the case, is whether, under the facts found by the court as to the nature of defendant's possession of the property, the plaintiff could maintain replevin therefor, assuming that the plaintiff had full ownership and the defendant had no personal right thereto. In other words, when the state is proceeding to abate an alleged nuisance in a legal manner and seizes personal property which from its alleged use constitutes a nuisance, can an owner of the property litigate the right of possession thereto with the sheriff, the arm of the court, and thus forestall a possible order of the court to destroy the property as a nuisance? We think the court correctly answered the question. True, as contended by the plaintiff. Code, § 266, assures to either party, in an action for the specific recovery of personal property, the right of trial by a jury.

But the question here involved is not solely one of the right of possession as between individuals, and, if it were the only question, the above statute has no higher standing than another statute prescribing a different procedure. Statutes apparently conflicting are to be construed together, and each given effect, if possible. Where, as in this case, two entirely different procedures are provided by statute for adjudicating a certain right or claim of right, which procedures are inconsistent and irreconcilable, but where one procedure is general and applicable to a class of claims under many varying circumstances, while the other is specific and applicable only to a specific relation of the parties or to a controversy arising under specific circumstances, the specific procedure should be held applicable in exclusion of the other. The provisions of Civ. Code, § 266, apply to replevin actions generally. The provisions of section 2495, Gen. St. 1901, are specific as to the particular class of property in this action and the trial there provided for is to determine whether or not the property as used at the time of filing the information was a common nuisance. The provision is: "All persons claiming an interest therein may appear and answer the complaint against such intoxicating liquors."

It was held in the case of *In re Massey*, 56 Kan. 120, 42 Pac. 365, that one claiming to own property which had been seized under the provisions of the prohibitory liquor law then (1905) in force could "maintain an action in replevin before another court of competent jurisdiction against the officer for the purpose of determining his right to the property," etc. This decision was expressly based upon the absence of any provision, in the nuisance statute, for a hearing as to the rights of property in the court where the criminal action was pending. This omission has since been supplied in the act known as the "Hurrell Law," enacted in 1901. Moreover, the language copied from the syllabus in the *Massey* Case, *supra*, is misleading. The question in that case was whether the officer who seized the liquors in the criminal action and had them in his possession was guilty of contempt in refusing to deliver them to another officer who demanded them under a writ of replevin issued to him by another court, and the decision held him guilty of such contempt. So the decision in that case was not that on the final hearing of his replevin action the owner of the liquors should prevail, as claimed in this case, but that the owner had a right to bring his action, and to have the writ issued therein served and obeyed. The words "B. may maintain an action," as generally used mean, "B. may successfully maintain an action," but such is not the meaning in that case.

As before said, the question involved in this replevin is not solely the relative rights of the owner and of Wallace as an individual to the possession of the property in question.

Information had been filed charging that the property, as used, was a common nuisance. A warrant had been issued, and the property had, so to speak, been arrested on this charge, and the sheriff, as required by law, was holding it in his custody until such time as the court should determine under a speedy procedure provided by law whether the property was, so to speak, innocent, and should be returned, or whether it was guilty, and should be annihilated, spiritually at least. It is a proceeding in rem, and, while it is pending in due and orderly course, the owner of the property should not be allowed to intervene, except to "answer the complaint against such intoxicating liquors," as provided in section 2495, *supra*. The property was in custodia legis, and the proceeding against it was in rem. *State v. McManus*, 65 Kan. 720, 70 Pac. 700; *Karr v. Stahl*, 75 Kan. 387, 89 Pac. 669; 17 Am. & Eng. Ency. Law, 304, 23 Cyc. 298. The proceeding is due process of law.

The plaintiff urges that the notice in the condemnation proceeding was not properly addressed, and not properly served. It should have been addressed to the defendants "and to all persons claiming any interest in the intoxicating liquors or other property." It was addressed to the defendants, but the words quoted above from the statute were omitted. It was served according to law. We think the words omitted from the address did not render the notice void. It was simply irregular, and there is no showing that the plaintiff did not have actual notice of the time and place of hearing. He is presumed to know the law that a notice of the time and place of the hearing would be issued within 48 hours after the return of the warrant. He knew his goods had been seized, and by whom, as he very promptly commenced his action in replevin therefor. He was bound to know that he was entitled to a hearing before the court without instituting another action. He evidently sought to bring a more favorable form of action. We hold he was not entitled to supersede the proceeding already pending.

The judgment is affirmed.

(77 Kan. 67)

SNIDER et al. v. WINDSOR et al.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. APPEAL—TRANSCRIPT OF RECORD.

Where a case is brought to this court on a transcript of the record, such transcript should contain everything that is part of the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2627.]

2. PLEADING—AMENDMENTS.

Amendments of pleadings may be allowed in furtherance of justice when such amendments do not substantially change the cause of action or defense. This change does not refer to the form of the remedy, but to the general identity of the transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 600, 686, 687.]

3. APPEAL—HARMLESS ERROR.

Any error in allowing an amendment which does not affect the substantial rights of the complaining party is not a sufficient ground of reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4106-4109.]

(Syllabus by the Court.)

Error from District Court, Kingman County; P. B. Gillette, Judge.

Action by Charles A. Windsor and others against John Snider and Ella F. Snider. Judgment for plaintiffs. Defendants bring error. Affirmed.

J. Q. Jenkins, C. C. Calkins, and C. W. Fairchild, for plaintiffs in error. S. D. LaFuze and Geo. L. Hay, for defendants in error.

BENSON, J. This proceeding is upon a transcript of the record. A motion is made to dismiss on the grounds that the transcript is not complete, that all the necessary parties are not before the court, and because the certificate is insufficient. The plaintiffs in error have asked leave to amend the transcript by inserting certain parts of the record which appear to have been omitted by the clerk.

The transcript is imperfect and confusing in its arrangement, and even with the amendments proposed it is doubtful whether it will be complete. The transcript should contain everything that is a part of the record, and what the record consists of is pointed out in section 417 of the Code. *Nelswender v. James*, 41 Kan. 463, 21 Pac. 573; *Com'rs of Elk County v. Scott*, 51 Kan. 139, 32 Pac. 919; *Cook v. Challiss*, 55 Kan. 303, 40 Pac. 643. We have concluded, however, to consider this transcript as amended, as requested, and for the purposes of review in this case to consider it sufficient. The original petition alleged the execution of certain promissory notes by the defendants, who are plaintiffs in error here, and chattel mortgages to secure their payment, averred default in such payments, and prayed for a judgment for the amount due upon the notes, and for the sale of the mortgaged property to satisfy such judgment. The petition was filed September 8, 1905. On the same day, the plaintiffs filed an affidavit for replevin of the property described in the petition and in the mortgages, and an order of replevin was issued thereon, and the property taken by the sheriff and afterwards delivered to the plaintiffs, except certain animals which were returned to the defendants by the plaintiffs' order. On September 11, 1905, the defendants filed their answer, not verified, containing a general denial, allegations of payment, and an averment of the tender of \$1,500 in satisfaction of the claims of the plaintiffs. On the same day defendants filed their motion to set aside the writ of replevin on the grounds that it had been improvidently issued, that no petition in replevin had been

filed, and that the affidavit was insufficient to show special ownership in the plaintiffs. At the same time plaintiffs presented an application for leave to file an amended petition. Both motions were heard at the same time. On the same day, December 11, 1905, leave was given to file the amended petition, and the motion to quash the writ was overruled. Thereupon the plaintiffs filed an amended petition setting up a cause of action in replevin for the same property described in the original petition, alleging default in payment, demand for the property, the refusal thereof, and the unlawful detention by the defendants after such refusal, and praying for judgment for possession. A motion was made by the defendants to strike this amended petition from the file, for the reasons that it changed the cause of action from one in equity to one at law, and from a petition on contract to one in tort, and that it sought to confer jurisdiction in replevin which the original petition did not do. This motion was overruled, and the defendants elected to stand upon their answer filed to the original petition. On the 6th day of March, 1906, the cause was tried, and the jury returned a verdict in the usual form in replevin, finding that the plaintiffs had a special ownership in the property of the value of \$1,900.81, being the amount due on the mortgages at the time the action was brought, that the plaintiffs were entitled to the immediate possession of the property, and that the defendants wrongfully detained the same. The jury also answered numerous special questions showing credits upon the notes for payments made at different times, the allowance of extensions, and other matters appropriate in an accounting to determine the amount due upon the securities. No damages were allowed for detaining the property. Thus it appears that, while this was commenced as an action to foreclose the mortgages, it proceeded, after the amendment, as an action in replevin for the same property, terminating in finding the amount due upon the mortgages, and a judgment for the return of the property or for the value of the special ownership, in the ordinary form.

The defendants did not ask for the imposition of terms on the allowance of the amendment, and the trial did not take place until about three months after the amendment. There is no suggestion that defendants were unprepared to try the issue finally presented, or that such trial resulted in any hardship or wrong. The plaintiffs, however, appear to have excepted to an order of the court allowing the withdrawal of the tender asked by the defendants, which order was affirmed in this court. *Windsor v. Snider* (Kan.) 90 Pac. 820. It must be conceded that such an amendment was not in the ordinary course of practice, but it does not appear to have affected the substantial rights of the defendants. If no amendment had been allowed, the same accounting would have been proper, the same finding of the amount due,

and an order for the sale of the property would have been made. The plaintiffs having obtained possession by this action, the defendants may have the property so sold. Section 4253, Gen. St. 1901. The Code abolishes the forms of actions, provides that the petition shall state the facts constituting the cause of action, and that causes of action, whether heretofore denominated legal or equitable, or both, may be united where they arise out of the same transaction, or transactions connected with the same subject of action, and, further, that amendments may be made in furtherance of justice, which do not substantially change the cause of action. The cause of action here was the default of the defendants in keeping the conditions of the chattel mortgages. By reason of these defaults the plaintiff might have maintained a suit for foreclosure, or in replevin. The transaction to be investigated on the trial was the same whichever form of remedy was sought. When this identity remains, the amendment does not substantially change the cause of action. *Bogle v. Gordon*, 39 Kan. 31, 17 Pac. 857; *Spice & Son v. Steluruck*, 14 Ohio St. 213. This change does not refer to the form of the remedy, but to the general identity of the transaction. Thus it was held in *Culp v. Steere*, 47 Kan. 746, 28 Pac. 987, that a petition founded in tort for false representations in the sale of a horse could be properly amended so as to include a claim upon an express warranty upon the contract of sale. Where a petition alleged fraudulent representations, and prayed for the rescission of a contract induced thereby, an amendment whereby damages were claimed for breach of the same contract was held proper. *Stevens v. Matthewson*, 45 Kan. 594, 26 Pac. 38. In that case the original petition disaffirmed, and the amendment affirmed, the contract, but the transaction to be judicially examined remained the same. The plaintiff first sought to have the mortgage foreclosed, and thus make his security available. Later, by amendment, he sought to recover possession of the same property under the same mortgages for the same purpose. Can it be said that this substantially changed the cause of action? If, however, we should concede that the allowance of the amendment was technically erroneous, still the substantial rights of the defendants were not affected thereby. The issue between the parties appears to have been fully and fairly tried, and no complaint is made of the final result. In this situation the language of Mr. Justice Burch in *Hopkinson v. Conley*, 75 Kan. 65, 88 Pac. 549, is pertinent: "If it be conceded that the rules of procedure have been violated in this case, the judgment cannot for that reason alone be overturned. The Legislature has enjoined upon this court the duty of looking beyond defects and errors in pleadings and proceedings to ascertain if they did, in fact, affect the substantial rights of the party complaining of them. Fixed rules are to be

observed and enforced, but not merely for the purpose of vindicating them. Harm must result from a wrong decision or it cannot be reversed." "The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Code, § 140; Gen. St. 1901, § 4574; *Hopkinson v. Conley*, 75 Kan. 65, 88 Pac. 549. The judgment is affirmed.

(77 Kan. 207)

LAWRENCE v. WHEELER.

(Supreme Court of Kansas. Jan. 11, 1908.)

**ELECTIONS—CONTEST — STATEMENT — DEMUR-
RER.**

A general charge in the statement of the contestor of a county election of error and mistake by the boards of judges in designated precincts in counting the ballots and by the board of canvassers in declaring the result is sufficient as against an attack by demurrer, and is not void for indefiniteness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 206-269.]

(Syllabus by the Court.)

Error from District Court, Finney County; Chas. E. Lobdell, Judge.

Election contest between H. V. Lawrence and A. C. Wheeler. Judgment for defendant, and Lawrence brings error. Reversed and remanded.

A. M. Harvey and A. Hoskinson, for plaintiff in error. W. R. Hopkins and Richard J. Hopkins, for defendant in error.

BURCH, J. H. V. Lawrence instituted a contest for the office of county treasurer of Finney county against A. C. Wheeler. His statement was sufficient, unless it be with reference to the causes of contest. In that respect it reads as follows: "Said contestor further states that the said A. C. Wheeler, contestee, was not legally and lawfully elected, or chosen by a majority of the lawful votes cast at said election to be the county treasurer of Finney county, Kan., for the following reasons, to wit: For errors and mistakes of the boards of judges of election at said election, so held in the various voting precincts, to wit: First, Second, and Third Wards of the city of Garden City, Cherlock, Macks, Huffmans, Plymell, Pierceville, Pleasant Valley, Knauston, Eminence, and Ravanna—in counting the votes so cast at said election for the said office of county treasurer of Finney county, Kan. For errors and mistakes of the board of county commissioners of Finney county, Kan., acting as a board of canvassers of the votes cast at said election in declaring the result of said election in favor of the said A. C. Wheeler, contestee, for the said office of county treasurer of Finney county, Kan., at said election so held on the 6th day of November, 1906. That the boards of election judges in Pierceville and Macks precincts

failed and neglected to account for, or return to the county clerk of Finney county, Kan., the number of ballots received by them from the said county clerk aforesaid prior to election. That the board of election judges in each of the aforesaid precincts failed to account for, or return to the county clerk of Finney county, Kan., the number of 'blank' ballots sealed up in an envelope as required by law, or the 'void' ballots or the ballots 'objected to,' as required by law inclosed in an envelope securely sealed and so marked and indorsed so as to clearly disclose its contents. That in said precincts, Pierceville and Macks, all ballots not used, and all ballots spoiled by the voters while attempting to vote, were not returned by the boards of judges of election in said two above-named precincts to the county clerk of Finney county, Kan., as required by law, the officers from whom all ballots were received. That the boards of election judges in said county in the following precincts, to wit: First, Second, and Third Wards in the city of Garden City, Sherlock, Macks, Huffmans, Plymell, Pierceville, Pleasant Valley, Knauston, Eminence, and Ravanna—failed to count for the contestor votes or ballots which were legally cast for him, and which were marked by said boards 'Blank,' 'Void,' and 'Objected to,' and 'Rejected.' That, on account of the above-mentioned errors, mistakes, and irregularities, a correct count of said votes cast in Finney county, Kan., on said 6th day of November, 1906, and a correct canvass of said votes, would affect the result of said election of county treasurer of Finney county, Kan., and that a correct count of the votes cast at the said several voting precincts so cast would affect the result of said election for the office of county treasurer, and that a correct count of the votes cast at said election on November 6, 1906, in Finney county, Kan., and a correct canvass of the votes so cast at said election would result in the election of said H. V. Lawrence, contestor, to the office of county treasurer of Finney county, Kan., at said election so held on the 6th day of November, 1906." The contestee demurred to the statement, but the demurrer was overruled. The contestee then filed an answer, to which the contestor replied, and the contest court proceeded to count the ballots. Various ballots were not counted for the contestor which he claimed should have been counted for him, and various ballots were counted for the contestee, to which the contestor objected. The ballots from two election precincts were not opened or counted. The contest court decided in favor of the contestee, and the contestor prosecuted proceedings in error in the district court. The district court declined to consider the principal errors alleged on the ground the statement did not specify with sufficient particularity the causes of contest, thereby virtually sustaining the demurrer which the contest court had overruled. The contestor prosecutes error in this court.

The district court adopted the rigorous rule approved by some courts and favored by some text-writers, which requires that the facts constituting the cause of contest must be pleaded in detail with particularity and precision, or the statement will not authorize the contest court to proceed or support a judgment in the contestor's favor. This rule rests in part upon the public policy which forbids speculative and groundless contests, and is supported by the argument that, if the contestor know of causes of contest, he can recite the facts, while, if he do not know, it is better that he should not be allowed to interfere.

The question is one of statutory interpretation; the Legislature having indicated what the public policy of this state demands by the procedure which it has prescribed. The remedy, so far as it relates to elections to county offices, is quite summary in character, and is designed to secure a speedy determination of the contest. The tribunal having jurisdiction to try the contest is an inferior one, having special and limited powers, and need not be composed of persons who are learned in the law or familiar with the arbitrary rules of pleadings in civil actions. The proceeding is not one for the benefit of candidates alone. It may be instituted by any elector of the county; the purpose being that the people's choice legally registered may be made to prevail upon the complaint of any of them. The contestor's statement is "a written statement of his intention to contest the election," and must set forth "the particular causes of contest." Gen. St. 1901, § 2650. The statute names causes for contest as follows: "First, for malconduct, fraud or corruption on the part of the judges of election in any township, or of any of the boards of canvassers, or on the part of any member of either of those boards. Second, when the contestee was not eligible to the office at the time of the election. Third, when the contestee has been convicted of an infamous crime before the election, and the judgment has not been reversed, annulled, or set aside, nor the contestee pardoned, at the time of the election. Fourth, when the contestee has given or offered any elector or any judge, clerk or canvasser of the election any bribe or reward, in money, property or thing of value, for the purpose of procuring his election. Fifth, when illegal votes have been received, or legal votes rejected, at the polls, sufficient to change the result. Sixth, for any error or mistake in any of the boards of judges or canvassers in counting or declaring the result of the election, if the error or mistake would affect the result. Seventh, for any other cause (though not enumerated above) which shows that another was the legally elected person." Gen. St. 1901, § 2655. In framing the law the Legislature considered specially the subject of certainty in stating causes of contest, but went no fur-

ther than to make the following requirement: "When the reception of illegal or the rejection of legal votes is alleged as a cause of contest, the names of the persons who so voted, or whose votes were rejected, with the township where they voted or offered to vote, shall be set forth in the statement." Gen. St. 1901, § 2660. There is no provision for the forming of definite issues such as the Code of Civil Procedure contemplates. This court has held that pleadings in the nature of an answer and reply are proper in contest cases, and, if filed, they should be construed according to the ordinary rules applicable to such pleadings. *Baker v. Long*, 17 Kan. 341. It has also been decided that the contest should be heard and adjudicated upon the merits, and not disposed of upon technicalities. *Buckland v. Golt*, 23 Kan. 327. The case last cited is instructive. The statute provides that the contestee shall be informed of the contest by a notice served upon him which shall contain a brief statement of the causes of contest. Gen. St. 1901, § 2662. The notice did not contain this statement. The contestee appeared specially, and moved to dismiss. The proceeding was dismissed, and the district court sustained the ruling of the contest court. This court held the notice to be irregular only, and said: "At the time that this contest was dismissed, it was too late for the contestor to commence a new contest, and hence, if this dismissal were to be sustained, it would be a final determination of the case, and a final determination upon a pure technicality. This the law never encourages, and especially not where cases are to be tried before inferior tribunals, not skilled in the law. It is a dangerous thing for an inferior tribunal, not skilled in the law, to attempt to decide cases upon pure legal technicalities. Superior courts seldom attempt any such thing. And the law always encourages trials upon the merits, and never encourages final determinations upon mere technicalities of any kind." From the foregoing it is plain the Legislature did not ordain a severely technical and highly specialized system of procedure for the contest of county elections, but, instead, adopted a very simple and liberal one designed to facilitate inquiry into causes, which, if established, would vitiate the declared result, while at the same time affording due protection to the public, the party chiefly interested, and to claimants of offices. The courts are fond of quoting the following fine paragraph relating to pleadings in election contests contained in the opinion in the case of *Maun v. Cassidy*, 1 Brewst. (Pa.) 11, 27: "The rule must not be held so strict as to afford protection to fraud by which the will of the people is set at naught; nor so loose as to permit the acts of sworn officers, chosen by the people, to be inquired into without an adequate and well-defined cause." The illustrative and qualifying paragraph immediately preceding usually

is not quoted. It reads as follows: "It is obvious that if the court were to require the same precision and certainty in an election petition as in the pleadings between parties to a suit at law, the object of which pleadings is to produce a single issue, the difficulty of stating precisely the manner in which a fraud has been perpetrated, or an undue return made, would, to a great degree, nullify the law itself, which designs that such charges shall be investigated." Taken together, the two paragraphs express a fair interpretation of the meaning and spirit of the Kansas statute.

In this case the contest court and the contestee were fairly advised of the causes of contest. The causes specified were not fraud, and corruption, the ineligibility of the contestee, the conviction of the contestee of an infamous crime, bribery, or the receiving of illegal votes; but errors and mistakes of the boards of judges in named precincts in counting the votes cast, errors and mistakes of the board of canvassers in declaring the result, and failure of the boards of judges in various named precincts to count certain described classes of ballots were specified. It is true that the ultimate fact of error and mistake was alleged in general terms, but this circumstance did not render the statement a nullity. If what was said were true, the contest was well founded, and the contest court was bound to investigate the charges. Even under the Code of Civil Procedure such an allegation will not render a pleading subject to demurrer. The adverse party may be entitled to a more definite and detailed statement of the facts, but his remedy is by motion, and not by demurrer. The following quotation from an early decision of this court construing a pleading attacking a tax deed is conclusive upon the question: "We think, however, the court below erred in sustaining said demurrer. We shall take the fourth reason given for the purpose of showing it, because said reason is the shortest, and because it is as material, and as well pleaded, as any of the others, and more so than the most of the others. It reads as follows: '(4) Said lots were not sold for taxes at the time and place required by law.' Now, if the lots were not sold at the time or place required by law, of course, the tax deed founded on such sale must necessarily be void. Of course, it must be admitted that this fact is not very well pleaded, but we think it is sufficiently pleaded to be good on general demurrer. If the defendant was not satisfied with this statement of facts, he might have required a more specific and definite statement thereof by a motion to have the petition in this respect made more definite and certain. Of course, the defendant had a right to know, from a specific allegation in the petition, whether the plaintiff claimed that the treasurer did not sell said property at the county seat, or whether he claimed that the place where the treasurer did sell the property was

not the county seat (a mere county seat question), or whether he claimed that the treasurer did not sell at his office, or at the place where he advertised to sell, etc. The defendant also had a right to know from a specific allegation in the petition whether plaintiff claimed that the treasurer sold said property prior to the first Tuesday of May, or after the adjournment of the tax sale, at the time to be held, or at some other time not designated by law. In fact, the petition should have stated specifically (if insisted on in the proper way by the defendant) the time when, and the place where, said property was sold (and not merely the time when and the place where it was not sold), and all the facts connected with the sale, so that a precise and specific issue could have been made up by the pleadings. Such is the better mode of pleading; and such is the mode that must prevail when properly insisted on by the adverse party. When true and specific issues are made up by the pleadings, the parties may know in advance, and before a trial, just what they will have to prove, and what they will have to disprove. But a party, in order to have the facts stated specifically, must raise the question in a proper way. He must do it by motion, and not by a general demurrer. If a petition states a cause of action at all, the petition must be held good when demurred to on the ground 'that it does not state facts sufficient to constitute a cause of action,' however general its statement of the facts may be." *Park v. Tinkham*, 9 Kan. 613, 618. Charges of fraud in pleadings in civil actions are excepted from this rule. *Ladd v. Nystol*, 63 Kan. 23, 64 Pac. 985. Perhaps there are some other exceptions; but a general charge in the statement of the contestor of a county election of error and mistake by the boards of judges in designated precincts in counting the ballots and by the board of canvassers in declaring the result is sufficient as against an attack by demurrer, and is not void for indefiniteness. "More particularity in pleading is not required than the nature of the subject is reasonably susceptible of, and it is obvious, in the very nature of things, that in most instances the candidate defeated by a miscount cannot know whose ballots were miscounted. All he can be expected to know is that about so many ballots were deposited for him at a given poll, and that the count does not agree therewith. If he knows more, it is accidental. Nor, in such case, is it of consequence whose ballot was miscounted, for the effect is the same, and the mode of proof is precisely the same, whether it was cast by one legal voter or another. It is, moreover, evident that the information upon which the contestant acts must, to a very great extent, be hearsay. He cannot be expected to have been personally at each poll, much less to have known how each elector voted. Nor can he be expected to have personally supervised the counting at each poll; and therefore, how-

ever grossly and palpably he may have been wronged at several polls, all that he can say truthfully in respect to most of it is that he is informed and verily believes." *Kreitz v. Behrensmeyer*, 125 Ill. 141, 172, 17 N. E. 232, 8 Am. St. Rep. 349. The district court justified its adoption of the strict rule of pleading by the fact that under the law of this state each political party and each candidate may be represented at every polling place in the county, and thus may be informed of the facts relating to errors and mistakes, if any occur. Each elector may not be so represented. Any elector may institute a contest. The rules of pleading must, with due regard to the interest of the public and of candidates, expedite his purpose, and there cannot be one set of rules for candidates and parties and another for plain electors. At the trial before the contest court the contestor offered an amendment to his statement, which was rejected. It aided the statement but little, and the court did not abuse its discretion in refusing to allow it to be filed.

The judgment of the district court is reversed; and the cause is remanded.

(77 Kan 155)

HASKINS & SELLS v. KELLY, State Treasurer.

(Supreme Court of Kansas. Jan. 11, 1908.)

CORPORATIONS—FOREIGN CORPORATIONS—DOING BUSINESS IN THE STATE.

Under the provisions of chapter 491, p. 807, Laws 1905, authorizing the Governor to employ such competent accountants as he may deem necessary to cause a full investigation to be made of the various state departments, the Governor may employ for that purpose a foreign corporation chartered as public accountants, and such foreign corporation while engaged in making such examination on behalf of the state is not engaged in business in the state within the meaning and contemplation of the Bush law, requiring a foreign corporation to obtain a permit to do business within the state.

(Syllabus by the Court.)

Application by Haskins & Sells, certified public accountants, for a writ of mandamus to T. T. Kelly, State Treasurer. Writ granted.

J. W. Gleed and J. L. Hunt, for plaintiff. F. S. Jackson, Atty. Gen., and John S. Dawson, for defendant.

PORTER, J. By an act of the Legislature of 1905 (Laws 1905, p. 807, c. 491) the Governor was authorized to employ such competent accountants as he might deem necessary for the purpose of causing a full investigation to be made of the various state departments. The act appropriated funds to pay for the services of such accountants. In pursuance of the act, the Governor employed plaintiff to investigate the treasury department. This is an original proceeding in mandamus to compel the State Treasurer to countersign and register a warrant for the sum of \$2,237.75, a balance due plaintiff for services rendered in the examination of the state

treasury. The warrant was issued by the Auditor upon a voucher duly approved and certified by the Governor, in accordance with the provisions of the act. The return to the alternative writ sets up as a defense, first, that plaintiff is a corporation created by the laws of another state for a purpose for which corporations are not permitted to be organized by the laws of this state, and, therefore, cannot maintain the action; second, that it is a foreign corporation, which has never applied for or received permission to engage in business within the state under the provisions of the Bush law, and for that reason cannot maintain the action. There is an agreed statement of facts from which it appears that plaintiff is a corporation organized and created under the laws of the state of New York, and authorized to do as a corporation all of the acts which it is alleged in the alternative writ were done by it. It was also agreed that plaintiff never has had an office or place of business in the state of Kansas. The Honorable E. W. Hoch, as Governor of the state, on May 15, 1905, employed plaintiff by letter, addressed to plaintiff at its office in the city and state of New York, to make investigations under the act of 1905, in pursuance of which employment and under instructions of the Governor plaintiff sent its accountants to the office of the Treasurer of the state, who there took from the books and records such information and data necessary for the making of a report, and afterwards, at its office in New York from the information and data so taken, prepared its report and delivered the same to the Governor. Our statute defining the purposes for which corporations may be created has no reference to foreign corporations. Other states and other governments may authorize corporations to exist for any lawful purpose which the lawmaking power of such states or governments may deem proper. And, if the nature of the business which a foreign corporation is authorized by its charter to transact is not repugnant to our laws or contrary to our public policy, its business may be transacted in this state. This proposition is universally recognized as true. *Land Grant Ry. & T. Co. v. Coffey Co.*, 6 Kan. 245, 254; *A. T. & S. F. R. Co. v. Fletcher*, 35 Kan. 236, 10 Pac. 596; *Kansas City Bridge & Iron Co. v. Com'r's of Wyandotte Co.*, 35 Kan. 557, 560, 11 Pac. 360.

It is contended, however, that the act itself necessarily contemplates that the accountant must be a person. The contention is based upon the provision of the statute that, in case the reports of the accountant shall show an offense against the state by any officer, assistant, or clerk, the accountant, if so requested either by the Governor or Attorney General, shall make an affidavit or complaint against the guilty person charging him with such offense, and the Governor is authorized to employ competent attorneys to assist in the prosecution of such person or

persons. It is seriously argued that, inasmuch as plaintiff is a corporation, it would be impossible for it to comply with this provision of the act, because it is said that a corporation cannot make an affidavit. But it is apparent that the purpose of the foregoing provision of the act would be subserved equally as well if a complaint should be sworn to by some person in the employ of the corporation making the examination as if it were made by the individual who was called the accountant. It would hardly be claimed, for instance, that a valid warrant could not be issued upon a complaint sworn to by one in the employ of the corporation. Nor would the fact furnish ground for a motion to quash an indictment or information based upon such a complaint. The purpose of this provision was to facilitate the prosecution of any state officer or employé of a department who should be shown by the report of the accountant to be guilty of any offense against the state, and it is impossible to conceive of any way in which this purpose could be defeated by the fact that the complaint under such circumstances would be sworn to by an officer or employé of the corporation acting as accountant. If the objection is not frivolous, it has at least no substantial merit.

After all, the main question is whether the state in the exercise of its sovereign powers finds its hands tied by the provisions of the Bush act, which require a corporation to comply with that act before engaging in business in the state. The mere statement of the proposition shows that there can be but one answer, though there are several reasons for the answer. In the first place, plaintiff was not transacting business in the state as contemplated by the provisions of the Bush law. In the second place, the Bush law was not enacted to prevent the state itself from contracting with a foreign corporation for any purpose for which the state may make a contract, nor for the purpose of preventing a foreign corporation from dealing with or transacting business with the state. The Legislature determines that the accounts of its officers and state departments shall be examined for the welfare of the state itself, and that it shall be done through the action of the Governor. In causing this to be done and in doing it the state exercises a sovereign power.

The precise question was before the court and decided adversely to the contention of the respondent in *State v. Book Co.*, 69 Kan. 1, 76 Pac. 411, 1 L. R. A. (N. S.) 167. That was a case brought in the name of the state for the cancellation of certain contracts entered into between the book company and the state text-book commission, by which the book company agreed to supply the schools of the state with certain text-books, and gave bond for the performance of the obligation. The action was based upon the failure of the book company to comply with the law known as the Bush law before entering into the contracts.

The question, therefore, was whether the contracts entered into were subject to cancellation because they were made before the book company had been admitted to do business within the state. The following language from the opinion of Mr. Justice Burch in that case applies with full force to the question involved here: "The Bush law has no application to the facts of this controversy. In order better to discharge the exalted duty enjoined upon it by section 2 of article 6 of the Constitution, the Legislature undertook to secure uniformity of text-books in the common schools. In doing so it exercised a sovereign power. The matter of procuring a corporation to supply needed books is purely a state affair. No private right attaches to it. Nor is the act one of ordinary trade or commerce, in which the state may divest itself of the attributes of sovereignty, and conduct itself as an individual may do. The most distinctively sovereign prerogatives of the Legislature, under the Constitution, are enlisted and concerned. Unable to attend to certain details of the work proposed, a special agent was created, and clothed with such authority as seemed necessary to accomplish the legislative design. The text-book commission is a public agency created to aid in the assertion of a public right, and the execution of a public power in the interest of the public welfare." We are satisfied with the interpretation of the law as announced in that case, and deem it useless to attempt to add further reasons or cite additional authorities.

The peremptory writ will go as prayed for.

(77 Kan. 8)

NICKLESON v. DIAL.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. PRINCIPAL AND AGENT — AUTHORITY OF AGENT.

A mere special agent will not be presumed to have authority to take, in his own name, and negotiate a promissory note for money due, or to become due, to his principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 248, 249, 391.]

2. WITNESSES—CROSS-EXAMINATION.

Where an action is commenced by the holder of a promissory note, claiming to be an innocent purchaser thereof, who, instead of resting upon the prima facie effect of the note, presents the payee thereof as a witness to establish his ownership of, and right to negotiate, such note, the witness will be subject to cross-examination as in other cases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 907-922.]

3. EVIDENCE—BEST AND SECONDARY.

Where, in such a case, the payee testifies that his authority to take and negotiate the note is contained in a contract with his principal, outside statements of such authority should be rejected, when objection to their admission is properly made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 549-554.]

(Syllabus by the Court.)

Error from District Court, Riley County: Sam Kimball, Judge.

Action by Ed Nickleson against John M. Dial. Judgment for defendant, and plaintiff brings error. Affirmed.

This is an action on a promissory note. It was commenced April 3, 1905, in the district court of Riley county by the plaintiff in error against the defendant in error. The petition was the ordinary form used in such actions. The note reads:

The Largest in the World.

The Mutual	\$138.83	On or before January 1st, 1905, for value received, I promise to pay to
Life		A. B. Headington, Special Agent, or
Insurance		order, one hundred and thirty eight
Co.		and 83-100 dollars, with interest from
of New York		maturity at the rate of 8 per cent.
Organized		per annum. If interest is not paid
		when due, same shall become part of
		the principal, and draw interest at
		the same rate.
Feb. 1, 1843.	Assets \$383,532,681.30.	John M. Dial.

Indorsement: "A. B. Headington."

The answer consisted of a general denial, and failure of consideration, but admitted the execution of the note. On the trial the plaintiff introduced the note in evidence, and then offered the payee as a witness, who testified in part as follows:

"Q. I will ask you to look at the note marked 'Exhibit A,' and I will ask you to state to whom that note belonged at the time it was given? A. Belonged to me. Q. Did anybody else have any interest?— A. No, sir. Q. Or ownership in said note? A. No, sir. Q. To whom did it belong? I will ask you to state if you sold it to anybody? A. Yes, sir. Q. To whom? A. Ed Nickleson. Q. Now, at the time you sold it, had anybody acquired any interest or ownership in this note from the time it was given down to the time you sold it to Ed Nickleson besides yourself? A. No, sir. Q. That is your signature on the back of the note, is it not? A. Yes, sir."

Cross-examination: "Q. Mr. Headington, in what capacity were you acting at the time that you took this note from Mr. Dial? A. Special agent of the New York Mutual Life. Q. Then when this note was made payable to A. B. Headington, special agent, it was meant as A. B. Headington, special agent of the Mutual Life Insurance Company of New York, was it? A. Yes, sir. Q. Now, then, at the time that you transferred this note to the plaintiff in this case it was the property of the Mutual Life Insurance Company of New York, wasn't it? A. No, sir. Q. Were you in the employ of the Mutual Life Insurance Company of New York at that time? A. Yes, sir. Q. And this was taken for a premium, advance premium, was it, of the company? A. Yes, sir. Q. For what? A. Life insurance. Q. For life insurance? A. Yes, sir. Q. For what amount was the policy to be made, and upon whose life? A. J. M. Dial and his wife, Kate V. Dial. Q. You may state now, Mr. Headington, what company was to issue the policy for which this note was given? A.

Mutual Life Insurance Company of New York."

Redirect examination: "Q. Did you have any arrangement, you say, that you owned this note at the time it was given? Now, if it was given for insurance in the Mutual Life Insurance Company, how did you become the owner of it? A. I was an agent on commission. Q. Well, would this note represent your commission? A. No, sir; represents the commission and note premium. Q. Then how did you become the owner of the note? A. We have to pay a note premium in cash on the issuance of the policy. Q. Did you pay it? A. No, sir. Q. Why? A. Because the policy has never— Q. Has that premium become due yet? A. No, sir; it has not. Q. Have you been willing and ready to pay it whenever it should be? A. Yes, sir."

Recross-examination: "Q. When did your connection with the Mutual Life Insurance Company cease? A. In September, 1904. Q. September, 1904? A. Something like that time. Q. Up to that period you had never reported this policy to the company at all, had you? A. No, sir."

The plaintiff then rested, and a demurrer to the evidence was sustained. By permission of the court the witness was recalled and gave further testimony, which reads: "Q. Mr. Headington, I would like to ask you if you were authorized to transfer this note by the Mutual Life Insurance Company of New York at the time you sold and transferred it to Mr. Ed Nickleson? A. That is a question I don't know how to answer. Q. Well, did they? A. The authority we had is a contract. Q. Well, does that contract allow you to sell notes that are given for the first premium? A. Yes, sir. Q. It does? A. We are to pay cash for everything we get. Q. Now, I will ask you to state if you were required to pay cash, and if the notes which are taken for them belong to the agent and not to the company? A. They do." Plaintiff then asked the witness a question, which reads: "Q. I will ask you to state if the rules of the Mutual Life Insurance Company of New York allow its special agents to take notes for the first premium, that is, that portion of the premium that belongs to the insurance company?"

Defendant objected on the ground that it was incompetent, irrelevant and immaterial, and not the best evidence. The objection was sustained. Plaintiff then made an offer of proof, which reads:

"Mr. Brock: Now, we offer to prove by this witness that the rules of the Mutual Life Insurance Company of New York don't allow its special agents to accept notes in payment of that portion of the first premium that would go to the insurance company, but that it allows the agents to take notes, but the notes belong to the agents, and they require the agents to pay cash to the company for that portion of the premium which goes to the company, and that the insurance company

doesn't have any interest in the note that is taken.

"Mr. Hessin: To which we object as incompetent, irrelevant, and immaterial."

Robt. J. Brock, for plaintiff in error. John E. Hessin and John C. Hessin, for defendant in error.

GRAVES, J. (after stating the facts as above). The assignments of error embrace the exclusion of evidence offered by the plaintiff, improper cross-examination by the defendant, sustaining the demurrer to plaintiff's evidence, and overruling plaintiff's motion for a new trial.

The principal point insisted upon by the plaintiff in error in his argument is that the words "special agent," added to the name of the payee of the note, were merely descriptive personæ, and therefore the note by its terms was owned by A. B. Headington, and the indorsement in his proper name was sufficient. Many cases are cited which support this contention, but in our view this question is not in the case. The plaintiff did not rest upon the prima facie effect of his note, but the payee was placed upon the witness stand to prove that he owned the note when it was taken. This opened the door to a full inquiry as to whether the payee took the note for himself or for the company. From the evidence of this witness it appears that the note was taken by the payee while acting as the special agent of the Mutual Life Insurance Company of New York, when he was engaged in the transaction of its business and in payment of insurance which it was to furnish. It is not shown that he was authorized to sell notes so taken.

It further appears that no report was made to the insurance company informing it of such application for insurance, and that payment therefor had been made by such note. The makers of the note have not been furnished with any policy of insurance. The payee ceased to be an agent of the insurance company, September, 1894, a few months after the date of the note, and several months be-

fore it became due. The note may never become due. If the insurance company should ever receive the applications for insurance, it may decline to issue policies thereon, in which case the premium will not have to be paid. No consideration whatever has been received by the makers of the note. It seems to us that, if the note itself furnished a prima facie case for the plaintiff, it has been completely destroyed by the testimony which he presented. The court might well have concluded that the note when taken belonged to the insurance company, and no authority existed for its transfer by the agent, Headington.

It is insisted that the plaintiff was erroneously prevented from showing authority, on the part of the payee, to sell the note, by the refusal of the court to permit the witness to state what the rules of the company were in this respect; but this question was objected to on the ground that it was not the best evidence, and, the witness having before stated that whatever authority he had was contained in his contract with the company, we are unable to perceive error in this ruling of the court. The contract was the best evidence. The same is true of the offer of proof.

It is insisted that the cross-examination made for the purpose of showing that the note when taken belonged to the insurance company was erroneous, because tending to contradict the terms of the note, and because immaterial as against an innocent holder. As a general proposition this may be correct, but here it must be remembered that the plaintiff himself raised the question of ownership. He by his testimony made this a material matter outside of the note. Having undertaken for his own purposes to establish the right of the payee to transfer the note, he cannot avoid ordinary cross-examination of the witnesses offered for this purpose. If the plaintiff is not willing to stand upon the terms of the note, he cannot expect the defendant to do so.

We see no material error in the rulings of the trial court, and therefore the judgment is affirmed.

(77 Kan. 41)

GREENWELL et ux. v. MOFFETT et al.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. MORTGAGES—FORECLOSURE SALE.

Where a compact body of land sold at public sale, consisting partly of a tract platted into town lots, used together with the other land as one farm, can be sold in a body to better advantage than in parcels, it is not error to refuse to set aside the sale because a demand to sell in parcels had been refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1515.]

2. JUDGMENT—RES JUDICATA.

Where an issue is presented in the pleadings and tried in an action of foreclosure, it cannot be again tried at the instance of the losing party upon a motion to set aside the sheriff's sale in the same action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1250.]

(Syllabus by the Court.)

Error from District Court, Cowley County; C. L. Swarts, Judge.

Action by William Greenwell and Minnie L. Greenwell against John Moffett and others, and action by Moffett Bros. & Andrews against William Greenwell and Minnie L. Greenwell. Actions consolidated. Judgments for Moffett Bros. & Andrews in both actions, and Greenwell and wife bring error. Affirmed.

Torrance & Bloss, for plaintiffs in error. Jackson & Noble, for defendants in error.

BENSON, J. William Greenwell and Minnie L. Greenwell commenced an action to cancel certain notes and a mortgage given by them to John Moffett and Moffett Bros. & Andrews, alleging duress in the execution thereof, and failure of consideration. The defendants in that action pleaded default in the conditions of the mortgage, and prayed for foreclosure. In the reply it was alleged that the mortgagees were in an unlawful combination or trust, and that the consideration for the mortgage was based on the illegal transactions of such trust, and that the mortgage was void for that reason. Afterwards an action was brought by Moffett Bros. & Andrews against the Greenwells to foreclose another mortgage upon the same premises. The defendants in the last-named action pleaded as a defense to this mortgage the same matters contained in their reply in the first-named suit, in connection with other charges of oppression and misconduct. The two actions were tried together. The court found for Moffett Bros. & Andrews in both actions, and rendered judgment for the amount of the notes so held by them, and for foreclosure of the mortgages. The mortgaged property was sold by the sheriff to satisfy these judgments to John Moffett, one of the firm of Moffett Bros. & Andrews, who filed a motion to confirm the sale. Greenwell and wife filed a motion to set aside the sale, and Minnie L. Greenwell filed objections to the sale. These motions and objections were heard together. The motion to confirm

was sustained; and this is the ruling complained of.

The motion to set aside the sale was upon the grounds that the judgment was irregular and void, and that the land should have been sold in parcels. The objections were made upon the same grounds, and upon the further ground that the plaintiff firm was in a trust and combination, alleging, in substance, the same matters stated in the pleadings to cancel the first mortgage, and in their defense to the action upon the second mortgage. Oral evidence was heard upon the hearing of these motions, from which it appeared that the mortgaged property consisted of a farm of about 30 acres, including several lots on the south side, platted in an addition to the town of Dexter, and the evidence tended to prove that the land could be sold to better advantage as a single tract than in parcels, and the land was so sold for \$7,080, which was more than its market value. In the tier of lots, but not included in the mortgage, were two lots constituting the homestead of the Greenwells, and also some other lots. All the mortgaged property was contiguous, comprising one body of land, occupied and used as a single farm.

The plaintiff in error on this hearing offered the same evidence of the illegal trust and combination that had been previously offered on the trial of the actions. This evidence was properly rejected. An issue tried and determined in the original action could not be tried again on this motion to confirm the sheriff's sale in the same action. The judgment and finding against the plaintiff in error on that proposition were final. The issue concerning the unlawful trust was res judicata. *Power v. Snow*, 75 Kan. 182, 88 Pac. 1083.

Mrs. Greenwell upon the sale demanded that the property should be offered in parcels, which was refused. She urged as a special objection to the sale in bulk that her house occupied a foot or two of lot 5, adjoining her homestead, and she desired to have the lots sold separately in order that she might redeem any lot or parcel that she might fail to purchase. On the hearing of the motion, no testimony was offered to show that the house was partly upon lot 5. The objections filed by her stated that such was the fact, and the objections were verified by her attorney, but upon belief only. This was not proof. The affidavit did not purport to state a fact, only a belief. *Thompson v. Higginbotham*, 18 Kan. 42.

The plaintiff in error also complains because the court ordered a sheriff's deed to be issued in six months, thus reducing the period of redemption. This the court had the right to do if the property had been abandoned or was not occupied in good faith. Section 4928, Gen. St. 1901. In the absence of any statement in the record to the contrary it must be presumed that proof of this fact was produced. *Glover v. Lawler*, 45 Kan.

559, 28 Pac. 42. Besides, no complaint was made of this ruling in the petition in error. The motion to dismiss this proceeding for want of necessary parties was met by the voluntary appearance of the parties so omitted.

Finding no error in the proceedings, the judgment is affirmed.

(77 Kan. 202)

STATE v. RHODES.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. FRAUD—EXECUTION OF—SECOND CONVEYANCE—MORTGAGES.

A real estate mortgage is not a "conveyance or assurance," within the meaning of section 2092, Gen. St. 1901.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 76.]

For other definitions, see Words and Phrases, vol. 1, p. 591.]

2. SAME.

The execution and delivery of a second mortgage upon real estate, when a first mortgage has been given thereon by the grantor of the second mortgage and before the first mortgage has been filed for record, without mentioning the first mortgage therein, with the intent to defraud, does not violate the above mentioned statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 76.]

(Syllabus by the Court.)

3. WORDS AND PHRASES—CONVEYANCE.

In states where there is no statutory definition, the word "conveyance" retains its common-law meaning, which is that transfer of the title to real estate. In states where a real estate mortgage conveys the legal title of the land to the mortgagee mortgages are held to be conveyances.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1575-1584; vol. 8, p. 7819.]

4. SAME—"ASSURANCE."

The word "assurance" refers to the instrument itself, rather than to what it accomplishes. It is defined to be any instrument which confirms the title to real estate. It was anciently used to evidence and assure title to the grantor in a transfer of real estate previously made, citing 1 Words & Phrases, 591.

Appeal from District Court, Russell County; J. C. Ruppenthal, Judge.

Alna R. Rhodes was indicted for a violation of Gen. St. 1901, § 2092. From an order quashing the information, the state appeals. Affirmed.

F. S. Jackson, Atty. Gen., and J. S. Dawson, Asst. Atty. Gen. (L. B. Beardsley, of counsel), for the State. E. W. Grant and Julius Cohn, for appellee.

GRAVES, J. This is a proceeding to determine the sufficiency of an information, filed in the district court of Russell county, which, except formal and unnecessary parts, reads:

"I, M. J. Gernon, the undersigned, county attorney of the said county of Russell, in the state of Kansas, * * * come now here and give the court to understand and

be informed that on the 23d day of October, A. D. 1906, the said defendant, Alna R. Rhodes, then and there being, was then and there the owner in fee simple of the following described real estate, situate in the said county of Russell, in the state of Kansas, to wit: * * * That on the said 23d day of October, 1906, the said defendant, Alna R. Rhodes, and one Minnie E. Rhodes, his wife, at the said county of Russell, in the state of Kansas, made, executed, and delivered to one Marc L. Friend their certain principal promissory note, in writing, of that date, whereby, for value received, they promised to pay to the order of said Marc L. Friend, in five years after date thereof, the sum of \$700, with interest at the rate of 6 per cent. per annum until paid, according to 10 interest coupon notes for \$21 each, and annexed to and bearing even date with said principal note. That for the purpose of securing the payment of said principal and interest notes, and the sums of money to become due thereon, the said Alna R. Rhodes and Minnie E. Rhodes, at the said county of Russell, in the state of Kansas, and on the said 23d day of October, 1906, made, executed, and delivered unto the said Marc L. Friend their certain mortgage, in writing, of that date, whereby they, said Alna R. Rhodes and Minnie E. Rhodes, did grant, bargain, sell, and mortgage unto the said Marc L. Friend, his heirs and assigns, the aforesaid property situate in the said city of Lucas, in the county of Russell, in the state of Kansas. That said mortgage was duly filed for record in the office of the register of deeds of said Russell county, Kan., on the 28th day of May, 1907, at 1 o'clock p. m. of said day, and duly recorded in volume 25 of Mortgage Records of said county at page 592. A copy of said mortgage is hereto attached, marked 'Exhibit A,' and made a part of this information. That the said Marc L. Friend is now and always has been the legal holder and owner of said note, mortgage, and coupon notes, and that said mortgage, note, and coupon notes have never been paid, or any part thereof, and that the same are outstanding and in force. That the said defendant, Alna R. Rhodes, is now, and ever since the time of the making of said mortgage, note, and coupon notes has been, the owner of said real estate hereinbefore mentioned and described and every part thereof.

"And I, the undersigned, county attorney, do further give the court to understand and be informed that on the 21st day of May, A. D. 1907, and while said mortgage heretofore mentioned and described, and given previously to said Marc L. Friend as aforesaid, was outstanding and in force, as aforesaid, and unrecorded in the office of the register of deeds of said Russell county, Kan., the said Alna R. Rhodes, then and there being, joined by his said wife, Minnie E. Rhodes, at and within the said county of Russell, in the state

of Kansas, did then and there willfully and unlawfully, and with the intent then and there of him, the said Alna R. Rhodes, the said Marc L. Friend to defraud, make, execute, and acknowledge their other certain mortgage, in writing, of that date, to one Harriet Rhodes, whereby he, said Alna R. Rhodes, joined by his said wife, Minnie E. Rhodes, conveyed, sold, and mortgaged to said Harriet Rhodes, for the purported consideration of \$350, the real estate heretofore mentioned and described and theretofore mortgaged to said Marc L. Friend as aforesaid, to wit: * * * That said mortgage so made and given to said Harriet Rhodes as aforesaid was on the 22d day of May, 1907, at 10 o'clock a. m. and prior to the recording of the mortgage given to said Marc L. Friend as aforesaid, filed for record in the office of the register of deeds of said Russell county, Kan., and recorded in volume 25 of Mortgage Records of said county, at page 591, and which mortgage so made and given to said Harriet Rhodes by said Alna R. Rhodes and Minnie E. Rhodes, and recorded as aforesaid with indorsements thereon, is in words and figures as follows: [Here follows an ordinary real estate mortgage from Alna R. Rhodes and wife to Harriet Rhodes.] On the back of said mortgage appears the following record item: 'State of Kansas, Russell County—ss.: I certify that this instrument was filed for record on the 22d day of May, A. D., 1907, at 10 o'clock a. m., and duly recorded in book 25 of mortgages, at page 591.' That said Alna R. Rhodes, in the said mortgage so made and executed by him and the said Minnie E. Rhodes to the said Harriet Rhodes as aforesaid, and recorded as aforesaid, willfully, purposely, and unlawfully, and with the intent of him the said Alna R. Rhodes, the said Marc L. Friend to defraud, failed to and did not recite or describe, or state in substance therein, the mortgage so made and given to the said Marc L. Friend, as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Kansas."

Exhibit A, attached to the information, is an ordinary real estate mortgage from Alna R. Rhodes and wife to Marc L. Friend covering the same property as the one to Harriet Rhodes. On the back of said mortgage appears the following record item: "State of Kansas, Russell county—ss.: I certify that this instrument was filed for record on the 28th day of May, A. D. 1907, at 1 o'clock p. m., and duly recorded in book 25 of mortgages, at page 592."

A motion to quash was sustained. The journal entry thereof reads: "Now, on this 2d day of August, 1907, at an adjourned session of the regular May, 1907, term of said court, there came on for hearing in said cause the certain motion of defendant made and filed in said cause on July 30, 1907, to quash the information filed in said cause, which mo-

tion, omitting the caption, is in words and figures as follows: 'Comes now the defendant, and moves the court to quash the information filed herein, for the following reasons: (1) That the court has no jurisdiction of the person of the defendant. (2) That the information does not state a cause of action or a crime under the laws of the state of Kansas. (3) That the information does not definitely describe an offense against the laws of the state of Kansas. Wherefore the defendant prays that his motion be sustained, and that the information be quashed, and that he have his costs.' The said plaintiff appearing by M. J. Gernon, county attorney of said county, and L. B. Beardsley, of counsel, the said defendant appearing in person and by his attorney, George W. Holland, and thereupon said motion was argued to the court, and after argument of counsel, and the court being fully advised in the premises, said motion was by the court sustained and the information filed in said cause quashed, upon the ground and for the sole reason that, in the judgment of the court, section 99 of the crimes act, being general section 2002 of the General Statutes of 1901, has no application to and does not cover the offense charged in said information; that is, that a second mortgage is not a 'deed or writing for the conveyance or assurance of lands, tenements or hereditaments' within the meaning of said statute; that this was the sole and only question passed upon by the court, and no other question was considered by the court in passing upon said motion. To which ruling and judgment of the court sustaining said motion and quashing said information the plaintiff, the state of Kansas, at the time duly excepted, and still excepts, and reserves the question for appeal to the supreme court of the state of Kansas."

The statute under which the information was drawn, being section 2002, Gen. St. 1901, reads: "Every person who shall make, execute or deliver any deed or writing for the conveyance or assurance of any lands, tenements or hereditaments, goods or chattels, which he had previously, by deed or writing, sold, conveyed mortgaged or assured or covenanted to convey or assure to any other person, such first deed being outstanding and in force, and shall not in such second deed or writing recite or describe such former deed or writing, or the substance thereof, with intent to defraud, and every person who shall knowingly take or receive such second deed or writing, shall on conviction be adjudged guilty of a misdemeanor."

The only question presented here is whether a real estate mortgage is a "conveyance or assurance of lands" within the meaning of this statute. The word "conveyance" has no fixed technical meaning. In some states, by statute, it is defined to be the transfer of personal property or any interest in real estate. But in states where there is no statutory definition the word retains its common-law meaning, which is the transfer of the title to real es-

tate. 9 Cyc. 860, and notes. In states where a real estate mortgage conveys the legal title of the land to the mortgagee, mortgages are held to be conveyances. 7 Am. and Eng. Ency. of Law (2d Ed.) 438, and notes. Where not controlled by statute, the weight of authority seems to be that conveyance means the transfer of the title to real estate. See the two authorities cited above, where the subject is fully discussed, and cases cited in the notes. It is a familiar rule of interpretation that criminal and penal statutes will be strictly construed in favor of the defendant. 26 Am. & Eng. Ency. of Law (2d Ed.) 658; U. S. v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37. The act made criminal by the statute under which this information was drawn is the "conveyance or assurance" of property which had been previously "sold, conveyed, mortgaged, or assured or covenanted to be conveyed or assured." It will be seen that the language here used to describe the condition of property sought to be protected is much broader and comprehensive than the language used to describe the acts which the grantor is prohibited from doing toward such property. This indicates that the word "conveyance" as first used was not intended to be synonymous with, or to include, the word "mortgage," or both would not have been used. It seems, therefore, that the interdicted act was intended to be something more than making a mortgage. This idea is borne out by the fact that real estate mortgages have not been regarded in this state as instruments of conveyance. A real estate mortgage does not transfer any part of the land to the grantee. Under our law, such a mortgage is a mere security—an incident to a debt to secure which it is given. *Kelso v. Norton*, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308; *Stark v. Morgan*, 73 Kan. 453, 85 Pac. 567, 6 L. R. A. (N. S.) 934.

It is urged that, even in this state, a mortgage at least conveys a lien. It would be more nearly accurate, we think, to say that it creates a lien upon the land in favor of the grantee, and thereby constitutes an incumbrance upon it, rather than a conveyance. The word "assurance" comes to us from very ancient times and refers to the instrument itself, rather than to what it accomplishes. It is defined to be "any instrument which confirms the title to real estate." 1 *Bouvier's Law Dictionary*, 186. It was anciently used to evidence and assure title to the grantor in a transfer of real estate previously made. 1 *Words and Phrases*, 591. We conclude that an ordinary real estate mortgage is not included in the words "conveyance or assurance," as used in section 2092, Gen. St. 1901, and therefore concur in the decision of the district court.

This case was presented here by counsel for the state only. The defendant did not appear. That side of the case, however, has been very fully and ably discussed in a carefully written brief prepared by Messrs. E. W. Grant and Julius Cohn, students in the law

department of the State University, who did so as friends of the court. We acknowledge our obligations to them for the assistance thus given.

The judgment of the district court is affirmed.

(76 Kan. 893)

DARLING v. ATCHISON, T. & S. F. RY. CO.
(Supreme Court of Kansas. Dec. 7, 1907.)

1. TRIAL—DIRECTING VERDICT.

When, upon the trial of an action in a district court, the plaintiff has introduced evidence tending to establish any cause of action set forth in his petition, it is error for the court to instruct a verdict for the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 318-333.]

2. APPEAL—CASE-MADE—TIME OF SERVICE.

In any such action upon the return of either a verdict, a report of a referee or a decision of the court which determines the issues of fact either party, considering himself aggrieved thereby, may file his motion for a new trial, and, until 10 days after such motion is decided, the jurisdiction of the court to extend the time for making and serving a case-made for appeal to the Supreme Court continues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2501-2506.]

3. CARRIERS—SHIPMENT OF LIVE STOCK—ACTION FOR DAMAGES.

The evidence in this case is held to be sufficient to entitle the plaintiff to a decision thereon by the jury, and that the instruction of the court directing a verdict for the defendant is erroneous.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by W. A. Darling against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

I. P. Campbell, J. G. Campbell, and Ray Campbell, for plaintiff in error. Houston & Brooks and W. R. Smith, for defendant in error.

SMITH, J. At the outset of this case, the defendant in error denies the right of the plaintiff in error to be heard, and moves the dismissal of the action in this court.

The case presented here for review, from the standpoint of the plaintiff in error, is, in substance, this: In his action against the defendant below issues of fact had been framed, and a jury had been impaneled to try them. Certain material and competent evidence had been introduced which, if true, established some liability against the defendant. Certain other material and competent evidence was offered by the plaintiff to further establish his claim, but it was erroneously excluded by the court. Thereupon the plaintiff rested his case, and, on the motion of the defendant, the court instructed the jury to return a verdict in favor of the defendant. Thus a trial of issues of fact was at least begun, and the facts were erroneously determined adversely to the plain-

tiff, and not by the jury, to whose verdict thereon he was entitled. He asked for a re-examination of these facts in the same court by filing a motion for a new trial therein. The defendant, on the other hand, says that the order of a court directing a verdict for the defendant was equivalent to a demurrer to the plaintiff's evidence and involved only a question of law, to wit, conceding the evidence to be true and allowing all inferences favorable to plaintiff, reasonably to be drawn therefrom, it establishes a cause of action in favor of the plaintiff. This contention seems to be supported by *Sullivan v. Phenix Ins. Co.*, 34 Kan. 170, 8 Pac. 112, to the extent, at least, of holding the direction of a verdict equivalent to a demurrer to the evidence. From this position the defendant advances another step, and says a motion to direct a verdict is equivalent to a motion for judgment upon the pleadings and opening statement of counsel, and, as held in *Wagner v. Railway Co.*, 73 Kan. 283, 85 Pac. 299, this raises a question of law only, and no motion for a new trial is necessary to enable the aggrieved party to bring the decision to this court for review. Wherefore, the defendant says in this case the motion for a new trial was unnecessary, and the fact that such a motion was filed does not extend the pendency of the action or the time of making and serving a case-made, and, as the order purporting to extend the time was made more than 10 days after the verdict was rendered, the court had lost jurisdiction to make it; hence, the action here should be dismissed. The argument is ingenious, but is unsound.

As defined by Code Civ. Proc. § 265 (Gen. St. 1905, § 5160), a trial is a judicial examination of the issues, whether of law or fact, in an action; and a new trial (Code Civ. Proc. § 306 [Gen. St. 1905, § 5202]) is a re-examination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision of a court. The same section provides that the former verdict, report, or decision shall be vacated, and a new trial granted on the application of the party aggrieved (which section 309 [section 5205] provides must be by motion on written grounds) for certain causes specified affecting materially the substantial rights of such party. Some of the causes specified are any order of the court by which the party is prevented from having a fair trial; that the decision is not sustained by sufficient evidence, or is contrary to law; error of law occurring at the trial and excepted to at the time. Code Civ. Proc. § 306 (Gen. St. 1905, § 5202). Strictly construed, then, as defined by the Code, a trial involves the judicial examination of all the issues of law and fact in an action, while a new trial involves only the re-examination of an issue of fact. That this strict construction is not applicable to new trials of ordinary actions in which the law applicable varies to the varying facts

pleaded or proven is apparent, when we consider the grounds for which new trials "shall be granted" as prescribed, some of which involve only a question of law. These must be re-examined both on the hearing of the motion for the new trial and upon the new trial, if granted. Issues of law are not ordinarily framed in an action by the petition and answer or by the answer and reply in the sense that a proposition of law is asserted in one pleading and denied in another; but such issues may arise in many ways at almost every stage of the action, and are sometimes determinative of the action and sometimes not; sometimes they arise in the course of the trial, and sometimes before the trial is commenced. It goes without saying that there can be no new trial until there has been a trial; and, by a fair construction of the Code, it must be such a trial as results or should result in a verdict, a report of a referee, or a decision by the court which involves and determines the facts in issue. Otherwise there could be no new trial "of the issue of fact." It follows, therefore, that whenever a trial has been had upon issues of fact, which trial results in a verdict, report of a referee, or a decision which determines such facts, either party who feels himself aggrieved may file his motion for a new trial on the grounds and within the time prescribed, and, until such motion is disposed of, the action is still pending, and the statutory time for preparing a case-made for an appeal does not begin to run. This view involves no conflict with or modification of *Wagner v. Railway Co.*, 73 Kan. 283, 85 Pac. 299. In that case judgment was rendered upon the pleadings and admitted facts. There had been no trial of any issue of fact; and hence there could be no new trial. It is also in accord with *Sullivan v. Phenix Ins. Co.*, 34 Kan. 170, 8 Pac. 112. In that case the court directed a verdict for the defendant upon its conclusion that the plaintiff had produced no evidence tending to establish his cause of action. This court viewed the evidence differently and granted a new trial.

It is not suggested by the defendant in this case how the verdict in this case could have been disposed of other than by a motion to set it aside and to grant a new trial. It is said, however, that in passing upon the request for an instructed verdict the court will be presumed to have accepted all of the plaintiff's evidence as true, and to have accorded him every favorable inference reasonably to be drawn therefrom, and then it decided that the evidence so considered did not tend to prove a cause of action in his favor. We think, however, that the plaintiff was entitled to a verdict of the jury, under proper instructions, upon his right to recover of the defendant any damages, and, if so, the amount thereof, under his evidence tending to show that he ordered cars of the defendant's agent for the purpose of shipping cattle and a reasonable time before the time

of shipment, and that he had his cattle at the station at the proposed time and the defendant failed to provide the cars as ordered, especially as this failure was entirely unexplained.

One contention of the plaintiff is that he offered competent evidence to prove material facts on the trial, and that the court by its order excluded the same. Whether this be really true or not, and of it we shall speak later, he had a right to represent the question, as he did, in a motion for a new trial, and, when the court again decided adversely to him thereon, he had the right to appeal and to have the decision of this court thereon. It appears by the record that no judgment was in fact rendered on the verdict, but the action remained pending upon the motion until that was decided. The court had jurisdiction at any time within 10 days thereafter to make and serve a case-made for appeal. The motion to dismiss is overruled.

We proceed to the consideration of the errors assigned. We are of the opinion that when a train dispatcher's office is supplied by a telephone connected with a system of telephone wires and offices, and a witness goes to another telephone office so connected and calls for the train dispatcher, and the call is responded to, the witness should be allowed to testify who the person responding said he was, even though the witness has no acquaintance with the dispatcher, and does not recognize the voice. Also, if the person responding said he was the train dispatcher, the witness may testify to the conversation as if had face to face. The rule seems to be the same as if the witness unacquainted with the officer had gone into the dispatcher's office, inquired for him, and a man should respond, "I am the dispatcher. What can I do for you?" The witness would be allowed to testify to the conversation had so far as relevant to the issues being tried. We are, however, unable to say from the record that this error was prejudicial in view of facts subsequently developed in the evidence. On the general proposition of telephonic communications, see *Oskamp v. Gadsden*, 35 Neb. 7, 52 N. W. 718, 17 L. R. A. 440, 37 Am. St. Rep. 428, and note; 27 Am. & Eng. Encyc. Law, 1091.

It is urged, and we think correctly, that the court erred in excluding portions of the depositions of witnesses Norton and Reed. The evidence excluded was in verification of exhibits from the books of the Kansas City Stockyards Company which received the cattle and of exhibits from the books of the commission company which sold them. The witnesses, respectively, had charge of the office in which the books were kept concerning which he was interrogated, but in neither case did he hold the pen that made the entries, and in neither case could he testify of his own knowledge that the entries were correct, but their evidence did show that the

entries were made in the usual course of business, and that the clerks who made the entries derived their knowledge of the facts entered from memorandum slips and oral reports made by the weighers and yardmen; also, that the books and the witnesses who made the memoranda and reports were out of the state and beyond the jurisdiction of the court. It is a matter of common knowledge, and hence one of which the courts should take judicial notice, that in the great and multifarious business of the stockyards company the clerk or bookkeeper who makes the entries of the transactions in the books at the offices knows personally nothing of the correctness of the entries, but records only what he learns from others by memorandum slips or oral reports from others who, in turn, may have derived their information from still others; also, that it is difficult and often impossible to secure the evidence of all these persons. It is also apparent that there can be no motive for falsifying such entries, and the entire business transacted by and through this great agency, running into millions annually, is based upon the fairness and accuracy of just such entries in the books of the stockyards company and the books of the numerous commission companies. The courts should regard as some evidence of the facts they purport to record such entries made from day to day in the regular course of business, without inquiring of the clerk in whose handwriting they appear what he knows of the correctness thereof when it is evident he knows nothing; and without inquiring of the yardman who reported to the clerk, or the weigher who reported to the yardman, what he remembers of the transaction, when it would evidently be an impeachment of his veracity if he testified he had any particular remembrance of one transaction among the hundreds. Old rules of evidence, still generally good rules, must so far yield to new conditions as not to greatly impede the purpose for which they were formulated, viz., the ascertainment of the truth in relation to disputed facts in courts of justice.

It is well said in that excellent treatise, 2 *Wigmore on Evidence*, p. 1896: "The conclusion is, then, that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so. Why should not this conclusion be accepted by the courts? Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation, investment, and

general confidence in every business enterprise; nor does the practical impossibility of obtaining constantly and permanently the verification of every employé affect the trust that is given to such books. It would seem that expedients which the entire commercial world recognizes as safe could be sanctioned, and not discredited, by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the courtroom. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who as attorneys have already employed and relied upon the same methods. In short, courts must here cease to be pedantic and endeavor to be practical." See, also, *Wright v. Chicago, B. & Q. Ry. Co.*, 118 Mo. App. 392, 94 S. W. 555; *A., T. & S. F. Ry., Co. v. Williams* (Tex. Civ. App.) 86 S. W. 38.

It is urged by the defendant that the errors, if any, in the introduction of evidence, were not prejudicial, and should be disregarded, for the reason that it alleged in its answer that the plaintiff and defendant "entered into" a written contract of shipment, which it says is equivalent to alleging that the written contract was executed by the parties, and that the plaintiff did not in his reply deny the execution thereof under oath; that the said contract contained the provision "that as a condition precedent to his [the plaintiff's] right to recover any damages for any loss or injury to his stock during the transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the company's road, or previous to loading thereof for shipment, the shipper or his agent in charge of the stock will give notice in writing of his claim therefor to some officer of the company * * * before such stock shall have been removed from the place of destination above mentioned," etc.; that it was not alleged by plaintiff that such notice was given, nor was any excuse given for the failure to give it. Therefore the plaintiff was not entitled to recover in any event, and no error in the trial could be prejudicial to him. Assuming, but not deciding, that the contention of the defendant in regard to its pleading the written contract and the failure of the plaintiff to verify his denial of the execution thereof is correct, we do not think the conclusion follows. Of the claims for damages one is for shrinkage in the weight of the cattle in consequence of the failure of defendant to furnish cars at the time they were ordered which necessitated the holding of the cattle at the place of shipment. Another claim is for damage to the cattle after the arrival at the destination on account of the carrier's negligent delay, resulting in loss

of market and shrinkage. On the authority of *M., K. & T. Ry. Co. v. Frogley*, 75 Kan. 440, 89 Pac. 903, and *M., K. & T. Ry. Co. v. Fry*, 74 Kan. 546, 87 Pac. 745, it must be said that the contract, if it is to be considered, did not preclude a recovery of such damages without the notice. The defendant had full knowledge of the holding of the cattle before they were loaded, and had full opportunity to inspect them, which is the object of the notice. As to the loss of market and other damages claimed after arrival at the destination, it was impossible to give the notice as required by the contract; hence, this claim is not covered by the stipulation.

It appears, therefore, that the instruction to return a verdict for the defendant was erroneous, and the verdict is set aside, and a new trial awarded.

(77 Kan. 24)

LYNDS v. VAN VALKENBURGH et al.

(Supreme Court of Kansas. Jan. 11, 1908.)

1. BILLS AND NOTES — ACTIONS — DEFENSES — FAILURE OF CONSIDERATION.

The consideration for certain promissory notes secured by a mortgage on land in Kansas was that the payee should assume the payment of certain notes secured by real estate mortgages on land in Nebraska which was conveyed to the payee. The payee sold and indorsed the Kansas notes to a third person who brought suit upon them. The maker pleaded a failure of consideration in that the payee had not paid the Nebraska notes and discharged the Nebraska mortgages. The court found that the indorsee was not an innocent purchaser and knew at the time he took the Kansas notes the maker claimed a defense to them on account of the failure of consideration described. It made no finding that at the time of the indorsement the information of the indorsee extended to any defense of failure of consideration upon any other ground. *Held*, the contract, the pleading, and the finding all forbid that judgment in favor of the indorsee should be denied for a failure of consideration in respect to any matter other than the one stated.

2. SAME — PRESUMPTIONS AND BURDEN OF PROOF — FAILURE OF CONSIDERATION.

In the suit referred to the plaintiff was not required to prove that he or the payee of the Kansas notes paid any of the Nebraska notes or discharged any of the Nebraska mortgages. The burden of proving the failure of consideration pleaded rested upon the defendant.

3. SAME.

The court found that the Nebraska notes had been paid but that the evidence did not disclose by whom the payment had been made. *Held*, the plaintiff was entitled to judgment on the findings. The word "paid" means *prima facie* that the obligations have been satisfied and the demands extinguished, and, if the obligors on the Nebraska paper still rest under liability upon it, the defendant should have established the fact.

4. SAME.

The court concluded as a matter of law that the plaintiff would be entitled to judgment provided he produced in court and delivered to the defendant the Nebraska notes paid and the Nebraska mortgages canceled. *Held*, error. The contract of assumption did not require a delivery of the Nebraska paper paid and canceled to the defendant, and whoever paid the notes and satisfied the mortgages was entitled to the possession of them.

5. SAME.

Following the return of the finding of fact and conclusion of law referred to, the plaintiff undertook to account for the Nebraska notes and mortgages. He produced and tendered one note canceled and the mortgage securing it released of record. One note and the mortgage securing it had been destroyed. Another note and the mortgage securing it had been delivered to a grantee of the land affected, who desired to retain it. The remaining note and the mortgage securing it had been canceled in a foreclosure suit based upon them, and had been filed with the papers in the case by the clerk of the court, but the note was missing. All the notes not produced had been paid under circumstances indicating an extinguishment of liability upon them, and the mortgages securing them had been released. There was no evidence of circumstances indicating that any right of equitable assignment or of subrogation existed or might arise. Held, the plaintiff was entitled to judgment.

(Syllabus by the Court.)

Error from District Court, Atchison County; B. F. Hudson, Judge.

Action by John H. Lynds against Tremain R. Van Valkenburgh and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

The plaintiff sued to recover judgment upon three promissory notes of \$1,000 each and to foreclose a mortgage securing them. The notes were executed by the defendant Tremain R. Van Valkenburgh to J. K. Carolus, and were indorsed without recourse to the plaintiff. The mortgage covered certain real estate in White Cloud, Kan., upon which were situated a mill and a grain elevator. Carolus had been the record owner of the mill property and deeded it free of incumbrance to Van Valkenburgh, receiving in consideration therefor conveyances to himself of several tracts of real estate in Nebraska and a deed to his sister, Margaret Over (who apparently had an interest in the mill), of a tract described as being in Taney county, Mo. At the time of the trade the tracts conveyed to the plaintiff were separately owned by Van Valkenburgh and others associated with him in the purchase of the mill, who afterward incorporated as the White Cloud Milling Company, the various individuals taking stock in proportion to the value of the land each one had contributed. Van Valkenburgh then deeded the mill property to the corporation. Four tracts of the Nebraska land were covered by mortgages. In the preliminary contract it was provided that, if it were possible, the Van Valkenburgh party would, before the exchange of deeds, pay off these mortgages so that the trade would stand clear mill for clear land; but, if it were not possible for them to do so, they would pay the incumbrances down to \$3,000, Carolus would assume \$3,000 of the mortgage indebtedness, and Van Valkenburgh would give Carolus a mortgage back on the mill property for that amount. January 1, 1894, was fixed as the date for closing the trade, but by agreement the time was extended to January 15th following. The extension

agreement also provided that, if the title to the tract of land in Taney county, Mo., which was afterward deeded to Margaret Over, were not satisfactory to Carolus, he should be given Nebraska land instead at any time within six months after January 15th. On January 15th, or soon after, deeds were exchanged, and, nothing having been paid on the Nebraska mortgages, the notes and the mortgages sued upon were given to Carolus. The deeds to Carolus of the Nebraska lands did not provide that he should assume or pay the mortgages or any part of the mortgages upon them.

The contract originally provided that two tracts of land in Taney county, Mo., should be conveyed to Carolus. For one of them Nebraska land was by agreement substituted upon which there was a mortgage which Carolus afterward paid. The title to the Margaret Over tract proving unsatisfactory, a Nebraska tree claim was substituted for it, valued at \$3,000. The Missouri land was valued at \$2,000. The agreement was that Van Valkenburgh should convey the tree claim to Carolus on the consideration that the Missouri land should be quitclaimed by Margaret Over to Van Valkenburgh, and that Van Valkenburgh should be credited \$1,000 on the notes secured by mortgage on the mill. It was understood by all parties that the tree claim was owned by Sarah E. Johnson, a sister of Van Valkenburgh, and that she had not proved up so as to be entitled to a patent. After final proof was made Van Valkenburgh tendered to Carolus a deed of the tree claim, executed by Sarah E. Johnson and her husband, and demanded the quitclaim deed from Margaret Over and credit of \$1,000 on his notes. The tender was refused, and compliance with the demand was refused. Some time previous to the tender Carolus had requested that the deed when executed should run to his wife. Sarah E. Johnson and her husband executed a new deed to Mrs. Carolus, which Van Valkenburgh tendered, coupled with the same demands as before and with the same result as before.

The plaintiff's suit was brought after the last note had matured. Various parties were made defendants, and numerous issues were framed. For present purposes, however, it is only necessary to refer to some of them. The answer of Tremain R. Van Valkenburgh admitted the execution and delivery of the notes and mortgage, but denied liability upon them. He pleaded the facts relating to the Margaret Over and Sarah E. Johnson lands, made a tender of the Johnson deeds to Carolus and Mrs. Carolus, demanded a quitclaim deed from Margaret Over, and asserted that the first note was paid. He then pleaded that the notes sued on were given upon the consideration that Carolus should assume and pay the four mortgages upon the Nebraska land, that such mortgages had not been paid whereby the consideration for the notes

had to that extent failed, and that the plaintiff purchased the notes with knowledge of the facts. Lastly he pleaded an offset arising upon a running account and some independent transactions. The failure of Carolus to procure the quitclaim deed from Margaret Over was not counted upon as affecting in any way the consideration of the second and third notes. The plaintiff replied, and the case was sent for trial to a referee.

At the trial Van Valkenburgh tendered the two Sarah E. Johnson deeds to Carolus unconditionally, offering to him his choice of them, and deposited them with the referee. The tender was refused at the time, but after the trial Carolus accepted one of the deeds. The referee found in detail the facts of which the foregoing furnishes little more than an outline. He further found that the plaintiff had purchased the first note after it became due, and that he held it subject to all defenses; that the plaintiff knew the second and third notes were given in a transaction which resulted in the conveyance of the mill property to Van Valkenburgh, but that the plaintiff did not know Van Valkenburgh or his associates claimed any defense to the notes or mortgages on account of the failure of Carolus to pay off the mortgages on the Nebraska land; and that the evidence failed to show whether the Nebraska notes were then due. An account between the parties was stated. From the facts found the referee concluded Van Valkenburgh was entitled to a credit of \$1,000 on the first note, which paid it, except \$35 accrued interest; that the plaintiff was entitled to recover the balance due upon the first note; that the plaintiff was entitled to the rights of an innocent purchaser of the second and third notes, and should recover both the principal and interest of them; and that after balancing the open accounts between the parties Van Valkenburgh was entitled to a credit in reduction of the plaintiff's claim of a stated sum. The referee's report was approved, and judgment was entered accordingly and for foreclosure of the mortgage. On the trial the referee held a witness to be incompetent to testify whose testimony if admitted would have tended to prove notice to the plaintiff of the claimed defense of failure of consideration. Proceedings in error were instituted in this court by the defendants to review the judgment, and for the single reason that the referee erred in rejecting the testimony referred to the judgment was reversed, and the cause was remanded for further proceedings. 63 Kan. 887, 66 Pac. 994.

When the controversy was resumed in the district court, a motion on behalf of the defendants attacking the referee's findings of fact and conclusions of law was overruled except that the finding relating to the plaintiff's want of notice and the conclusion of law based thereon were set aside. Van Valkenburgh amended his answer in a particular

not now material. The plaintiff amended his reply in many respects, and the issues left undetermined by the former proceeding and the new issues raised by the amended reply were then tried by the court. At the conclusion of the trial the court made additional findings of fact and conclusions of law, which read in part as follows:

"At the time of the purchase of said notes and said mortgage by the plaintiff he knew that they were given in the transaction which resulted in the conveyance of the mill and elevator property to Tremain R. Van Valkenburgh, and also knew that Tremain R. Van Valkenburgh and his associates claimed defenses to the notes and mortgages on account of the failure of said J. K. Carolus to pay the several notes secured by the mortgages on the Holt county, Neb., lands. At the time he purchased them the plaintiff knew that the only consideration for the notes sued on herein was the promise of J. K. Carolus to pay the certain notes and to have released of record the mortgages securing the same, which had theretofore been made and executed by said Tremain R. Van Valkenburgh and others on said lands in Holt county, Neb., and which are all due. While it appears from the evidence in this case that said mortgage indebtedness has been paid since the trial of this case before the referee, it does not appear who paid such indebtedness, or in whose possession the notes are now."

"The plaintiff is not entitled to the rights of an innocent purchaser of the notes and mortgage sued on herein, and said defendants T. R. Van Valkenburgh and Henrietta Van Valkenburgh and the White Cloud Milling & Elevator Company are entitled to set up and maintain any defense to said notes and mortgage in the hands of the plaintiff which they could set up and maintain against J. K. Carolus, the original payee of said notes and mortgage. The plaintiff will be entitled to judgment upon the notes sued on herein, but without costs, in whatever sum he may be equitably entitled to, the amount to be determined hereafter; said judgment to be a first lien on all the property mentioned and described in his said mortgage, if he shall, within a reasonable time from this date, produce, or cause to be produced, the several notes which the said J. K. Carolus assumed and agreed to pay, and which were secured by mortgages on said lands in Holt county, Neb., and deliver said notes, paid and canceled, and said mortgages, properly satisfied of record in said Holt county, Neb., to said T. R. Van Valkenburgh, and also shall deliver to said T. R. Van Valkenburgh a properly executed quitclaim deed from said Margaret Over, or any one claiming under her, to section six (6), town twenty-one (21), range nineteen (19), Taney county, Mo., as described in finding of fact No. 4 of the report of the referee filed herein, otherwise judgment will be entered in favor of said defendants

T. R. Van Valkenburgh and Henrietta Van Valkenburgh. Final judgment herein will be reserved until the further order of this court."

The cause was continued from time to time to allow the plaintiff opportunity to meet the conditions upon which judgment would be rendered in his favor. Finally, being unable to do this, he so announced to the court, but asked and was granted leave to make a showing. The plaintiff thereupon produced and tendered a coupon note of Levi Van Valkenburgh for \$550 payable to George S. Lewis, with indorsements of interest and principal paid, the mortgage securing the note on one of the tracts of Nebraska land and an acknowledged release of the mortgage by the mortgagee. The note and mortgage correspond in all respects to the description in the third amended answer of one of the incumbrances which Carolus assumed. The record discloses no objection made to the identity of the paper or to the sufficiency of the release.

The remainder of the showing was by deposition and accounted for the other notes and mortgages as follows: One tract of land was sold by the plaintiff to W. F. Conrad about the year 1901. The sum of \$500 due upon a mortgage given by Van Valkenburgh was then unpaid. Conrad paid the balance due, and received the note and mortgage canceled and marked paid. Afterward he sold the land, and, the note and mortgage not being called for, he burned them with other papers. A release of the mortgage was obtained at the time the note was paid and was recorded. A certified copy of the recorded release identified by the recorder of the county is attached to the deposition. M. F. Harrington bought the mortgage upon another tract known as the "Swain Land," and the note secured and obtained possession of them. He then purchased the land itself, and secured a release of the mortgage from a receiver who had been appointed for the mortgagee. He then sold the land to William Hart clear of incumbrances, and delivered the note and mortgage to Hart as fully satisfied and paid. The release from the mortgagee was procured to evidence the fact that the mortgage was canceled and satisfied. Hart has the note and mortgage in his possession, and under the advice of his attorney desires to keep them. A certified copy of the recorded release is attached to the deposition. An action was brought to foreclose the mortgage given by Van Valkenburgh to Celim H. Seymore upon the remaining tract. The land was owned at the time of suit by S. H. Greenwalt. A decree of foreclosure was entered, and then a deed was given by Greenwalt to Seymore in satisfaction of the plaintiff's claim. The attorney for the plaintiff had possession of the note and mortgage during the proceedings, and surrendered them to the clerk of the court for cancellation. The clerk placed his cancellation stamp upon them, and

they remained in the files for some time. The canceled note is now missing from the clerk's office.

In addition to the foregoing the depositions show that after the note and mortgage last referred to were canceled by the clerk of the court Levi Van Valkenburgh, one of the incorporators of the White Cloud Milling Company, the grantor of one of the tracts of the Nebraska land to Carolus and the maker of the Lewis mortgage which Carolus assumed, had a conversation with the attorney for the plaintiff in the foreclosure suit, in which he inquired if it would be possible for any one to obtain the canceled note and mortgage and remove them from the official files. He further said he was interested in an action pending in Kansas in which John H. Lynds was plaintiff and Tremain R. Van Valkenburgh and others were defendants; that it would be absolutely necessary for Lynds to produce the original papers in court to obtain relief; and that, if Lynds were unable to produce the original note, they (the Van Valkenburghs) would be \$800 ahead in the Kansas suit. William Hart testified that Levi Van Valkenburgh called upon him and told him that, if Carolus obtained the note and mortgage pertaining to his land, they would take the land away from him, and make him pay back the amount he had paid for it. W. F. Conrad testified that Levi Van Valkenburgh interviewed him, and stated to him that Lynds needed the note which he had burned and probably would write to him about it.

None of the testimony given by deposition was contradicted or impeached, and no counter showing was made to impair its force. The defendants merely introduced the record of the proceedings in an action wherein Margaret Over obtained a judgment against Van Valkenburgh on account of a breach of the warranty contained in the deed to her of the Taney county, Mo., land.

The court made no additional findings of fact, but drew a conclusion of law adverse to the plaintiff, and rendered judgment in favor of the defendants. The plaintiff prosecutes error.

W. W. & W. F. Guthrie and S. M. Brewster, for plaintiff in error. W. D. Webb, for defendants in error.

BURCH, J. (after stating the facts as above). Many assignments of error are made and argued. Much testimony is quoted by both parties in support of their respective positions upon which neither the referee nor the court made findings. This court can consider the written instruments executed by the parties, other written documents, the pleadings, admissions, and stipulations, and findings of fact. It can also consider the evidence upon any branch of the case which is all in depositions, as that procured by the plaintiff to explain his inability to produce the notes and mortgages which Carolus had

assumed. But it cannot found its judgment upon oral testimony not reduced to findings of fact by the trial court. If the parties desired findings in respect to the matters covered by such testimony, a request for further findings should have been made. *Shuler v. Lashhorn*, 67 Kan. 694, 74 Pac. 284. Therefore many matters debated in the briefs are not open to consideration. Of those properly reviewable only two need be discussed to dispose of the controversy. The obligation placed upon the plaintiff to procure a quitclaim deed from Margaret Over before he could have judgment on the second and third notes was wholly unwarranted. The contracts between the parties did not include the subject of the substitution of the tree claim for the Margaret Over tract within the consideration of any of the notes. The answer did not plead the failure of Carolus to deliver a quitclaim deed from Margaret Over as a failure of consideration for the second and third notes, but, on the contrary, pleaded that circumstance in connection with the defense to the first note and then pleaded the omission to pay the Nebraska mortgages as the sole failure of the consideration for the other two notes. There is no finding that any feature of the tree claim transaction whereby Carolus became bound to procure a quitclaim deed from Margaret Over affected any portion of the consideration of the notes; but, on the other hand, the finding quoted at length above is to the effect that the only consideration for the mill property mortgage was the promise of Carolus to pay the Nebraska notes and have the Nebraska mortgages released of record. The same finding is explicit upon the proposition that the plaintiff's knowledge, when he bought the notes, extended to claimed defenses on account of the failure of Carolus to pay the several notes secured by the Nebraska mortgages. There being no finding that the plaintiff, when he bought the notes, knew of any defense on account of the Over quitclaim deed matter, this court can imply none, and upon the record as it stands the plaintiff was an innocent purchaser so far as that defense is concerned. Besides all this, in order to secure a credit on the first note for \$1,000, the difference in price between the tree claim and the Margaret Over tract, Van Valkenburgh waived his right to a quitclaim deed from Margaret Over, and tendered the Johnson deeds unconditionally. The credit was allowed, Carolus has accepted one of the Johnson deeds, and that transaction was closed before the district court made its additional findings of fact. The judgment in favor of Margaret Over against Van Valkenburgh had no bearing upon any issue in the case determinable and undetermined at the time it was offered in evidence, and the plaintiff is entitled to judgment without procuring a quitclaim deed from Margaret Over.

The requirement that the plaintiff procure and deliver to Tremain R. Van Valkenburgh

the Nebraska notes paid and canceled and the Nebraska mortgages satisfied of record was unwarranted. It may be premised that Carolus assumed the payment of the Nebraska mortgage indebtedness, although the writings into which the preliminary contract merged did not so provide, and it may be taken for granted that a contract to assume a mortgage indebtedness is a contract to pay it. But when Carolus agreed to pay the Nebraska notes and satisfy the Nebraska mortgages, he became the principal obligor so far as the individuals of the Van Valkenburgh party were concerned, and upon payment of the notes was himself entitled to possession of the evidences of indebtedness. Any payment or payment through any means which would relieve the parties liable upon the notes of their obligations would satisfy the promise which Carolus gave, and, if some grantee of one of the tracts of land should pay the mortgage indebtedness against it, he would be entitled to possession of the paper. *Stiger et al. v. Bent*, 111 Ill. 328. In any event the contract of Carolus was to pay, not to produce evidence of payment, and the plaintiff could not be defeated because he did not bring into court paper which Carolus was not bound to turn over. The burden was upon the defendants to prove failure of consideration. Proof by them that they rested under an existing liability upon the Nebraska paper was indispensable to the defense. The plaintiff was not obliged to prove that anybody had paid the Nebraska notes and mortgages. When the court found that those notes and mortgages had been paid, but that there was no evidence to show who paid them, the defendants had not sustained the burden they assumed by their pleadings. They had not shown they were still liable upon the paper, and the plaintiff was entitled to judgment.

It only remains to inquire if the plaintiff aided the defendant's proof in his effort to show what had become of the paid notes and satisfied mortgages. Clearly he did not. The Lewis note and mortgage and a release of that mortgage were produced and tendered in court. In every other instance the nature of the transaction and the conduct of the parties were such as to indicate a positive purpose completely to extinguish both the debt and the lien. Any intention on the part of the holders to assign, and of the persons paying to take title to the securities, is clearly negated. After clearing his land, and then selling it, Conrad burned up the canceled notes and mortgages. Harrington is the only person who could claim any right against the defendants because of the payment he made, but he passed the instruments on to his grantee as mere muniments of title. The Seymore note and mortgage were surrendered, canceled, and filed for the very purpose of making a public record of the fact that the last spark of vitality in them had been quenched, and to prevent

them from being used again as live obligations.

If one person, not a mere interloper, but having an interest in the matter, pay the note and satisfy the mortgage of another, the question whether he becomes an assignee of the note and mortgage is one of fact and intention of the parties. *Binford v. Adams*, 104 Ind. 41, 3 N. E. 753, and authorities cited in the opinion. If, however, overriding equities so require, one who satisfies an incumbrance upon his land may be subrogated to the rights of the lienholder, or may be entitled to an equitable assignment of such rights. Subrogation and equitable assignment are acts of the law as distinguished from assignment by acts of parties. "We must be careful to distinguish between an assignment of the mortgage debt and a mere right of subrogation to the lien of the mortgage creditor. Assignment is the act of the parties, and depends generally upon intention. Where the nature of the transaction is such as imports a payment of the debt and a consequent discharge of the mortgage, there can, of course, be no assignment, for the lien of the mortgage is extinguished by the payment. A mortgage creditor cannot be compelled to assign the debt and mortgage upon receiving payment. All that he can be required to do is to give an acquittance and release. The exception to this rule, if it can be so termed, is found in those cases where the party making the payment occupies the position of surety to the debt, or is in some way personally bound for its payment. Such a person may, in equity, require an assignment or transfer, not only of the mortgage itself, but of all the securities held by the creditor, for his protection and indemnity, and, although no such assignment or transfer is actually made, a court of equity will treat it as having been done. But if the party making the payment does not occupy the position of surety for the debt, as a general rule he cannot claim to be entitled as assignee unless by agreement with the creditor. Subrogation is, however, a very different thing from an assignment. It is the act of the law, and the creature of a court of equity, depending not upon contract, but upon the principles of equity and justice. It presupposes an actual payment and satisfaction of the debt secured by the mortgage. But, although the debt is paid and satisfied, a court of equity will keep alive the lien for the benefit of the party who made the payment, provided he as security for the debt 'has such an interest in the land' as entitles him to the benefit of the security given for its payment." *Gatewood v. Gatewood et al.*, 75 Va. 407, 410. In this case all the evidence is opposed to the idea of an assignment, or that liability on the part of the persons primarily bound was preserved. It imports payment of the debt and extinguishment of the lien, and the depositions are barren of any evidence that any occa-

sion exists or may arise for the application of the doctrine of subrogation, or of equitable assignment, in favor of the persons who paid the Nebraska mortgages. In the case of *Crippen v. Chappell*, 35 Kan. 493, 499, 11 Pac. 453, 57 Am. Rep. 187, it is said: "It always requires something more than the mere payment of the debt in order to entitle the person paying the same to be substituted in the place of the original creditor. It requires an assignment, legal or equitable, from the original creditor, or an agreement or understanding on the part of the party liable to pay the debt, that the person furnishing the money to pay the same shall in effect become the creditor, or the person furnishing the money must furnish the same either because he is liable as surety or liable in some other secondary character, or for the purpose of saving or protecting some right or interest, or supposed right or interest, of his own." Here we have the fact of payment by landowners, circumstances indicating that no substituted equitable rights exist, and no circumstances indicating that subrogation or equitable assignment may ever need to be invoked. The court cannot speculate upon the subject. It cannot conjure up imaginary states of fact to aid an unproved defense of failure of consideration.

One or two matters urged in the defendant's brief may be noticed. It is said that the referee found there had been a failure of consideration for the notes in suit, and that his finding and conclusion upon the subject were not disturbed. There is no finding by the referee that Carolus agreed to pay the Nebraska notes at once upon the conclusion of the trade, or before they fell due. Neither is there any such finding by the court. Oral testimony to that effect is quoted, but for reasons already stated it cannot be considered. The referee found expressly that at the time of the trial before him it did not appear whether the notes were due or not. He further found that the plaintiff took the first note after maturity, and hence subject to the defense of failure of consideration. But he found that, after allowing the credit of \$1,000, the plaintiff was entitled to recover on the first note the sum of \$35, being six months interest to July 1, 1894, when the credit should have been made. Therefore the referee decided that the defense of failure of consideration had not been established at all. Otherwise he would have allowed no recovery on the first note which the plaintiff took subject to the defense if proved.

It is urged that both Lynds and Carolus were witnesses in the case, that both testified, and that neither of them offered evidence to show that either of them had paid the Nebraska obligations. They were not required to furnish any such evidence. On the face of the documents set up in the petition the plaintiff was entitled to judgment. He continued to be entitled to judgment, unless

the defendants proved a state of facts destroying the right. At the time of the trial before the referee it was not shown that Carolus was in default. At the time of the trial before the court it was found that the notes were paid. *Prima facie* the word "paid" indicates that the obligation has been satisfied and the demand extinguished. "But payment of a promissory note is not a contract. It is performance of the obligation arising out of the promise to pay. Any one of the several parties to a joint contract, or any one in his behalf and at his request, or with his consent, may perform the obligation, and, when performance has been offered or made, and the money accepted, the obligation becomes extinguished. The parties to the contract are no longer bound to each other by the vinculum legis of right and duty. The duty being discharged, the right ceases to exist." *Moran v. Abbey*, 63 Cal. 58, 61. The finding was entirely sufficient for the plaintiff. If the circumstances were such that the defendants were still liable in any way, they were bound to prove the fact.

It is suggested that the plaintiff accepted the court's conclusion and undertook to comply with the requirement which it virtually imposed. Conceding, but not deciding, that the plaintiff's conduct is to be so construed, it is plain the purpose of the court was to be assured that the defendant and his associates were no longer subject to liability upon the Nebraska indebtedness. The plaintiff, perhaps, in the face of some obstruction, has fairly complied with the spirit of the order. The only object which the court could have had in view having been substantially attained, the plaintiff is entitled to judgment.

The plaintiff should recover the principal and interest of the second and third notes, and a decree should be entered for the foreclosure of his mortgage as a first lien on the mill property. He should also recover the unpaid interest on the first note and the costs of the action. On the findings of the referee the defendant is entitled to an offset which should be allowed him with interest.

The judgment of the district court is reversed, and the cause is remanded, with instruction to enter judgment according to the foregoing views.

(77 Kan. 14)

MISSOURI PAC. RY. CO. v. BRINKMEIER.

(Supreme Court of Kansas. April 3, 1906.

On Rehearing, Jan. 11, 1906.)

1. RAILROADS—EQUIPMENT—SAFETY APPLIANCE ACT.

A railway company doing business as a common carrier, engaged in interstate commerce, has complied with the requirements of the act of Congress relating to safety appliances, enacted March 2, 1893 (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 8174], and its amendments of 1903, being chapter 976, Act March 2, 1903, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), when it equips its cars with

automatic couplers as prescribed by said act, and it will not be thereafter subject to the conditions imposed by section 8 of such enactment (27 Stat. 532 [U. S. Comp. St. 1901, p. 8176]) on account of subsequent defects occurring to the couplers, which ordinary care and diligence could not have avoided.

2. MASTER AND SERVANT—PETITION—EVIDENCE—INTERSTATE COMMERCE.

A petition contained an averment which reads: "The Missouri Pacific Railway Company is and was at all the times hereinafter mentioned a corporation, * * * doing business as a railway company as a common carrier in, into, and through the counties of Sedgwick and Reno, in the state of Kansas, and into the states of Colorado, Nebraska, Missouri, Arkansas, Texas, Oklahoma, and Indian Territory." *Held*, that it was not error to admit evidence thereunder showing that such railway company was engaged in interstate commerce.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. O. Wilson, Judge.

Action by Henry Brinkmeier against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

See 77 Pac. 586.

J. H. Richards, C. E. Benton, and Smyth & Helm, for plaintiff in error. O. V. Ferguson (Kos. Harris, V. Harris, E. A. Moseley, and L. M. Walter, of counsel), for defendant in error.

GRAVES, J. Henry Brinkmeier, the defendant in error, commenced this action in the district court of Sedgwick county against the plaintiff in error to recover damages for personal injuries received while in its employment as brakeman. He recovered a judgment for \$6,500, and the railway company brings the case here for review. The controlling facts are not seriously disputed. The controversy arises principally upon the construction of sections 2 and 8 of the act of Congress, enacted March 2, 1893 (Act March 2, 1893, c. 196, 27 Stat. 531, 532 [U. S. Comp. St. 1901, pp. 8174, 8176]), and entitled "An act to promote the safety of employes and travelers upon railways by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes." These sections read:

"That on and after the first day of January, 1893, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of cars.

"That any employe of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use

of such locomotive, car or train had been brought to his knowledge."

This law was amended March 2, 1903 (Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), the amendment after title and preliminary clause reads: " * * * The provisions and requirements hereof, and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce. * * * in connection therewith. * * * "

It is urged that the petition does not state a cause of action under this law; that in it there is no averment that the car which inflicted the injury was being used in moving interstate traffic, nor any statement equivalent thereto; that there are no facts stated therein which suggest a violation of this federal statute, but, on the contrary, they clearly indicate that the pleader intended to state an ordinary case of negligence. The petition contains an allegation which reads: "The Missouri Pacific Railway Company is and was at all the times hereinafter mentioned a corporation legally existing and doing business under and pursuant to the law of the state of Missouri, and doing business as a railway company as a common carrier in, into, and through the counties of Sedgwick and Reno, in the state of Kansas, and into the states of Colorado, Nebraska, Missouri, Arkansas, Texas, Oklahoma, and Indian Territory." Under this averment proof that the defendant was engaged in interstate commerce might be properly introduced. It is unnecessary to specifically mention this act of Congress in a cause of action predicated thereon. It is sufficient if the pleading contains facts which would suggest to a person familiar with such act that its provisions had been violated. *Voelker v. C., M. & St. P. Ry. Co.* (C. C.) 116 Fed. 867. All the coupling appliances of every railway company engaged in interstate commerce are subject to the provisions of this statute, and when it is shown that such a railroad company had a defective automatic coupler in use on one of its cars the additional averments necessary to state a cause of action are practically the same as those required in an action of ordinary negligence. We are unable therefore to hold that the petition was fatally defective as against this objection, which appears to have been first specifically presented in this court. It is expressly admitted that the car in question was engaged at the time of the injury in moving interstate traffic, and is therefore clearly within the provisions of this statute.

There is a sharp controversy between the parties as to what constitutes a compliance with section 2 of the federal statute, hereinbefore quoted. It is insisted by the defendant in error that every car used in interstate traffic must be equipped with the prescribed

appliance, and at all times thereafter be in proper repair. If because of any defect therein an employé is injured, the railway company will incur the burden imposed by the provisions of section 8, however diligent it may have been in an effort to discover and repair the defect. On the other hand, it is urged that, when a car is once supplied with the appliance as required by law, the company will not in case of injury be subject to the provisions of section 8, unless it has been negligent with reference to keeping such appliance in repair. The facts upon which this controversy depends, briefly stated, are these: The plaintiff was injured while attempting, as a brakeman, to couple one car to another, each of which was equipped with an automatic coupler. One of the couplers was not in repair, being out of its proper position, and turned so that it would not properly meet the one on the other car. The brakeman while attempting to adjust the defective coupler so as to make the coupling got his foot between the couplers and received the injuries of which he complains. About a year prior to the injury the company received the car having the defective appliance, at which time the coupler was in perfect condition. When it became defective does not appear. So far as the evidence shows, the plaintiff was the first person to notice it, and he made the discovery immediately before attempting to make the coupling. Upon these facts the trial court gave the jury instructions which read: "You are instructed that under such act it was the duty of the defendant railway company, not only originally to equip its cars with automatic couplers, as required by said act, but also to keep them in proper condition so that they could at all times be coupled or uncoupled without the necessity of men going between the ends of the cars to assist in coupling or uncoupling them. And the railway company was bound to know at its peril that the coupler attached to the car in question was in proper working condition, and the fact that the defendant company may not have known of its defects or defective condition, if you find that it was defective, does not in any manner excuse its unlawful use. You are further instructed that, if you find the plaintiff has established his injuries, and you find the coupler would not couple automatically by impact, he is entitled to recover for his injury, unless you further find that the plaintiff was negligent in the premises which directly contributed toward his injury."

Under our construction of the statute these instructions are erroneous: They impose a materially greater burden upon common carriers than the law contemplates. The duty prescribed by them cannot be found in the express language of the statute, and therefore must have been placed therein by construction. If the language is open to construction, then it must be construed so as to fairly carry out the Legislative intent as de-

scribed by the act. *United States v. So. Pac. Ry. Co.* (D. C.) 135 Fed. 122; *United States v. Lacher*, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080. In this connection it is proper to consider briefly some of the conditions which led up to the enactment of this statute. During the year ending June 30, 1891, 47 different styles of car couplers were in use, and during that year 2,680 employes were killed and 26,140 injured. Interstate Commerce Commission Report 1891. In the messages of President Harrison of 1889, 1890, 1891, and 1892 he urged the necessity of congressional action to ameliorate this wholesale destruction of human life. In his message of 1891 he said: "It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce, and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war." March 2, 1893, this law was enacted. These facts, the preamble, context, and subject-matter of the act indicate with reasonable clearness that the real point aimed at by the statute was to eliminate from railroad service the old homicidal link and pin and the 46 other dangerous devices then used for coupling cars and compel the adoption of a uniform class of couplers which would reduce the loss of life among railroad employes to the minimum. In the case of *Johnson v. So. Pac. Ry. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, Fuller, C. J., in speaking upon this subject, said: "The object was to protect the lives and limbs of railroad employes by rendering it unnecessary for a man operating the couplers to go between the ends of the cars, and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars." In the administration of this law its manifest object should be recognized and promoted by giving full force and effect to its salutary and beneficent provisions. In the performance of this duty, however, courts cannot indulge in rules of construction which change the meaning of the law from what its framers contemplated, nor which make its requirements impractical, unreasonable, or impossible to perform. In our view, the law is satisfied as to any specific car, whenever that car has been supplied with the prescribed appliance. Whenever an automatic coupler, such as the act of Congress requires,

is attached to a railway car, it stands in the same category as all other appliances and instrumentalities used by railway companies. Thereafter it is the duty of the company to use reasonable and ordinary care and diligence to keep this and all other equipments in good repair and safe condition for the use of its employes, and a failure to do so constitutes negligence. This was the law before the act of Congress was passed, and that act did not change the law in this respect. It seems reasonable to assume that, if Congress had intended to impose a special duty upon common carriers to keep a particular appliance in repair, not applicable to all, such intent would have been expressed in clear and specific terms. The construction given to this statute by the instructions of the trial court impose conditions which seem to be unreasonable and in some instances would be impossible to perform. Every railroad appliance must inevitably wear out, break and become defective, and no degree of foresight can anticipate the time when repairs will be needed. Any appliance, especially couplers, may get out of repair while cars are being moved in the yards, or on side tracks in making up a train, or while moving in a train between stations. Railroad companies are compelled to rely for information concerning defects in their appliances almost wholly upon the employes who use them. Necessarily it takes time to make repairs. No degree of diligence within the limits of a reasonable possibility would be sufficient to enable a railroad at all times and under all circumstances to keep its car couplers in such a state of repair as would prevent a brakeman disposed to encounter danger, as the plaintiff did in this case, from receiving injury. So far as the evidence shows, the coupler in question in this case may have been thrown out of place by a jam received immediately before the plaintiff discovered it, in which case it would have been impossible for the company to have known of and repaired the defect. Statutes should not be extended by constructions so as to produce such unreasonable results.

No case has been cited which can be regarded as an authority in support of the construction insisted upon. In case of *U. S. v. So. Pac. Ry. Co.* (D. C.) 135 Fed. 122, this question is discussed, and the opinion seems to sustain the view here contended for by the plaintiff; but in that case it was found by the court that the railroad company had been guilty of gross negligence in not discovering and repairing the defect which caused the injury. This makes the discussion wholly unnecessary to the decision of the case, and weakens its force as an authority. This decision was considered by the United States District Court of Colorado quite recently, in the case of *United States v. A., T. & S. F. Ry. Co.*, 150 Fed. 442, in which it is said that the conclusion there reached is exceptional, a departure from the general and better rule,

and has been sharply criticized. In the case last cited the court said: "These couplings will get out of repair, and it takes time to repair them. It takes time to discover whether or not they are out of repair. It is the duty of the railroad companies to use prudence and the ordinary diligence of a business man, keeping in view the purpose of this act, to keep these couplings in repair. The act construed in an intelligent and practical way would not impose on the railroad company the absolute duty every instant to have this coupling so that it would work automatically. If a coupling is out of repair, and the railway company handling the car then uses ordinary and reasonable care, considering the facilities at hand to repair the coupling and put it in repair, so that it would comply with the act, then it is not liable." We think the position of the Colorado court more reasonable and less liable to lead to impractical results. The burden of proof was upon the plaintiff to show that the defendant was negligent in having this defective appliance in use. Upon this question there is a total failure of proof. The car was placed at the saltworks two days before the injury. It was brought from there in charge of the plaintiff as brakeman. He did not discover this defect until immediately prior to the accident. There is no evidence as to when the car was last inspected, and nothing whatever appears to indicate negligence on the part of the defendant.

The jury were told by the instructions of the court that if the coupler was defective, and the plaintiff was thereby injured, a verdict against the defendant would be proper regardless of whether it had been negligent or not. This was erroneous.

The judgment is reversed, with direction to grant a new trial and proceed in accordance with the views herein expressed. All the Justices concurring.

On Rehearing.

GRAVES, J. After the opinion had been filed in this case, the Interstate Commerce Commission requested that a rehearing be granted and that it be permitted through special counsel to present an argument, both oral and printed, upon the questions involved in the case. The defendant in error joined in this request. Appreciating the deep interest taken by this national tribunal in all cases arising under the provisions of the safety appliance statute, and being anxious to receive all the light possible upon the questions involved, the rules applicable to ordinary actions were waived and the request granted. At the rehearing extended arguments and citation of authorities were presented. We have carefully examined the briefs and decisions submitted, and have reconsidered the questions discussed, but are unable to accept the contention of defendant in error as to the meaning of the federal

statute when applied to the facts of this case, and therefore adhere to the opinion heretofore filed.

In the argument our attention was called to a question which was overlooked when the case was decided. It was urged before, and is insisted upon now, that the safety appliance act should not be considered, for the reason that the plaintiff's petition does not allege a violation of any of its provisions. The force of this position is found in the following facts: The injury complained of was received November 12, 1900. At that time section 2 of this statute prohibited railroad companies from hauling any car used in moving interstate traffic and not equipped with the appliance required. In 1893 the law was amended so as to make its provision apply, not to a car used in moving interstate traffic merely, but to all trains or cars used on any railroad engaged in interstate commerce. The petition does not allege that the car which caused the injury was being used in moving interstate traffic. It is therefore insufficient under the law as it stood when the injury occurred. It was held to be sufficient, however, because it contained averments which, by a very liberal construction, could be said to allege that the car by which the injury was inflicted constituted a part of a train owned and operated by a railroad company engaged in interstate commerce, which made it sufficient under the law as amended some three years after the cause of action accrued. The importance of these dates was not clearly indicated in the first argument, and was overlooked when the case was first considered. The plaintiff in error was entitled to a reversal of the judgment upon this ground alone, and the case might have been so decided if these facts had been clearly presented. We are satisfied, however, with the position taken in the opinion, and still adhere to it.

In view of the foregoing facts, we now place the judgment of reversal both upon the ground that the petition does not state a cause of action under the statute and because the trial court erred in its instruction to the jury.

(77 Kan. 176)

CHAVES v. CITY OF ATCHISON et al.

(Supreme Court of Kansas. Jan. 11, 1908.

Rehearing Denied Feb. 14, 1908.)

MUNICIPAL CORPORATIONS — EXTENSION OF BOUNDARIES—WHO MAY QUESTION.

The validity of proceedings taken by city officers under statutory authority extending the corporate boundaries of a city so as to annex a tract of land can only be questioned in a direct proceeding prosecuted at the instance of the state by proper public officers. *Topeka v. Dwyer*, 70 Kan. 244, 78 Pac. 417, followed.

(Syllabus by the Court.)

Error from District Court, Atchison County; J. H. Gillpatrick, Judge.

Action by G. F. Chaves, for himself and

others, against the city of Atchison and the mayor and council of such city. Judgment for defendant, and plaintiff brings error. Affirmed.

Henry Elliston, for plaintiff in error. W. A. Jackson, for defendant in error.

JOHNSTON, C. J. In this case G. F. Chaves, for himself and others similarly situated, questions the validity of the annexation of territory to the city of Atchison. The question arises on a ruling sustaining a demurrer to his amended petition, in which it was alleged that in 1860 the land was platted and annexed to the city as "Spring Garden Addition," but that subsequently the addition was vacated and restored to the condition of unplatted land. Later several attempts were made to again bring the land within the city, which the courts held to be ineffectual. Still later, and on August 18, 1905, the mayor and council of the city passed an ordinance in due form, which treated the tract as platted territory and purported to annex it to the city. The ordinance was approved and published. Since that time the officers of the city have assumed that the tract was within the corporate limits, and claim the right to exercise authority and control by establishing lights, opening and working streets and alleys, building walks, assessing real and personal property, and exercising the same dominion and control over the land which they might if it were legally brought within the limits of the city. Chaves owns and resides upon the tract of land so annexed, and he asks that the city and its officers be enjoined from imposing city taxes on persons and property upon the land in question, and from improving or controlling the streets, walks, or highways on the addition, and from exercising authority and control as if it were a part of the city. The theory of the court in sustaining the demurrer to the petition is said to have been that the corporate organization of the city, including the extension of its limits, could not be questioned in a collateral proceeding, nor at the suit of private parties. Specific legislative authority has been given for extending the corporate boundaries of cities of the first class so as to include adjoining territory and make it a part of the city. Laws 1903, p. 179, c. 122, § 9. In this act, the validity of which is not challenged, provision is made for annexing three classes of lands: First, land adjoining or touching the city limits which has been subdivided into blocks or lots; second, any unplatted land lying within or mainly within the city; third, a tract of platted or unplatted land, not exceeding 20 acres in area, having a boundary line two-thirds of which lies upon or touches the boundary line of the city. It thus appears that there was statutory authority for adding territory to the city. It was empowered to take in either platted or unplatted land, in large or small tracts, lands

which lie wholly or mainly within the city limits, and lands which lie upon or touch its boundaries. It is alleged, it is true, that the tract was not legally annexed, but there is undoubted jurisdiction in the mayor and council to make a legal annexation by the passage of an ordinance. An ordinance has been passed in fair form purporting to enlarge the boundaries of the city and making the addition in question a part of the city, and since that time the city has been exercising municipal authority over the addition and the people residing there. The validity of the corporate existence of the city as originally organized, or as reorganized by the extension of its boundaries, cannot be questioned by private parties. It has been held that the extension of corporate limits to include new territory, under statutory authority, is, in effect, a reorganization of the city; that the act of annexation involves the corporate integrity of the city, and is not open to collateral attack; and that its validity cannot be questioned by any party other than the state any more than can the validity of the original organization of the city. *Topeka v. Dwyer*, 70 Kan. 244, 78 Pac. 471. In that case the question presented here was examined with great care, the prior decisions of our own and other courts were cited and considered, and what was there said must be regarded as decisive of the case at bar. In the still later case of *Railway Co. v. Lyon County*, 72 Kan. 16, 82 Pac. 519, 84 Pac. 1031, the same principle was affirmed and applied. We are therefore not warranted in considering whether the steps taking the tract of land into the city were legal or not. The objections which the plaintiff makes can only be considered in a direct proceeding prosecuted at the instance of the state by the Attorney General or county attorney.

Judgment affirmed.

(77 Kan. 185)

MARTIN et al. v. HOFFMAN.

(Supreme Court of Kansas. Jan. 11, 1908.

Rehearing Denied Feb. 14, 1908.)

1. TRIAL—FINDINGS.

A general finding in favor of either party is a finding in his favor of all facts necessary to constitute his claim.

2. APPEAL—REVIEW—EVIDENCE.

The evidence upon which a finding is made cannot be reviewed in this court, except so far as may be necessary to determine whether there was competent evidence sufficient to support the finding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

3. EVIDENCE—BEST AND SECONDARY.

It is a general rule that, where a witness has identified a letter introduced on the trial as his writing, it is not proper to ask whether statements such as counsel may suggest are contained in it, the letter being the best evidence of the fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 558.]

(Syllabus by the Court.)

Error from District Court, Phillips County; A. C. T. Geiger, Judge.

Action by Ellen K. Hoffman against L. T. Martin and Ella H. Martin. Judgment for plaintiff, and defendants bring error. Affirmed.

C. A. Lewis and Kennett & Gant, for plaintiffs in error. W. A. Barron and Mahlin & Mahlin, for defendant in error.

BENSON, J. The defendant in error, Ellen K. Hoffman, commenced this action against the plaintiffs in error, her daughter and her daughter's husband, to quiet her title to a tract of land, alleging that she was the owner and in possession thereof. The answer contained a general denial, and a statement in substance that upon the death of Mr. Hoffman, the plaintiff's husband, it was verbally agreed that the plaintiff, his widow, should have all his property during her life, and that then it should become the property of her daughter, the defendant Ella Martin; that after this understanding, however, a will was found giving the entire property to the widow, except certain notes against L. T. Martin, which were given to his wife, Ella; that by co-operation of all the parties the land in question was purchased by them jointly, the plaintiff contributing \$2,500, and the defendants \$1,000, of the consideration, under an arrangement that they should occupy it together; that they accordingly took possession of the land, and so occupied it jointly, treating it as their joint property, but that defendants accounted to the plaintiff for the present use thereof, the defendants making large improvements thereon of which no accurate account was kept; that in the year 1904 the plaintiff removed to another state, the defendants remaining in possession, the plaintiff giving to them an instrument as follows: "Long Island, Kansas. July 19, 1904. This is to certify that I have rented my farm, the northeast quarter section 23, township 1, range 20, to L. T. Martin and Ella H. Martin, and they can make any improvements necessary to their comfort or that is required on place, it being understood between me and my daughter Ella that the place is to be hers at my death. But if I should sell the place I must first pay them for any improvements whatsoever that they have put on the place. Ellen K. Hoffman." The answer further stated that L. T. Martin was elected county clerk in 1904, and after consultation with the plaintiff rented the premises for \$600 per year, of which she (the plaintiff) was to have \$500, and that the tenant had been in possession since March 1, 1905, but that the tenant refused to pay the rent for 1905, because he had been notified by the plaintiff that he must not do so. The defendants further alleged that they had treated the plaintiff as children should treat a parent, and were desirous of preserving the premises as a home for her in her declining years, as was the intention it should be, and that it should remain to the defendant Ella Martin when the plaintiff was done with the use of it. The reply

included a general denial, and a statement that in making such purchase the defendants had furnished a house and lot which was put in at \$1,000, under a verbal contract that the plaintiff should pay them \$1,000 therefor, which she had paid in full. The tenant intervened in the action, reciting his promise to pay \$600 rent, that both parties claimed it, and asking for the orders of the court thereon. Before the trial, on motion of the plaintiff, the court ordered the clerk to pay her \$300 out of the rents paid in by the tenant, which was done. The judgment was for the plaintiff.

The plaintiff in error asks for reversal for error in allowing such payment of rent to the plaintiff below, and because of alleged erroneous rulings concerning evidence, and in overruling the demurrer to the evidence, in rendering final judgment, and in refusing a new trial. Upon the pleadings, and the admission that the title to the farm was taken in the name of the plaintiff, two principal issues of fact were presented, viz., whether the plaintiff was in possession when the suit was brought, and whether the \$1,000, admitted to have been furnished by the defendants, was advanced upon an agreement that they were to have a present interest in the land therefor, as alleged in the answer, or whether that sum was to be repaid to them, as alleged in the reply. As stated by plaintiff in error, "this is the storm center around which all the evidence hovered." This was the vital question upon the merits of the case. If the Martins put in their house and lot to assist Mrs. Hoffman in making up the consideration upon her agreement to pay them \$1,000 therefor, and she did afterwards pay it, then they cannot hold an interest in the land merely because they furnished part of the consideration. If on the other hand they so contributed this amount in pursuance of an agreement to purchase the land jointly for the use and benefit of all, then it may be urged that Mrs. Hoffman holds the title as a trustee to the extent of their interest. This issue, however, was determined against the defendants by the general finding for the plaintiff. It was, as conceded, an important issue under the pleadings, and, no special findings being asked, it was resolved against them by the general finding for the plaintiff. A general finding in favor of either party is a finding in his favor for all of the facts necessary to constitute his claim or defense. *Bixby v. Bailey*, 11 Kan. 359. It was necessary for the plaintiff to prove that she was in possession. This she alleged and the defendants denied. This issue was also determined in her favor by the general finding. This finding established generally the plaintiff's title and possession, and, if no other interest was shown in the defendants, was sufficient to support the judgment. In the argument counsel for the defendants urge that their clients had an interest to the extent of \$500 and more for improvements, and refer to the last clause in the instrument of July 19, 1904, as supporting

that claim. No such interest, however, was pleaded. The only reference to this matter in the answer, aside from the recital in the agreement copied therein, was this clause: " * * * And making large improvements thereon by defendant L. T. Martin, of which no accurate account was kept." This was not pleading an interest based on improvements, but was matter of inducement in the statement of the general claim, based on the alleged joint purchase and resulting common ownership, which claim, as we have seen, was disposed of by the finding. If the clause in the instrument of July 19, 1904, "If I should sell the place I must first pay them for any improvements whatsoever that they have put on the place," should be construed to give them the right of possession until such payments were made, then it appears that they voluntarily yielded such possession. The evidence clearly shows that the defendants urged Mrs. Hoffman to lease the place to another, informing her of their intention to leave, and advising that the place should not be left vacant. In referring to the amount for which they said they had leased the place and in obtaining her consent thereto, they made no claim for any part of the rent, and made no suggestion of any possible lien for improvements, although they did at another time ask for a note for the amount they claimed to have expended for that purpose. It is true that Mr. Martin executed the lease in his own name, but there was nothing in the correspondence to indicate to Mrs. Hoffman his intention to do so, nor did he report that fact to her, and, when asked for the lease, failed to send it, or a copy of it. In the circumstances Mrs. Martin was amply warranted in supposing that the lease had been executed in her own name, and that the rents were hers. The evidence upon which the general finding for the plaintiff was based cannot be reviewed in this court, except so far as to determine whether there was competent evidence sufficient to support the finding. *Donaldson v. Everhart*, 50 Kan. 718, 82 Pac. 405; *Briggs v. Brown*, 53 Kan. 229, 86 Pac. 334; *Railroad Co. v. Swarts*, 58 Kan. 235, 48 Pac. 953.

Complaint is made of the rulings of the court in the admission of evidence. On cross-examination of the plaintiff as a witness she identified a letter written by her, and was then asked, "And in that letter you say—" At that point an objection was made, and the objection was sustained. The purpose of counsel in asking the question was not disclosed, but they now say in their brief that "every word written in that letter might have been repeated to the witness and she asked whether that was her statement at that time." But she had said so in effect, for she had admitted that she had written it. If they meant to repeat parts of the letter and then ask if she made the statements so repeated, then the rule as stated in *Greenleaf* applies, viz.: "And if he (the witness) admits the letter to be his writing, he cannot be asked whether state-

ments, such as the counsel may suggest, are contained in it, but the whole letter itself must be read as the only competent evidence of that fact." 1 *Greenleaf*, Ev. § 463; *Jones* on Ev. §§ 232, 850; *Glenn v. Gleason et al.*, Ex'rs, 61 Iowa, 28, 15 N. W. 659. Notwithstanding this rule it may be that, where the purpose of counsel is to use an extract from the writing as a basis for some inquiry fairly tending to test the witness' memory or credibility, it ought in the exercise of a wise discretion to be permitted. *Wigmore on Evidence*, §§ 1259, 1260. No such purpose, however, was indicated, and, counsel having read the letter in evidence, no injury could have resulted from the ruling, and under the authorities there was no error in this respect. The same witness over the objection of the defendant was allowed to testify that she was "living on the premises when the suit was commenced." This was objected to as a conclusion. It is true that her possession was an issue in the case. Still we think that where she was living was a fact. Yet if it was a mere conclusion from other facts, they were also given. Thus she related when she went to the farm that her household goods were there, and that she ate and slept there. Some other minor objections to testimony were made, but we find no error in the rulings thereon.

Error is also predicated upon the order allowing the plaintiff to receive \$300 of the money paid into court by the tenant. As the defendants admitted that \$500 of this fund belonged to her, it is clear that they were not prejudiced by the order.

Upon an examination of the record, we conclude that the case was fairly tried, that the rights of all the parties were properly protected, and that there was no error in the proceedings prejudicial to the plaintiffs in error.

The judgment is affirmed.

(77 Kan. 111)

FEDERAL BETTERMENT CO. v. REEVES.

(Supreme Court of Kansas. Jan. 11, 1908.

Rehearing Denied Feb. 14, 1908.)

1. PLEADING—AMENDED PLEADINGS—NECESSITY FOR AMENDMENT.

An application for leave to amend a petition, made when the case is called for trial, may properly be denied where it is not made to appear that the proposed amendments are material and the reasonable necessity thereof is not shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 653-675.]

2. EVIDENCE—OPINION—BODILY APPEARANCE OR CONDITION.

In an action to recover damages for personal injuries, corporal appearances and conduct, as indicating health or the lack of it, are relevant, and such ordinary indications may be testified to by any competent person who was in a situation to know. Such appearances and the ability to labor before and after the injury are ordinarily proper to be considered in determining the extent of the hurt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2237-2241.]

2. DAMAGES—EVIDENCE—HEALTH AND PHYSICAL CONDITION.

Where it is claimed that the disability from such injury continues, the limits of time covered by such evidence must depend on the circumstances of each case, and the probability of intervening changes, and must be left to the wise discretion of the trial judge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 482.]

4. EVIDENCE—RES GESTÆ—EXCLAMATIONS OF PAIN.

Where the bodily condition of a person is a subject of inquiry, exclamations of present pain or suffering made by the party who claims to have been injured may be received in evidence in connection with his appearance and conduct, where they appear to be the natural and spontaneous expressions of present feeling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 377-382.]

5. SAME—INTRODUCED BY ADVERSE PARTY.

Where the existence of a corporation is denied by the defendant, any insufficiency in the proof of that fact offered by the plaintiff is immaterial, where the plaintiff has in the same action supplied such proof and filed in the court a copy of its charter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2429; vol. 12, Corporations, § 2087.]

(Syllabus by the Court.)

Error from District Court, Neosho County; L. Stillwell, Judge.

Personal injury action by John W. Reeves against the Federal Betterment Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Burnham & Dashiell (C. S. Denison, of counsel), for plaintiff in error. W. R. Cline, for defendant in error.

BENSON, J. A former judgment in this action was reversed. *Betterment Co. v. Reeves*, 73 Kan. 107, 84 Pac. 560. Upon a new trial the plaintiff below, John W. Reeves, again recovered, and this proceeding is brought by the company to review the proceedings upon such second trial. The facts are fully stated in the former opinion. The negligence charged is, in brief, the failure of the company engaged in furnishing gas to place a regulator on its lateral line leading from its high pressure main to the meter in the factory where the plaintiff was working, thereby causing an explosion and resulting in personal injuries to the plaintiff. Various errors are assigned.

The first error complained of is the refusal of the court to sustain a motion for further security for costs. This motion was first presented when the case was called for trial. There was no error in this ruling. The court in its discretion might well refuse to entertain such a motion at that time. Besides, the judgment being against the moving party, he is not prejudicially affected by such ruling. *Wilcox v. Byington*, 36 Kan. 212, 12 Pac. 826. At the same time the defendant below asked leave to amend its answer, but the nature of the proposed amendment was not shown, nor any reason

why an earlier application had not been made. In these circumstances, it does not appear that the refusal of the court to permit such amendment was erroneous. Such applications are made to the discretion of the court, and the reasons upon which they are asked ought to be frankly stated, and the reasonable necessity thereof shown. To secure a reversal upon that ground it must affirmatively appear that the amendments refused were material and proper to be made. *Byington v. Com'rs of Saline Co.*, 37 Kan. 654, 16 Pac. 105.

The next complaint, and the one principally relied upon, is against the rulings of the court upon the evidence offered by the plaintiff. These objections to testimony may be resolved into two groups or classes: First, to the testimony offered to show that plaintiff was a strong able-bodied man, capable of doing regular manual labor before the injury, and that he was infirm and his ability to thus labor was impaired after the injuries; and, second, to the evidence of exclamations or utterances of pain given by the plaintiff at various times after the alleged injury. The evidence tended to show that the plaintiff was thrown several feet by the explosion of the meter, and suffered an injury to his head and ear, affecting his general health, causing pain, and impairing his physical powers; and it was claimed that such injuries were permanent in their effects. To substantiate this claim, his physical condition before the injury was shown by those who had the opportunity to know, and also the fact that he worked in toilsome occupations was allowed. His appearance before and after the injuries, as to health and strength, was also testified to. All this was objected to, but the evidence was properly received. Corporal appearances and conduct, as indicating health or the lack of it, are relevant, and such ordinary indications may be testified to by any competent person who was in a situation to know. The looks, appearance, and conduct of a person, his ability to labor before and after an alleged injury, are ordinarily competent in determining the effect and extent of the hurt. *Wigmore on Evidence*, §§ 190, 223, 225, 568. In many cases a witness, although not an expert, may be permitted to state the result of his observation, notwithstanding it involves in a sense his opinion or judgment, such as the apparent health of a person or other characteristic manifest to the apprehension of a common observer. *Robinson v. Exempt Fire Co.*, 108 Cal. 1, 36 Pac. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93. One who is in a situation to know may testify to the fact whether another is competent to perform manual labor before and after an injury. *Lawson v. Conway*, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17. In *Chicago City Ry. Co. v. Van Vleck*, 143 Ill. 490, 32 N. E. 262, an action to recover for personal injuries suffered in a collision, the court said:

"It was one of the contentions of appellant at the trial that the permanent injuries for which appellee sought to recover damages in this suit were not occasioned by the collision under investigation, but were caused by being dragged while holding fast to the hand rail of a street car in 1877, 10 years prior to the collision of August 2, 1887. In that connection many of the relatives, neighbors, and acquaintances of appellee testified in regard to her state of health, hearing, eyesight, ability to work and walk, and use her arms and legs naturally and without trouble during the intervening 10 years. Appellant objected to all testimony of this kind, and now insists that said witnesses were incompetent to testify in regard to such matters because they were not experts, physicians, and surgeons. We think the objection is without merit and untenable. We do not see why persons who were familiarly associated with appellee, and came in frequent contact with her, were not capable of knowing whether she was in good or bad health, whether her hearing was good and acute or otherwise, whether her eyesight was defective or not, whether or not she was lame, and whether she had the free and natural use of her hands or not, even though such persons were not scientific experts in matters relating to the human anatomy. In our opinion they were competent to testify to what they knew from their own personal observation." The reasons for the admission of such evidence are stated in 1 Greenleaf on Evidence, § 441b, and may be thus summarized: Experts may testify either from their own knowledge of the person or matter, or from facts stated to them. Other witnesses who have had the means of observation, and yet cannot adequately state all the data, so as to put the jury completely in the witnesses' place, may give the result of their observation in matters of this character.

The defendant company complains of the fact that such inquiries were extended over a considerable period of time; but it is claimed here that the disability continued, and the limits of time over which such evidence may range must depend on the circumstances of the case, as to the probability of intervening changes, and must ordinarily be left to the discretion of the trial judge. In this instance it does not appear that such discretion was unwisely exercised.

Numerous objections were made to testimony repeating the utterances and exclamations of the plaintiff indicating pain and suffering. On the former hearing the reversal was based on a ruling allowing a medical witness to give his opinion based partially upon the history of the case, and partially upon his examination. Following the rule in *A. T. & S. F. R. Co. v. Frazier*, 27 Kan. 463, it was held that such evidence was inadmissible. In the opinion, however, it was said: "A physician may testify to the condition of the patient as he found him, whether suffering from

pain, and to utterances or exclamations of pain. * * *" The narrative or history of the case given by the patient and opinions based thereon are excluded, but his exclamations and utterances indicating present pain and suffering, in connection with his appearance and conduct, are properly received. Where exclamations and utterances appear to be the natural and spontaneous expressions of present pain or suffering, they may be testified to by a professional witness, or by a layman who heard them, and observed the manner and appearance of the person. In such circumstances they are sometimes characterized as verbal acts. They are outward signs of an inward state, such expressions as usually and naturally accompany the feeling so revealed, and therefore competent for a jury to consider, with all the attendant circumstances. Where the bodily condition of a person is a relevant fact, exclamations of present pain or distress are competent circumstantial evidence of the existence of the particular bodily conditions. 16 Cyc. 1164. The admissibility of such evidence is not limited to the time or about the time of the injury. Concerning this it has been held: "Where, however, it becomes important to illustrate the physical or mental condition of an individual, either at the time an injury is received, or from thence to the time of inquiry as to its severity, effect, and nature, we think expressions or declarations of present existing pain or malady, whether made at the time the injury is received, or subsequent to it, are admissible in evidence. * * * Expressions of present existing pain, and of its locality, are exceptions to the general rule which excludes hearsay evidence. They are admitted upon the ground of necessity, as being the only means of determining whether pain or suffering is endured by another. Whether feigned or not is a question for the jury. Such declarations and expressions are competent, regardless of the person to whom they are made. They are especially competent and of more weight when made to a physician for the purpose of receiving treatment, or to a medical expert who makes an examination at the request of the opposite party, or by the direction of a court, for the purpose of basing an opinion upon as to the physical situation of the person whose condition is the subject of inquiry." *C. & C. & I. R. Co. v. Newell*, 104 Ind. 284, 3 N. E. 836, 54 Am. Rep. 313. The rule under consideration was expressed by Justice Valentine thus: "That whenever evidence is introduced tending to show a real injury or a real cause for suffering or pain, as in this case, the declarations of the party concerning such suffering or pain while it exists, and as simply making known an existing fact, should be allowed to go to the jury for what they are worth, and the jury in such a case should be allowed to weigh them and to determine their value." *A. T. & S. F. R. Co. v. Johns*, 36 Kan. 769, 782, 14 Pac. 237, 59 Am. Rep. 609. In apply-

ing this rule everything in the nature of a narrative of past experiences or suffering should be carefully excluded, and the evidence confined strictly to such complaints, expressions, and exclamations as furnish evidence of present existing pain or malady. *Insurance Company v. Mosley*, 75 U. S. 397, 19 L. Ed. 437; *Wigmore on Evidence*, § 1718, and note.

The plaintiff was asked as a witness what effect the injury had on the veins of his leg. This was objected to. If the question was improper, the ruling of the court was certainly correct. The ruling was: "He can describe the condition so far as he knows." And the answer was a simple description of conditions. A witness was asked: "Whether he knew that Mr. Reeves had been ailing, or what his general condition of health was." This was an unprofessional witness, and the objection might properly have been sustained, especially to the last part of the question. On cross-examination the witness testified that: "All I knew about the plaintiff's suffering was what he told me." Thus the jury had, almost immediately after the answer was given, the confession of the witness as to his only means of knowledge, and could weigh the evidence accordingly. The defendant did not move to strike out the former answer, as he might properly have done after the witness had disclosed his lack of personal knowledge. We do not say that it is necessary to move to strike out improper evidence given after a proper objection had been interposed, but, where a witness appears to have sufficient knowledge of a fact inquired about, and is therefore permitted to answer, if it is afterwards shown that he did not have such knowledge, a motion should be made to strike out the answer, and thus call the attention of the court to the lack of information of the witness.

The superintendent of the gas plant at Erie, who testified that he was familiar with the use of gas meters such as that placed in the factory where it was alleged the injury occurred, was allowed to testify that a regulator was necessary upon the connecting line between the main and the meter. This was objected to on the ground that the question called for a conclusion. This was a matter not within the common knowledge of the jury, requiring peculiar knowledge and skill, and the witness appeared to be competent to give an opinion that would be helpful in arriving at the truth. No objection was made to the form of the question, and the opinion of the witness was in harmony with the allegations of the answer filed by the defendant, and so was not prejudicial. The answer alleged that "the plaintiff was expressly informed of the danger to persons, and the damage that might be occasioned to property, if the gas should be turned on before placing in such position such regulator." The issue was not made as to the necessity of the regulator,

but upon the warning given against operating without it.

It is not necessary to consider in further detail the numerous objections to evidence. The observations already made, we think, fairly cover all that need be referred to.

Another question is presented. The petition alleged that the defendant was a corporation "duly organized and licensed, and is doing business under and by virtue of the laws of the state of Kansas." The answer contained a general denial, and was verified. On the trial the plaintiff offered in evidence a certificate of the Secretary of State that the defendant company, a West Virginia corporation, was authorized to do business in this state. The defendant objected to this, but the court received it in evidence. This ruling, however, was immaterial. The record shows that the court took judicial notice of such incorporation from the fact that upon a motion to set aside the service of summons in the action the defendant had filed an affidavit and a copy of its charter thus proving that it was duly incorporated. Having thus proved its own corporate existence in such a proceeding in the action, the defendant cannot now properly complain of the insufficiency of the proof of that fact.

The judgment is affirmed. All the Justices concurring.

(76 Kan. 456)

UPDEGRAFF et al. v. LUCAS, Sheriff, et al.

(Supreme Court of Kansas. Nov. 9, 1907.)

1. PLEADING—PETITION—DEMURRER.

A petition which otherwise states a cause of action is not subject to demurrer for the reason that it seeks to recover more or different relief than that to which plaintiff is entitled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 439.]

2. JUDGMENT — DOMINANT JUDGMENT — INJUNCTION.

Injunction will lie to enjoin an execution upon a dormant judgment. The plaintiff in such an action does not thereby seek to use the statute of limitations as a sword, but as a shield, to protect something which the law has already given him—the right not to have his property taken upon a void process.

3. SAME—EXECUTION—INJUNCTION.

A judgment becomes dormant upon the death of the judgment creditor, although the action was prosecuted by one having no beneficial interest therein, and the judgment belongs, in fact, to another; and, under such circumstances, where no proceedings to revive the judgment have been taken within one year after the death of plaintiff in the action, an execution issued upon the judgment is void and may be enjoined.

(Syllabus by the Court.)

Error from District Court, Shawnee County; A. W. Dana, Judge.

Action by O. P. Updegraff and another against A. T. Lucas, sheriff, and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Quinton & Quinton, for plaintiffs in error. James E. Larimer and J. G. Slonecker, for defendants in error.

PORTER, J. This proceeding in error raises the sufficiency of a petition and answer and various rulings of the court thereon. Plaintiffs in error were plaintiffs below. Their petition was filed January 31, 1905, by which it was sought to enjoin a sheriff's sale. It was supported by affidavits, and the temporary injunction was allowed by the court on the same day. Subsequently, upon motion, the court required plaintiffs to state separately and number their causes of action, and an amended petition was filed. This petition alleged that plaintiffs owned certain real estate in the city of Topeka; that they were defendants in a suit to foreclose a mortgage in the district court of Shawnee county in which Maria H. Hotchkiss was plaintiff, and in which, on January 26, 1900, she recovered judgment against them; that the real estate covered by the mortgage had been sold under the foreclosure, leaving a balance due thereon of \$220 which had not been paid; that Maria H. Hotchkiss, plaintiff in the foreclosure proceeding, died in the city of New York on the 10th day of November, 1901, without leaving any last will and testament; that an administrator of her estate was duly appointed in December, 1901; that the judgment rendered in the foreclosure action was never revived nor made a lien upon plaintiffs' real estate, and thereby became and was dormant; that notwithstanding the dormancy of the judgment defendants, in violation of the rights of plaintiffs, and in order to subject them to the annoyance of a suit at law for the protection of their property, had sued out an execution on the judgment in December, 1904, directed to the sheriff of Shawnee county; and that the sheriff in obedience thereto levied upon the real estate belonging to plaintiffs and advertised the same for sale, and, that unless restrained by the court, would on a certain day sell the same at sheriff's sale to satisfy the execution. It was also alleged that the judgment constituted a cloud on plaintiff's real estate. In the prayer for relief plaintiffs asked that their title to the real estate be established against the adverse claims of defendants, and that defendants be barred and forever estopped from claiming any right or title adverse to plaintiffs in plaintiff's real estate, and that defendants be enjoined by the order of the court from proceeding any further in the action, and for costs. To this an answer was filed, which admitted the death of Maria H. Hotchkiss, but alleged that she only appeared to be plaintiff in the foreclosure proceedings, and that the real parties in interest were Charles H. Bissell and Wm. L. Bissell; that long before the foreclosure proceedings were commenced Maria H. Hotchkiss, by a deed of trust, a copy of which is attached to the answer, had conveyed all her interest in the note and mortgage to them as trustees, and had authorized them by the deed of trust to maintain an action in her name thereon, and that the cause of action, although prosecuted in the name of Maria H. Hotchkiss, was, in

fact, the cause of action of Charles H. Bissell and Wm. L. Bissell who were then and ever since have been and are now the owners of the estate and property rights, real and personal, of Maria H. Hotchkiss, and of the judgment rendered in her name; that the foreclosure had been commenced long after the acceptance by them of the trust created by the deed of trust. Plaintiffs demurred to the answer. The court overruled the demurrer as to the answer, and carried the demurrer back to the petition and sustained it. Afterwards another petition was filed setting up the same facts, except that it omitted certain allegations in the former with reference to damages sustained, and asked that the injunction be made perpetual. This the court ordered stricken from the files on the ground that it was inconsistent with the former petitions and constituted a departure. The court made an order dissolving the temporary injunction, and rendered judgment against plaintiffs for costs.

The merits of the controversy can best be determined by considering the sufficiency of the petition and answer. It is the contention of defendants in error that the petition is demurrable, because it sets up an affirmative cause of action, based upon the statute of limitations, and such appears to be the conclusion reached by the court. There are cases holding that equity will not enjoin an execution upon a dormant judgment. See cases in 16 A. & E. Enc. of Law, 404. We fail to find in any of them, however, a suggestion that the action cannot be maintained because plaintiff thereby seeks to use the statute of limitations as a sword instead of a shield, or seeks affirmative relief based upon the statute. They proceed upon the theory that plaintiff has an adequate remedy at law by motion in the original action to recall the execution, or, as in *Hanson v. Johnson*, 20 Minn. 194 (Gil. 172), that a sale under such an execution would not cast any cloud on plaintiff's land. The weight of authority, however, is that an action will lie to enjoin an execution on a dormant judgment, notwithstanding plaintiff may have a different remedy by proceeding by motion in the original action. See cases cited in 16 A. & E. Enc. of Law, supra; *Freeman on Judgments*, 497.

By this proceeding plaintiffs do not seek to use the statute for the purpose of securing anything except that to which they are already entitled. They seek to hold what the law has already given them—the right to their property as against a void execution. The prayer for relief does not determine the nature or extent of the relief to which plaintiffs are entitled. It is not a part of the cause of action in that sense. *Smith v. Smith*, 67 Kan. 841, 73 Pac. 56, and cases cited. The law determines the relief to which a plaintiff is entitled upon the facts averred; nor does a petition become demurrable because from its averments it seeks to recover more than plaintiff is entitled to, if it otherwise states a cause of action. The petition alleged that

an execution had been issued upon a dormant judgment, and that unless restrained by the court the sheriff would proceed to sell at public sale the real estate belonging to plaintiffs. The fact that it contained other averments upon which plaintiffs asked that their title be quieted against the judgment does not affect the former averments. We think the petition stated a good cause of action, and that the court erred in sustaining the demurrer.

The demurrer to the answer should have been sustained. None of the facts stated therein could affect the dormancy of the judgment. The statute declares the conditions which render a judgment dormant, and provides the manner in which it may be revived. Sections 430, 433, 434, 489, Code Civ. Proc. (Gen. St. 1905, §§ 5328, 5331, 5332); Seeley v. Johnson, 61 Kan. 337, 59 Pac. 631, 78 Am. St. Rep. 314. There is no exception provided by which a judgment in the name of one person shall be kept alive after his death by a showing that the cause of action, or the judgment in which it merged, belonged, in fact, to another.

The court erred in dissolving the temporary injunction and in striking from the files the petition of plaintiffs.

For these reasons, the judgment must be reversed, and the cause remanded for further proceedings in accordance herewith.

(77 Kan. 126)

MISSOURI, K. & T. RY. CO. v. QUINLAN.

(Supreme Court of Kansas. Jan. 11, 1908.
Rehearing Denied Feb. 14, 1908.)

**MASTER AND SERVANT—INJURY TO SERVANT—
NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—
DEFECTIVE APPLIANCES—FELLOW SERVANTS.**

The plaintiff, a skilled machinist employed by the defendant, was engaged in the work of chipping a casting. He held a handled chisel, while a helper struck it with a plainly defective sledgehammer supplied by the defendant. A sliver of steel broke from the head of the sledge, flew into plaintiff's eye, and destroyed his vision. Under all the circumstances of the case stated at length in the opinion, it is held:

(1) The defendant was guilty of actionable negligence.

(2) No duty rested upon the plaintiff to inspect the helper's sledge or to observe its defective condition. He could assume the defendant had performed its duty and had furnished the helper a proper tool.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 675-677, 710-722.]

(3) The failure on the part of the plaintiff to observe the sledge did not constitute contributory negligence. He could be negligent only in case he saw the sledge or under the circumstances must have seen it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 675-677, 710-722.]

(4) The plaintiff and the helper were not fellow servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 449-492.]

(5) The plaintiff did not assume the risk of injury from the sledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 610-622.]

(6) The question whether the plaintiff saw the sledge or under the circumstances must have seen it was for the jury to determine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1072-1077.]

(Syllabus by the Court.)

Error from District Court, Labette County; Thos. J. Flannelly, Judge.

Action by John J. Quinlan against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, defendant brings error. Affirmed.

Jno. Madden and W. W. Brown, for plaintiff in error. W. D. Atkinson, for defendant in error.

BURCH, J. The plaintiff was a skilled machinist employed by the defendant to work in its shops at Parsons. He was directed to fit a large casting known as a "smokestack saddle" upon the rounded top of the smoke arch of a locomotive. To do this, it was necessary to chip off portions of the casting. The plaintiff marked lines on the casting to guide him in dressing it, and secured it to a bench to hold it in position. He then held a handled chisel, while a helper struck it with a sledge; the chisel being readjusted with reference to the marks on the casting after each blow. Just as the plaintiff was completing the preliminaries to the work of chipping the casting a helper named Fogleman appeared to do the sledging, bringing with him a sledge of his own selection from a collection of tools supplied to helpers by the defendant. The helper was sent to the work by a foreman without direction from the plaintiff. The sledge was too highly tempered, and therefore brittle. There were old breaks in each face of it. It was defective and dangerous, and soon after work was begun a sliver of steel broke from it, flew into the plaintiff's left eye, and destroyed his vision. The plaintiff sued for damages, and recovered. In this proceeding in error it is alleged that the petition stated no cause of action; that no cause of action was proved; that the plaintiff was guilty of contributory negligence; that he assumed the risk of the injury which he suffered; that certain instructions given to the jury were inapplicable, because they left to the jury questions which the court should have determined as matters of law; and that the defendant is entitled to judgment on special findings returned by the jury. The petition stated the nature of plaintiff's employment, his duties, the circumstances of the injury, and contained the following allegations: "That said sledgehammer so used by the said James W. Fogleman was by defendant supplied and furnished to the servants and employes of defendant engaged as helpers to machinists, for their use in the work about said repair and machine shops of defendant; that said sledgehammer was improperly and too highly tem-

pered; was hard and brittle; would break and shiver off when used; was because thereof not reasonably safe for use; and was because thereof a dangerous and defective tool for use, which facts from the use and from the appearance of said hammer were well known to defendant, or by the exercise of ordinary care might have been known to defendant." It is said that this simple charge of knowledge and of means and opportunity for knowledge on the part of the defendant demolished the plaintiff's cause of action. The argument runs thus: The knowledge of the defendant as to the condition of the sledge was no greater than that of the plaintiff. If the defects in the hammer could be ascertained by use and appearance, the plaintiff, "who was the last to see the hammer in use before his injury," could have ascertained them. He was called upon for his own protection to make observations and take precautions respecting the tool, particularly since the defects were ascertainable by use and from appearance; and no greater duty in this respect rested upon the defendant than upon the plaintiff.

The same argument is made in discussing the sufficiency of the evidence, the negligence of the plaintiff, assumption of risk, the pertinency of the instructions, and the effect of the special findings. It is continually asserted that the plaintiff owed the duty of scrutinizing his helper's hammer, that he was obliged to know, because of the use and appearance of the tool, if it was safe, and that the defendant's duty of observation rose no higher than that of the plaintiff. Since the argument is based upon a fallacy which permeates the entire brief for the defendant, it may as well be disposed of now and once for all. No duty rested upon the plaintiff to make an independent investigation of the sledge which the helper brought to the work for the purpose of ascertaining if it was safe for use. It was the master's duty to provide the helper with a fit tool. It was not incumbent upon the plaintiff to stop his work to see if that duty had been performed. He could rest upon the assumption that the master would not permit a helper to appear with a defective sledge. Therefore, unless his attention was, in fact, drawn to the imperfections of the sledge, or unless the sledge was so obtruded upon his gaze that he could not but observe it, the injury could not be charged to any want of care or breach of duty on his part. These principles are fundamental in the law of master and servant, and it is merely carrying coals to Newcastle to cite authorities for them. However, the case of *Buoy v. Milling Co.*, 68 Kan. 436, 75 Pac. 466, is instructive. The facts are stated in the opinion as follows: "James Buoy, an employé of the Clyde Milling & Elevator Company, who was assisting in the construction of a warehouse, was injured by the fall of a negligently constructed scaffold. * * *

Miller, the general manager of the company, employed Richa to complete the building, and told him that he would send Buoy around to help him. According to plaintiff's testimony, Richa had worked some time, and had practically completed the scaffold, when Buoy arrived at the building. Buoy inquired if the scaffold was safe, and the reply of Richa was that it could not be pulled down with a team. Plaintiff went upon the scaffold with Richa, and within a few minutes it fell to the ground, and the plaintiff was seriously injured." The syllabus of the case reads: "The furnishing of a safe place to work and safe appliances with which to do the work is among the absolute duties of the master; and, unless the servant's attention is drawn to defects or the dangerous condition of the place or the appliances furnished or he should have known of them, he is not required to make an investigation, but may rest upon the assumption that the master has performed his duties in these respects." In the opinion it is said: "The furnishing of a safe place to work and safe appliances with which to do the work are among the absolute duties of the master. From the testimony a fair inference may be drawn that these duties were not performed. It is said, however, that plaintiff had an opportunity to examine and must have examined the scaffold before using it. According to the testimony, he was told to go to the assistance of the carpenter, and, when he went, he found a scaffold erected upon which he was expected to work, and, unless there was a very obvious defect, he had a right to assume that it was properly built. *Kelley v. Railway Co.*, 58 Kan. 161, 48 Pac. 843. * * * We cannot say that he should have known of the insecurity of the scaffold. Unless his attention was drawn to defects or to the dangerous condition, he was not required to institute an investigation, but might rest on the assumption that the company had performed its duty. * * *

As we have seen, the scaffold was not built by him, and the accident occurred within a few minutes after he began work on it. It cannot be arbitrarily said that he knew, or should have known, of the danger to which he was exposed. Under the law, it is not only necessary that the employé shall know of the facts constituting the negligence of the master, or have opportunity to know them, but, in addition to these facts, he must have known, or by the use of ordinary observation ought to have known or understood, the danger to which he was exposing himself by reason of those conditions." With but slight modification, this syllabus and opinion could be adopted in the present case. The fact that the helper used a sledge whose appearance condemned it was not conclusive upon the plaintiff. Such fact did not bind him to knowledge of the sledge's unfitness for use or appreciation of the danger in using it. His relation to the sledge was not the same as



that of the defendant who was obliged to perform the active duty of furnishing its helpers with safe sledges. The plaintiff was under no duty to examine the sledge or to inquire into its condition. He could only be held to knowledge of facts actually brought home to him or which under the circumstances he could not but possess; and there is no warrant in the law for arbitrarily attributing such knowledge to him. So much being clear, it is plain the petition stated a cause of action, and the court was required to proceed to a trial.

The plaintiff was employed in the mechanical department of the railway company, which was under the supervision and control of William O'Herin, superintendent of motive power and machinery. W. H. Brehm was master mechanic, in general charge of the shop in which plaintiff worked. James A. Wilson was foreman of the shop. The workmen in the shop were divided into three gangs, each under a foreman. The plaintiff belonged to gang 3, of which Robert E. Bate was foreman. The helpers of each gang did only unskilled and heavy work. Appropriate tools were provided for their use. Each evening the foreman of each gang ordered the tools for the helpers to his gang to be collected into a cupboard or locker of which he kept the key. This cupboard the foreman locked at night and unlocked in the morning. When the cupboard was unlocked, the tools were likely to be thrown upon the shop floor. Each helper took from the floor or from the locker such tools as he needed. Sometimes tools strayed from one part of the shop to another, and it so happened the plaintiff was injured by a sledge belonging to gang 1. The same rules of oversight by gang foreman prevailed, however, throughout the shop. Gang Foreman Bate ordered the plaintiff to do the work upon which he was engaged, and ordered Helper Fogleman to assist him, but no one ordered Fogleman to use the sledge in question. When he undertook to equip himself for work, Fogleman found no hammer in the cupboard of suitable weight for the light work of chipping a casting. Looking about, he found this one on the shop floor. The jury found specially that the sledge was not of the kind, character, quality, and appearance of those constantly used by the helper before the time of the accident; that it was not a reasonably safe tool for use; that it was too highly tempered, hard, and brittle and would break and splinter off when used; that these defects appeared on the face of the hammer, and that it was defective and dangerous. The evidence may be taken as establishing the fact that the defendant equipped the shop with a supply of safe hammers. Indeed, the plaintiff said that, before he was hurt, he had never seen a defective hammer in the shop. When defective hammers were discovered by the machinists, they were reported to the gang foreman, and either repaired or discarded. The defendant had no

actual knowledge of the defects in the hammer which Fogleman used. No one had ever objected to it, or asked that it be repaired, and it was first brought to the attention of those having authority after the plaintiff was injured.

The jury found specially that the plaintiff did not know the defective condition of the sledge before he was injured, but held the defendant responsible, returning the following special findings in connection with the general verdict: "Q. 9. Do you find from the evidence that the said sledge hammer was furnished by defendant to the servants of defendant for their use? A. Yes." "Q. 16. Do you find from the evidence that said sledgehammer had been a long time in use by the helpers in the machine shops of defendant? A. Yes." "Q. 36. Does the evidence disclose the fact that the appearances of the hammer was such as to indicate that it was a dangerous and defective tool for use, and that the defendant by the exercise of ordinary care might have known the defective condition of the tool from its appearances? A. Yes." "Q. 37. If you answer the above question in the affirmative, you may state how the railroad company could have known of the defective condition of the tool in the exercise of ordinary care? A. Through foreman." "Q. 17. Do you find from the evidence that James A. Wilson in the discharge of his duty by the exercise of ordinary care could have known of the condition of said sledgehammer at the time plaintiff sustained injury? A. Yes." "Q. 18. Do you find from the evidence that Robert E. Bate, in the discharge of his duty, by the exercise of ordinary care, could have known of the condition of said sledge hammer at the time plaintiff sustained injury? A. Yes."

The defendant argues that it discharged its duty to the plaintiff, and that no negligence on its part was proved. It furnished safe tools. It did not direct this tool to be used. It had no knowledge of the fact that a defective tool was in use; and it asks the question: How could the defendant know that the sledge was unsafe when the plaintiff did not know it? The evidence and special findings so far adverted to do not complete the proof favorable to the plaintiff. There is much more which the defendant in its argument overlooks or ignores. The defendant did not stop with supplying proper tools for helpers to work with. Helpers were unskilled men without the expert knowledge necessary to determine whether tools were safe or unsafe, and the defendant undertook, not merely as a matter of law, but as a matter of fact, to see and know whether helpers' tools were in proper condition for use. The testimony of Mr. James A. Wilson, general foreman, is conclusive upon these questions: "Q. What position do you hold with reference to the defendant in this action? A. General foreman of the Missouri, Kansas & Texas shops at Parsons, Kan. Q. Fre-

quently during the day do you usually get around the gangs where gang 2 and 3 are at work? A. I pass through the gangs 20 or 30 times a day, and maybe more than that. Q. There is a foreman with each one of the gangs? A. Yes, sir. Q. So, then, there is to direct the work of the machinists, what is to be done, how it shall be done, Mr. Brehm, yourself, and the foreman of the gang in which they are at work? A. Yes, sir. Q. And that is the duty of all the three of you? A. Yes, sir. Q. As you pass around on the floor where these gangs are at work, you see the tools lying around there, do you? A. I generally do; yes, sir. Q. One of your duties is to see what is there, is it not? A. Yes, sir. Q. What would you have done, and what would have been your duty, had you seen this hammer in the condition it was delivered to you, in either of the gang foreman's cupboards, or upon the floor for use? A. Why I would have taken it up. Q. What do you mean by 'taking it up'? A. I would take it away, take it out of the shop, because I considered it a tool to be put in shape and in condition. Q. In other words, you considered it to be an unsafe tool to be used? A. Under the conditions; yes. Q. Would it be the gang foreman's duty to know its condition and call your attention to it? A. Not where his attention was called to it. Q. Isn't it his duty to look after everything that is there under his charge? A. Everything under his charge; yes, sir. Q. Are not the tools that are furnished to the helpers to be used under the charge of the gang foreman? A. They are. Q. Then, it is his duty to know whether a tool is a safe tool, or unsafe tool for their use is it not? A. It is. Q. And, when he discovers that it is an unsafe tool for use, it is his duty to see that it is not used, is it not? A. Yes, sir. Q. And to take it up? A. Yes, sir. Q. Either to take it to the blacksmith's shop, or cause it to be taken there and worked over, or take it or cause it to be consigned to the scrap heap. A. Yes, sir. Q. And the helpers are not supposed to have or possess any skill in the matter of determining what are safe, or what are unsafe tools to use, are they? A. No." Much other testimony is to the same effect. The plaintiff as a machinist was rarely called upon to handle helper's tools. There is no finding that he was charged with the duty of examining helper's tools to determine if they were fit for the helper to use. There is abundant evidence that such was not his duty. Helpers were incompetent to judge of the fitness of the tools they used. That function the company reserved to itself and the evidence quoted means nothing less than that the presence of a sledgehammer in a cupboard or on the shop floor constituted a license from the gang foreman to every helper to use it, whether better ones were available or not. Wilson and Bate each gave testimony to show that it was the duty of the machinists to inspect the tools of their

helpers, but the jury evidently did not credit them in this respect, and based its verdict and special findings upon the evidence to the contrary. It was the special province of the jury to resolve conflicts in the evidence, and this court cannot reinvestigate the matter. That the defendant had ample time and opportunity to discover the defective condition of the hammer after it had become unfit for use was fully proved so that the defendant's duty and breach of duty were clearly established. The answer to the question propounded by the defendant in connection with its argument upon this branch of the case is now very plain. Under the law and under the organization and rules of the shop, no duty of active vigilance rested upon the plaintiff with respect to the fitness of his helper's tools. He could rest under the assurance that the master had performed its duty, and take it for granted that the sledge was a proper one. The foreman was obliged under the law and under the organization and rules of the shop to inquire and see and know whether helper's tools were reasonably safe. After reasonable opportunity had been afforded to the foreman to ascertain the facts, the defendant is held to all the consequences of knowledge. The plaintiff is bound only by what he actually knew or under the circumstances could not but know.

The defendant claims that the plaintiff and his helper were fellow servants; that, since the defendant furnished proper tools, the choice of a defective sledge was the negligent act of a fellow servant, and hence that no cause of action was proved. From the evidence quoted, it is plain the helper exercised no intelligent choice. He was not on the same plane as either the plaintiff or the defendant. He did not have the requisite capacity to determine between the qualities of different tools, and no duty rested upon him to make a choice so far as fitness for use was concerned. The foreman chose all the helper's tools, and placed them at his disposal as being safe for use. Any so-called selection the helper might make was the selection of the foreman, and, if the tool proved defective, the foreman was responsible, and not the helper.

It is strenuously insisted by the defendant that the plaintiff was guilty of contributory negligence in not observing the defects in the hammer and preventing its use. The entire argument, however, is confused and vitiated by the improper assumption noted in the discussion of the sufficiency of the petition. Negligence involves a breach of duty. When there is no duty, there can be no neglect of duty. If a specific kind of care is for any reason not required in a given case, a person cannot be negligent in failing to use such care. The defendant's duty required that it should see and know what kind of a sledge the helpers were using, and the failure to discharge that duty constituted actionable negligence. No duty rested upon the plain-

tiff to see and know what kind of a sledge the helper used. He did not owe it to the defendant or to the helper or to himself to look. He could remain passive under the assurance that the master had fulfilled its obligation. Therefore his failure to observe the defects in the hammer did not constitute negligence barring recovery. The prudence of the plaintiff's conduct is further shown by the following very enlightening bit of testimony given by Robert E. Bate, foreman of the plaintiff's gang: "Q. If as a machinist, you had been working upon that same piece of work which Quinlan was working upon, dressing the smokestack saddle, and Fogleman, or any other helper had started to get that hammer, if you had not known there was a defective hammer in use upon the floor, it would not occur to you to look at the hammer he was using for defects, would it? A. No, sir. Q. It would not occur to any machinist under those circumstances to look and see whether it was safe or unsafe to handle, would it? A. I don't think it would." The defendant shapes its argument to do further service under the heading of assumption of risk. Assumption of risk is an element of the contract of employment. A servant assumes only those hazards which are the natural incidents of the employment. Tools which are dangerously defective are not the natural incidents of any employment. It is the master's absolute and unassignable duty to supply safe ones. If defective tools are furnished, the servant may assume the risk attending their use, but he can be held to have done so only when he has knowledge, or the equivalent of knowledge, of the facts and of the danger. The subject is fully discussed, and assumption of risk and contributory negligence are discriminated from each other in the case of *K. C., M. & O. Ry. Co. v. Loosley* (Kan.) 90 Pac. 990. The flying of chips of metal from the casting the plaintiff was dressing was a natural incident of his work. He was bound to know that such a result would follow from the pounding of his chisel by the helper's sledge, and was required to take all necessary precaution to protect himself from injury from that source. But he was not bound to take any steps to protect himself from a slivering sledge when he could take it for granted the master had given the helper a sound one. It is said the plaintiff knew how to temper steel, knew that sledges tempered until they were brittle would break under use, knew all about the kind of work done in the shops, knew that sledges were used for striking blows upon chisels, could comprehend a simple tool like a sledge, had good eyesight, was, in fact, a skilled mechanic, and had the means of knowing if this sledge was defective—all of which is true. But he had the legal right to rest upon the belief that the master would not violate its duty, and negligently expose him to the hazard attending the use of a dangerous sledge. It is said the test of the tool was

use, that the master could learn whether the tool was defective only by putting it to use, and that, while the tool was in use, the plaintiff assumed the risk. The argument is unsound in several respects, but it is enough to note a single flaw. The hammer was too old. The test had been made, and the proof of deficiency was written upon both ends of the implement long before the plaintiff lost his eyesight. When ample evidence of unsuitability for use had been supplied by use, the plaintiff had the right to rely upon the master to perform its duty to take up the tool, and no longer endanger his safety by permitting it to be used.

The one close question in the case now presents itself. Already it has been foreshadowed, and is this: Was the hammer so paraded before the plaintiff's eyes that he must have seen it? If so, he was fully competent to estimate the probable consequences of using it, and acted at his own peril. If not, he is entitled to judgment. The defendant does not segregate this question, and discuss it upon its merits, but, starting from the false premise that it was the plaintiff's duty to inspect and observe equally with the master, readily reaches the conclusion that the plaintiff's opportunity to see furnished the virtual equivalent of knowledge. The subject is partially covered by findings of fact which read as follows: "Q. 14. Do you find from the evidence plaintiff at the time he sustained injury knew the condition of said sledge hammer? A. No. Q. 15. Do you find from the evidence that at the time plaintiff sustained injury he was exercising ordinary care to prevent injury to himself? A. Yes. * * * Q. 18. You may state whether the plaintiff had good eyesight, and was a reasonably careful and prudent man in observing the place where he had to work and the tools which he and his helper had to use. A. Yes. Q. 19. Is it a fact that while the plaintiff held the chisel and his helper, James W. Fogleman, used the sledgehammer in striking, the plaintiff could see said sledgehammer as it was raised and lowered, and could see the same when it descended upon and struck the chisel which was held by the plaintiff? A. Yes; when his attention was not directed to the point of chisel used by him. Q. 20. Was there anything to prevent the plaintiff from observing the sledgehammer and the condition of the same at the time he commenced his work in chipping off the casting, and during the time he was engaged in his work? A. No. * * * Q. 26. Is it a fact as shown by the evidence, that machinists engaged in the shops of the defendant company at Parsons, holding chisels in the kind of work in which the plaintiff was engaged, ought to turn their faces away when the hammer descended upon the chisel, for the purpose of saving their face from flying particles? A. No. * * * Q. 28. You may state what is the fact as to whether the plaintiff turned his face away as the sledgehammer

descended upon the chisel which he held during the time that he was making the repairs upon the locomotive and at the time he received his injury. A. No. Q. 29. You may state what defect, if any, existed in the sledgehammer that was used by James Fogleman at the time of the injury of the plaintiff? A. Such defects as appeared on the face of the hammer. * * * Q. 38. Would an examination of the tool, from its appearance and conditions, have revealed the fact to the plaintiff that it was a defective tool? A. Yes. * * * Q. 40. Would an examination of the tool by the plaintiff at the time of the commencement of his work on the day of his injury have revealed the fact that it was improperly and too highly tempered, and consequently hard and brittle and would break and sliver off when used? A. Yes. * * * Q. 63. You may state what observation, if any, as disclosed by the evidence, was made by the plaintiff in ascertaining the condition or appearance of the sledgehammer at the time the same was selected by his helper or during any period of time when the same was being used? A. None."

It is not shown how the helper carried the sledge when he came to the place where the plaintiff's work was to be done, whether upon his shoulder, or at his side, or in front of him, or by the end of the handle with the silvered head near the floor. The plaintiff was absorbed with the details of his own part of the work. The sledge was not in his thought. He was under no obligation to consider it. He was not obliged to suspect danger. He could rest secure that the helper had a safe sledge without taking notice. It was his business to prepare the casting to be chipped, and, when that work was performed, to adjust his chisel to the line where the cutting was to begin. Up to this point, he had no occasion to look at the sledge, and from that time forward his eye was directed, not to the head of the chisel where the hammer scarcely paused between strokes, but to the cutting edge of the chisel and the lines marked on the casting. The plaintiff testified as follows: "Q. When you felt the blows come down on the chisel which you held, and you observed the blows were all right, and that the hammer was all right as to weight, what was there to prevent you looking at the hammer when it descended on the chisel? A. Well, I was keeping track of the line where I was cutting. Q. In keeping track of the line, wouldn't you necessarily have to keep your eye on the chisel and the hammer as it fell too? A. No, sir. Q. Would you permit yourself to hold a chisel with a man who was using a dangerous hammer? A. Not if I knew it, I would not. Q. Were you not yourself in duty bound to make an examination of the hammer before you commenced to work? A. No, sir; that was not my duty. Q. Didn't you know it was your duty to report any defective tools you might find in your line of work to the gang foreman that

might be in your charge? A. Any one I had charge of. Q. You didn't take charge of it and your helper might have charge of it, and you would still sit by and allow him to use a defective tool on the chisel. A. Not if I knew it. Q. Weren't you called upon to use your eyesight? A. Not that I remember of. Q. You knew sparks and chips would fly from this casting? A. Yes, sir. Q. If there were glancing blows on that chisel, you might be injured that way if the hammer was defective and there might be pieces fly from it, you would know that? A. If the chisel was not held in proper position. Q. Or if the hammer was badly battered the pieces might fly off? A. It is all a man can do to hold one of them chisels and keep track of the line. He cannot look around and examine anybody else's tools; and it is not customary. Q. Now, if you were particularly careful in selecting the chisel that you were holding yourself, will you explain to the jury why you would not make an examination of the tool your helper was using, and see whether it was just as safe as the one you used? A. I had nothing to do with the helper's tools. Q. You relied upon the fact that the helper would get a good tool, one that was not defective and use it, is that it? A. Yes, sir. Q. Now, Fogleman came to you about 7 o'clock, did he, to work? A. Somewhere in that neighborhood in the morning. Q. Well, did he have the hammer when he came? A. Well, I don't remember whether he did or not. Q. You knew he could not do the work that you had to do without the hammer? A. When I held the chisel up and was ready for him, he had the hammer then. Q. That is the first time you noticed the hammer, was it? A. I never took no particular notice of the hammer. He just started right in striking when I says, 'We are ready.' Q. When you said 'We are ready,' you are assuming he had the hammer? A. Yes, sir. Q. Did you notice it at the time when you said, 'We are all ready'? A. No. Q. You never took any notice of it even then? A. No. Q. Did you see Stevens or Robinson there while you were working and cutting away this saddle? A. I never noticed anybody in particular. Q. Did you know Stevens and Robinson were right on the other side of the bench from you? A. I never noticed anybody. Q. As a matter of fact, you were not taking notice of anything that morning? A. Not but what I was working on; that is all I was watching—my job fitting the saddle. Q. Now, although you were facing in this direction, yet you didn't see whether any persons were working here? A. I never noticed. Q. Although you were standing and facing that way, and looking this way; but you were looking at your hammer? A. I was looking at the edge. There was a little bit of a line that I started, and I watched right close to it. Of course, I could not see the line half the time, but it is a mark made by machinists to govern where

to cut, and I was holding my chisel on that line. Q. What was absorbing your attention in the dressing of this casting, and where was your attention directed? A. Directed right on the line of the cutting edge of the chisel. Q. What line do you mean? A. The line where I was taking off material to fit; where I had marked it off. Q. Is the dressing and fitting of a smokestack saddle particular work? A. Yes, sir. Q. What is there about it that requires careful and close work? A. It must fit nice and snug over the boiler, and leave no holes. It has a curved surface. Q. On account of the curvature on the top of the boiler? A. Yes, sir. Q. Was it that that was absorbing your attention at the time of dressing the casting to that line? A. Yes, sir. Q. Is that why you didn't observe whether or not there were other parties before you? A. Yes, sir." The helper, Fogleman, testified as follows: "Q. What did Quinlan appear to be giving his attention to at the time? A. He was holding the chisel, looked as though he was watching the line. He had his cap kind of pulled over his eyes, holding his chisel. I don't remember the position in which he was holding it, but he was holding it at arms' length. Q. Where did his attention appear to be directed? A. To the cutting end of the chisel. Q. Following the lines? A. Seemed to. I was watching where I was striking at the other end of the chisel. Q. You were directing your attention to the surface of the chisel? A. To the center part of it. Q. That is where your attention was directed? A. Yes, sir. Q. Where did Quinlan's attention appear to be directed at the same time your attention was directed there? A. At his chisel, cutting to the line where he was cutting. His attention seemed to be directed there. I didn't see him look around at anything. In fact, he didn't have time. I was striking every time he set the chisel. Q. State what you mean by that? A. Every time I would strike and cut a chip he would bring his chisel back, and set it at the place where he wanted to cut, and every time the chisel cut he would bring it back and set it. Of course, I had to wait until he set his chisel, and I didn't come down as fast as I pleased. I struck when he had his chisel set and therefore I had to watch the chisel." C. B. De Dual, a machinist, testified as follows: "Q. You observed him [Quinlan] while he was at work, did you? A. Yes; at times. Q. You observed where his attention was directed at those times when you did observe him? A. Yes, sir. Q. State to the jury where his attention was directed? A. His attention was directed to the smoke saddle that he was chipping."

It is the duty of the court to harmonize special findings with each other, and with the general verdict, if that can be done. The jury has found specially that the plaintiff was a careful and prudent man, and was in the exercise of reasonable care, although he did not observe what he might have seen had

he looked. The reason he did not observe the sledge as it rose and fell is fairly stated by the answer to question No. 19. Finding No. 20, considered in connection with the others and with the general verdict, evidently means no more than that no physical obstruction to a view of the hammer precluded the plaintiff from seeing it. The other findings merely established the fact of opportunity to see defects which were visible to any one looking at the sledge and that the plaintiff with good eyesight did not see. Under the circumstances, the question was one of fact, and, being a question of fact, the inference of the jury expressed in the general verdict is controlling. It is very true that in many cases this court can, and will, disregard a conclusion of fact drawn by a jury. No matter what may be the opinion of the jury, the court will not tolerate the conclusion that a man did not see what he could not avoid seeing. If a person with good eyesight stand upon a railway track, have an unobstructed view of an approaching train, and look in the direction of the train, a jury cannot be allowed to say, after he is run down, that he did not see the train. In such a case different minds could not rightfully reach different conclusions. Only one inference could rightfully be drawn and it would be the duty of the court to disregard any other. Usually the question arises in cases where a duty to be observant exists and the facts are to be estimated with reference to that duty. Here the legal obligation to see is wanting, and different opinions might well be entertained upon the question whether the plaintiff must have seen. Therefore the question was one for the jury. *St. L., F. & W. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266; *A., T. & S. F. R. Co. v. Rowan*, 55 Kan. 270, 39 Pac. 1010; *Rouse v. Ledbetter*, 56 Kan. 348, 43 Pac. 249; *Railway Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938; *Cement Co. v. Moore*, 65 Kan. 768, 70 Pac. 864; *Hoffmeier v. Railroad Co.*, 68 Kan. 831, 75 Pac. 1117. Certain decided cases cited by the defendant may be briefly discriminated.

In *Lanyon Zinc Co. v. Bell*, 64 Kan. 739, 68 Pac. 609, the plaintiff's work lay amid stacks of zinc spelter. They were a necessary part of his environment. Their condition was open and observable. No negligence of the defendant was shown, and the plaintiff was held to be chargeable with knowledge of what he could and under the law was bound to see. In this case the defective sledge had no rightful place in the midst of the plaintiff's surroundings. It was an intruder of whose presence the plaintiff was ignorant, one which he was not bound to observe, and one which could be there only through the defendant's negligence. In *McQueen v. Cent. Branch U. P. R. R. Co.*, 30 Kan. 689, 1 Pac. 139, an employé injured because of defective wheels on a hand car had used the car, had examined it, and several times had wiped oil off the defective wheels. Of course, he not

merely had full opportunity to see, but must have known, the condition of the wheels. In *Libbey v. A., T. & S. F. Ry. Co.*, 69 Kan. 869, 77 Pac. 541, a railroad conductor was struck by a train moving upon a track in the railway yards. Railway tracks are warnings of danger. They are laid for the purpose of running trains upon them, and every man must be vigilant in keeping out of the way of trains upon them. The following sentences from the opinion sufficiently distinguish the case from the one now under decision: "He knew the dangers of the place; he voluntarily and unnecessarily put himself into a place of danger; and he took no precaution for his own protection. In stepping upon a railroad track in front of a moving train without looking or listening, he ignored the plainest dictates of ordinary prudence." In the case of *Jackson v. K. C., L. & S. W. R. R. Co.*, 31 Kan. 761, 3 Pac. 501, a train conductor continued to use a defective step with full knowledge of the defect until he was hurt. Comment is scarcely necessary. In the case of *U. P. Ry. Co. v. Estes*, 37 Kan. 715, 16 Pac. 131, an employé voluntarily and unnecessarily placed himself in a place of danger; and in the case of *Carrier v. Railway Co.*, 61 Kan. 447, 59 Pac. 1075, an employé voluntarily and knowingly chose an unsafe, instead of a safe, way of doing his work. In *A., T. & S. F. Ry. Co. v. Withers*, 69 Kan. 620, 77 Pac. 542, 78 Pac. 451, the syllabus reads: "One may not knowingly stand upon a railroad track in a switch yard, or so near thereto as to be in an equally dangerous position, where he knows, or has reason to know, that cars may run at any time (another position being equally available), neglect to use his ordinary faculties to guard against danger, and, when injured through the negligence of the railroad company by a car passing along such track, recover damages. His contributory negligence bars such recovery." This is a restatement of the rule applied in the *Libbey Case*. The plaintiff *Quinlan* was in a place of safety, and was not required to be on guard against the use of a defective sledge. In the case of *A., T. & S. F. Ry. Co. v. Welkal*, 73 Kan. 763, 84 Pac. 720, it was held the plaintiff assumed the risk of injury from flying pieces of steel chipped off in furrowing out a key seat in a steel shaft. The decision is sound, but not pertinent. The hazard was one which naturally and necessarily attended the work. So in this case the plaintiff and his helper assumed the risk of injury from chips of the casting they were dressing. But the doctrine of assumption of risk does not apply when the master without notice or warning to the servant exposes him to some danger which does not inhere in the employment. In the case of *Rush, Adm'x, v. Mo. Pac. Ry. Co.*, 38 Kan. 129, 12 Pac. 582, a switchman worked in the defendant's yards, doing switching every day for 2½ months. It was held he must have known the condition of those

yards. He made no complaint of their condition, and it was held he assumed the risk. In this case a defective sledge was unexpectedly placed, not in the plaintiff's hands, but in the hands of his helper. The plaintiff was busy with work which did not require him to use or see the condition of the tool, and within an hour or two he was injured. In the case of *A., T. & S. F. R. Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204, it was not shown that the railway company was negligent, and the danger from which the plaintiff suffered was an ordinary and usual one naturally attending the work in which he was engaged. In the case of *U. P. Ry. Co. v. Monden*, 50 Kan. 539, 31 Pac. 1002, it was the plaintiff's legal duty to be vigilant in noting marks and signs to designate an approach to a junction. He had made one trip over the road. It was held the court should have instructed the jury upon the question whether the plaintiff ought not to have known there was no marker at a particular junction. The case of *Railway Company v. Sledge*, 68 Kan. 321, 74 Pac. 1111, relates to the continued use of a defective appliance after a promise to repair. In the case of *Walker v. Scott*, 67 Kan. 814, 64 Pac. 615, Scott was engaged in digging a trench, and was injured by a slipping of the bank. The following extract from the opinion shows how foreign the decision is to the present controversy: "He was fully alive to all the dangers of his employment, and knew the conditions as completely as any one could. It was his judgment and belief that a cave-in would occur." The case of *Donnelly v. Packing Co.*, 68 Kan. 653, 75 Pac. 1017, involves a question of co-service, a subject which already has been sufficiently discussed. In the cases of *A., T. & S. F. R. Co. v. Schroeder*, 47 Kan. 315, 27 Pac. 965, *S. K. Ry. Co. v. Moore*, 49 Kan. 616, 31 Pac. 138, and *S. K. R. Co. v. Drake*, 53 Kan. 1, 35 Pac. 825, the injured employés had full actual knowledge of all the dangers attending their work. Much reliance is placed by the defendant upon the case of *Gillaspie v. United Iron Works Co. (Kan.)* 90 Pac. 760. There the plaintiff was injured by a piece of steel flying from the battered top of a snap or set when struck by a sledgehammer in the process of riveting metal beams together. The plaintiff went personally with another workman to a toolbox and selected the defective tool with all its imperfections staring him in the face. Besides this, he personally assisted in heating a piece of wire and bending it around the snap for a handle. He saw and knew the condition of the snap, and this court held him to the consequences of his actual knowledge, all of which were within the comprehension of an ordinarily intelligent man. If the plaintiff in this case had voluntarily gone to the cupboard where the helper's tools were kept, had selected a hammer head, had heated a wire, and bent it around the hammer head for a handle, and then had turned the tool over to his helper to be used,

the two cases could be paralleled, and the court would say of the plaintiff, as it did of Gillaspie, that he saw the battered faces of the sledge, knew the cause of its condition, knew that slivers of steel would fly from it, and knew the danger attending its use. The defendant has cited no decision of this court which would warrant its release from liability. On the contrary, the cases cited together with the others which have been referred to establish a consistent body of legal principles which authorize a recovery by the plaintiff and with which the court is entirely satisfied. Some decisions from other states are presented for consideration. They have all been examined. Some of them are quite wide of the mark. One or two contain statements difficult to reconcile with the settled views of this court. So far as they do this, they are disapproved. All of them are distinguishable by giving close attention to the facts. None of them presents the peculiar situation disclosed by the evidence and findings under review.

If the plaintiff, a skilled machinist, had been voluntarily and deliberately using the defective tool, the entire aspect of the case would be different. He would not be permitted to escape the consequences of knowledge. If the helper had been a machinist of equal grade and capacity with the plaintiff, or of sufficient capacity to estimate the fitness of tools for service, and the master had left it to the workmen to determine when a tool was worn out or unfit for further use and to report the fact, it might be said that each workman should be on guard against the use of defective tools by his associates. Then the cases cited might be controlling. But the plaintiff in this case had no supervision over helper's tools so far as fitness for use was concerned. Those tools belonged to a distinct class. Helpers were not themselves able to pass upon the question of the fitness of their tools. The master undertook to supply this deficiency of knowledge and judgment through its foreman, so that, whenever a helper took up a tool for work, the machinist had the master's guaranty that it was safe for use, and would not injure him.

Since other opinions must be printed in the same volume of reports with this one, the discussion cannot be extended further. In the light of what has been said, the court rightfully overruled the demurrer to the evidence. The jury was properly instructed, the motion for judgment on the findings was properly overruled, and a new trial was rightfully denied.

The judgment of the district court is affirmed.

HARRINGTON v. BUTTE, A. & P. RY. CO.
(Supreme Court of Montana. Feb. 10, 1908.)

1. APPEAL—NEW TRIAL—GROUNDS.

An order granting defendant a new trial will not be reversed because the ground on which

it was based was without merit, if defendant was entitled to a new trial on any of the grounds urged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3408.]

2. TRIAL—INSTRUCTIONS—CONSIDERATION.

In reviewing objections to instructions, the entire charge will be considered as a whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-717.]

3. SAME—VERDICT—ACCEPTANCE.

Code Civ. Proc. § 1090, declares that, when a verdict is announced, if it is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be again sent out. Section 1171 provides for a new trial on various grounds, including misconduct of the jury in resorting to chance in arriving at a verdict. *Hehe*, that the court, on the return of a verdict, was not authorized to inquire by what method it had been reached, and, on ascertaining that it had been found by the quotient method, to direct the jury to retire and return a verdict by "deliberation and reasoning."

4. NEW TRIAL—GROUNDS—PROOF.

Under the express provisions of Code Civ. Proc. §§ 1172, 1173, the fact that chance has intervened in the deliberations of a jury, which is made a ground for a new trial by section 1171, must be made to appear to the court by affidavit.

5. APPEAL—DISCRETION—REVIEW.

Where there is a conflict of evidence on an application for a new trial because of misconduct of the jury, the determination of the trial court will not be interfered with on appeal, unless there is a clear abuse of discretion.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

Action by Bernard Harrington, by Jeremiah P. Harrington, his guardian ad litem, against the Butte, Anaconda & Pacific Railway Company. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Peter Breen, Jesse B. Roote, and John J. McHatton, for appellant. D. Gay Stivers and Forbis & Evans, for respondent.

BRANTLY, C. J. The plaintiff, an infant, brought this action by his guardian ad litem to recover damages for a personal injury alleged to have been occasioned by the negligence of the defendant through its servants and employes, in running its cars at a point upon its line of road where it crosses a highway called "North Wyoming Street," immediately north of the city of Butte. The defendant is the owner of a line of road running from Anaconda to Butte, with the usual necessary side tracks, switches, spurs, etc. At the point where the accident occurred there are two tracks on a grade ascending from the east to the west. It seems that in switching cars from the north to the south track, they are pushed up the grade toward the west over the north track, and, being uncoupled from the engine, which then moves away toward the east, are allowed to drift back by their own weight over upon the south track, one or more brakemen being in charge to check the momentum. Wyoming street is used extensively by the people living in the vicinity of the crossing.

On July 5, 1906, the day of the accident, a number of people, among whom were several children, including the plaintiff, had gathered near the crossing, being drawn together by the peculiar appearance and behavior of a man who was singing and acting as if intoxicated. It is alleged that by reason of the negligence of the defendant in failing to have a watchman at the crossing to warn passengers over the highway or persons present of the danger, and the reckless and careless management of defendant's employes in the switching of cars, the plaintiff was knocked down and run over by one of defendant's cars, whereby he suffered the loss of his left arm and other injuries, thus being permanently disabled and disfigured in his person. The issue made by the pleadings and submitted to the jury was whether the injury was the result of negligence of defendant's employes, or of the act of plaintiff himself by suddenly coming upon the track in front of the moving car, and thus rendering it impossible for defendant's employes to avoid the injury. The trial resulted in a verdict for the plaintiff for \$20,000, and judgment was entered accordingly. The defendant moved for a new trial on several of the statutory grounds, including alleged errors in the instructions and irregularity in the proceedings of the court, by which the defendant was prevented from having a fair trial. The motion was sustained, on the ground of error in one of the instructions which the court deemed prejudicial; the presiding judge stating in the order that "other errors, if such, could be avoided at the new trial." The plaintiff has appealed.

While it is contended by counsel for the appellant that there is no error in any of the instructions, it is conceded that, though the court was mistaken in granting the order on the ground it did, yet, if the order should have been granted upon any of the grounds urged, it should be affirmed. The concession is properly made, because, if the defendant was entitled to a new trial upon any of the grounds urged, the order was properly made, though it was based upon a ground that was devoid of merit. We shall not comment upon the particular instructions of which complaint is made further than to say that, while some of them are open to criticism, in that they are inaccurate and somewhat vague in expression, yet, when read in connection with others on the same subject, the complaint made of them appears to be without substantial merit. It is a familiar rule that, in reviewing a charge of a trial court, it will be examined as a whole. While one or more paragraphs, standing alone, may be inaccurate or even prejudicially erroneous, yet, if these are qualified and explained by the other portions of the charge in *pari materia*, and, taken together with them and the rest of the charge, fully and fairly submit the case to the jury, the verdict and judgment should be sustained. *Upton v. Larkin*, 7 Mont. 449,

17 Pac. 728; *Cushing v. Quigley*, 11 Mont. 577, 29 Pac. 337; *Cannon v. Lewis*, 18 Mont. 402, 45 Pac. 572; *State v. Fuller*, 34 Mont. 12, 85 Pac. 369, 8 L. R. A. (N. S.) 762. While, as stated, some paragraphs of the instructions are not sufficiently explicit and comprehensive, we do not think any error therein sufficient to warrant the granting of a new trial.

We are nevertheless of the opinion that a new trial should have been granted on the ground of irregularity in the proceedings of the court. When the jury came in with their verdict, the following proceedings were had: The foreman handed a written verdict to the judge, who, having examined it, handed it to the clerk. The clerk then marked it filed, signing his name to the filing mark. He thereupon read it aloud to the court and jury, as follows: "We, the jury in the above-entitled action, find our verdict in favor of the plaintiff, and against the defendant, for the sum of \$18,750. Michael Hennigan, Foreman." Inquiry was made of the jury whether this was their verdict. The inquiry was answered in the affirmative by the foreman. The jury being polled, each juror answered that the verdict was his. Immediately thereafter the court inquired of the jury by what method they had reached the verdict, stating that a quotient, or chance, verdict was void, and defining what is meant by the expressions "quotient" and "chance." Several of the jurors stated that they had arrived at the amount of damages found by having each one write down the amount he thought plaintiff entitled to and dividing the sum by 12. Thereupon the court directed the jury to retire and find a verdict by "deliberation and reasoning thereon," and, if they found for plaintiff, to find as their best judgment dictated upon the evidence and instructions, excluding the element of chance. The clerk then handed to the foreman the verdict already announced, whereupon the jury retired to their room. Presently the jury again returned into court, presenting to the court the same written verdict, except that the amount, \$18,750, had been erased and \$20,000 written in place of it. Thereupon the jury were discharged. At none of these proceedings were the parties or their counsel present.

We are of the opinion that the action of the court was wholly unauthorized, in that it was in total disregard of the provisions of the statute applicable. Section 1090 of the Code of Civil Procedure declares: "When the verdict is announced, if it is informal or insufficient in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out." After the verdict has been announced, it has passed from the control of the jury, except for the purposes declared by the statute. The purposes for which it may be retained are clearly stated. If it is informal, it may be corrected under the advice of the court; or, if it does not cover all the

issues, it may be corrected in like manner, and for either purpose the jury may again be sent out. Except in these respects it cannot be altered or amended in any particular. The section of the statute quoted is the law upon the subject in this state (Code Civ. Proc. § 3453), and, though it must be liberally construed with a view to effectuate its objects and to promote justice, the court cannot go beyond its plain provisions. In the absence of such statute, we doubt not that it would be the duty of the court to do exactly what the statute permits, this course being required in order to obviate the necessity of another trial and the attendant expense and inconvenience. The doing of these acts in no wise interferes with the substantial rights of the parties. But the plain purpose of the provision is to prevent the receipt of informal or insufficient verdicts. It does not extend to matters going to the substance that do not appear upon their face. If the verdict covers the issue, and is complete on its face, the court must receive it, for it is the utterance of the jury to which the parties are of right entitled, without interference by the court. In the cases enumerated in section 1171 of the Code of Civil Procedure, upon application by the party aggrieved, a verdict may be set aside, but not otherwise. These provisions are explicit, and limit the power of the court to correct the decision or verdict in matters of substance, and the power must be invoked in the manner and within the time prescribed in sections 1172 and 1173. *Ogle v. Potter*, 24 Mont. 501, 62 Pac. 920. Any other rule would render the right of trial by jury nugatory, because, if inquiry could be made into the method pursued by the jury in one case, it could with equal propriety be resorted to in all other cases. The consequence would be that a verdict would be the result of the judgment, not of 12 men, but of 13, the last being always the controlling factor.

In *Norris v. Burke*, 15 Mont. 214, 38 Pac. 1065, the identical question involved here was considered by this court. The trial court had submitted instructions under which, if the jury found for the plaintiff, the verdict should have been for a certain sum. The jury having returned a verdict for a less sum, the trial judge concluded that it was incumbent upon him to require a verdict to be returned according to the instructions, and in effect directed the jury to retire again and so find. The provisions of the Code then in force (Comp. St. 1887, div. 1, §§ 271, 296, 297, 298) were substantially the same as sections 1090, 1171, 1172, and 1173, cited above. This court said: "The fact is that the court refused to receive the verdict, not because it was insufficient or informal, but the real ground of the refusal was the insufficiency of evidence to justify the verdict, and that it was against the law. But this is a ground for a motion for a new trial. Code Civ. Proc. § 296, subd.

6. A motion for a new trial is a matter of some formality. A statement is prepared and carefully stated, and the case is usually heard by the court, with both sides represented by counsel, and, if either party is dissatisfied, an appeal is taken to the Supreme Court upon the record so made. But the court in the case at bar, in refusing to receive the verdict, acted upon precisely the same ground which is one of the principal reasons for granting a motion for a new trial. It is our opinion that a question of so serious an import as setting aside a verdict because the evidence was insufficient to sustain it, or that it was against the law, the Code intended should be carefully heard and deliberately determined by the district court on a motion for a new trial, and not by the simple act of refusing to receive a verdict. In this view the provisions of section 271 of the Code of Civil Procedure still have a meaning, and, it appears to us, a very clear one. The idea is this: That, lest a party should be unreasonably put to the labor of making a motion for a new trial by reason of a clerical error or informality having occurred in the verdict, or because the jury inadvertently omitted to find upon an issue presented, then, as a remedy against such accidents, we have the provisions of section 271, allowing such informalities to be corrected before they had gone too far." That case is conclusive upon the point involved here.

That a jury has resorted to chance in order to reach a verdict is one of the grounds of motion for a new trial enumerated in section 1171. Under the provisions of sections 1172 and 1173 the fact that chance has intervened in their deliberations must be made to appear to the court, on motion for a new trial, by affidavit, and in this particular case the verdict may be impeached by the affidavits of jurors themselves. On motions for new trials it is frequently the case that there is a conflict in the evidence presented by the affidavits. This court will not interfere in such case with the action of the trial court upon the motion, unless there is a clear abuse of discretion. The action of the court in this instance amounted to a summary granting of a new trial on its own motion upon the unsworn statements made by some of the jurors. Doubtless if the matter had come up regularly on motion for a new trial, there would have been dissenting jurors who would have contradicted the statements of those who had admitted that chance had entered into their deliberations. Hence it is apparent that, if the course pursued by the trial court were permissible, it would lead to untold abuses, and allow the trial court to set aside, in its own discretion, all the provisions of statute touching motions for new trials. The order is affirmed.

Affirmed.

HOLLOWAY and SMITH, JJ., concur.

O'FLYNN v. CITY OF BUTTE.

(Supreme Court of Montana. Feb. 10, 1908.)

1. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS—INJURIES—CLAIM.

Where written notice of claim for injury on a defective city sidewalk containing the time when and the place where the injury was alleged to have occurred was received in evidence, and an indorsement indicated that it had been referred to the judiciary committee of the city council and the claim disallowed, the proof sufficiently showed a compliance with Laws 1903, p. 166, § 1, requiring notice to a city or town of an injury by a defect in a sidewalk as a condition precedent to a recovery therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1696-1707.]

2. SAME—EXISTENCE OF DEFECT—NOTICE TO CITY—QUESTION FOR JURY.

Evidence held to require submission to the jury of the question whether a patent defect in a sidewalk by which plaintiff was injured had existed for such a length of time as to charge defendant city with notice thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1750.]

3. APPEAL—PREJUDICE—EVIDENCE.

Where, in an action for injuries on a defective sidewalk, it did not appear that there was any other broken board in the immediate vicinity of the one claimed to have caused the accident, and a witness testified that she had fallen at the same place a week before, defendant was not prejudiced by evidence of plaintiff's daughter that she stated to such witness where plaintiff claimed to have been injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

4. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK—INJURIES TO PEDESTRIANS—ACTION—INSTRUCTIONS.

An instruction that a person in the exercise of ordinary care, and without knowledge of any defects in, or the dangerous condition of, a sidewalk, might rely on the presumption that the sidewalk was in an ordinarily safe condition for travel, was not objectionable for failure to charge that, if the traveler had previous knowledge of the dangerous condition of the walk, the presumption did not apply, the rule not being changed by knowledge on the part of the person injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1677.]

5. TRIAL—REQUEST TO CHARGE.

Where, in an action for injuries to plaintiff, caused by a defective sidewalk, the court charged that plaintiff was entitled to presume that the walk was ordinarily safe for travel, and defendant relied on plaintiff's knowledge of the condition of the walk as nullifying the effect of such presumption, it was its duty to request an instruction covering such point.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 628-641.]

6. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIAN—ACTION—PLEADING.

Where a complaint alleged that defendant city carelessly and negligently permitted the sidewalk on which plaintiff was injured to be and remain in a dangerous and unsafe condition for a long time prior to the date of the injury, and that such dangerous condition of the walk was known to defendant for a long time prior to the date of the injury, it sufficiently negated the idea that the defect was not known to defendant for a sufficient length of time prior to the injury to enable repairs to be made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1711-1716.]

7. SAME—EVIDENCE.

Where, in an action for injuries on a defective sidewalk, a witness testified that she had fallen on the walk at the same place a week before, and that two days after plaintiff was injured the loose plank which constituted the defect was in the same condition as when witness fell, the proof sufficiently showed that the condition of the walk remained the same from the time the witness fell until plaintiff was injured.

8. TRIAL—RECEPTION OF EVIDENCE—OBJECTION—SCOPE.

Where evidence that a witness had previously fallen at the same place where plaintiff was injured by an alleged defect in a city sidewalk was objected to as incompetent and too remote, the objection was insufficient to present the question that such evidence was incompetent for any purpose, either as bearing on notice to the city or the dangerous character of the walk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 191-227.]

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

Action by Ellen O'Flynn against the city of Butte. Judgment for plaintiff, and defendant appeals. Affirmed.

Edwin S. Booth and William E. Carroll, for appellant. John J. McHatton, for respondent.

SMITH, J. Plaintiff brought this action to recover damages for injuries alleged to have been received by her through stepping upon a defective plank in a sidewalk in the defendant city. She had a verdict in the district court of Silver Bow county for the sum of \$5,000. Judgment was entered in her favor for that amount, and from such judgment and an order denying a new trial, the city appeals.

The first contention of the appellant is that no notice to the city council was given of the claim of plaintiff, as provided by section 1 of an act relating to actions against cities and towns for damages to persons injured on streets and other public grounds. Laws 1903, p. 166. That act provides that "before any city or town shall be liable for damages, for or on account of any injury or loss alleged to have been received or suffered by reason of any defect in any bridge, street, road, sidewalk, culvert, park, public ground, ferry boat or public works of any kind, * * * the person so alleged to be injured * * * shall give to the city or town council, or other governing body of such city or town, within sixty days after the alleged injury, notice thereof; said notice to contain the time when and the place where said injury is alleged to have occurred." No discussion of this question is found in the brief of counsel for the appellant, and the court would, for that reason, be justified in passing it. We find, however, from the record, that at the trial written notice of the injury and a claim for damages containing the time when and the place where the injury was alleged to have occurred was offered and received in evidence, without objection. The claim is indorsed: "Marked No. 1,200, claim of Ellen

O'Flynn for injuries, filed on the second day of Sept. 1904. P. H. Sibley, City Clerk." Also: "Disposition. Sept. 7, 1904. Read and referred to judiciary committee. Oct. 19, 1904, disallowed." The reference to the judiciary committee seems to show that the claim was presented to the city council, and that is evidently the fact; otherwise the city attorney would have objected to the admission of the paper in evidence.

The plaintiff testified that she was passing along the sidewalk in question, accompanied by her son. She said: "We came to 521 North Wyoming street and without any cause I kicked my foot against a board which stuck a little bit out, and in the meantime my son stepped on the end and the board sprang up, and in the meantime my two feet got tangled in the hole." It is contended by the appellant that the evidence is insufficient to show that the alleged defective condition of the sidewalk "had existed for such a length of time that the defendant, through its officers, had actual notice thereof, or that by the exercise of any, except the most extraordinary care, could have had notice or knowledge thereof. From all of the evidence it appears that the defect, if any existed, was latent, else it would have been discernible to plaintiff herself who had used the sidewalk at least once a week for many months prior to the time." It is true that there was testimony on the part of the defendant to the effect that the defective condition of the sidewalk was not discernible to the eye, that the defect consisted in the fact that one or more boards were not nailed down to the stringers, and that there was no broken board. The plaintiff's witnesses, however, testified that one board was broken. Plaintiff herself said at the trial: "The sidewalk was broke about two feet in off the street, and this long board which was loose, without anything in it, projected over that hole. There was nothing to steady that board, and my son stepped on that and it popped up." As the jury evidently believed the testimony of the plaintiff and her witnesses on this subject, having returned a verdict in her favor, we must conclude that the defective condition of the sidewalk was not latent, but that it could be seen.

No actual notice of the condition of the walk was brought home to the city, so that it becomes necessary to inquire whether knowledge of the defect can be imputed to the defendant; and in this connection we have this testimony of the plaintiff: "I went over this sidewalk every week. As to whether I was familiar with this sidewalk prior to the time I fell, I used to pass there, and it was always in pretty bad shape. I noticed that. I did not notice the particular condition of the walk at the place I fell. I was not referring to about the same place I fell. I was referring to all along the sidewalk. There were several breaks further up and down."

Mrs. Richards testified: "The board was broken like in the center, kind of split and raised up at both sides. * * * I picked up the board, and then I laid it down, * * * because I thought somebody else would fall on it. When the board was laid against the fence there was kind of a hole under where the board had been. There were two parts of the broken board, and I think one was a little longer than the other. The outside portion of the board next the street was a little higher than the one next the fence. When I picked up the portion next to the fence the portion next to the street was still lying there, kind of tilted up from the outside of the walk." Miss Christie Sullivan testified: "There was a hole in the sidewalk. I fell down there myself a week before. The board was broken in two, and that is what caused the hole in the sidewalk." Margaret Sullivan, a sister of Christie, testified that she was with her sister when she fell, and that the board was broken.

The plaintiff offered in evidence sections 5 and 19 of Ordinance No. 120 of the defendant city, reading as follows:

"Sec. 5. It shall be the duty of the street commissioner to inspect all sidewalks, and keep the same in repair and in a safe and passable condition and to inspect daily the reports of the police officers for information relative to their condition. Whenever a sidewalk needs renewal he shall report the same to the city council, giving the name of the street, the lot and block number or other description and the name of the owner, if known."

"Sec. 19. It shall be the duty of the city marshal and all policemen to report to the street commissioner or note upon their daily reports all defects in sidewalks, and in case of accident they shall report the particulars to their superior officer, together with the names of any witnesses, if known to them."

See *Leonard v. City of Butte*, 25 Mont. 410-418, 65 Pac. 425.

In the light of this evidence we think the question whether this patent defect had existed for such a length of time as to charge the defendant city with notice thereof should have been, as it was, submitted to the jury.

But it is contended by the counsel for appellant that the testimony of the witness Christie Sullivan was improperly admitted, for the reason that the place where she fell was not identified as being the same place where Mrs. O'Flynn was injured. Plaintiff testified that she told her daughter Mary where she fell, and that the place was in front of the premises No. 521 North Wyoming street, occupied by Charles Ferns. Mary testified that she afterwards visited the place and told Christie Sullivan where the mother claimed to have been hurt. She said: "It was 521 North Wyoming street that mamma was hurt, and I told her [Christie] the place and how it happened." Christie Sullivan then

testified: "She [Mary] told me where her mother claimed to be injured. I know 521 North Wyoming street, Ferns' place." After describing the place where she fell she continued: "I saw this plank a couple of days after Mrs. O'Flynn fell, and the condition was just about the same. It had not changed. * * * There might have been other broken places, but I did not notice them." Patrick O'Flynn, the husband of plaintiff, testified that he examined the place where his wife said she was injured, that he examined the broken board, and that there was no other board broken in front of No. 521 or in the immediate vicinity of that sidewalk. It appears, therefore, that Christie Sullivan had personal knowledge of the place where she fell. She identified it as in front of No. 521 North Wyoming street, Chas. Ferns' place. This being the same place where plaintiff was injured, we think there was no prejudicial error in permitting Mary to state that she told Christie where Mrs. O'Flynn claimed to have been injured, especially in view of the fact that there appears to have been no other broken board in the immediate vicinity.

Appellant objects to instruction No. 5, which reads as follows: "You are instructed that a person, in the exercise of ordinary care, and without knowledge of any defects in, or dangerous condition of, the sidewalk, is entitled to rely upon the presumption that the sidewalk is in an ordinarily safe condition for travel, and that they are not exposing themselves to danger while walking thereon and thereover." It is said that the court should have told the jury in this connection that the presumption referred to is a rebuttable one, "and in the event of there being evidence showing upon the part of the traveler a previous knowledge of the dangerous condition of the sidewalk then the presumption does not apply." But the answer to this criticism is that the rule of law is not changed in any event by knowledge on plaintiff's part. The rule remains the same whether applicable to the particular case or not. In this case it may have been a question whether plaintiff had knowledge of the defect; if so, that was for the jury to determine, under proper instructions, and if defendant's counsel relied upon that knowledge on her part as nullifying the effect of the presumption, an instruction covering the point should have been requested. No other complaint is made of this instruction.

It is said of instructions Nos. 2, 8, 9, and 12 that they do not follow the issues in the case, by reason of the fact that the complaint fails to allege that the defendant had notice or knowledge of the defect in the sidewalk in time sufficient to have repaired the same. The allegations of the complaint are that the defendant carelessly and negligently permitted the sidewalk to be and remain in a dangerous and unsafe condition "for a long time" prior to the date of the injury, and that this

condition of the sidewalk was, at the time of the injury and "for a long time prior thereto, known to the defendant." The allegations of carelessness and negligence negative the idea that the defect was not known to the defendant for a sufficient length of time, prior to the injury, to enable repairs to be made, and in each of the instructions last referred to, the court covered the point by telling the jury that the defendant must have had notice, actual or constructive, of the defective condition for a sufficient length of time prior to the injury to enable it, in the exercise of reasonable diligence, to repair or remedy the same.

Again, it is said that, if the evidence of Christie Sullivan was admitted on the theory of constructive notice to defendant by reason of the length of time the walk was out of repair—and we understand, from reading the record, that that was the theory of the plaintiff in introducing it—then that testimony should have been followed by proof that the condition of the walk remained the same from the time that she fell until the date of the injury to the plaintiff. Assuming that defendant's counsel are correct in their deduction, the contention is disposed of by the quotation heretofore made from the testimony of Christie Sullivan. She testified that two days after Mrs. O'Flynn was injured the plank was in the same condition as when the witness fell. We think this testimony was sufficient to warrant the court in submitting the question to the jury.

We have said that it is apparent to us from the record that the testimony relating to the accident to Christie Sullivan was admitted by the court as bearing upon the length of time the defect had existed in the sidewalk, and not as proof of the dangerous character of the walk. Defendant seems to argue, although not very strenuously—perhaps it is merely a suggestion—that the testimony was not competent for any purpose. But no such objection was urged at the trial. The witness was asked this question: "Now, do you know of anything being wrong with the sidewalk at that particular place up there at any time prior to the time Mary O'Flynn told you about her mother being hurt?" "Mr. Forestell: Objected to for the reason that the location and time are not fixed and for that reason it is incompetent, irrelevant, and immaterial." After the witness had answered that she fell there herself a week before, because of a hole in the sidewalk, the city attorney said: "Objected to as incompetent, irrelevant, and immaterial, and move that the answer be stricken out for the reason that it is too remote." It appears, therefore, that the objection that this testimony was incompetent for any purpose, either as bearing upon notice to the city or the dangerous character of the sidewalk, was never urged in the court below.

We find no reversible error in the case, and the judgment and order appealed from are therefore affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

CARLSON v. BARKER.

(Supreme Court of Montana. Feb. 10, 1908.)

1. APPEAL—PRESENTATION OF GROUNDS OF REVIEW—PLEADING—COMPLAINT.

In an action to recover wages due for services to a partnership of which defendant was a member, an allegation that the partners, upon winding up their affairs, had an accounting, and as part consideration for same defendant agreed to pay plaintiff the balance due him from the firm, while somewhat indefinite and uncertain, sufficiently stated a consideration for defendant's promise to pay plaintiff the money due him from the firm, as against an objection first made on appeal that the complaint did not state a cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1226-1240.]

2. PLEADING—UNCERTAINTY—MODE OF OBJECTION.

If a defendant desires a complaint to be made more definite and certain, the proper course is to file a special demurrer for that purpose in the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 518.]

3. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In an action to recover wages due for services to a partnership of which defendant was a member, he having agreed to pay the debt upon a final settlement between the partners, an instruction that, unless defendant, at the time of making the promise, had funds of the partnership sufficient to pay the debt, there was no consideration for his promise, if erroneous, was harmless error, where the jury, by finding for plaintiff, must have found that defendant did have sufficient funds to pay the debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4225-4228, 4230.]

4. FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER—AGREEMENT BY PARTNER TO PAY FIRM DEBT—CONSIDERATION.

(iv. Code, § 3612, subd. 3, provides that a promise to answer for the antecedent obligation of another need not be in writing, where the promise is made upon a consideration beneficial to the promisor. Upon the winding up of a copartnership of which defendant was a member he retained certain partnership funds and agreed to pay plaintiff a debt due him from the firm. *Held*, that defendant's promise was upon a consideration, beneficial to himself under section 3612, and was valid, though not in writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 54.]

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

Action by Emil Carlson against David L. S. Barker. From a judgment for plaintiff and order denying a new trial, defendant appeals. Affirmed.

Downing & Stephenson, for appellant. A. C. Gormley, for respondent.

SMITH, J. This is an appeal from a judgment of the district court of Cascade county,

and an order denying the defendant a new trial. The jury returned a verdict in favor of the plaintiff for the full amount demanded in the complaint. It is believed that a reference to the pleadings and the charge of the court will be sufficient to explain the nature of the action and the questions involved on the appeal, without any extensive recital of the evidence. The complaint reads as follows:

"The plaintiff complains of the defendant and alleges:

"First. That during the times hereinafter mentioned the defendant, David L. S. Barker, and one Nels Carlson, and one Olaf Lindquist, were interested together as partners in a certain lease upon the Ripple quartz lode mining claim, near Nelhart, Cascade county, Mont., the defendant, David L. S. Barker, owning a one-half interest in said lease and the said Nels Carlson and Olaf Lindquist each owning a one-quarter interest in said lease.

"Second. That on or about the 9th day of July, 1903, the plaintiff was hired and employed as a miner by the said lessees, David L. S. Barker, Nels Carlson, and Olaf Lindquist, to work in the said Ripple mine, so leased by them, and was to receive the usual and customary wages of three and one-half dollars (\$3.50) per day; that the plaintiff continued to work for said parties as aforesaid until on or about the 1st day of April, 1904; that the value of his services at three and one-half dollars (\$3.50) per day amounted to eight hundred seventeen dollars and twenty-five cents (\$817.25); that the plaintiff has received from time to time, on account of said services, the sum of five hundred twenty-seven dollars and thirty-eight cents (\$527.38), leaving a balance due and unpaid of two hundred eighty-nine dollars and eighty-seven cents (\$289.87).

"Third. That when the said lessees of the Ripple mine ceased to work the same under their said lease on or about the 10th day of April, 1904, they had a settlement and accounting of all their business connected with said lease, and on said settlement and accounting, and as part consideration for the same, the defendant, David L. S. Barker, promised and agreed to pay the plaintiff the said balance of two hundred eighty-nine dollars and eighty-seven cents (\$289.87), due and unpaid him as aforesaid.

"Fourth. That the said sum of two hundred eighty-nine dollars and eighty-seven cents (\$289.87) has not been paid nor has any part thereof; that the defendant has refused to pay the same, though payment thereof has been demanded of him by the plaintiff."

There was no demurrer on the part of the defendant, but an answer was filed denying each and every allegation of the complaint. The court charged the jury as follows:

"You are instructed that the defendant in this case has denied all of the allegations of

the complaint, and before the plaintiff can recover in this case he must prove by a preponderance of the testimony that the copartnership between the defendant, Nels Carlson, and Olaf Lindquist, existed, and during its existence that the plaintiff worked for said partnership, as alleged in the complaint, at the price of \$3.50 a day, that a balance remains due the plaintiff unpaid of \$289.87, that when said partnership ceased to work said lease the said partners had a settlement and accounting of all their business connected with said lease, and as a part consideration that defendant had moneys in his hands belonging to said copartnership, and promised and agreed with his copartners to pay the balance of \$289.87 alleged to be due the plaintiff; and, if you find the facts to be as set forth in this instruction, it will be your duty to return a verdict for the plaintiff for \$289.87, with interest at the rate of 8 per cent. per annum from the 2d of August, 1906, unless you find from a preponderance of the testimony the facts to be as set forth in the next instruction.

"You are further instructed that, although you find from the evidence that the defendant, David L. S. Barker, and Nels Carlson made an agreement by which David L. S. Barker agreed to pay the plaintiff the sum of \$289.87, if you should further find that before the said Emil Carlson, the plaintiff herein, released the copartnership from said indebtedness, not notifying the said David L. S. Barker of his acceptance of him for the payment of said moneys, the said Nels Carlson and the said David L. S. Barker made another agreement by which the said David L. S. Barker paid the moneys in his hands to Nels Carlson instead of paying them to Emil Carlson, in that event you are instructed to find a verdict for the defendant in this case.

"It is not necessary, in order to make defendant liable, that he should have made to the plaintiff the promise to pay said \$289.87, but a promise in consideration of his having funds belonging to said copartnership sufficient to pay the same and made to his copartner, Nels Carlson, in a settlement of the copartnership affairs, with authority in Nels Carlson to make such settlement from his copartner Lindquist, would be sufficient to bind the defendant so far as the promise is concerned.

"You are instructed that it is not sufficient for you to find that the sum of \$289.87 was due and owing to the plaintiff from the firm of Carlson & Co., but that, in order to find for the plaintiff in this case, you must find also that the partners, David L. S. Barker, Nels Carlson, and Olaf Lindquist, had a settlement, and that in consideration of such settlement the defendant, David L. S. Barker, promised and agreed to pay Emil Carlson the said sum of \$289.87, and, unless you find that there was such a settlement and such an agreement upon the part of the defendant,

David L. S. Barker, you are instructed to find a verdict for the defendant.

"You are instructed further that, unless you find that the defendant, David L. S. Barker, had moneys in his possession amounting to \$289.87, belonging to the firm of Carlson & Co., that there would be no consideration for an agreement upon his part to pay the sum to the said Nels (Emil?) Carlson, plaintiff herein."

It will be seen from the foregoing that the cause was tried upon the theory that paragraph 3 of the complaint was a necessary and material part thereof, without which the complaint did not state a cause of action, and that the defendant was not severally liable to the plaintiff, and could not be sued alone for the partnership debt as such. We shall not examine the correctness of this theory, but shall treat the case as it was treated in the district court.

The first contention of the appellant is that the complaint does not state facts sufficient to constitute a cause of action, because paragraph 3, "construed most favorably to the plaintiff, does not state any consideration for the promise of the defendant to pay." We cannot agree with appellant's counsel in this view. Paragraph 3 does state, in a general way, that there was a consideration and what that consideration was. It is true that it does not state in detail what the arrangement between the parties was. If the defendant desired to have the complaint made more definite and certain in this regard, he should have raised the point by special demurrer in the court below.

The district judge instructed the jury that before the plaintiff was entitled to recover he must show by a preponderance of the testimony (1) that the so-called copartnership composed of Barker, Nels Carlson, and Lindquist existed; that during its existence the plaintiff worked for it, as alleged in the complaint, at the price of \$3.50 a day, and a balance remained due and unpaid to him of \$289.87; (2) that the simple promise of the defendant Barker to pay this amount to the plaintiff was not sufficient to warrant a verdict for the plaintiff, but the jury must go further and find that at the time of making the promise the defendant had funds in his hands belonging to the copartnership sufficient to pay the amount; that unless Barker did have funds to that amount there would be no consideration for his agreement to pay the plaintiff. Whether the court below was right or wrong in imposing this additional limitation upon the plaintiff's right to recover is immaterial, because the jury found for the plaintiff, and must have found that the defendant did have this amount in his hands at the time he made the agreement with Nels Carlson, his copartner.

It only remains to be ascertained whether there is any testimony warranting such a finding. An examination of the testimony

of Nels Carlson discloses the fact that he testified that at the time Barker promised to pay the plaintiff's claim they were engaged in an effort to finally adjust the affairs of the copartnership; that it was ascertained that the firm owed the sum of \$852.11, of which Barker agreed to pay one half, and Nels Carlson and Lindquist the other half; that at this time Barker had in his possession the sum of \$471.69 belonging to the partnership, being the proceeds of certain ore sold by the firm to the East Helena smelter; that in the settlement this fact was taken into consideration, and the portion of the debts Barker was to pay was ascertained and adjusted on the basis of his retention of the whole amount received from the smelter. There is no other matter involved in the appeal save this one question of fact. The district court submitted the case to the jury upon this theory, and the jury resolved the issue in favor of the plaintiff. The defendant does not complain of the instructions of the court, but insists that the promise of Barker, made to his copartner, to pay the plaintiff's claim, was without consideration and within the statute of frauds, because not in writing.

We may assume, in passing, that Barker was not severally liable for the plaintiff's claim, although, in the light of sections 3250 and 1940 of the Civil Code, there may be grave doubts upon that subject, and we do not resolve them; but there can be no doubt that under the testimony of Nels Carlson, stamped as true by the verdict of the jury, an independent consideration passed to the defendant, Barker, and that his agreement to pay the claim was a good promise, by virtue of the provisions of section 3612 of the Civil Code, which reads as follows: "A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing: * * * (3) Where the promise being for an antecedent obligation of another * * * is made upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person." See *McCormick v. Johnson*, 31 Mont. 266, 78 Pac. 500.

The judgment and order appealed from are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

RAYMOND v. BLANCGRASS et al.

(Supreme Court of Montana. Feb. 1, 1908.)

1. PLEADING—DEMURRER—HEARING—COMPLAINT—STATEMENT OF CAUSE—SUFFICIENCY.

In determining whether a complaint states a cause of action or entitles plaintiff to any re-

lief, matters of form and allegations that are irrelevant or redundant will be disregarded, and if upon any view plaintiff is entitled to any relief, the pleading will be sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 45, 66-75, 555.]

2. TROVER AND CONVERSION—GROUNDS—TITLE AND RIGHT OF POSSESSION.

A complaint which alleges that defendants at a certain time and place combined and conspired together to hinder and defraud plaintiff in her rights in her husband's property, that while she had an action pending against her husband for separate maintenance they wrongfully took and carried away certain sheep then and there the property of her husband and in his possession, does not state a cause of action for conversion, for in such an action plaintiff must allege and prove a general or special ownership in the property and a right to the immediate possession of it at the time of the unlawful taking.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 197.]

3. EQUITY—DECREE—NATURE—JUDGMENT.

While decrees in equity often extend to matters beyond the purview of judgments at law, they are nevertheless judgments within Code Civ. Proc. § 1000, defining a judgment as the final determination of the rights of the parties in an action or proceeding, and, so far as the decree awards a recovery of money, it is in no wise different from judgments at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 932-940.]

4. JUDGMENT—LIEN—DECREE IN EQUITY.

Where properly docketed, a decree in equity becomes a lien upon the real estate of the judgment debtor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1322.]

5. EQUITY—DECREE—ENFORCEMENT—STATUTORY PROVISIONS—EXECUTION.

Under Code Civ. Proc. § 1214, providing that when a judgment is for money it may be enforced by a writ of execution, and section 1825 providing that, whenever an order for the payment of a sum of money is made by the court pursuant to provisions of the Code, it may be enforced by execution in the same manner as if it were a judgment, a decree in equity for the payment of money may be enforced by execution in the same manner as a judgment in an action at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1053, 1055.]

6. SAME—APPROPRIATE PROCESS—EXECUTION.

When no method is specifically provided for enforcing a decree in equity for the payment of money, the court would be authorized to enforce it by execution as the most effective process in view of Code Civ. Proc. § 205, providing that, when jurisdiction is conferred on a court, all the means necessary to carry it into effect are also given, and if the course of proceeding is not specifically pointed out any suitable process may be adopted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1053-1055.]

7. HUSBAND AND WIFE—SEPARATE MAINTENANCE OF WIFE—DECREE—RIGHT OF ENFORCEMENT.

Where a wife recovers a judgment against her husband for separate maintenance, she becomes his creditor for the amount adjudged due at the time, and for amounts accruing from month to month, occupies toward him the position of any other creditor, is entitled to the same relief in equity if she seeks the satisfaction of her claim, and may maintain an action at law upon any ground available to any other creditor.

8. TORTS — PREVENTING SATISFACTION OF CREDITOR'S CLAIM.

A creditor who has been prevented from having satisfaction of his claim by the wrongful act of a third person acting with or independently of the debtor may maintain an action for damages against such person for the value of the property put beyond the creditor's reach.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Torts, §§ 14, 15.]

9. SAME—NECESSITY OF SPECIAL INJURY.

A judgment creditor has no cause of action against one who has conspired to defeat his judgment, unless he can show some special injury different from that suffered by other creditors.

10. HUSBAND AND WIFE—SEPARATE MAINTENANCE — DECREE — ENFORCEMENT — ACTIONS AGAINST THIRD PERSONS.

One who has obtained a decree against her husband for separate maintenance cannot sue others to recover damages for conspiracy during the pendency of that suit to defeat the suit and make ineffective the decree which might be obtained therein by removing the property of plaintiff's husband, since prior to a decree the husband would not be her debtor.

11. CREDITOR'S BILL—GROUNDS.

A complaint alleged that defendants, by the conversion of certain property of plaintiff's husband, conspired to render ineffective any decree which might be recovered in a separate maintenance suit pending at the time of the alleged conversion, but there was no allegation that the husband was involved in the conversion, that plaintiff had acquired a lien on the property, nor that there was a trust in her favor. *Held*, that the complaint was not good as a creditor's bill.

12. DISCOVERY—BILL OF DISCOVERY—GROUNDS.

A complaint which alleges that defendants conspired, pending a suit by plaintiff against her husband for separate maintenance, to defraud plaintiff of her rights in her husband's property and to render ineffective any decree which might be obtained against him, and wrongfully took and carried away certain property of her husband then in his possession to plaintiff's damage, etc., is not good as a bill of discovery, since the relation of the parties toward the subject-matter of the controversy is clearly understood, and no discovery is necessary.

13. EQUITY—SUBJECTS OF EQUITY JURISDICTION — TORTS — RECOVERY BY CREDITOR OF PERSON INJURED.

Where property of a debtor has been converted by third persons, the creditor cannot sue and recover in equity from such persons on the mere ground that he is a creditor and that the debtor has no other property.

14. EXECUTION—SALE—RIGHT OF PURCHASER—STATUTORY PROVISIONS—CONSTRUCTION.

Code Civ. Proc. § 1232, relating to sheriff's sale under execution, provides that, when the purchaser of any "real" property, not capable of manual delivery, pays the purchase money, the officer making the sale must execute and deliver to him a certificate of sale. Section 1233 and the following sections direct the sheriff relative to the sale of real estate and provide for redemption. *Held*, that the word "real" in section 1232 was used by mistake, and the word "personal" should be substituted therefor in the application of the section.

15. EQUITY—ADEQUACY OF LEGAL REMEDY.

Civ. Code, § 4662, subsec. 3, provides that "personal property" includes things in action. Code Civ. Proc. § 1218, provides that all property or any interest therein of the judgment debtor not exempt by law is liable to execution, and all property not capable of manual delivery may be attached on execution in like manner as

on writs of attachment. Section 1224 requires the sheriff to execute a writ by collecting or selling the things in action, etc. Section 1232 provides that the officer making the sale must execute and deliver to the purchaser of real (personal) property not capable of manual delivery a certificate of sale upon payment of the purchase money. Section 895, as amended by Laws 1899, p. 139, provides for attachment of debts, credits, and other personal property not capable of manual delivery by serving upon the debtor or person responsible a copy of the writ, etc. *Held*, that a wife who obtained a judgment against her husband for separate maintenance had a remedy against persons who had converted the husband's property by execution against her husband to collect amounts due under her judgment under which his claim against such persons might have been sold and bought in by her, whereupon she could sue them at law, and that she could not otherwise maintain an action against them in equity, since equity will aid only where an adequate remedy is not found in the provisions of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 151-155.]

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Action in equity by Mary Raymond against John Blancgrass and others. From a judgment for plaintiff, John Blancgrass and Philip Chevallier appeal. *Reversed*.

Albert I. Loeb, Walsh & Nolan, and I. Parker Veazey, Jr., for appellants. E. A. Carleton, for respondent.

BRANTLY, C. J. It is alleged in the complaint herein that on April 29, 1904, the plaintiff, in an action brought for that purpose against her husband, Pierre Raymond, in the district court of Lewis and Clark county, obtained a decree providing for the separate maintenance of herself and her four minor children, which the decree awarded to her custody; that the decree directed the husband to pay to her monthly, and on the first day of every month thereafter during the joint lives of plaintiff and defendant, or until reconciliation should be effected, or until the further order of the court, the sum of \$80; that it further directed that the defendant forthwith pay to her the sum of \$50 to purchase necessary clothing for the plaintiff and her children, and also an additional sum of \$48 to pay rent then due and owing by the plaintiff; that none of said sums have been paid by the defendant, or any one in his behalf, but are long past due; and that the said defendant is wholly insolvent, has no other property within the jurisdiction of the court out of which the sums so awarded may be realized, and is, and has been since soon after the rendition of the decree, a nonresident of the state of Montana. It is then alleged as follows: "(5) Plaintiff further avers: That no reconciliation has ever taken place between her and her said husband, Pierre Raymond, and there is no likelihood that any will ever occur between them. That ever since said decree of separate maintenance was entered the said Pierre Raymond has utterly failed and neglected to contribute in

any manner whatsoever to the support or maintenance of the plaintiff or her said minor children, nor has he communicated with them in any way, but has utterly abandoned this plaintiff and her said children. (6) That such proceedings were had in this court under and by virtue of said decree of separate maintenance. That the visible and known property of said Pierre Raymond, after he had departed without this state and had refused and failed to comply with said decree, was set apart by the court for the benefit of plaintiff and her said minor children in order to carry out and make effectual the provisions of said decree, but that the funds derived from the sale of said property of said Pierre Raymond have become almost exhausted, and will, in a very short period of time, be wholly consumed, thereby leaving plaintiff and her said minor children without any means of support, as this plaintiff is without any other property or means of her own. (7) Plaintiff avers that she brings this suit in behalf of herself and her said minor children to enable her to provide the means for her and their support and to secure to her and them the rights and benefits to which they are entitled under and by virtue of the aforesaid decree. (7a) Plaintiff further avers: That on or about March 10, 1904, at Lewis and Clark county, in the state of Montana, these defendants combined, connived, and conspired together to hinder, delay and defraud the plaintiff of her rights in the property of her said husband, and said defendants combined, connived, and conspired together to defeat the plaintiff in her said suit for separate maintenance against her husband, which was then pending in this court, as these defendants well knew, to make ineffectual any decree which she might obtain against her husband. And so it was that at the time and place aforesaid these defendants unlawfully and wrongfully took and carried away 150 head of sheep, of the particular kind known as wethers, then and there the property of the said Pierre Raymond and in his possession, and which said wethers were of the value of \$900, and converted and disposed of the same to their own use to the damage of plaintiff in the sum of \$900. (8) That in the unlawful taking and converting of said 150 head of wethers, as aforesaid, the defendants have been guilty of fraud, oppression, and malice." The prayer demands judgment for the sum of \$900, with interest on this sum since March 10, 1904, and costs of suit, and that the amount, when recovered, be devoted by the court to the payment of the sums awarded plaintiff under the decree. The defendants in their answers admit the rendition of the decree, as alleged, but put in issue all the other allegations of the complaint. At the commencement of the trial the defendants objected to the introduction of any evidence in support of the allegations of the complaint on the ground that

they do not state a cause of action. The objection was overruled. At the close of plaintiff's case the defendants made separate motions for nonsuit, basing their motions upon the same ground upon which their objection was made. The motion of defendant Blaise was sustained, and the cause dismissed as to him. Those of the other defendants were denied. The latter declined to offer any evidence. The court submitted the case to the jury for two special findings, viz., whether the defendants converted the sheep, and what was their value at the time of the conversion. The jury having found that the defendants were guilty of the conversion, and that the sheep were of the value of \$712.50, judgment was rendered and entered in favor of plaintiff for this sum, with interest and costs. The defendants Blancgrass and Chevalier have appealed from the judgment and an order denying them a new trial.

The question submitted for decision is whether the complaint states facts sufficient to warrant any relief. It is not clear from an inspection of it whether it attempts to state a cause of action for a conversion, or one for damages in the nature of an action on the case for the wrongful conduct of defendants, by which plaintiff has been prevented from having satisfaction, pro tanto, of her judgment, or whether the plaintiff has attempted to invoke the aid of equity to reach an asset of her husband which cannot be reached by the ordinary process of execution. The form in which an action is brought is of no consequence; nor does it matter that the complaint contains allegations not appropriate to the purpose sought to be attained. In determining the issue of law presented by a general demurrer to the complaint, or by any other appropriate method of raising the question—as here, by an objection to the admission of evidence at the trial, on the ground that the facts stated do not warrant any relief—matters of form will be disregarded, as well as allegations that are irrelevant or redundant; and if, upon any view, the plaintiff is entitled to relief, the pleading will be sustained. *Donovan v. McDevitt*, 36 Mont. —, 92 Pac. 49.

We inquire, first, whether the complaint states a cause of action in conversion. In such an action the plaintiff must allege and prove a general or special ownership in the property and a right to the immediate possession of it at the time of the unlawful taking by defendant. *Harrington v. Stronberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413; *Glass v. Basin & Bay State Min. Co.*, 31 Mont. 21, 77 Pac. 302. The allegations of the complaint here do not meet this requirement. It is nowhere alleged that the plaintiff was the owner of the sheep at the time of the conversion, nor that she had any special property in them, nor that she was in possession of them. Indeed, the contrary appears, for it is alleged that "these defendants unlawfully and wrong-

fully took and carried away 150 head of sheep * * * then and there the property of the said Pierre Raymond, and in his possession," etc. The idea that plaintiff had any interest in them, even by possession, is thus excluded. Further, the conversion took place prior to the rendition of the decree, and it is not alleged that the cause of action arising out of it was set apart to the plaintiff under the terms of the decree, supposing this could have been effectively done. Does it, then, state a cause of action for damages, upon the theory that, by the wrongful acts of the defendants, the plaintiff has been prevented, in part, from having satisfaction of her judgment against her husband? Just here it may be observed that the result of the action for separate maintenance was a personal judgment against Raymond which could be enforced by execution as any other judgment. "A judgment is the final determination of the rights of the parties in an action or proceeding." Code Civ. Proc. § 1000. While decrees in equity often extend to and cover matters entirely beyond the purview of judgments at law, they are nevertheless judgments within the definition of the statute, supra, and, so far as they award in any case a recovery of money, they are in nowise different from judgments at law. In legal effect there is no distinction. 5 Ency. Pleading & Practice, 489. When properly docketed they become liens upon the real estate of the debtor. They are enforced by execution just as are judgments in legal actions. Code Civ. Proc. § 1214. An order directing the payment of money is, pro hac vice, a judgment, and may be enforced by execution. Code Civ. Proc. § 1825. Even if the statute did not contain this specific provision, the court would adopt the most appropriate process. Code Civ. Proc. § 205. And it cannot be doubted that the execution would be most effective and appropriate. The plaintiff, then, by the recovery of her judgment against her husband, became his creditor for the amount adjudged to be due her at the time of its entry, and also for the amounts accruing thereon from month to month, and occupied toward him the position of any other creditor. At least she "stands in the equity" of a creditor, and is entitled to the same relief in equity when she seeks to have her claim satisfied. *Twell v. Twell*, 6 Mont. 19, 9 Pac. 537; *Bump Fr. Con.* (3d Ed.) 505; 14 Cyc. 298; 5 Ency. Pleading & Practice, 489. Such being the case, she is also entitled to maintain an action at law upon any ground which would be available to any other creditor.

The substantive statement in the complaint is that "said defendants combined, connived, and conspired together to defeat the plaintiff in her said suit, * * * which was then pending in this court, as these defendants well knew, to make ineffectual any decree which she might obtain against her husband; and so it was that at the time and place aforesaid these defendants unlawfully,

etc., * * * took and carried away, etc., * * * to the damage of plaintiff in the sum of \$900." There can be no doubt of the soundness of the proposition that a creditor who has been prevented by the wrongful acts of a third person acting in connection with or independently of the debtor from having satisfaction of his claim may have his action for damages against such person, the measure of recovery being the value of the property put beyond the creditor's reach. This is sustained both by reason and authority. But when it is sought to apply it to particular cases, difficulty is encountered. In Pennsylvania the action may be maintained by any creditor, whether he has a lien upon the property eligned or secreted or not, or whether he has reduced his claim to judgment. *Penrod v. Mitchell*, 8 Serg. & R. (Pa.) 522; *Mott v. Danforth*, 6 Watts (Pa.) 304, 31 Am. Dec. 468; *Kelsey v. Murphy*, 26 Pa. 84. In *Mott v. Danforth*, supra, the court seems to rely for support of its decision both upon cases adjudged at common law in England and upon the provisions of the statute of Elizabeth (13 Elizabeth, c. 5) relating to fraudulent conveyances and imposing penalties upon the guilty participants. But the rule of these cases is exceptional. Speaking generally, the courts of this country adhere to the rule that the action cannot be maintained unless the plaintiff, by judgment, execution, or attachment, has secured a lien upon the particular property, and thus has a vested right therein which has been rendered nugatory by the acts of the defendant, the plaintiff thereby having sustained a specific injury different from that suffered by other creditors. In other words, in order to warrant a recovery, the plaintiff must allege and show that he had a specific right to subject the particular property to the satisfaction of his judgment, and that the defendant, either alone or with others, has deprived him of this right. Otherwise a recovery would be had upon the plaintiff's bare chance to have satisfaction of a claim which he possessed in common with other creditors—a wrong too remote, indefinite, and contingent to be the ground of an action. This is declared to be the rule by the Supreme Judicial Court of Massachusetts in *Lamb v. Stone*, 11 Pick. (Mass.) 527, where it is said: "The plaintiff complained of the fraud of the defendant in purchasing the property of his absconding debtor in order to aid and abet him in the fraudulent purpose of evading the payment of his debt. The court ask, what damage has the plaintiff sustained by the transfer of his debtor's property? He has lost no lien, for he had none. No attachment has been defeated, for none had been made. He has not lost the custody of his debtor's body, for he had not arrested him. He has not been prevented from attaching the property, or arresting the body of his debtor, for he had never procured any writ of attachment against him.

He has lost no claim upon, or interest in the property, for he never acquired either. The most that can be said is that he intended to attach the property, and the wrongful act of the defendant has prevented him from executing this intention. * * * On the whole, it does not appear that the tort of the defendant caused any damage to the plaintiff. But, even if so, yet it is too remote, indefinite, and contingent to be the ground of an action." See, also, *Wellington v. Small*, 3 Cush. (Mass.) 145, 50 Am. Dec. 719; *Bradley v. Fuller*, 118 Mass. 239. In the early case of *Smith v. Blake*, 1 Day, 258, the Supreme Court of Connecticut announced the same view and stated, as a further objection to the maintenance of such an action, that the result would be that the defendant would be subject to a like action by every one of the creditors of the insolvent debtor, and thus be liable to pay many times the value of the property, whereas the only penalty imposed upon him by law is that he shall reap no benefit by his fraudulent conduct. The doctrine of this case is reaffirmed by the same court in the case of *Hatstat v. Blakeslee*, 41 Conn. 301, where the case of *Smith v. Blake* is cited with approval. In *Moody v. Burton*, 27 Me. 472, 46 Am. Dec. 612, the Supreme Judicial Court of Maine had before it the question whether a judgment creditor, with execution returned unsatisfied, could maintain an action against a third person who had conspired with the judgment debtor to put his property beyond the reach of his creditors. It was held that the action could not be maintained, because the plaintiff did not show a right to, or interest in, the property superior to that of any other creditor, and hence that the injury was too remote to sustain a judgment; and further, because, since the creditor could show no specific interest in, or lien upon, the property, but only a bare chance to reach it, there was no standard by which the injury could be measured. The same conclusion was reached in *Klous v. Hennessey*, 13 R. I. 332, the court holding that the fundamental reason why the action could not be maintained is that the "damage, which is the gist of the action, is too remote, uncertain, and contingent, inasmuch as the creditor has not an assured right, but simply a chance of securing his claim by attachment or levy, which he may not succeed in improving." In *Hall v. Eaton*, 25 Vt. 458, the right to maintain the action was denied, the court basing its decision upon *Lamb v. Stone* and *Moody v. Burton*, supra. The decisions of the New York Court of Appeals are conflicting. In *Braem v. Bank*, 127 N. Y. 508, 28 N. E. 597, the right to maintain the action is denied, the court apparently distinguishing that case upon its facts from the earlier case of *Quinby v. Strauss*, 90 N. Y. 464, wherein it was held that the action would lie in favor of a judgment creditor. The two cases seem, on principle, to be

directly in conflict. In *Adler v. Fenton*, 24 How. (U. S.) 407, 16 L. Ed. 696, the Supreme Court of the United States refused to sustain an action by a general creditor against the fraudulent grantees of the debtor, repudiating the doctrine of the Pennsylvania cases. In the case of *Findley v. McAllister*, 113 U. S. 104, 5 Sup. 401, 28 L. Ed. 930, the general rule that in order to sustain the action the plaintiff must show a specific interest in the fund or property sought to be applied to the satisfaction of his judgment was recognized, the court citing and distinguishing *Adler v. Fenton*, supra. The same rule has been recognized by the Supreme Court of Wisconsin. *Field v. Siegel*, 99 Wis. 605, 75 N. W. 397. A collection of cases may be found in the notes to this case, reported in 47 L. E. A. 433. It thus appears that under the rule established by the great weight of authority in this country, although it is made clearly to appear that the defendant has willfully become a party to a conspiracy to defeat the judgment of the creditor, such a creditor has no cause of action against him, unless he can show that he has suffered some special injury different from that suffered by the other creditors. Applying the rule announced in the cases cited to the allegations of the complaint, we find that they are not sufficient to sustain the action, in that it does not appear therefrom, even by inference, that the plaintiff had any special right in the property alleged to have been fraudulently taken from the possession of her husband by the defendants. At the time the conversion occurred the suit was pending. She had no judgment, and therefore, at that time, was not a creditor of her husband, for the relation of creditor was fixed by the entry of the decree in the separate maintenance action. Prior to that time her husband was not her debtor, and in this respect she occupied a different relation toward him from that of any other creditor.

Counsel for respondent contends, however, that the complaint is in form and substance a creditor's bill, and in support of this contention among other cases cites *Twell v. Twell*, 6 Mont. 19, 9 Pac. 537; *Ryan v. Speith*, 18 Mont. 48, 44 Pac. 403, and *Wilson v. Harris*, 21 Mont. 407, 54 Pac. 46. But none of these cases are in point, nor are any of the others cited. It does not appear that Raymond, the debtor, had anything to do with the conversion of the sheep by the defendants, so that he might be said to have fraudulently disposed of or concealed them, and the purpose of the action is to annul the fraudulent conveyance which stands as an obstruction in the way of plaintiff's execution. The complaint has none of the attributes of a bill to reach property fraudulently conveyed. If it were otherwise sufficient for this purpose, it would fail, for the reason that it does not show that the plaintiff has acquired a lien on the property by attachment or execution, or that there is a trust therein in her favor.

Wilson v. Harris, *supra*; Westheimer v. Goodkind, 24 Mont. 90, 60 Pac. 813; Wyman v. Jensen, 26 Mont. 221, 67 Pac. 114. Nor has it any of the attributes of a bill of discovery, for that it appears expressly upon the face of it that the relations between the parties and their attitude toward the subject-matter of the controversy are clearly understood and no discovery is necessary. In fact, the manifest purpose of the action is to secure a judgment in favor of the plaintiff upon a cause of action for a conversion by the defendants existing in favor of her husband, the sole ground of her right to do so being that she is a creditor. Without pausing to discuss the features of that character of a creditor's bill, the purpose of which is to reach assets not liable to execution, it may be remarked that a creditor cannot, solely on the ground that he is a creditor, and that his debtor has no property other than an existing cause of action at law, bring suit upon such cause of action and obtain a judgment thereon as if he were the owner of it, and justify the action on the theory that he is proceeding by a creditor's bill. To hold the contrary would be equivalent to laying down the doctrine that, because an insolvent debtor does not bring action to rectify a wrong done him, his creditor may do so, and not only so, but may, in his own right, bring the wrongdoer to book by going into a forum and adopting a form of action wherein and whereby the wrongdoer is deprived of a trial according to the fundamental law requiring his case to be submitted to a jury according to the forms of law. Now, it is insisted by counsel for respondent, and conceded by counsel for appellant, that the legal cause of action existing in favor of Raymond which the plaintiff seeks to reach is property which may be subjected to the satisfaction, *pro tanto*, of plaintiff's judgment. If this is so, and there is every reason why it should be so under the statute (Civ. Code, § 4662), plaintiff had a plain, speedy, and adequate remedy at law, and therefore could not call equity to her aid until she had exhausted it. The statutes of Montana relating to the kinds of property that may be taken on execution are very broad, and under them any species of property may be seized, sold, and proceeds thereof applied to the satisfaction of the judgment. The procedure which would have given plaintiff all the relief to which she was entitled is found in the following sections of the Code of Civil Procedure:

"Sec. 1218. All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other

property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution."

"Sec. 1224. The sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient, collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs, must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs."

"Sec. 1232. When the purchaser of any real property not capable of manual delivery pays the purchase money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied."

Under section 1218 all property of every description, tangible and intangible, including debts, credits, and all other property not capable of manual delivery, may be attached on execution in like manner as upon writs of attachment. By reference to section 895 of the Code of Civil Procedure, as amended by the act of 1899 (Laws 1899, p. 139), debts, credits, and other personal property not capable of manual delivery are attached by serving upon the debtor, or person responsible, a copy of the writ and the notice therein directed. Under section 1224, *supra*, the sheriff must collect or sell things in action, and also sell the other property seized, until sufficient funds are realized to pay the judgment. It will be noticed that in section 1232, *supra*, which contains directions to the sheriff as to the delivery of a certificate in case of a sale of property not capable of manual delivery, the word "real" qualifies the term "property." When we examine all the provisions of the chapter together, it becomes apparent that the use of this term is a mistake, and that the term "personal" must be substituted for it. Section 1233 and the following sections direct the sheriff relative to sales of real estate and provide for redemption. If the word "real" be retained in section 1232, this section becomes inconsistent with the following sections, or else can be assigned no intelligent meaning. Real estate is never capable of manual delivery. If, however, the position of this section in the

chapter be considered, and it be held to apply to the subject with which it evidently deals, it is clear that the substitution should be made, for thus all the sections are made consistent, and we have a provision which prescribes what shall be done in case of sales of personal property not capable of manual delivery, whereas, otherwise, we should find no such provision. Besides, section 698 of the Code of Civil Procedure of California, pertaining to the same subject, of which our section is a literal copy, except in the particular just mentioned, uses the word "personal," giving the section the meaning and application which the Legislature of that state, and of our own state as well, evidently intended it to have. Making the proper substitution in this section, and considering all the sections together, it is entirely clear that the plaintiff could have reached the asset of her husband sought to be reached in this action by the process of execution, and hence that the necessity to go into a court of equity to obtain aid did not exist. For, according to the contention of her counsel, the very purpose of her action was to reach an asset that she could not reach by this process. Nor is it any hardship upon plaintiff that she is compelled to pursue the remedy thus pointed out. This course is required of every creditor, and equity will aid only when an adequate remedy is not found in the provisions of law. The want of an adequate remedy at law "constitutes the very cradle of equity." *Wilson v. Harris*, supra.

The remedy pointed out is adequate. The execution could have been levied as easily as a service of summons could have been made in this case. If no other purchaser could have been found, the plaintiff could have become the purchaser herself, and thus have become vested with title to the cause of action, whereupon, if defendants had refused payment without suit, she could with legal propriety have sued in her own name. It is no answer to this reasoning to say that this course would have been somewhat less expeditious than the one pursued by the plaintiff. If the asset must be regarded as property to be subjected to the payment of debts, it must follow as a necessary conclusion that the way pointed out by the statute to reach it must be pursued.

Since the complaint does not state a cause of action from any point of view, the judgment and order must be reversed, and it is so ordered.

Reversed.

HOLLOWAY and SMITH, JJ., concur.

DUNBAR v. GRIFFITHS.

(Supreme Court of Idaho. Jan. 20, 1908.)

1. PLEADING—AMENDMENT.

Under the provisions of section 4228, Rev. St. 1887, the parties may amend any pleading once as a matter of course at any time before an-

swer or demurrer filed, or after demurrer and before the trial of the issue of law thereon; but such right of amendment without leave of court does not extend beyond the time allowed by law for filing a demurrer or answer where no such pleading has in fact been filed, and the right to thereafter file such a pleading rests in the sound discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 594-598, 653-675.]

2. SAME—LEAVE TO AMEND.

Under section 4229, Rev. St. 1887, great liberality must be exercised in the allowance of amendments to pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 591-598.]

3. SAME—DISCRETION OF COURT—GROUNDS.

Where a party applies to the court under Rev. St. 1887, § 4229, for permission to file an amended pleading, and the application is one that addresses itself solely to the discretion of the court, and the party asks leave to make a showing as to the reasons why he had not previously offered the amendment and why he has delayed, and his reasons for invoking the discretion of the court, it is an abuse of discretion for the court to refuse to permit him to make such showing or state to the court his reasons and grounds therefor and to thereupon deny the application to amend.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 599-635.]

4. SAME.

The sound legal discretion of the trial judge will be determined from the showing made, and the circumstances under which such showing was made or offered to be made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 599-601.]

(Syllabus by the Court.)

Appeal from District Court, Canyon County; Frank J. Smith, Judge.

Action by Joseph C. Dunbar against Walter Griffiths to quiet title. Judgment for plaintiff, and defendant appeals. Reversed.

Frank Martin, Lot L. Feltham, and Griffiths & Griffiths, for appellants. Rice & Thompson, for respondent.

AILSHIE, C. J. This appeal is from the judgment and an order denying a motion for a new trial. The action is one to quiet title. Plaintiff's complaint is in the usual form, alleging fee-simple title and exclusive right of possession. Defendant answered, denying plaintiff's title and right of possession, and alleged title and exclusive possession and right of possession in himself. The cause was tried on an amended complaint which appears to have been filed on the 2d day of September, 1904. The answer was filed on the 1st day of February, 1905. So far as the record is concerned, the case appears to have rested without any further proceedings being had thereon, except the taking of some depositions, until March 1, 1906. The case seems to have been previously set for trial for the latter date. Before entering upon the trial, the defendant filed an amended answer containing the same denials and affirmative allegations as contained in his original answer, and in addition thereto alleging that he was the owner of the property in question and that he derelinqed title through a sheriff's

deed issued on an execution sale in a case wherein Sweet, Dempster & Co. had procured judgment against W. C. Dunbar, a brother of the plaintiff. Defendant alleged that while W. C. Dunbar was heavily indebted and in an insolvent condition he purchased this tract of land and caused the same to be conveyed to his brother, Hiram C. Dunbar, and that the latter acquired no interest therein and paid nothing whatever therefor, and was cognizant of the fraud being perpetrated on the creditors of W. C. Dunbar, and that, in furtherance of the fraudulent purpose and with a view to concealing the fraudulent character thereof, Hiram C. Dunbar transferred the property, without consideration, and in furtherance of the fraud upon W. C. Dunbar's creditors, to the plaintiff herein. It was further alleged that the transfer and transaction whereby the plaintiff acquired the legal title to the property was fraudulent and void as against the creditors of William C. Dunbar, and that in truth and in fact the judgment debtor, William C. Dunbar, at all times prior to the execution sale, exercised the sole and exclusive control and right of possession over the property. The defendant did not seek any affirmative relief, nor did he ask for a decree quieting his own title, but only prayed that the plaintiff's prayer be denied and that his action be dismissed. The amended answer was filed March 1, 1906, being a year and one month after the filing of the original answer. On motion of the plaintiff the court made an order striking the amended answer from the files upon the ground that it had not been made until the time set for the trial of the case, and that it had been filed without leave of the court. The defendant at the time of this ruling made the following statement and offer to the court: "If there is any reason why any terms should be granted to the other side, we will agree to anything that the court decides in this matter. We have relied upon the fact that we would have the right to amend. We feel that, if the court will give us permission, we can present to the court proper showing why this amendment has not been made before, and to deny us this right practically denies us the right to make a defense in this case." The court denied the application and refused to give the defendant time or opportunity to make a showing why he should be allowed to go to trial on his amended answer as presented to the court. The trial proceeded, and, after the plaintiff rested, the defendant submitted evidence tending to prove each of the allegations of his amended answer, and tending to establish that the equitable title rested in him and that the plaintiff's legal title had been acquired in fraud of the creditors of the judgment debtor. The court excluded all the evidence tending to establish such defense, and entered judgment against the defendant and in favor of the plaintiff, quieting his title.

The defendant, who is appellant in this

court, argues, first, that under the provisions of section 4228, Rev. St. 1887, he was entitled to amend his answer as a matter of course, at any time before actually entering upon the trial of the case. That portion of section 4228 on which appellant relies is as follows: "Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended, and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading." This section provides that, "Any pleading may be amended once by the party of course," provided that he does so "before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon." *Hedges v. Dam*, 72 Cal. 520, 14 Pac. 133; *Spooner v. Cady* (Cal.) 36 Pac. 104. The language of this section is somewhat uncertain as to the limitation of time within which this amendment may be made as a matter of course. It is clear to us, however, that, where an answer has been filed and a demurrer has been interposed, either the demurrer or answer may be amended as a matter of course at any time "before the trial of the issue of law thereon." We think, however, that this section must be read in connection with the other provisions of the statute (sections 4174, 4176, and 4140, Rev. St. 1887) fixing the time for demurrer or answer to a pleading. A plaintiff may demur to the defendant's answer within 10 days after service thereof. Section 4193, Rev. St. 1887. If he does not demur within that time, he has no absolute right to do so thereafter without leave of court. If he should let the time for filing a demurrer to the answer expire without demurring, we do not think the defendant would thereafter be entitled to amend his answer as a matter of course, but would be then bound to invoke the discretion of the court (which must be liberally exercised) as provided for under section 4229. In this case we think the court abused its discretion, at least in that he refused to allow the defendant to make a showing as to why he had not previously filed his amended answer and the reasons for his delay. Had the delay caused plaintiff any material injury or delay, the court could have protected him by imposing terms on defendant. Defendant might have been able to make a showing that would have established a clear and convincing case of abuse of discretion on the part of the court had the court still gone ahead and made the order striking the amended answer from the files. Since that showing is not before us and was not before the trial court, we cannot surmise or anticipate what it would have been; but in view of the condition of the case and the pleadings at that time and the statement of counsel and the refusal of the court to permit a showing, the whole transaction viewed together constitutes

such abuse of discretion as calls for a reversal of the judgment. This court has often expressed the view that trial courts should be liberal in the matter of permitting amendments to pleadings where it appears that they are in good faith and their allowance would serve the ends of justice. *Kroetch v. Empire Mill Co.*, 9 Idaho, 277, 74 Pac. 868; *Kindall v. Lincoln Hdw. Co.*, 10 Idaho, 13, 76 Pac. 992; *Murphy v. Russell & Co.*, 8 Idaho, 133, 67 Pac. 421.

The judgment will be reversed and a new trial granted. The cause is remanded accordingly. Costs awarded in favor of appellant.

SULLIVAN and STEWART, JJ., concur.

STATE v. SHERIDAN.

(Supreme Court of Idaho. Feb. 5, 1908.)

1. LIBEL.—CRIMINAL LIBEL.—WHAT CONSTITUTES.

Under the provisions of section 6737, Rev. St. 1887, libel is a malicious defamation, expressed either by writing, printing, signs, or pictures, tending to impeach the honesty, integrity, virtue, or reputation of a person, and expose him to public hatred, contempt, or ridicule.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 404.]

2. SAME.

Under this section of the statute (Rev. St. 1887, § 6737), in order to constitute libel, it is not necessary that the alleged libelous matter charge the person named with a crime; but it is sufficient that the defamation tends to impeach the honesty, integrity, virtue, or reputation of such person, and thereby expose him to public hatred, contempt, or ridicule.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 404.]

3. SAME.—ARTICLE LIBELOUS PER SE.

Under the statute (Rev. St. 1887, § 6737) a published article as follows: "Gooding and graft have become so thoroughly known as synonymous terms that the rank and file will have no more of it. Only federal office holders and those connected with the Gooding-Brady machine are zealous in the support of the big chief" (meaning the said Frank R. Gooding)—is libelous per se.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 404.]

4. SAME.

The fact that the alleged libelous article uses a slang word, upon which its libelous character depends, does not render the article any the less libelous by reason of that fact, provided the word used, although slang, has a well-recognized meaning, or is given a meaning by the article itself which conveys to the reader the understanding that the word is used in such a way as tends to impeach the honesty, integrity, virtue, or reputation of the person named in the article, and thereby exposes him to public hatred, contempt, or ridicule.

5. SAME—"GRAFT."

The word "graft," in its generally accepted meaning, as applied to individuals, public officials, corporations, etc., imputes to the person, officer, or corporation charged with grafting dishonesty; dishonest gain by reason of public office, or public or private position; irregular or unlawful means of support; the use of office or position for personal gain, without rendering fair or compensatory service; to steal; to swindle.

6. SAME.—CONSTRUCTION OF WORDS—QUESTION FOR COURT.

Where a word is capable of two constructions, one actionable and the other not, it is the duty of the court to give to such word the construction which the circumstances show the word naturally bore, according to its plain, popular, and ordinary sense, and such as it would naturally be understood to have by persons hearing or reading it in the connection in which it is used, unless it affirmatively appears that it was used or understood in some other sense.

7. SAME.—JUSTIFICATION.

Under section 6740, Rev. St. 1887, a defendant charged with libel is permitted to give in evidence, as a justification for the publication, the truth of the matter published; and when the article published is libelous per se, the proof of the publication makes a prima facie case, and it is for the defendant to offer such proof as he may desire, showing the truth of the article published, and that the same was published with good motives and for justifiable ends.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 440.]

8. SAME.—EVIDENCE.

Where an article is libelous per se, the prosecution is not required to prove the untruth of the article, or that the same was published with bad faith. The truth or good faith of the publication is a matter of defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 423, 440.]

9. SAME.—PRIVILEGED ARTICLES.

An article which gives the opinion of a reporter as to the proceedings of a judicial, legislative, or other public official body is not privileged, under section 6743, Rev. St. 1887.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 410.]

10. SAME.

Under section 6743, Rev. St. 1887, in order for an article to be privileged, the article itself must be a fair, true report of a judicial, legislative, or other public official proceeding, or of a statement, speech, argument, or debate in the course of the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 407-411.]

(Syllabus by the Court.)

Appeal from District Court, Ada County; Fremont Wood, Judge.

R. S. Sheridan was indicted for criminal libel. Demurrer to the information sustained, and the state appeals. Reversed.

J. J. Guheen, Atty. Gen., Charles F. Koelsch, Pros. Atty., and Alfred A. Fraser, for the State. Frank Martin, for respondent.

STEWART, J. An information was filed against the defendant in the district court of Ada county, charging him with criminal libel. The charging part of the information is as follows: "That on the 18th day of July, 1906, one Frank R. Gooding, then being, and for a long time prior thereto having been, a public officer, to wit, Governor of the state of Idaho, duly elected, qualified, and acting as such, and said defendant, R. S. Sheridan, then being the proprietor, editor, and manager of a newspaper, to wit, the Evening Capital News, which newspaper was then, and ever since has been, published and in general circulation in Ada county, state of Idaho, the

said R. S. Sheridan as such editor, proprietor, and manager did then and there willfully, unlawfully, maliciously, and with intent to injure said Frank R. Gooding, compose, print, and publish in the said newspaper a certain false and malicious defamation of and concerning the said Frank R. Gooding, Governor of Idaho, as aforesaid, and of and concerning the acts of said Frank R. Gooding as such Governor, which said malicious defamation was of the tenor and effect following; that is to say: 'Even so mild an indorsement as that of Governor Gooding's "splendid business administration" could muster but three votes in a Republican county convention near by, where the people are familiar with the record. Gooding and graft have become so thoroughly known as synonymous terms that the rank and file will have no more of it. Only federal office holders and those connected with the Gooding-Brady machine are zealous in support of the big chief' (meaning the said Frank R. Gooding). And which malicious defamation tends, and did then and there tend, to impeach the honesty, integrity, and reputation of the said Frank R. Gooding, Governor of the state of Idaho, as aforesaid, thereby exposing the said Frank R. Gooding to public hatred, contempt, and ridicule, all of which is contrary to the form, force, and effect of the statute in such case made and provided, and against the power, force, and dignity of the state of Idaho."

To this information the defendant filed a demurrer, alleging, first, that said information does not state facts sufficient to constitute a crime or public offense under the laws of the state of Idaho; second, that said information fails to state facts sufficient to constitute any public offense or any crime under the laws of the state of Idaho, and particularly as follows, to wit: "(a) Said information fails to state or charge any language as published by the defendant, Sheridan, which is libelous. (b) Said information fails to state or charge that the language which is claimed is libelous was published of and concerning Frank R. Gooding, Governor of Idaho. (c) It is nowhere alleged in said information in what way the words set forth could or did affect the party to be defamed injuriously, nor are any facts set forth in said information to which the language alleged to be libelous could so refer as to constitute said language libelous. (d) It is nowhere alleged in any averment in said information how or in what way or manner the words used tended to or did tend to impeach the honesty, integrity, or reputation of Frank R. Gooding, or in what way or manner said words did, or could be understood to, impeach the honesty, integrity, or reputation of said Frank R. Gooding. (e) The information in this case shows that the language which it is charged is libelous was published of and concerning an official body, to wit, a Republican county convention, and

under the laws of the state of Idaho such publication was privileged. (f) The information in this case shows that the language which it is claimed is libelous was published concerning Frank R. Gooding as Governor of Idaho and as a candidate for renomination to the office of Governor of Idaho, and fails to show or charge that said language was not published in good faith and with the intention to inform the voters of Idaho of facts which were for the public good, or that the said publication was not made upon reliable information and with the full belief in the truth thereof." The demurrer was sustained by the court, and the state appeals from such decision, under the provisions of section 8043, Rev. St. 1887, as amended by the act of March 15, 1907 (Sess. Laws 1907, p. 508).

Counsel for the appellant contends that the language published and set forth in the information was libelous per se; while counsel for defendant and respondent contends that such language is not libelous per se, and requires an explanation, by innuendo, of the meaning intended to be conveyed by such publication. If the article set forth in the information and charged to have been published by defendant is libelous per se, then the information states facts sufficient to constitute a public offense under the laws of this state, unless the article shows upon its face to have been privileged. Section 6737, Rev. St. 1887, provides as follows: "A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural or alleged defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule." It will thus be seen that this section provides that libel is a malicious defamation tending to impeach the honesty, integrity, virtue, or reputation, and thereby to expose such person to public hatred, contempt, or ridicule. Under this statute the article published as alleged in the information is libelous per se. The article says: "Gooding and graft have become so thoroughly known as synonymous terms that the rank and file will have no more of it. Only federal office holders and those connected with the Gooding-Brady machine are zealous in support of the big chief" (meaning the said Frank R. Gooding). Section 6737, supra, does not require, in order to constitute libel, that the alleged libelous matter charge the person named with a crime. It is sufficient under the statute that the defamation tends to impeach the honesty, integrity, virtue, or reputation of such person, and thereby expose him to public hatred, contempt, or ridicule. The statute does not even require that the alleged libelous matter must impeach the honesty, integrity, virtue, or reputation of such person; but if it tends to do so it is libelous. An examination of the article al-

leged to be libelous discloses that the charge is made that "Gooding and graft have become so thoroughly known as synonymous terms that the rank and file will have no more of it. Only federal office holders and those connected with the Gooding-Brady machine are zealous in support of the big chief" (meaning the said Frank R. Gooding). In other words, this article charges Gooding and graft to be the same, or that Gooding is a grafter, and, by reason of being a grafter, the rank and file will have no more to do with him.

Counsel for appellant contends that the word "graft," as applied to individuals, officials, or corporations, has a definite and distinct meaning; while counsel for respondent contends that the word "graft" is merely a slang word, and that it has no fixed or settled meaning. The word "graft," as applied to individuals, officials, corporations, etc., is of comparatively recent origin, and has come into general use within recent years, yet during that time its use has been so general that its meaning has become fixed and well-recognized. In the Standard Dictionary, published in 1905, it is defined as follows: "An irregular or unlawful means of support; a steal or swindle; that which has been obtained by grafting; stolen goods." "Grafter" is there defined as one who grafts; a swindler or dishonest person. In the Century Dictionary and Cyclopedia (volume 3, p. 2591) the following definition is given: "Graft 3 (graft), n. Dishonest gain acquired by private or secret practices or corrupt agreement or connivance, especially in positions of trust, as by offering or accepting bribes (slang). Graft 3 (graft), v. i. To engage in graft; live by graft (slang). Graft 2 (grafter), n. One who takes or makes 'graft,' or dishonest private gain, especially in positions of trust, and in ways peculiarly corrupt (slang)." The New Dictionary of Americanisms, published by Louis Weiss & Co., New York, defines it as follows: "Graft—In thieves' parlance, to pick pockets, to help another to steal." The Dictionary of Slang and Colloquial English, published by E. P. Dutton & Co., New York, defines it: "Graft—To steal." In the case of *Craig v. Warren*, 99 Minn. 246, 109 N. W. 231, the Supreme Court of Minnesota defines the word as follows: "The word 'graft' is commonly used to designate an advantage which one person, by reason of his peculiar position of superiority, influence, or trust, extracts from another."

As to the definition taken from the Century Dictionary, as above given, respondent contends that the word is a slang term, and that the definition was merely an example to show how it is sometimes used. Respondent then quotes from a number of articles, secured from the press of the country, dealing with the word "graft," and the use made of it. These articles were promiscuously selected, and show many different uses given to the word "graft." It is history, however, that

during the last four or five years the press and magazine writers have been very generous in the use of this word "graft," and it is doubtful if any other word in the English language, except the common ordinary everyday words, has been more generally used than the word "graft." This general use gives to it its meaning and fixes its standing. The fact that the word is yet a slang word does not detract from or render its meaning any less definite than it would have if it were a word used by the standard writers and authorities in the literary world. It is difficult to draw the line of demarcation between a slang word and a word standardized in good English. The promotion gives a slang word, so as to entitle it to enter the society of good English, is based on its general use in the literature of the country; that it is no longer shunned or disregarded by standard writers. Many words, which are now good English, and recognized and used by the leading writers of the day, were formerly slang, and passed through the intermediate stage of colloquialism before they secured admission to the literary language. "There is no real difference in kind between the processes of slang and those of legitimate speech. Slang is only the rude luxuriance of the uncared-for soil, knowing not the hand of the gardener." Its richness, however, is not changed or added to by its subjection to the caretaker. The fact that a word may be slang to-day, and to-morrow may discard its associates and enter better society, does not necessarily give the word a different meaning, or change its use, or add any strength or force to its meaning. The change is only a matter of recognition on the part of the literary writers of the country. Even though the word "graft" may still be recognized as slang, yet its meaning and use have always been and will be the same. It takes its name and meaning from its use during the slang period. When standardized, its meaning is the same.

The fact that an article alleged to be libelous uses a slang word, upon which its libelous character depends, does not render the article any the less libelous by reason of that fact. If the word used, although slang, has a well-recognized meaning, or is given a meaning by the article itself which conveys to the reader the understanding that the word is used in such a way as tends to impeach the honesty, integrity, virtue, or reputation of the person named in the article, and thereby exposes him to public hatred, contempt, or ridicule, it is no less libelous. In the article in question in this case the writer has placed a construction upon the word "graft" as therein used. It says: "Gooding and graft are synonymous terms"—that is, each stands for the other, and means the same as the other—and "have become so thoroughly known that the rank and file will have no more of it." In other words, the rank and file will have no more of "graft," and no more of anything for which graft stands. The intention,

evidently, of the writer, was to imply that by reason of the fact that Gooding and graft were synonymous terms there was in the word "graft" itself an inherent vice with which the rank and file would have nothing whatever to do; that it was odious, of a nature and character that met the disapproval, censure, and blame of the public. We think it will now be generally conceded that the word "graft," as applied to individuals, officials, corporations, etc., stands for dishonesty; dishonest gain by reason of public office or public or private position; irregular or unlawful means of support; the use of office or position for personal gain, without rendering fair or compensatory service; to steal or swindle. If this be a fair illustration of the meaning of the word "graft," the publication of an article signifying that a public official's name was synonymous with this word inevitably tends to impeach his honesty, his integrity, and his reputation, and by reason of such fact necessarily exposes him to public hatred, contempt, and ridicule.

Certainly, in the publication of the article involved in this case, the defendant did not intend to give Gooding a certificate of good character, testifying to his honesty and integrity, or apply to him an endearing term. The very reverse is disclosed by the language of the article. The defendant evidently intended, and did in fact say, that by reason of the fact that Gooding and graft were synonymous terms there was something in or about Gooding, because he was a grafter, which was odious and offensive to the rank and file, and, because of that, they would have nothing further to do with him. The language of the article is sufficient of itself to show its tendency, and requires no innuendo or explanation to give effect to that tendency. In the case of *People v. Seeley*, 139 Cal. 119, 72 Pac. 834, the Supreme Court of California, in discussing this question, says: "Of course, the publication must have the tendency to do some one of the things prescribed in the statute; but, in case the alleged libelous matter is such per se, it is sufficient to set it forth, and the law says it tends to impeach the honesty, integrity, virtue, or reputation of the party concerning whom it was published. The malicious defamation is complete when the defendant has done the thing or things set forth in the statute. The information states clearly that defendant did the thing defined as libel. As to whether or not the published matter tended to impeach the honesty, integrity, virtue, or reputation of the party concerning whom it was published, when the matter is libelous per se, is as easily ascertained by the inspection of it as it would be by a statement of the district attorney as to his opinion concerning it. It is provided in section 904 of the Penal Code: 'An indictment or information for libel need not set forth any intrinsic facts for the purpose of showing the application to the party libeled of the defamatory matter on

which the indictment or information is founded; but it is sufficient to state generally that the same was published concerning him, and the fact that it was so published must be established on the trial.' If the facts are stated in ordinary and concise language, so that a person of common understanding knows what is intended, it is sufficient. It is clearly libelous under the statutes of this state."

Counsel for respondent contends that, where a word is capable of two constructions, one actionable and the other not, it is the duty of the court to give to such word an innocent construction if possible, or that construction which will render the same not libelous. The rule, however, as we understand it, is that where a word is capable of two constructions, one actionable and the other not, that construction will be adopted which the circumstances show the word naturally bore, and that all parts of the article should be taken together in order to determine the true meaning. *Berea v. Powell* (Ky.) 77 S. W. 381; *Holmes v. Clisby*, 118 Ga. 820, 45 S. E. 684; *Kilgour v. Evening Star Newspaper Company*, 96 Md. 16, 53 Atl. 716. The rule of construction now adopted by the courts is that words are to be construed according to their plain, popular, natural, and ordinary sense, and as they would naturally be understood by persons hearing or reading them, unless it affirmatively appears that they were used and understood in some other sense. *Cooper v. Greeley*, 1 Denio (N. Y.) 358; *More v. Bennett*, 48 N. Y. 472; *Little v. Barlow*, 26 Ga. 423, 71 Am. Dec. 219; *World Pub. Co. v. Mullen*, 43 Neb. 126, 61 N. W. 108, 47 Am. St. Rep. 737; *Edwards v. San Jose P. & P. Soc.*, 99 Cal. 431, 34 Pac. 128; 2 *Current Law*, 706; *People v. Ritchie*, 12 Utah, 180, 42 Pac. 209. We are not aware of any definition or general use made of the word "graft" which would indicate an innocent act or motive on the part of the person designated as a grafter; and our attention has not been called to any general use made of this word which would not have a tendency to impeach the honesty, integrity, or reputation of the person designated as a grafter. In thus holding we believe we are adopting the use and meaning of this word generally recognized, as applied to individuals, public officials, or corporations; and to charge one with being a grafter has a tendency to impeach his honesty, integrity, and reputation.

It is next contended by respondent, in support of the action of the lower court in sustaining the demurrer to the information, that the information should set forth and charge the particular dishonest act imputed to the person named in the article by the use of the word "graft." The defendant who wrote the article knows best the use made of the word "graft," as intended by him in the published article. He is permitted under section 6740,

Rev. St. 1887, to give in evidence, as a justification for the publication, the truth of the matter published. When the article published is libelous per se, the proof of publication makes a prima facie case, and it is for the defendant to offer such proof as he may desire in defense, showing the truth of the article published; and if it appears to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party is to be acquitted. It would be a strange doctrine, indeed, if the state was required, where an article published is libelous per se, to prove the untruth of the article, when the article charges the person named with a series of acts, any one of which is libelous. If this rule were to prevail, when the state proved one act the defense might claim that the article intended to charge some other act, and if that be proven untrue the defense might claim that it was intended to charge another act, and so on; but this rule is not the law where the article is libelous per se. Current Law, vol. 2, p. 707; *Id.* vol. 3, p. 414.

It is next claimed that the article in question was privileged. Section 6743, Rev. St. 1887, provides: "That no reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication." An examination of the article published discloses that the alleged libelous matter did not purport to be a report of any judicial, legislative, or other public official proceeding, or of any statement, speech, argument, or debate in the course of the same. The inception of the article says: "Even so mild an indorsement as that of Governor Gooding's 'splendid business administration,' could muster but three votes in a Republican county convention near by, where the people are familiar with the record." This part of the article does not set forth the action of the convention referred to. It is merely a reporter's opinion of the action, and does not even claim to be a report of such a convention. But the libelous part of the article which follows is not alleged or charged to be the action or acts of any convention or official proceeding. It does not appear to be the opinion of a reporter as to what took place at an official proceeding or convention. It is a positive declaration and assertion of an alleged fact, and does not come within the provisions of the statute as to a privileged communication. A newspaper has full right to publish the news, and to criticize and expose official misconduct and dishonesty; but, where an article published is libelous per se, the newspaper cannot justify the publication upon the ground that it is a report of an official body, unless the ar-

ticle is confined to the minutes or proceedings of the convention. It cannot shield itself behind a report giving an opinion of what such body or convention did. Where the article published is libelous per se, the truth of the article or the motive which prompted its publication are matters of defense. The prosecution is not required to prove the motive or bad faith. The good faith is a matter of defense.

We have made a careful examination of all the authorities cited in this case, and the authorities generally, and find that a large number of them have no bearing on the case under consideration, for the reason that the decisions have been made upon statutes different from that of this state. An examination of the statute of this state will at once impress the reader with the fact that it is very strict in its terms, and makes libelous any writing, printing, signs, or pictures which tend to impeach the honesty, integrity, virtue, or reputation of the person named, and thereby expose him to public hatred, contempt, or ridicule. The statutes of many states require, for the article to be libelous per se, that it charge the person named with a crime, or that as a fact it impeach the honesty, integrity, virtue, or reputation of the person named; but the statutes of this state only require that the article published tends to impeach the honesty, integrity, virtue, or reputation of the person named, and, if so, it is libelous per se. Counsel for both appellant and respondent cite the case of *Douglas v. Douglas*, 4 Idaho, 293, 38 Pac. 934. That was an action for damages for slander. The question in that case was whether or not the words spoken were slanderous per se, and the court held that, inasmuch as the words spoken did not charge the party against whom they were spoken with a crime, they were not actionable per se. We have no statute in this state defining slander, or providing what shall constitute slander; but we have a statute defining and prescribing what shall constitute libel. In determining whether particular words are actionable per se, the same rule does not apply to libel as to slander. What would not be actionable without alleging and proving special damages if simply spoken may be actionable per se if written or printed or otherwise published in a libel. Any words which would be actionable if spoken will be actionable if published in writing or its equivalent. Current Law, vol. 2, p. 709. The law of libel goes much further than the law of slander, and gives a cause of action without the necessity of alleging and proving any special damage, as in the case of slander; for any words which are false, and not justified or privileged, and which are either injurious to the character or credit, domestic, public, or professional, of the person concerning whom they are published, or in any way tend to cause men to shun his society, or bring him into hatred,

contempt, or ridicule. The authorities treating of this subject generally are collected and cited in Current Law, vol. 2, p. 710. The case of *Douglas v. Douglas*, supra, is not authority in a prosecution for libel, where the alleged libelous matter is such per se, even though a crime is not charged. We are therefore of the opinion that the information states a public offense under the laws of this state, and that the district court erred in sustaining the demurrer.

The judgment of the district court is reversed, and the cause remanded.

AILSHIE, C. J., and SULLIVAN, J., concur.

BOSWELL v. FIRST NAT. BANK OF LARAMIE.

(Supreme Court of Wyoming. Feb. 10, 1908.)

1. EXECUTION—SUPPLEMENTARY PROCEEDINGS—SALE OF MORTGAGED CHATTELS—TITLE ACQUIRED.

One buying mortgaged chattels at a sale of a receiver, appointed in aid of execution instituted by a judgment creditor of the mortgagor, was bound to take notice that the court making the order of sale had no jurisdiction to do so.

2. CHATTEL MORTGAGES—TRANSFER OF PROPERTY—RIGHTS OF PURCHASER.

Where defendant in purchasing cattle took a bill of sale ending, "It is understood and agreed that we in no way guarantee the title to the cattle herein mentioned," he took the chances of the title acquired, and because he was honestly mistaken as to the validity of the sale at which he purchased is not a legal reason why he should be protected against mortgages on the cattle given to secure a valid indebtedness of former owners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 468-470.]

On petition for rehearing. Petition denied. For former opinion, see 92 Pac. 624.

BEARD, J. The plaintiff in error has filed a petition for a rehearing in this case, in which it is urged that the court was in error on each and every question decided. The opinion appears in 92 Pac. 626, advance sheets. It is contended that a chattel mortgage on copartnership property is invalid unless the mortgage is signed by each and every member of the firm in person, and that authority to do so cannot be conferred by power of attorney. The statute requiring such mortgages to be executed by each member of the firm was evidently intended to limit the general agency of the members of the firm, and one of its purposes was to prohibit one member, without the knowledge or consent of the others, from creating specific liens upon the firm property. But we can perceive no good reason—nor has any been advanced—why such authority cannot be conferred by a proper power of attorney for that purpose, as well as in at least equally important business transactions such as the incumbrance or conveyance of real estate.

It is argued with much ability and at length, in counsel's brief in support of the petition for rehearing, that the record of the mortgages in this case did not constitute constructive notice by reason of the fact that they were acknowledged before a notary who was at the time a stockholder of the corporation, which was the mortgagee, and that the district court erred in refusing to permit the plaintiff in error to prove that fact on the trial. We are, and were at the time the decision in this case was handed down, aware of the conflict in the decisions upon that question. In the case before us the mortgages were valid between the parties although not acknowledged. (See paragraph 2 of the opinion.) The acknowledgments are in due form, and there is nothing either upon the faces of the instruments or in the certificates of acknowledgment to indicate that the notary was a stockholder in the mortgagee corporation or had any interest in the mortgages. They were fair and regular upon their faces. They were therefore admissible to record for the reasons stated in the opinion, and imparted constructive notice to subsequent purchasers. In addition to the authorities cited in the opinion, see *Read v. Loan Co.*, 68 Ohio St. 280, 67 N. E. 729, 62 L. R. A. 700, 96 Am. St. Rep. 663, *National Bank of Fredericksburg v. Conway*, 17 Fed. Cas. 1202, Case No. 10,087, and *Fair v. Bank*, 70 Kan. 612, 79 Pac. 144, 67 L. R. A. 851. In the Kansas case last cited it was held that "a chattel mortgage, regular upon its face, duly filed for record, and accompanied by an affidavit of renewal, filed in proper time and regular upon its face, and regular in fact except for the latent defect that the notary public who administered the oath was a stockholder in the mortgagee corporation, imparts notice as fully as if such defect did not exist." (From syllabus by the court.) It must be remembered that we are considering a question of notice only, and not whether the acknowledgments of these mortgages (assuming that the notary was a stockholder in the bank) were sufficient proof of their execution to admit them in evidence. Their execution was otherwise proved. What we held, and now hold, is that the acknowledgments being fair and regular upon their faces, and there being nothing on the faces of the instruments or the certificates of acknowledgment indicating any disqualification of the notary or that he had any interest in the mortgages, they were admissible to record, and that the record imparted constructive notice to subsequent purchasers.

It is urged that "the case is one of peculiar hardship, and that the long residence and undoubted character for fair dealing and commercial integrity of the plaintiff in error, as disclosed by the records in this case, surely does not stamp him as a wrongdoer or trespasser. He evidently relied upon the order of the district court and the fact that the chief executive officer of the county acted at the

sale." All this may be granted, but it does not change the situation. He was bound to take notice of the fact that the court making the order of sale had no jurisdiction to do so. He took his chances on the title he acquired, and that he did so knowingly appears from the bill of sale which he introduced as evidence of his title. The bill of sale is as follows: "Albany County, Wyoming, March 11th, 1903. This is to certify that for and in consideration of the sum of twelve hundred dollars to us in hand paid, we have this day sold to N. K. Boswell all our right, title and interest in and to the cattle described in a certain bill of sale, bearing even date herewith, given by Alfred Cook, sheriff of Albany county, state of Wyoming, as receiver of the property and effects of the co-partnership of Bird Brothers to us. It is understood and agreed that we in no way guarantee the title to the cattle herein mentioned. (Signed) Harden & Hartman." It is evident that the plaintiff in error understood that he was acquiring only such right, title, or interest in the cattle as Harden & Hartman acquired by virtue of their purchase from the receiver. That sale was held to be void for the reason that the court making the order of sale was without jurisdiction to order it. He took the chances, and because he was honestly mistaken as to the validity of the receiver's sale is not a legal reason why he should be protected against these mortgages given to secure a valid indebtedness of Bird Bros. to the bank. The other points presented by the petition for rehearing are so fully discussed in the opinion that we deem it unnecessary to enter upon a further discussion of them or to repeat what is therein stated.

The case was fully and ably presented at the hearing, both in briefs and in oral arguments, and we have again considered the questions presented by the petition for rehearing, but see no reason to depart from the decision as handed down. A rehearing is therefore denied.

Rehearing denied.

POTTER, C. J., and MATSON, District Judge, concur.

KOPPALA et al. v. STATE.

(Supreme Court of Wyoming. Feb. 10, 1908.)

1. MINES AND MINERALS—OFFENSES BY COAL MINERS—INTENT.

Under the statute making it unlawful for a coal miner to enter any place in a mine against caution or to disobey orders, or to do any other act whereby lives or health of persons or the security of the mine, etc., is endangered, intent to endanger life or property is not an element of an offense; the intentional doing of an act with knowledge that in so doing life or property will be thereby endangered being the gist thereof.

2. SAME—"CAUTION" DEFINED.

To "caution," as used in the statute, making it unlawful for a miner to enter a place in a coal mine against "caution," or to do any other

act whereby lives or the security of the mine, etc., means to give notice of, or warn against, danger.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, p. 1020.]

3. SAME—INFORMATION—SUFFICIENCY.

Under the statute making it unlawful for a miner to enter any place in a coal mine against caution or to disobey orders, or do any other act whereby the lives or health of persons or the security of the mine, etc., is endangered, an information is sufficient where it charges that defendants on a specified day in a certain county, against the caution and in disobedience of the mining boss of a specified coal mine, unlawfully, wrongfully, and willfully entered the mine and a specified mine entry thereof, an unsafe portion of the mine, thereby endangering the lives and health of persons employed in the mine and the security of the mine and its machinery, that defendants were miners and workmen employed in the mine, and that it was the property of a specified corporation, which employed an average of more than 10 persons in such mine during every 24 hours.

4. INDICTMENT AND INFORMATION—STATUTORY OFFENSES—SUFFICIENCY.

An information charging a statutory offense in the language of the statute is usually sufficient, where the statute fully defines the offense, especially after the verdict.

5. CONSTITUTIONAL LAW—CRIMINAL LAW—DUE PROCESS OF LAW—WHAT CONSTITUTES.

A criminal trial upon a sufficient information under a valid statute, a finding of guilty by a jury, and the imposition by the court of the minimum penalty presented by the statute, constitutes due process of law.

On petition for rehearing. Denied.

For former opinion, see 89 Pac. 576.

BEARD, J. This case was decided at the April, 1907, term of this court; the opinion appearing in 89 Pac. 576.

A petition for a rehearing was filed, and, as the case had been submitted on briefs without oral argument, the court requested oral arguments on the petition for rehearing, and the case has been argued orally and at length. The petition is based upon two grounds, viz.: That the information is insufficient and charges no offense; and that the statute is unconstitutional. The charge contained in the information is as follows: That the defendants "on the 24th day of July, A. D. 1905, at the county of Carbon and state of Wyoming, did then and there, against the caution and in disobedience of the mining boss of Hanna Coal Mine No. 1, at Hanna, Wyo., unlawfully, wrongfully, and willfully enter said Hanna Coal Mine No. 1, and did then and there, against the caution and in disobedience of the said mining boss, unlawfully, wrongfully, and willfully enter mine entry No. 28, of said Hanna Coal Mine No. 1, an unsafe portion of said mine, and did thereby endanger the lives and health of persons employed in said mine, and did then and there and thereby endanger the security of said mine and the machinery employed therein, the said Nels Koppala and the said Isaac Lampe then and there being miners and workmen employed in said mine, the said Hanna Coal Mine No. 1 then and there being the property of the Union Pacific Coal Com-

pany, a corporation, which said Union Pacific Coal Company, a corporation, then and there employed an average of more than 10 persons in said Hanna Coal Mine No. 1 during every 24 hours."

It is contended that the information is not sufficient because it does not state the names of the persons whose lives were endangered. But, as stated in the opinion, the information also charges that the security of the mine was endangered, which would constitute the offense without the allegation that the life or health of any one was endangered. The intent to endanger or injure life or property is not an element of the offense; but it consists of the intentional doing of an act with the knowledge that in so doing life or property will be thereby endangered; and the information in this case charges that the defendants, against the caution of the mining boss, entered an unsafe place in the mine, and did thereby endanger the life and health of those in the mine and the security of the mine and the machinery therein. To caution means to give notice of danger—to warn against danger—and a fair and reasonable construction of the language of the information is that the defendants did, after being notified and warned of the danger in so doing, intentionally entered an unsafe portion of the mine, and did thereby endanger the lives and health of those in the mine and the security of the mine and machinery. Accurate pleading might require a more definite statement in some respects than is contained in the information; but it contains all of the essential elements of the crime, and the charge is substantially in the language of the statute. The offense is purely statutory and the statute fully defines the offense; and in such case it is usually sufficient to charge the offense in the language of the statute. This is especially so after a verdict. The objections to the sufficiency of the information go to the manner of stating the offense, and not to the substance. It is not in a failure to state some essential element of the offense, but it is in the manner in which it is stated, of which complaint is made. Such objections are waived if not presented by motion to quash before plea.

It has been very earnestly urged in argument that the statute is unconstitutional, in that it is a delegation of legislative power; and, in the language of the brief of counsel for plaintiffs in error, gives "a mining boss or other person the right to make his word equivalent to a law the disobedience of which would make them criminals." We do not so construe the statute. It simply makes it a misdemeanor to enter a mine or some part thereof under certain defined conditions, among which is to intentionally enter any part of the mine against caution whereby life or property is endangered. It is not the entering of some safe place of the mine in

disobedience of an arbitrary order of the mining boss when neither life or property would be endangered in so doing; but it is the intentional act of willfully and knowingly doing that which exposes life or property to danger that the law condemns. The statute makes it the duty of the mining boss to ascertain and know the condition of the mine, and it imposes a penalty upon him for permitting any one to work in an unsafe place except for the purpose of making it safe; and the provisions of the statute we are here considering makes the caution of the mining boss sufficient notice of the danger to render the act of intentionally entering after such caution, and thereby exposing life or property to danger, criminal. The Legislature certainly had the right to say that it should be a misdemeanor for one to intentionally do an act which would endanger life or property after being cautioned by one on whom the law imposed the duty of ascertaining the danger. In other words the provision is a protection against unreasonable criminal accusations rather than the reverse, since it exposes one to prosecution only upon the doing of an act after a specified notice of the danger attending it. The situation is the same, in effect, as to make one guilty of an offense upon knowingly doing the forbidden act. Statutes similar to ours and containing substantially the same provisions have been enacted and have been in force in a number of the states for many years, among which are Illinois, West Virginia, Missouri, Kansas, and Iowa; but, so far as we are advised, their constitutionality has not been questioned upon the ground that they were a delegation of legislative power. Counsel for plaintiffs in error say in their brief: "Unquestionably the Legislature under the police powers has a right to say that the omission of certain acts or the commission of certain acts productive of injury to life or property shall be a crime." That is what we understand the statute to do. It forbids the commission of certain acts whereby life or property is endangered; and such is the charge contained in the information. The Legislature, and not the mining boss, has defined what acts should constitute the offense. Upon a re-examination of the case, we discover no reason for reopening the case for further argument. The defendants were tried upon a sufficient information under a valid statute, found guilty by a jury, and the minimum penalty provided by the statute imposed by the court. This in our opinion constituted due process of law, and there is nothing presented by the record in the case showing the defendants to have been deprived of any substantial right, or that they have just cause for complaint. A rehearing is therefore denied.

Rehearing denied.

POTTER, C. J., and SCOTT, J., concur.

CHICAGO, B. & Q. R. CO. v. MORRIS.

(Supreme Court of Wyoming. Feb. 10, 1906.)

1. WRIT OF ERROR—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

A special finding by the jury on conflicting evidence will not be disturbed on writ of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

2. CARRIERS—CARRIAGE OF LIVE STOCK—DUTY TO FURNISH SUITABLE CARS—LIABILITY FOR INJURIES.

A carrier of live stock is bound to furnish cars suitably equipped to safely transport horses to their destination, and is liable for injuries to them from a failure to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 925.]

3. SAME—DUTY OF SHIPPER TO INSPECT CAR.

A shipper of horses is not required to inspect a car furnished by a carrier for their transportation to see if it is properly equipped.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 931.]

4. SAME—LIABILITY OF CARRIER FOR DELAY.

While it is not every delay that will entitle a shipper of live stock to damages, if a delay is caused by the carrier's negligence and contributes to the injury of the stock, it constitutes a proximate cause and is ground for damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 920-922.]

5. SAME — ACTIONS — EVIDENCE — PROXIMATE CAUSE.

Evidence examined, and held sufficient to support a special finding that the proximate causes of an injury to horses while being transported by a carrier were the defective condition of the car and delay in transportation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 960.]

6. SAME—QUESTION FOR COURT—CONSTRUCTION OF SHIPPER'S CONTRACT.

The rights, duties, and obligations created by a contract of shipment between a shipper and carrier are questions of law for the court.

7. WRIT OF ERROR—REVIEW—HARMLESS ERROR—SPECIAL FINDINGS.

In an action by a shipper against a carrier on an express contract to transport horses, where the question whether it was plaintiff's duty to accompany the stock was improperly submitted to the jury as a question of fact, their answer that there was no evidence showing such a duty was not prejudicial to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4059, 4231.]

8. CARRIERS—CARRIAGE OF LIVE STOCK—INJURY—VICES AND PROPENSITIES—BURDEN OF PROOF.

That a carrier may avoid liability for injuries to horses during transportation on the ground of their vices and natural propensities, it must appear that the injuries occurred by reason of such vices and natural propensities alone, or in conjunction with some innocent cause, and the burden is upon the carrier to prove that fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 929.]

9. SAME—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

In an action by a shipper against a carrier for injuries to horses during transportation, evidence held sufficient to support a finding that the carrier was negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 960.]

10. NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.

The proximate cause of an injury is a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 279-302.]

11. CARRIERS—CARRIAGE OF LIVE STOCK—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action by a shipper against a carrier for injuries to horses during transportation, evidence held to sustain a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 960.]

12. WRIT OF ERROR—RESERVATION OF GROUNDS FOR REVIEW—MOTION FOR NEW TRIAL—STATEMENT OF GROUNDS.

The allegation, as ground of a motion for a new trial, of "errors of law occurring at the trial," is too general and indefinite to present for review, in an action by a shipper against a carrier for injuries to live stock in transit, the question whether the court erred in refusing to permit the carrier to show that it was a custom to attach car loads of stock at the rear end of the train, but the particular error and matter complained of should be specified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1744.]

13. TRIAL—VERDICT—SPECIAL FINDINGS—RIGHT TO JUDGMENT.

The right to a judgment upon special findings returned with a general verdict, as expressly allowed by Rev. St. 1899, § 3656, is limited to cases where there is an inconsistency between the special finding and the general verdict by section 3657, providing that when the special finding of facts is inconsistent with the general verdict the former shall control the latter, and the court may give judgment accordingly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 857-860.]

14. CARRIERS—CARRIAGE OF LIVE STOCK—LOSS—ACTIONS—EVIDENCE—NEGLIGENCE.

The fact that during transit the door of a stock car in which horses were being transported was found partly open, the bull board down, and a horse missing, is evidence of the carrier's negligence in failing to furnish a car provided with a secure and safe door to prevent the horses from falling out or escaping.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 960.]

15. SAME—DAMAGES—EXCESSIVE DAMAGES.

Plaintiff shipped a car load of horses over defendant's railroad. By reason of the defective condition of the car and delay in transportation eight of them were injured by falling down in the car, and one escaped through the door in transit. Of the horses injured, one died, and the others were sold at prices much lower than they would have brought had they not been injured. Held, that \$205 damages being within the evidence, and not excluding the limit of value in the contract of shipment, was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 963, 964.]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Action by A. J. Morris against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lonabaugh & Wenzell and N. K. Griggs, for plaintiff in error. Robert P. Parker, for defendant in error.

SCOTT, J. This action was brought in the district court of Sheridan county by the de-

feudant in error, as plaintiff, against the plaintiff in error, as defendant, to recover damages for injury to horses while in transit over plaintiff in error's line of railway, alleged to have been sustained by reason of the negligence of the company. The case was tried to a jury, and a general verdict returned December 13, 1906, in favor of Morris and against the company for the sum of \$295, as damages and interest thereon from October 16, 1905. At the same time the jury returned their separate answers to interrogatories which the court submitted to them as follows, viz.: "Int. 1. Was the car containing plaintiff's horses overloaded or overcrowded? Ans. No. Int. 2. Did the overloading or the overcrowding of the car in question cause, or contribute to, the falling or injuring of plaintiff's horses while in transit between Aberdeen and Sheridan? Ans. Not overcrowded or overloaded. Int. 3. Was it the duty of the plaintiff to go himself, or have some one else do so, along with the car of horses in question, while same was in transit between Aberdeen and Sheridan, to prevent his horses from falling and being trampled upon while in the car in such transit? Ans. No evidence to show. Int. 4. Was the falling or the injuring of plaintiff's horses, while in transit between Aberdeen and Sheridan, due to any act of negligence or want of care of defendant? And, if so, state specifically in what such negligence or want of care consisted, and also state by whose testimony or by what evidence such negligence or want of care of defendant has been shown. Ans. Bad order car and delayed train. By defendant's witness and all others. Int. 5. Was the falling or injury of plaintiff's horses, while in transit between Aberdeen and Sheridan, caused by any rough or unusual handling of the car containing such horses? And, if so, state specifically where such rough and unusual handling occurred, and by whose testimony or by what evidence such fact is established. Ans. No testimony." A motion by the company for judgment on the special findings, as also a motion for a new trial, was overruled, and the company brings the case here on error.

1. The company assigns as error the overruling of its motion for a new trial. It is contended, first, that the evidence is insufficient to support the verdict; second, that the verdict is contrary to law; third, that it was entitled to judgment upon its motion therefor upon the special findings.

It is admitted in the pleadings that plaintiff in error is and was a railroad company operating a line of railroad at the time of the shipment of the horses from Billings, Mont., to St. Louis, Mo., and a common carrier transporting merchandise and live stock for hire, and that it received a car load of horses from the defendant in error as such common carrier, and undertook to transport them over its line to their destination. There

was conflicting evidence upon the question as to whether the car was overloaded or overcrowded. The jury, as seen by their special finding No. 1, found that it was not, and, in view of the conflicting evidence upon that question, such finding cannot be disturbed. The jury having so answered the first interrogatory, it follows that their second finding is correct, for, if there was no overloading or overcrowding of the stock in the car, it is apparent that the injury to the animals cannot be attributed to that cause.

The evidence tended to show that upon the plaintiff's application the company, on the 16th day of October, 1905, furnished him a car on its side track and at its loading pen at Aberdeen, Mont., for the purpose of shipping a car load of horses from that point to East St. Louis. The car was loaded about 11 o'clock at night, and shortly thereafter it was switched from the side track and attached to a freight train in rear of 47 car loads of lumber, and next forward of the caboose. The car had a broken drawbar on the front end, and was coupled to the car in front by a chain, there being about 18 inches of slack which was not taken up by the chain. The train was equipped with air brakes which were coupled onto the damaged car. The boiler of the engine was foaming, and the train was overloaded, so that in climbing Parkman Hill in going south from Aberdeen the train crew had to divide the train, and it was hauled in separate sections up that hill. The train was also delayed by having to wait at meeting points, and did not reach Sheridan, a distance of 40 miles from the starting point, until some time between 12:30 and 2:30 in the afternoon of the next day. Upon arrival at Sheridan the car was allowed to stand in the yards from 1¼ to 1½ hours before the horses were unloaded. It was then found that eight of the horses had been injured by having fallen in the car and having been trampled upon, one dying shortly thereafter, three were in such condition that they could not be shipped further, and the remaining four were reloaded with the rest. The three left in the stockyards at Sheridan were afterwards sold by the company, and the other four so injured were sold by the shipper at their destination at prices much below what they would have brought had they been free from injuries. At Newcastle, Wyo., the horses were again unloaded for water and feed, and, with the exception of those left at Sheridan, none were missing from the shipment. The horses were again reloaded, and upon arrival at Alliance, Neb., it was found that one horse was missing. The door of the car was discovered to be partly open and the bull board down. Neither the owner nor any one in his behalf accompanied the horses to care for them and attend to their needs between Aberdeen and Sheridan, and this fact was known to the conductor who was in charge of the train. No contract of

shipment was signed at the initial point nor at the time of delivery and acceptance of the horses by the company for transportation. The shipment, with the exception of the four head left at Sheridan, was accompanied from that point by a Mr. Towns as agent for the shipper, and upon leaving Sheridan he signed a shipping contract as agent for his principal. The contract so signed purports to be dated at Parkman Station on October 16, 1905, and the number of head of horses as stated therein is 38. There was evidence on behalf of the defendant tending to show careful handling and management of the train, and the jury by their answer to interrogatory No. 5 found that there was no testimony to show that the injury to plaintiff's horses between Aberdeen and Sheridan was due to any rough or unusual handling of the car.

It was incumbent upon the company to furnish a car properly equipped to safely transport the horses to their destination, and it was liable for injuries resulting from a failure to do so. 5 Am. & Eng. Ency. of Law (2d Ed.) 432; 6 Cyc. 440. It is conceded that the car which was furnished had a broken drawbar, and it is not shown that the plaintiff was cognizant of that fact, nor was it his duty to inspect the car. Union Pac. Ry. Co. v. Rainey, 19 Colo. 225, 34 Pac. 986; Mason v. Mo. Pac. Ry. Co., 25 Mo. App. 473; Gulf, etc., Ry. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; 5 Am. & Eng. Ency. of Law, 435. According to the evidence on behalf of the plaintiff, there was 18 inches of slack between the car in which the horses were and the next car ahead which was not taken up by the chain with which the coupling was made, and there was evidence tending to show that there would be more jarring and unsteadiness of the car by reason of such slack, and consequently a greater tendency of the horses to get down in the car and be trampled upon, than if the car had been properly equipped in this respect. One of the witnesses for the defendant, who at the time was superintendent of the division of defendant's railroad on which the injuries occurred, testified that any defect in a train might cause more jarring, and that a defective drawbar would be a serious defect.

The length of time consumed by the train in going from Aberdeen to Sheridan, a distance of 40 miles only, and the delay in reaching the latter point, was properly before the jury as bearing upon the question of proper equipment to handle the train and transport the animals with reasonable dispatch to where they could be unloaded and cared for. While it is not every delay that entitles a shipper to damages, yet if such delay was by reason of negligence of the company and contributed to the injury it constituted a proximate cause, and an action for damages would lie. The overloading an engine, or a defective engine which causes a delay, is evidence of negligence (Cleveland, etc., R. Co. v. Heath, 22 Ind. App. 47, 53 N. E. 198; Mich. So., etc.,

Ry. Co. v. McDonough, 21 Mich. 163, 4 Am. Rep. 466; McCrary v. R. Co., 100 Mo. App. 567, 83 S. W. 82), and, if such negligence contributed to the injury, there is no reason why damages should not be recoverable.

Negligence per se was not shown, but there was evidence sufficient to go to the jury, and therefore sufficient to sustain a finding of negligence. It was for the jury to say from all the evidence whether such negligence constituted the proximate cause of the injury to the animals, and by their special finding No. 4 they found the proximate causes to be "bad order car and delayed train." If the damaged car and the delay in transit increased the hazard and risk of injury to the horses by getting down and being trampled upon and injury also resulted in inability to unload the animals at an earlier hour, this court cannot say that the jury's finding is wrong. It would seem reasonable that the longer they were in transit and the consequent delay in getting those up which had fallen, together with the character and kind of animals, and their need of care and attention, should all be taken into consideration in determining whether such delay contributed to and was a proximate cause of their injury. This was a question of fact for the jury to determine, and we are of the opinion that the special finding No. 4 is not contrary to the evidence, and that it is sustained by sufficient evidence.

It is contended that the verdict is contrary to law, and in support of this contention it is argued that the plaintiff was guilty of contributory negligence in failing to go or send some one along with the horses and attend to their needs and wants during transit between Aberdeen and Sheridan, and also that owing to the natural propensities of the horses and their liability to injure each other the injuries must be attributed to such propensities or vice, and that the company by the terms of the contract was not liable therefor. The contract of shipment provided that the company should furnish free transportation for the owner or his agent to accompany the horses, and that he or his agent should have sole charge of the car and horses, and that the company should not be responsible for such attention and care. The evidence is that the plaintiff and a stock inspector, together with the train crew, loaded the horses at Aberdeen. The plaintiff testifies that after loading them he left the car and horses in charge of the train crew. The evidence of the conductor who was in charge of the train is to the effect that he knew he was not carrying any one on the part of the plaintiff to care for the horses between Aberdeen and Sheridan.

The existence of the contract was one of fact, and was admitted by the parties. The rights, duties, and obligations created thereby were questions of law to be determined by the court. There was some evidence of a custom of stockmen to accompany or send some one along to care for their stock while in transit,

but the shipment was under the terms of an express contract, and the rights of the parties must be measured thereby. A custom to that effect and a failure to comply therewith were not pleaded. The jury by their answer to interrogatory No. 3 stated that there was no evidence to show that it was the duty of the plaintiff to go, or have some one else do so, along with the car of horses while same was in transit between Aberdeen and Sheridan to prevent his horses from falling or being trampled upon while in the car in such transit. This question, we think, is one of law and not of fact, and that it was therefore improperly submitted to the jury, and its answer thereto—that there was no evidence—cannot be regarded as prejudicial to the defendant for that reason. That this was a question of law was recognized by the court in its instruction to the jury as follows: "You are instructed that the duty of looking after the horses in question, while on the way between Aberdeen and Sheridan, devolved on the plaintiff. Hence, if he allowed such horses to be transported between those points, without going along himself, or having some one do so, to look after them on the way, and some of them got down and were injured because of such want of care, he cannot recover in this action." In another instruction the jury were told that in order for the plaintiff to recover for injury to his horses he must affirmatively prove by a preponderance of the testimony that they were injured alone through the negligence of the company. The failure of the plaintiff to accompany or send some one along to care for his horses, under the verdict and finding of the jury, neither contributed to nor was it the proximate cause of the injuries.

If the injuries to the horses were due solely to their vices and natural propensities, then the company was not liable therefor, but in order for this to be a defense it must appear that such vices or propensities constituted the sole proximate cause of the injuries. 5 Am. & Eng. Ency. of Law, 445. It is true that the evidence shows that horses of this character are nervous and excitable, and would be more liable to get down in the car for the first hundred miles of the journey, and that that fact was known to the shipper as well as the company. The jury did not find that the natural propensities or vices of the animals was the sole proximate cause of the injuries, and upon the whole evidence it was for them to determine what the proximate cause of the injuries was (*Giblin v. National S. S. Co.*, 8 Misc. Rep. 22, 28 N. Y. Supp. 69), and to have been the proximate cause, as a defense, the injuries must have occurred by reason of the natural propensities alone or in conjunction with some innocent cause (*Chicago, etc., R. Co. v. Harmon*, 12 Ill. App. 54), and the burden was upon the company to show that fact. 5 Cyc. 469. The jury by their special finding found the proximate cause of the injuries to have been bad order of car and delayed

train. We do not think that the injuries could upon the evidence have been the result solely of the natural propensities of the animals, either alone or in conjunction with an innocent cause, for the damaged car and delayed train were not, nor could they be considered, an innocent cause. We are of the opinion that the verdict is sustained by sufficient evidence, and that it is not contrary to law.

2. It is urged in argument that the court erred in refusing to permit the defendant to show that it was the custom to attach car loads of stock at the rear end of the train. The motion for a new trial does not specify this ruling as a ground therefor, unless it be included in the general ground defined in the statute and alleged in the motion as "errors of law occurring at the trial." The ground is too general and indefinite, and upon the record it does not affirmatively appear that the specific question here argued was brought directly to the lower court's attention. *Boburg v. Prah*, 3 Wyo. 325, 23 Pac. 70. While it may have been argued and submitted to that court, the only way of showing that fact and presenting the question for review is by setting out and specifying in the motion the particular error and matter complained of. Section 853, *Elliott on App. Proc.*

3. It is assigned as error that the court erred in overruling the company's motion for judgment on the special finding of facts. The interrogatories were submitted to the jury to be answered and returned with their general verdict, in pursuance to the provisions of section 3656, Rev. St. 1890. Section 3657, Rev. St. 1899, is as follows: "When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly." The right to a judgment upon the special finding of facts under these provisions of the statute is limited to those cases where there is an inconsistency between the special finding and the general verdict, and, unless there is such an inconsistency as to be irreconcilable, such a motion should be denied. *Davis v. Turner*, 60 Ohio St. 101, 116, 68 N. E. 819. The special finding of facts is reconcilable with the general verdict, and, that being the case, the company was not in a position to ask affirmative action on the part of the court upon its motion for judgment based upon such finding.

4. The correctness of the instructions is not here questioned, nor is the right to recover the value of the horse which was lost from the car between Newcastle and Alliance seriously questioned. There was some conflicting evidence as to whether the horse was loaded with the others, but that was a question for the jury, and, if so loaded, the condition of the door at the time the horse was found to be missing would be sufficient evidence to sustain the verdict on the ground of negligence on the part of the company in failing

to furnish a car provided with a secure and safe door to prevent the horses from falling out or escaping. *Smith v. New Haven, etc., R. Co.*, 12 Allen (Mass.) 531, 90 Am. Dec. 166; *Pratt v. Ogdenburg, etc., R. Co.*, 102 Mass. 557; *Indianapolis, etc., R. Co. v. Strain*, 81 Ill. 504; *Betts v. Chicago, etc., R. Co.*, 92 Iowa, 343, 60 N. W. 623, 26 L. R. A. 248, 54 Am. St. Rep. 558; *Central of Georgia R. Co. v. James*, 117 Ga. 832, 45 S. E. 223; *Root v. New York, etc., R. R. Co.*, 83 Hun, 111, 31 N. Y. Supp. 357.

5. It is urged that the damage awarded by the jury is excessive. The damage was variously estimated by different witnesses, and the amount found by the jury was within the evidence, and does not exceed the value placed upon the animals in the contract of shipment, and to which value the plaintiff limited the amount of his recovery for injury to or loss of the horses while in transit. The argument upon this question seems to be that a recovery, if at all, must be for the value of the horse which was lost from the car, and that there was no liability for damage for injury to the horses while in transit between Aberdeen and Sheridan. This contention, as we have seen, is not correct, for the plaintiff was entitled to recover for injuries to them as well. We are of the opinion that the damage assessed by the jury is not excessive.

No prejudicial error appearing in the record, the judgment will be affirmed.

Affirmed.

POTTER, C. J., and BEARD, J., concur.

FRYE & BRUHN, Inc., v. PHILLIPS et al.
(Supreme Court of Washington. Feb. 8, 1908.)

1. PARTNERSHIP—ACTIONS AGAINST PARTNERS—BURDEN OF PROOF.

In an action on an account against a firm in which one of the partners defended on the ground that she had paid one-half of plaintiff's claim under an agreement that such payment should be in full of her liability thereon, the original debt being thus admitted, the burden of proof was on the answering defendant to establish her affirmative defense.

2. TRIAL—MOTION FOR JUDGMENT—EFFECT OF MOTION.

In an action on account against a partnership where one member set up an affirmative defense, the plaintiff, by moving for judgment at the close of defendant's case, does not waive his right to contest the affirmative matter set up in the answer.

On petition for rehearing. Former opinion modified and petition denied.

For former opinion, see 89 Pac. 559.

PER CURIAM. This was an action on account against a copartnership. One of the partners defaulted, the other partner interposed the defense that she had paid to the plaintiff one-half of the firm indebtedness, under an agreement that such payment would be accepted in full of all claims and demands against her, and that the plaintiff would look

to the other partner for the balance due. The affirmative defense was denied by the reply. Inasmuch as the original indebtedness was admitted, the burden of proof rested upon the answering defendant to establish the allegations of her affirmative defense. At the close of her testimony, the court ruled that the agreement set forth in the answer was without consideration, and granted judgment in favor of the plaintiff for the full amount claimed. In the original opinion filed in this case (89 Pac. 559) we held that the agreement set forth in the answer was founded upon an adequate consideration and reversed the judgment, with directions to enter judgment in favor of the defendant. The plaintiff did not waive its right to contest the affirmative matter set forth in the answer by moving for judgment at the close of the defendant's testimony, any more than a defendant waives his right to contest the plaintiff's case by moving for a nonsuit.

For this reason a new trial should have been awarded, instead of directing judgment for the defendant. To this extent the original opinion is modified, but in all other respects the petition for rehearing is denied.

HIDDEN et ux. v. GERMAN SAVINGS & LOAN SOCIETY.

(Supreme Court of Washington. Feb. 5, 1908.)

1. ESTOPPEL—EQUITABLE ESTOPPEL—CHANGE OF POSITION.

Where the interest on a mortgage note is long overdue, and the mortgagee agreed to accept a lesser amount in full satisfaction of the amount due in reliance on which agreement the mortgagor paid the amount agreed on, and continued in possession and paid a large amount of interest subsequently accruing, the mortgagee cannot subsequently assert that the agreement was void as being without consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 142.]

2. CHATTEL MORTGAGES—INSURANCE ON MORTGAGED PROPERTY—LIABILITY FOR PREMIUMS.

The payor of a note secured by a chattel mortgage is not obliged to repay the mortgagee for amounts paid out to keep the property insured in the absence of an agreement to that effect.

3. TENDER—SUFFICIENCY.

Where a note requires payment in gold coin at a certain place, the payee cannot object that a tender of the amount due made and refused was not good, because made by draft, where the refusal was not based on that ground especially when previous payments were accepted, although not in gold coin.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tender, §§ 29-32, 44.]

Appeal from Superior Court, Clarke County; W. W. McCredie, Judge.

Action by L. M. Hidden and another against the German Savings & Loan Society. From a judgment for plaintiffs, defendant appeals. Affirmed.

Milton W. Smith, for appellant. H. W. Arnold, for respondents.

RUDKIN, J. On the 25th day of April, 1893, O. M. Hidden, Margaret Hidden, L. M. Hidden, Mary Hidden, and Arthur W. Hidden executed their promissory note in favor of the defendant, the German Savings & Loan Society, for the sum of \$20,000, payable five years after date, with interest from date until paid at the rate of 7 per cent. per annum payable quarterly. On the same date, for the purpose of securing the payment of the promissory note according to its terms, the makers executed and delivered to the payee their indenture of mortgage on certain hotel property owned by them in the city of Vancouver, Clarke county. On the 21st day of February, 1898, the makers executed and delivered to Louis J. Goldsmith, as trustee, a chattel mortgage on the furniture and fixtures in the hotel situated on the lots covered by said first mentioned mortgage as additional security for the payment of \$2,727.02, overdue interest on the loan. On the 1st day of January, 1902, interest was overdue and unpaid on the principal note to the amount of \$4,947.88, and on or about that date the defendant agreed to accept the sum of \$3,447.88 in full of all interest to January 1, 1902, and to reduce the rate of interest to 5 per cent. per annum thereafter, on condition that the back interest was promptly paid. The plaintiff accepted the offer, and paid the amount specified on the 27th day of January, 1902, receiving from the defendant a receipt acknowledging payment in full of all interest to January 1, 1902, as agreed. For upwards of three years thereafter the plaintiffs promptly paid the interest on the loan at the reduced rate, and the defendant accepted such payments, receipting in full for all interest accruing during the periods covered by the respective payments. On June 8, 1905, \$10,000 was paid on the principal of the note, and on October 30, 1905, the further sum of \$10,131.94 was tendered by draft, in full of the balance on the principal sum due and all accrued interest to that date at the reduced rate agreed upon by the parties. This tender was rejected, and the present action was thereafter instituted to cancel the note and mortgage, and for other relief. The complaint alleges that the plaintiffs are the successors in interest to the original mortgagors and this allegation is denied by the answer; but, in view of the conclusion we have reached on the merits of the case, this question becomes immaterial. The court below made findings in favor of the plaintiffs, and gave judgment according to the prayer of the complaint. From the judgment so rendered, the defendant has appealed.

While the appellant rejected the tender of October 30, 1905, for the reason that the respondent refused to repay certain sums paid out by the appellant for insurance on the personal property covered by the chattel mortgage above referred to, at the trial in the court below and again in this court it con-

tended that the tender was insufficient for the following reasons: First, because the agreement of January 1, 1902, to accept a lesser amount in full satisfaction of the interest then overdue, was without consideration; second, because the respondent failed to tender the amounts paid out by the appellant for insurance on the personal property covered by the chattel mortgage; and, third, because the note called for payment in gold coin at San Francisco, and the tender by draft was not in accordance with the agreement of the parties. Other minor questions are discussed in the briefs, but we find them without merit. With these several contentions we cannot agree.

1. At the time the appellant agreed to remit the sum of \$1,500 from the amount of the unpaid interest both principal and interest were long overdue. At that time it doubtless deemed itself insecure, else the remission would not have been made. The respondents were then at liberty to suffer the mortgage to go to a foreclosure, and permit the appellant to recover its indebtedness as it then stood as best it could. But, in reliance on the promise made, the respondents continued in possession of the property, and paid, not only the overdue interest which they were already obligated to pay, but additional interest under the modified agreement to the amount of more than \$3,000. This interest was accepted by the appellant and the agreement of January 1, 1902, was fully acquiesced in by both parties until a dispute arose between them over the payment of certain insurance premiums. After the respondents had thus changed their position, and after the agreement had thus been executed and acquiesced in for such a length of time, it certainly does not lie with the appellant to say that the original agreement was without consideration or void.

2. The chattel mortgage contained no provision requiring the mortgagors to keep the property insured, or authorizing the mortgagee to procure insurance at their expense. The court below found that there was no collateral agreement to that effect and such finding is sustained by the testimony.

3. While the note required payments to be made in gold coin at the appellant's office in San Francisco, the tender was not refused because not so made, and this requirement of the contract was not insisted upon in the case of any prior payment. Under such circumstances, it would be highly inequitable to permit such a technical objection to be raised or suggested for the first time by answer.

Finding no error in the record, the judgment is affirmed.

HADLEY, C. J., and FULLERTON, DUNBAR, MOUNT, CROW, and ROOT, JJ., concur.

VAN HORN v. VAN HORN.

(Supreme Court of Washington. Feb. 5, 1908.)
DIVORCE — ALIMONY — INTERLOCUTORY JUDGMENT—FOREIGN JUDGMENT.

An action will not lie in this state on an interlocutory order of a California court awarding plaintiff herein temporary alimony and suit money in an action for divorce pending in that court, since such order, though final and appealable under California statutes, is subject to modification by the court making it, and, this court not having jurisdiction of the original suit, its attempt to enforce the order might result in a conflict of authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 841.]

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Marion V. Van Horn against Ross H. Van Horn on an interlocutory order of a foreign court awarding temporary alimony and suit money. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

William B. Allison, for appellant. Bamford A. Robb, for respondent.

RUDKIN, J. This action was instituted in the court below on an interlocutory order of the superior court of Alameda county in the state of California awarding temporary alimony and suit money to the plaintiff herein in an action for divorce pending in that court. A demurrer interposed to the amended complaint was sustained, and the plaintiff electing to stand on her complaint, and, refusing to plead further, a judgment of dismissal was entered. From that judgment the present appeal is prosecuted.

The order on which the action is based was made under section 137 of the Civil Code of California, which reads as follows: "When an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony, any money necessary to enable the wife to support herself and her children, or prosecute or defend the action." The authorities very generally agree that an action will not lie in another court or in the courts of another state on an order or judgment such as this. *Baugh v. Baugh*, 4 Bibb. (Ky.) 556; *Ledyard v. Brown*, 39 Tex. 402; *Vine v. Vine*, 21 R. I. 190, 42 Atl. 871; *Cuttler v. Cuttler*, 88 Ill. App. 464; *Webb v. Buckelew*, 82 N. Y. 553; *Lynde v. Lynde*, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332, same case affirmed 181 U. S. 183, 21 Sup. Ct. 553, 45 L. Ed. 810; *Freud v. Freud* (N. J. Ch.) 63 Atl. 756; *Israel v. Israel*, 148 Fed. 576, 79 C. C. A. 32, 9 L. R. A. (N. S.) 1168; *Hunt v. Monroe* (Utah) 91 Pac. 269; *Sistare v. Sistare* (Conn.) 66 Atl. 772; *Geisler v. Geisler*, 98 S. W. 1023, 30 Ky. Law Rep. 430; *Barclay v. Barclay*, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351. The reason for the rule is thus stated in *Israel v. Israel*, supra: "The decree for alimony may be changed from time to time by the chancellor, and there may be such cir-

cumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree. * * * The peculiar character of the obligation is such that it is always subject to modification by the court in which the decree was entered according to the varying circumstances of the parties, and no other court could undertake to administer the relief to which the parties are entitled except that having jurisdiction in the original suit. An attempt to do so by such other court would bring about a conflict of authority and a condition of chaos with reference to questions of this character, because no other court would have before it the facts with reference to such change and condition and as to such original right of the parties."

Without questioning the rule announced in these cases, counsel for the appellant earnestly insists that the order in question is a final one under the decisions of the Supreme Court of the state of California, and must be so considered here. In support of this contention he cites: *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; *Hiite v. Hiite*, 124 Cal. 389, 57 Pac. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82; *Baker v. Baker*, 136 Cal. 303, 68 Pac. 971. While the Supreme Court of California holds in the cases cited that an order such as this is a final order from which an appeal will lie under its statutes, it does not hold, and has not held to our knowledge, that such an order is not subject to change or modification in the discretion of the court in which it was made, and this is the principal objection to permitting an action to be maintained on such an order in another jurisdiction. It is a significant fact that, while the Supreme Court of California cites *Lochnane v. Lochnane*, 78 Ky. 468, and *Blake v. Blake*, 80 Ill. 532, in support of the right of appeal in the Sharon Case, the courts of both of these states hold that an action will not lie on such an order. *Cuttler v. Cuttler*, and *Geisler v. Geisler*, supra.

Finding no error in the record, the judgment is affirmed.

HADLEY, C. J., and FULLERTON, MOUNT, CROW, and DUNBAR, JJ., concur.

DAY v. McPHEE et al.

(Supreme Court of Colorado. Dec. 2, 1907. Rehearing Denied Feb. 3, 1908.)

1. APPEAL — LIABILITY ON BOND — WHEN SURETY'S LIABILITY ATTACHES.

Upon affirmance of a judgment on appeal, the sureties' liability upon the appeal bond becomes absolute, and the obligee need not exhaust his remedy against the principal before proceeding against the sureties, but may elect which of the sureties he will proceed against, or what security holden for the judgment he will resort to for its satisfaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4788-4790.]

2. SAME—ACTIONS—DEFENSES.

As a general rule, the only defense which a surety upon an appeal bond can interpose after affirmance of the judgment is one which discharges him from his obligation in whole or in part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4792-4794.]

3. SAME.

Plaintiffs sued their debtor, and sued out an attachment, under which funds of the debtor sufficient to pay the claim were attached. The attachment was discharged upon the debtor filing a bond, with R. as surety, conditioned to pay any judgment obtained, and the property released was turned over to the surety, R., to indemnify him against loss. Judgment was obtained against the debtor, and defendant became surety on his appeal bond, and the judgment was affirmed. *Held*, that on affirmance the judgment creditors could elect which bond they would first proceed upon, and it was immaterial which of the sureties was the primary surety, or whether R.'s bond was a substitute for the garnished assets, or whether R. held the assets as security to indemnify him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4785-4787.]

4. SAME.

The fact that an appeal is taken, and an appeal bond executed, in the interest and with the consent of a surety on a bond given for the dissolution of an attachment, conditioned to pay any judgment obtained against the principal, while it may raise a liability on the part of the first surety to the other one, does not affect the creditors' right to proceed upon either bond.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4785-4787.]

5. SAME.

In an action against a surety on an appeal bond, an allegation that plaintiffs had collusively arranged with the surety on another bond for the dissolution of an attachment, conditioned to pay the judgment, to release him from his obligation, is no defense, since it does not allege that the other surety has been absolutely released, but merely alleges that which would result by operation of law if defendant paid the judgment, since plaintiffs could have but one satisfaction.

6. PRINCIPAL AND SURETY—RIGHTS OF SURETIES AS TO CO-SURETY.

If one surety is primarily liable, the right of the surety secondarily liable, who has discharged the liability, to compel the one primarily liable to repay the sum disbursed, attaches immediately upon payment, and is not affected by a subsequent attempt of the obligee to discharge the surety primarily liable.

7. SAME—RECOURSE OF SURETY TO OBLIGEE'S SECURITY.

As a general rule, the right of a surety on an appeal bond with respect to any security which the judgment creditor may subject to the payment of his judgment is to resort to it himself on paying the judgment, and not to compel the creditor to resort to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 474-479.]

8. SAME—RELEASE OF SECURITY BY CREDITOR.

The release by a creditor of security to which a surety has the right to resort upon paying the debt releases the surety to the extent that he is thereby deprived of indemnity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 244-268.]

9. ATTACHMENT—BOND FOR RELEASE—EFFECT.

Where, by mutual arrangement between plaintiff and defendant in an action in which property of defendant has been attached, plaintiff takes defendant's bond with surety conditioned for the payment of any judgment in the action, and the attached property is released

and the attachment dissolved, the surety taking over the property released for his indemnity, the liability of the surety on the bond becomes a substitute for the property attached which by virtue of the bond is released.

10. PRINCIPAL AND SURETY — DISCHARGE OF SURETY — RELEASE BY CREDITOR OF OTHER SECURITY.

In determining equities between a creditor and sureties on a bond, where the creditor's acts in releasing security to which the surety may resort on payment of a debt would result in loss to the surety, the result of the creditor's action is persuasive in adjusting the equities because the right of subrogation of a surety rests not on contract, but on principles of natural justice.

11. PRINCIPAL AND SURETY—RIGHTS OF SURETY—RELEASE OF SECURITY BY OBLIGEE.

Since, where a bond for the release of an attachment is taken, conditioned for the payment of any judgment in the action, the liability of the surety on the bond becomes a substitute for the property attached which a surety on an appeal bond in the action might resort to upon payment of the judgment, the release of the surety on the former bond will release the surety on the appeal bond.

12. SAME—LIABILITY OF CO-SURETIES.

Since, where a bond for release of an attachment is taken, conditioned for the payment of any judgment in the action, the liability of the surety on the bond is a substitute for the property attached, his obligation as against a subsequent surety on an appeal bond in the action is not within the doctrine that, if sureties are bound for the same thing or do not occupy towards each other the same relative position, a subsequent surety will have no right as against the first.

13. SAME — RIGHTS OF SURETY — RELEASE OF SECURITY BY OBLIGEE—RIGHT OF OBLIGEE TO PROCEED ON ONE OF SEVERAL BONDS.

While a judgment creditor may elect upon which of two bonds he will proceed to obtain satisfaction of his judgment, he may not proceed against one of them if by an affirmative act he has destroyed the surety's right to be subrogated to the only security there was for the payment of the judgment and which was sufficient to pay it.

14. APPEAL — LIABILITIES ON BONDS—ACTION —PARTIES — EQUITIES BETWEEN CO-SURETIES.

In an action by a judgment creditor against a surety on an appeal bond, defendant is not entitled to the delay of the case incident to bringing in a surety on a bond given to release an attachment merely to settle equities between defendant and such surety, unless plaintiffs were in some way responsible for the creation of such equities, or had, by affirmative action, destroyed them.

15. SAME.

The liability to a surety on an appeal bond of a surety on a bond for release of an attachment, conditioned to pay the judgment, in case the former should pay it, would not entitle the surety on the appeal bond to have the other surety made a party defendant in an action on the appeal bond, since that liability would not affect or postpone plaintiff's rights.

16. SAME.

Under Civ. Code, § 16, providing that, when a complete determination of controversies between the parties to an action cannot be had without the presence of other parties, the court shall order them to be brought in, where it is alleged that defendant, a surety on an appeal bond, was released by plaintiff destroying defendant's right to resort to a bond given for the release of an attachment, the surety on the bond for release of the attachment is properly made a party defendant.

Appeal from District Court, Weld County; Christian A. Bennett, Judge.

Action by Charles D. McPhee and others against William E. Day on an appeal bond. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

H. N. Haynes, for appellant. Chas. J. Hughes, Jr., Gerald Hughes, and Barnwell S. Stuart, for appellees.

GABBERT, J. The question presented by this appeal is the liability of appellant as surety on an appeal bond upon which suit was commenced against him by the appellees McPhee & McGinnity. In the complaint filed by these appellees in their action on the bond, it is alleged that they obtained a judgment in the district court of Arapahoe county against J. B. Hindry for a specified sum; that Hindry appealed from this judgment to the Court of Appeals; that, pursuant to an order of that tribunal, Hindry filed an appeal bond upon which appellant and another were sureties, conditioned for the payment of the judgment appealed from in case it was affirmed; that the judgment was affirmed, and has not been paid. To this complaint the defendant, Day, as an answer, interposed four defenses and a cross-complaint. To the latter the appellee Ross-Lewin, by order of court, was made a party defendant. By the same order he was also made an additional party defendant in the original action. To each defense and cross-complaint a general demurrer was interposed and sustained. The defendant Day elected to stand by his answer and cross-complaint, and judgment was rendered against him, from which he appeals. His liability on the bond in question, therefore, depends upon whether or not either defense or the cross-complaint stated facts sufficient to constitute a defense to the action upon the bond.

By the first defense, it is averred that the judgment mentioned in the complaint was rendered in an action instituted by plaintiffs in the county court of Arapahoe county against J. B. Hindry; that this action was supplemented by an attachment under which the city of Denver was garnished, by which sufficient funds of Hindry were attached to more than cover their claim; that following this garnishment, by stipulation of parties to the action, an order was entered by the county court reciting that the parties had stipulated to discharge the attachment upon Hindry filing a bond in the sum of \$3,000, with sureties, conditioned for the payment of any judgment which might be obtained against him in the action; that such bond had been filed, and thereupon, by consent of all parties, it was ordered that the attachment be dissolved, and the city of Denver discharged as garnishee. It is also averred that the appellee Ross-Lewin was the surety on this bond; that it was executed by him to obtain a discharge of the writ of attachment, and the release of the city of Denver as garnishee,

with the intent that such bond should stand in lieu of the garnishment; that Hindry thereafter collected the amount due him from the city, and paid the same to Ross-Lewin, pursuant to an agreement between Ross-Lewin and himself, made at and prior to the execution of the bond by the former to thus indemnify Ross-Lewin. It is then alleged that plaintiffs recovered a judgment against Hindry in the county court, from which Hindry, with the consent and in the interest of Ross-Lewin, prosecuted an appeal to the district court; that the result of the appeal was that judgment was again rendered against Hindry, and that from this judgment an appeal was taken to the Court of Appeals, where the judgment was affirmed. It is also alleged that, in order to prosecute this appeal, the defendant Day signed the appeal bond mentioned in the complaint. It is also charged that this appeal was in the interest of Ross-Lewin, and with his knowledge, concurrence, and consent, to the end that, if possible, the judgment would be reversed and Ross-Lewin released from his obligation. It is further alleged that plaintiffs have entered into an arrangement with Ross-Lewin to enforce collection of the judgment from this defendant upon his bond, and to discharge Ross-Lewin from all liability thereon when such judgment is so collected. It is also averred that Hindry is insolvent.

From the foregoing synopsis it is claimed by counsel for defendant that it appears from this defense that the judgment for which Day became surety on the appeal bond sued upon was originally fully secured by garnishment proceedings; that the Ross-Lewin bond was taken as a substitute for, and in lieu of, the assets secured by such proceedings; that these assets were, by the principal debtor, turned over to Ross-Lewin as security to indemnify him against loss in signing the bond which he executed, by virtue of which the attachment was discharged; that the appeal to the Court of Appeals was taken in the interest, and with the consent, of Ross-Lewin, and that McPhee & McGinnity have released Ross-Lewin. Upon these facts the following legal propositions are advanced by counsel for appellant in support of his contention that the court erred in sustaining the demurrer to the first defense: (1) A surety, on paying the indebtedness of his principal, has the right to be subrogated to the securities held by the creditor for the payment of the debt discharged by the surety. (2) That this right extends to securities of the principal debtor held by other sureties. (3) That a release by the creditor of a security to which the surety has a right of subrogation releases the surety. (4) That, as between Day and Ross-Lewin, the latter was the primary surety from whom the former, on paying the judgment, would be entitled to full indemnity. This proposition is based upon the further ones to the effect that the bond signed by Ross-Lewin was a

substitute for the original garnished assets of Hindry; that Ross-Lewin held as security assets of the principal debtor, Hindry; and the appeal perfected by the bond of Day was taken in the interest, and with the consent, of Ross-Lewin. (5) That the agreement of plaintiffs to release Ross-Lewin from his obligation has released the defendant Day. Conceding, for the present, for the sake of argument, that these propositions are correct statements of the law, the facts to which it is sought to apply them do not relieve the defendant Day from his obligation upon the appeal bond. Upon affirmance of a judgment from which an appeal is prosecuted, the liability of the sureties upon the bond given to perfect the appeal becomes fixed and absolute. The obligee in such bond is not required to exhaust his remedy against the principal before proceeding against the surety, but may elect which of the sureties he will proceed against, or what security, holden for the judgment, he will resort to for its satisfaction. *Anderson v. Sloan*, 1 Colo. 484; *Steinhauer v. Colmar*, 11 Colo. App. 494, 55 Pac. 291; *Wood v. Derrickson*, 1 Hilt. (N. Y.) 410; *Staley v. Howard*, 7 Mo. App. 377; *Bingham v. Mears*, 4 N. D. 437, 61 N. W. 808, 27 L. R. A. 257; *Davis v. Patrick*, 57 Fed. 909, 6 C. C. A. 632. The reason for these rules of law is that a judgment debtor may appeal from a judgment rendered against him independent of the judgment creditor; and, when he is enabled to exercise this right through another engaging to pay the judgment appealed from in case it is affirmed, whereby the collection or enforcement of the judgment is stayed, the surety on the bond given for this purpose will not be heard to say that there is property of the principal debtor which can be subjected to the payment of the judgment, or that there are other sureties holden for the debt, or that, because of equities between himself and others liable for the debt which the judgment creditor was not responsible for creating, the discharge of his engagement should be postponed until such property is exhausted, or unless other sureties are proceeded against, or such equities between himself and others are first settled. So that, upon the breach of the condition of his obligation, he will not be allowed to escape liability thereon, or postpone discharging it except for the most cogent reasons. *Shannon v. Dodge*, 18 Colo. 164, 32 Pac. 61. Generally speaking, then, the only defense which a surety upon an appeal bond can interpose after affirmance of judgment is one which discharges him from his obligation, either in whole or in part. There may be exceptional cases, as where the judgment creditor has access to a fund for the payment of his debt which a surety cannot make available, but no facts are presented for our consideration by the first defense upon which any argument is based, which excepts this case from the general rules of law announced.

Applying these principles, it is clear that the facts upon which defendant relied as pleaded in his first defense were not sufficient in law for any reason suggested by counsel. The judgment which he engaged to pay by the appeal bond which he executed was affirmed. That Ross-Lewin may also have been liable to discharge such judgment by virtue of the bond which he executed did not concern the defendant, for the plaintiffs had the right to elect which bond they would first proceed upon. Whether Day or Ross-Lewin was the primary surety was also immaterial for the same reason. Neither was it material whether the bond signed by Ross-Lewin was or was not a substitute for the original garnished assets of Hindry, or that Ross-Lewin held as security to indemnify him assets of the debtor Hindry, because, as stated, the plaintiffs had the unquestioned right to elect which of the several sureties liable for the judgment they would proceed against. If it be true, as contended by counsel for defendant, that the allegation to the effect that the appeal of Hindry was taken in the interest, and with the consent, of Ross-Lewin, made him liable to Day if he should pay the judgment, that is a relation created between them for which the plaintiffs were in no manner responsible. Nor does the averment that plaintiffs have entered into a collusive arrangement with Ross-Lewin to release him from his obligation incurred by the bond given to dissolve the attachment in any manner affect the rights of the defendant. It is not equivalent to an allegation that the plaintiffs have absolutely released Ross-Lewin upon his bond, but is nothing more than the averment of what the result would be by operation of law if the defendant paid the judgment. The plaintiffs could have but one satisfaction, and, after payment by Day, they could not hold Ross-Lewin upon a bond when the condition which made him liable thereon did not exist. Neither would an attempt on the part of the plaintiffs to discharge Ross-Lewin, after payment by defendant, affect his rights, because, if, as contended, Ross-Lewin is primarily liable for the judgment and defendant would have the right to compel him to repay the sum disbursed to discharge it, that right would attach immediately upon his paying the judgment, and no action of the plaintiffs thereafter could affect that right. In short, from the facts pleaded by the first defense, nothing appears which would operate to release him as a surety upon the appeal bond or postpone plaintiffs' right of action against him for any reason urged by his counsel. Whatever his rights against Ross-Lewin may be, they are intact; but he can only assert and settle them after he has discharged his obligation to the plaintiffs and thereby been subrogated to such rights as they may have against others, or property liable for their judgment, which the law, by virtue of his payment, would confer upon him. As a general rule, the right of a surety on

an appeal bond with respect to any security which the judgment creditor may subject to the payment of his judgment is to resort to it himself on paying the judgment, and not to compel the creditor to resort to it. *Bingham v. Mears*, supra; 1 *Brandt on Suretyship* (2d Ed.) § 97; (3d Ed.) § 110. There are no facts stated in the first defense upon which any argument is predicated by counsel for defendant which excepts this case from that rule.

The second defense is the same as the first, omitting the averment that Ross-Lewin was indemnified by the debtor, Hindry, and that the appeal by Hindry was taken with the consent of Ross-Lewin. By this defense, the alleged primary liability of Ross-Lewin and his liability to defendant Day appears to be based upon the allegation that the bond executed by Ross-Lewin was a substitute for the property of Hindry attached. That this is no defense, in connection with the other facts presented, although the contention of counsel for defendant may be correct as to the relative liability of Ross-Lewin and Day as between each other, has been shown in considering the first defense.

The third defense is the same as the first, except that, instead of alleging an agreement on behalf of plaintiffs to release Ross-Lewin upon collection of their judgment from defendant, it is averred, in substance, so far as necessary to notice, that defendant, because of certain facts stated, believes it probable that subsequent to the affirmance of the Hindry judgment by the Court of Appeals an agreement has been entered into between plaintiffs and Ross-Lewin, whereby the former have either absolutely released the latter from obligation upon his bond or on the contingency of their obtaining and collecting a judgment against defendant upon his bond. Then follow statements or averments to the effect that by reason of the premises, and by virtue of the relation between plaintiffs, Ross-Lewin and the defendant, he is entitled, as a condition precedent to plaintiffs' obtaining a judgment against him or collecting the same, to an assignment of their judgment against Hindry, and also an assignment from them of their cause of action against Ross-Lewin upon his bond, with satisfactory assurances and indemnity to protect him against any defense which Ross-Lewin might interpose to an action on his bond by virtue of any agreement of plaintiffs to release him therefrom. It is further stated or averred that, as a condition precedent to plaintiffs' obtaining judgment against defendant and collecting it, they be required to disclose whether or not they have entered into any arrangement or agreement whereby they have agreed absolutely or contingently to release Ross-Lewin from his obligation, so that by such disclosure the defendant may know whether his right to subrogation against Ross-Lewin has been impaired, lost, or discharged by the action of plaintiffs, to the end that, if by such

disclosure it should appear that Ross-Lewin has been discharged from his obligation, either absolutely or contingently, defendant be discharged from all liability on his bond. Then follows an averment to the effect that, after suit was commenced against defendant, he requested of plaintiffs information as to whether or not they had agreed to release Ross-Lewin, either absolutely or contingently, and whether if he, the defendant, should pay plaintiffs the amount sued for, they would assign to him their judgment against Hindry, and their right of action against Ross-Lewin on his bond, coupled with assurances that such right of action would not be impaired by any arrangement, contract, or agreement, whereby Ross-Lewin could justly claim that he had been or should be released by plaintiffs from obligation upon his bond, but that plaintiffs fail and neglect to give the defendant the information or assurances requested, and fail to indicate or express any willingness to execute or deliver to defendant the assignments requested, in the event defendant should satisfy plaintiffs' claim against him.

The right of defendant to the disclosure requested is not challenged; neither is the sufficiency of this defense questioned, except upon the ground that, in no event, would Ross-Lewin be responsible to defendant in case the latter should discharge his obligation upon the appeal bond. That the alleged contingent release is immaterial has already been determined. It might be said that defendant is not entitled to a formal assignment from plaintiffs of security to which they could resort to satisfy their judgment, because, if defendant could resort to such security to indemnify him, his right to do so, upon payment of the judgment, would be protected by operation of law. But, as this question is not argued by counsel for plaintiffs, nor the right of defendant to a disclosure of whether or not plaintiffs have released Ross-Lewin from his obligation questioned, we shall express no opinion upon either of these propositions, but pass to the question of whether that obligation can be resorted to by defendant in case he pays the judgment, and such collateral ones connected therewith as are necessary to determine the rights of defendant with respect to the Ross-Lewin bond. We have said the defendant's liability upon the appeal bond is absolute, but it is not so in the sense that plaintiffs, by any affirmative act on their part, can destroy his right to indemnity and still hold him on such bond. The release by a creditor of security for a debt to which a surety therefor has the right to resort upon paying such debt releases the surety to the extent that he is thereby deprived of indemnity. *Crosby v. Woodbury*, 37 Colo. 1, 89 Pac. 34; *Brandt on Suretyship* (2d Ed.) § 301; *Pomeroy's Equity* (2d Ed.) § 1419. If, then, plaintiffs have absolutely released Ross-Lewin from his bond, and defendant would have the right, because of such

bond, to compel him to repay any sum which he might pay to discharge his obligation, the defendant would be released from his bond. The important question, then, to determine, is whether or not the defendant, on payment of the judgment, could hold Ross-Lewin liable for the amount thus disbursed. Counsel for defendant contend that this bond was a substitute for the garnished assets of Hindry, and stands in lieu thereof; while, on behalf of plaintiffs, it is claimed that this obligation is but a common-law undertaking on the part of Ross-Lewin, whereby he is nothing more than a common-law surety for the payment of Hindry's debt. It is not the statutory forthcoming bond which a defendant may give in case of an attachment, for that would not have dissolved the attachment. Its purpose was to secure the debt sued for in the action in which the writ issued, and at the same time work a dissolution of the attachment by substituting the bond for the garnishment. The action of the parties indicate that such was their intent and object. It is so alleged in the defense under consideration. Plaintiffs, in the action against Hindry, had impounded sufficient assets of the latter to secure their claim. They were parties to the arrangement by which the Ross-Lewin bond was given. By consent, upon this obligation being executed, an order was entered by the court dissolving the attachment and discharging the garnishee. Thereby the Hindry assets were placed in his control, but plaintiffs were secured in lieu of such assets by the Ross-Lewin bond. Ross-Lewin was indemnified by having these assets placed in his hands. In jurisdictions where the defendant in a suit supplemented by an attachment may give a bond provided by statute which has the effect of releasing the attached property, it is held that such bond is a substitute for the property attached. *Sutro v. Bigelow*, 31 Wis. 527; *Smith v. U. S. Express Co.*, 135 Ill. 279, 25 N. E. 525; *Jayne's Ex'r v. Platt*, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810; *Inbusch v. Farwell*, 1 Black (U. S.) 566, 17 L. Ed. 188. The person signing such an obligation assents to assume the identical liability of the garnishee, had no such undertaking been given; or, as in *Sutro v. Bigelow*, supra, where, by virtue of a statutory undertaking a garnishee had been released, the court, in speaking of the obligation of the surety on such undertaking, aptly stated: "Such appears to be the object and purpose of the statute enacted for the benefit of the defendant in the original action, and, when he avails himself of it * * * in order to procure the release of his own property from attachment, and to obtain the possession of it for himself, it seems not inaccurate to say that the persons signing the undertaking are his sureties with respect to the property or effects so released, and that they are content to assume, and do assume, the precise liability with respect to him as defendant in the action which would have rested upon the

property, or the holder of it, in case they, as such sureties, had not intervened with the undertaking." In the Illinois case above cited, in speaking to the same point, it was said: "When the attachments were discharged and the funds attached were released, the bonds of the surety company stood in the place of such funds, and were substitutes therefor." There is certainly no good reason why a bond, although not given in accordance with any statutory provision, by virtue of which a garnishee is released and the attachment is dissolved, should not be so construed. We therefore conclude that where, by mutual arrangement between a plaintiff and defendant in an action in which an attachment has issued, and property of the latter has been attached, the plaintiff takes the bond of the defendant with surety conditioned for the payment of any judgment which may be rendered in that action, and the attached property is released and the attachment dissolved, and the surety, by arrangement with the debtor at the time of executing such undertaking, takes over the property so released for his indemnity, the surety signing such bond places himself in the attitude of a substitute for the property attached, which, by virtue of such bond, is released. Any other conclusion, according to the facts presented by the defense under consideration, would work a great hardship on the defendant. Ross-Lewin is secured upon his obligation by the identical assets of Hindry which were attached. Plaintiffs can subject this bond to the payment of their judgment. Hindry is insolvent. If plaintiffs have released Ross-Lewin from his obligation, these assets are released, and Hindry may do with them as he pleases, or other creditors may step in and subject them to the payment of their claims; and defendant, although he may discharge the judgment which he bound himself to do, by his obligation, will be without remedy, whereas, if Ross-Lewin should discharge his obligation, or is required to reimburse defendant in the event he pays the judgment, the payment by Ross-Lewin, either in satisfaction of the judgment or by way of reimbursing defendant in the event he pays it, will not be at his expense, because he is amply secured by property of the principal debtor. Loss to an obligor because he is required to discharge his obligation is not a conclusive reason why he should be relieved from his contract, but, in determining equities between a creditor and the sureties where the acts of the former in releasing security to which the surety may resort on payment of a debt would result in loss to the latter, the result of the action of the former is persuasive in adjusting such equities, because the right of subrogation of a surety rests not on contract, but is founded on principles of natural justice.

The next question to consider is the effect of plaintiffs' absolutely releasing Ross-Lewin from his obligation. Had his bond not been accepted by plaintiffs, the assets of Hindry

would have been subject to their judgment, and, had they released them subsequent to defendant executing his bond, he would have been released therefrom, for his right to be subrogated to plaintiffs' rights in these assets would have been destroyed. The bond of Ross-Lewin stands in lieu thereof. Therefore the defendant would have the right to resort to it upon payment of the Hindry judgment. Consequently, a release of Ross-Lewin by plaintiffs would release defendant from his obligation. Counsel for plaintiffs advance the proposition that as between Day and Ross-Lewin the former is primarily liable, and this, because Day was an intervening surety in a legal proceeding for the collection of a debt, and Ross-Lewin is an original surety for that debt. The premise is wrong as to Ross-Lewin. True, he obligated himself to pay whatever judgment plaintiffs might obtain against Hindry in their action in the county court, but that obligation took the place of property of Hindry which had been attached. This excepts his obligation from the doctrine announced in *Bispham on Equity*, § 330, where it is said, in effect, if sureties are not bound for the same thing, or do not occupy towards each other the same relative position, a subsequent surety may have no right as against the first. It likewise distinguishes the rights of Ross-Lewin from the old English case of *Parsons v. Briddock*, 2 Vernon, 608. In that case the principal on a bond was arrested and gave bail. Judgment was obtained against the bail. The sureties on the original bond or obligation of the debtor were compelled to pay it. They were adjudged to be entitled to an assignment of the judgment against the bail because he stood in the place of the principal, and could not be released from the obligation he assumed, except upon the same condition the principal would be; i. e., the discharge of the debt. Nor are the cases cited in point wherein it is held that sureties intervening in legal proceedings brought to recover a debt become primarily liable therefor as between each other in the inverse order they became such sureties. The feature of the obligation of Ross-Lewin which takes it without the rule contended for by counsel is that it is to be treated precisely as though it were the assets of Hindry, which were originally attached. This conclusion works out exact justice between the parties. The plaintiffs may satisfy their judgment by resorting to the Ross-Lewin bond. If they do, he, in turn, is indemnified by the assets of the judgment debtor placed in his hands. Plaintiffs may satisfy their judgment by resorting to the bond of defendant. If they do, he can require Ross-Lewin, by virtue of his obligation, to reimburse him, in which event Ross-Lewin can apply the assets of Hindry to indemnify him for any sum he may have paid to the defendant; so that, in the end, whichever course is pursued, the judgment is satisfied

out of the property of the principal debtor, and at the same time the rights of the plaintiffs are fully protected and the sureties relieved. While, as we have stated, plaintiffs have the right to elect upon which obligation they will proceed to obtain satisfaction of their judgment against Hindry, they may not do so as against the defendant, if by any affirmative act on their part they have destroyed his right to be subrogated to their rights in the Ross-Lewin bond. A judgment creditor may release such security for the payment of his judgment as he elects, but he must do so at his own risk, and not at the expense of others liable for such judgment.

The fourth defense is the same as the third, omitting the allegations concerning the indemnity of Ross-Lewin by Hindry, and the statement that Ross-Lewin consented to the appeal perfected by the bond of defendant. From what has been said previously, we do not deem it necessary to determine specifically whether or not this defense was good.

The first nine paragraphs of the cross-complaint are essentially the same as the first seven paragraphs of the third defense. In addition, it is stated in substance, so far as we shall notice, that to avoid a multiplicity of suits, to obtain complete settlement in one action, and fully protect the rights of defendant, it is necessary that Ross-Lewin be made a party defendant to the original action and a party defendant to the cross-complaint. An order making Ross-Lewin defendant to both the original action and cross-complaint was entered. To merely settle equities between Ross-Lewin and Day which the plaintiffs were in no wise responsible for creating, or to settle such equities between Ross-Lewin and Day which the plaintiffs, by affirmative action, have not destroyed, would not entitle the defendant to a delay of the case to determine those questions. By the cross-complaint two vital questions are presented: First, the liability of Ross-Lewin to Day in the event the latter pays the Hindry judgment; and, second, whether or not, in case such liability exists, the defendant is released because plaintiffs have destroyed his rights to resort to the Ross-Lewin bond. Standing alone, the first question would not entitle the defendant to have Ross-Lewin made a party, because the mere question of the liability of Ross-Lewin to the defendant on his obligation would not affect or postpone plaintiffs' rights, but, when it is charged that Ross-Lewin has been released, his liability to defendant, as well as the question of his release, become vitally important in determining the liability of defendant to plaintiffs. Section 16 of our Civil Code provides: "The court may determine any controversies between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversies cannot be had without the presence of other parties the court

shall order them to be brought in." By virtue of this provision, it has been decided that, where there are persons not parties whose rights must be ascertained and settled before the rights of the parties to the action can be determined, such persons must be made parties, upon proper application to that end being made. *Pollard v. Lathrop*, 12 Colo. 171, 20 Pac. 251; *Bliss on Code Pleading*, § 96; *Pomeroy's Remedial Rights*, § 418. Under this rule, it is manifest that Ross-Lewin was a proper party. If determined that he was liable originally, and that this liability continued because plaintiffs had not released him, then the defendant would not be released but the determination of these questions would not bind Ross-Lewin in his absence; so that, in determining the rights of plaintiffs and defendant as between each other, it was necessary, under the issues presented by the cross-complaint, to also settle and fix the rights of Ross-Lewin.

It is contended on behalf of plaintiffs and Ross-Lewin that the cross-complaint falls to state a cause of action, because, if it be true, as contended by defendant, that he has a right to resort to the Ross-Lewin obligation upon payment of the judgment, the release of Ross-Lewin by plaintiffs would not affect his rights. This contention is not tenable. Plaintiffs have the right to elect upon which obligation they will proceed to collect their judgment and they have the right to absolutely release Ross-Lewin from all obligation to them prior to defendant discharging his bond, but, if they do so, that, for reasons we have previously given, would prevent the defendant from holding him upon his bond, and this would operate to discharge the defendant from his obligation.

The judgment of the district court is reversed, and the cause remanded for further proceedings in harmony with the views expressed in this opinion.

Reversed and remanded.

STEELE, C. J., and CAMPBELL, J., concur.

SCOTT et al. v. SAN BERNARDINO VALLEY TRACTION CO. (L. A. 1589.)

(Supreme Court of California. Jan. 13, 1908.
Rehearing Denied Feb. 10, 1908.)

1. STREET RAILROADS — COLLISION OF CAB WITH TEAM—CONTRIBUTORY NEGLIGENCE.

Whether one who, on the busiest street in the city, at the busiest time, in driving across a street car track, had the hind wheel of his buggy struck by a street car going up a slight grade, at a speed of four miles an hour, without warning, and without attempt to stop it till it was within five or six feet of the buggy, was guilty of contributory negligence, is a question for the jury, though when he got into the buggy and started his horse the car, not seen by him, was standing at the crossing, with its front end 50 feet from where he must cross the track, and though, while he listened attentively, with-

out hearing anything, he did not look beyond the side curtains of his buggy so as to see the car till his horse was across the track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 255-257.]

2. SAME—NEGLIGENCE—INSTRUCTIONS.

Modifying the requested instruction of defendant, in an action for the collision of a street car with a buggy, that, if defendant's employes in charge of the car, as soon as they discovered the dangerous position of plaintiff, used ordinary care to prevent the collision, defendant would not be liable for any collision which might have been prevented, if such employes had had other appliance than what they had for preventing a collision, by adding the words, "unless a mere running of the car without having it provided with such additional appliances, if they were any, would in itself have amounted to wanton and reckless conduct on the part of defendant," was not error.

3. TRIAL—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS.

Where the complaint alleged \$14,000 damages for personal injuries, and \$1,000 for expenses in curing the same, and there was no evidence of expense, any error in instructing that the verdict should be "in such sum as damages, not exceeding the \$15,000 asked for in the complaint," as may have been sustained by plaintiff on account of the collision, is harmless; the jury having otherwise been directed to estimate the damages from the facts and circumstances in evidence, that they should take into consideration all the facts and evidence before them, and that plaintiffs were entitled to such damages as the jury should find from the evidence, so that they must have understood they were unauthorized to give damages for expenses alleged, but not proven, and the verdict having been only for \$1,500.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 703-718.]

In Bank. Appeal from Superior Court. San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by Jennie R. Scott and another against the San Bernardino Valley Traction Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

E. R. Annable, Goodcell & Leonard, and Byron Waters, for appellant. Prescott & Morris, for respondents.

SHAW, J. This is an action by husband and wife to recover damages sustained by the wife from personal injuries alleged to have been caused by the negligence of the defendant. Plaintiffs recovered, and the defendant appealed from the judgment within 60 days after its rendition. A bill of exceptions sets forth the evidence.

A street car operated by defendant collided with a buggy in which the plaintiffs were driving, whereby the plaintiff Jennie R. Scott was thrown out and injured. It is contended that the plaintiff George H. Scott was negligent in driving upon and across the track in front of the car, and that this negligence contributed to the injury. In considering this proposition, it is necessary always to bear in mind that the jury has found to the contrary. In this case it not only returned a general verdict to that effect, but, in an-

swer to a specific question, it declared that George H. Scott did not negligently drive upon the track. If there was any substantial evidence in support of this fact, the verdict must stand, although the preponderance of the evidence may be against it. The question whether or not upon a given occasion the conduct of a person is negligent is always comparative and relative. The conduct must be compared to that of an assumed person of ordinary prudence, and must be considered with relation to all the circumstances attending the occasion which might reasonably be taken into consideration by a person of ordinary prudence in determining what his conduct should be. The circumstances to be considered are those which the evidence shows may reasonably be supposed to have been known to such person, and to have influenced his mind and actions at the time. These are not necessarily the circumstances which afterwards, in the light of the event, it can be seen should have been known to him, and should have influenced his conduct. Nor is his wisdom in determining what to do to be judged by the event. We must, as nearly as possible, put ourselves in his place; he being compelled to act without foreknowledge, and with only ordinary prudence and wisdom to guide him. In some particular cases of frequent occurrence it has been established by a long course of judicial decision that certain precautions are presumptively necessary to constitute due care, and that, if one of these precautions is omitted, negligence will be presumed as matter of law. For example, one who, in traveling a public road, crosses the track of an ordinary steam railroad, must, before going upon the track, look and listen for an approaching train, and must generally stop for that purpose. If it does not appear that he did these things, he will be considered guilty of negligence, unless he shows some extraordinary and unusual conditions which rendered it unnecessary. But in general negligence is a question of fact for the jury, and the law has fixed no exact standard of care other than the general one that it must be such as a reasonably prudent man would exercise in the particular circumstances. Hence in ordinary cases it is peculiarly a question for the jury or court trying the cause to decide as a matter of fact whether or not the person was culpably negligent. Judged by these rules, we think the verdict in this case is supported by sufficient evidence.

The collision occurred on Orange street, in the city of Redlands, at a point about 98 feet south of the south intersecting line of State street. Scott and his wife drove up Orange street from the north, and stopped in front of a store on the west side of that street at a point almost directly opposite where the collision took place, where, leaving the buggy and horse by the curb facing south, in care of his wife, Scott went into a hat store, one

door further south than the buggy, to make a purchase. Upon coming out he got into the buggy and drove off. He wished to go north on that street, and in order to do so it was necessary for him to cross to the other side of the street, turning his horse and buggy around in the operation so as to face them north. Accordingly he started to drive in a course curving to the east and north and crossing the car track so as to bring his horse to the east side of the street and east of the car track with its head to the north. He got the horse and all of the buggy, except the left hind wheel, across the track, when the defendant's car, which was going south, struck that wheel with such force that it was broken to pieces, and the plaintiff Jennie R. Scott was thrown out and severely injured. The buggy had immovable side curtains so placed that the driver, while in the usual position, could not readily look to the rear. While Scott was in the hat store, the car in question had come from the north, and had stopped at the corner on Orange street south of State street. As Scott came out of the store and walked northerly to his buggy, the car was standing at the corner in plain sight and in line with his buggy. He looked both ways as he got into the buggy. The evidence is not clear on this point, but the jury may justly have inferred the fact. However, he did not observe the car, and it must be conceded that he did not look with care. There is a conflict of evidence upon the question whether the car had started south or was standing motionless at the corner at the time he made this observation, got into the buggy, and started to make the turn to the north. Gaylord testified that he was standing on the east side of Orange street to the north and rear of the car; that when he first noticed it the car was just a trifle from the corner of State street in motion, going south; that he next observed a horse coming across the track to the south of the car, with a buggy attached; that the car was then about two car lengths (78 feet) from the horse, and could not have more than started from the corner. If this was true, the car must have been standing still when the horse started. Meek, who was on the car, testified that the car was standing at the corner when the buggy started. Smith, for the defense, testified that the car was just starting in motion as he saw Scott start across the track, which, of course, was some seconds after Scott started from the side of the street, if the witness is to be taken literally. Some of the statements of these witnesses on cross-examination might be construed to be inconsistent with this testimony, but the apparent inconsistency may easily be reconciled. There was other evidence indicating that the car started before Scott did; but, as we must view the case, the fact was established that he started while the car was standing still upon the track, with the front end 59 feet

from the point where he must cross the track. He did not observe the car when he started; but, as he would have seen it if he had looked attentively, his conduct must be judged as if he had seen it there standing, and had then started to cross in front of it.

The evidence further shows that he listened attentively while crossing the track, and heard no gong or sound of car wheels; that he was slightly dull of hearing, but not hard of hearing; that he could not see far toward the rear of the buggy from his position in the buggy; that when he got on the track he had turned sufficiently to see down the street a little farther in the direction from which the car was coming, but saw no car approaching; that he first saw the car after his horse was across the track and had turned to the north, and while his hind wheel was still on the track. The car was then some 10 or 12 feet away, and he urged his horse ahead to get the buggy out of the way of the car, and thought he was going to get clear. As it was, the car barely caught the hind wheel. The car did not slacken its speed until it struck the wheel or until it was within 5 or 6 feet of it. The evidence shows that the motorman did not see the buggy nor make any effort to stop the car until his attention was called to it by others in the car about the time it struck the buggy, and that he then stopped it within a distance variously estimated at from 6 to 15 feet. The car was then going up a slight ascending grade at the speed of four miles an hour, according to the estimate of most of the witnesses. There was evidence of actual observation, showing that the cars, when running at practically the same speed, covered the distance of 59 feet from the place of starting to the point of collision in six seconds, actual time, or at an average speed of 6.7 miles an hour. This would be fully as satisfactory as estimates of eyewitnesses. As it was at rest at the beginning, it might be inferred from this that the speed gradually increased from nothing at the start to a rate much faster than the average speed, and that it was going at this rapid rate when the collision occurred. It was upon the busiest street in Redlands, and at the busiest time of the day. Other teams were on the street in that block at the time, and another car was standing at the next corner to the south. It was customary at that time of day for cars going south on Orange street to stop on the south side of State street to let off passengers. Some teams standing on the east side of Orange street prevented plaintiff from going straight across the track, compelling him to turn in closer to the rails than he otherwise would.

It is the law that one walking or driving in a public street is bound to use reasonable care to look and listen as he goes, so as to be able to avoid collisions with others exercising the common privilege of using the street. This duty is not confined to persons

driving or about to drive upon a street car track. It rests alike upon every person while in a public street. It is as obligatory upon the motorman propelling a car as upon the footman, horseman, and driver. In determining whether or not he will cross such a street at any given time and place, one may, and often must, act upon the theory that he has an equal right with others, and upon the belief and expectation that others as well as himself will use the reasonable care that the situation requires, and that, while he is necessarily looking out ahead to avoid running down any person on the street and to guide himself or his team, others approaching him from the side will in like manner look out ahead and avoid a collision with him. A street car cannot go on the street except upon its rails, and hence it has the better right to that space, to which others must yield when necessary; but otherwise its rights are not superior to that of any other person who has occasion to use the street. *Shea v. Potrero, etc., Co.*, 44 Cal. 414; *Clark v. Bennett*, 123 Cal. 280, 55 Pac. 908. The reasonable care which is required must be measured by all these conditions, rights, and circumstances. The foot passenger or driver of a horse has a right to expect that those in charge of street cars will operate them in the manner and run them at the speed which is customary at the particular place, and that they will give the usual warnings and signals, and take the usual precautions to avoid injury to others. *Orcutt v. Pac. C. R. Co.*, 85 Cal. 299, 24 Pac. 681; *Driscoll v. Cable R. R. Co.*, 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203. In a crowded street it is often necessary and not inconsistent with reasonable prudence for a person to cross the street in front of street cars, in motion or at rest, at a point so near that it would be *prima facie* an act of negligence, if attempted at another place where the streets are less crowded and the cars usually run faster. The rights and obligations of all persons using a public street are, in this respect, reciprocal. Each may rightfully expect that the other will, at the proper time, discharge his proper duty toward others. He cannot rely wholly on the care of others, nor, on that account, neglect to use the precautions which the particular situation demands of him. But he frequently must, to some extent, depend on others in such situations, and his conduct must be considered in view of that fact in determining whether or not it is negligent. His care, or want of care, in such cases is generally a matter to be determined by the jury from all the circumstances surrounding him at the time. *Clark v. Bennett*, 123 Cal. 277, 55 Pac. 908.

Assuming, therefore, that George H. Scott did see the car standing at the corner of State street, and apparently about to start south, and that he thereupon started to drive across the street to turn northward, as he

did, we cannot say, as a matter of law, that it was a negligent act. People do the same thing every day under similar conditions in every city. It cannot be said that an act which the majority of men would do in the existing circumstances, and which we may presume is usually done in safety, is negligence per se. "It falls within the province of the jury, not only to determine the facts constituting negligence, but also the question as to what would be the conduct of a person of ordinary prudence, under similar circumstances, which commonly is a question of fact, not of law. In general, all these questions are for the jury, whose verdict in favor of the plaintiff must be regarded as conclusive, unless the validity of the defense, both as to the existence of the negligence and its effect as contributing proximately to the injury, follows necessarily from the undisputed facts." *Schneider v. Market St. Ry. Co.*, 134 Cal. 488, 66 Pac. 737. "It cannot be said that a person is guilty of contributory negligence merely because he attempts to cross a street railway when a car is approaching. If that were so, he could never attempt to cross such a track in the crowded parts of a city where there is practically always an approaching car; and, in such case, as street cars go at a comparatively low rate of speed and are quickly stopped, the question of negligence would depend on the proximity or remoteness of the car, and upon all the other circumstances surrounding the occurrence. In such a situation the traveler cannot be held to exercise the very highest prudence and judgment. It is sufficient if he exercises that degree of care and prudence and good sense which men who possess those qualities in an ordinary or average degree exercise." *Clark v. Bennett*, 123 Cal. 278, 55 Pac. 908.

It may be conceded that the failure of Scott to observe the car standing at the corner ready to start at the time he started to make the turn was negligence. But the jury would have been justified in finding that, even if he had seen the car, it was not negligence for him to attempt to cross in front of it, and they may rightly have concluded that his negligent failure to perceive it did not contribute to the injury. Their verdict compels us to assume that they took that view. A negligent act or omission "must have contributed directly to the injury, or, however improper or illegal it may have been in the abstract, no action or damages can be founded upon it." *McKune v. Santa Clara, etc., Co.*, 110 Cal. 486, 42 Pac. 981.

With respect to his failure after he got upon the track to lean forward and look toward the car to see if it was approaching before he was so far turned as to be able to see it from his position in the buggy, we are of the opinion that the question whether or not he exercised ordinary prudence was also for the jury to decide. The car, according to its custom, would not be going at full

speed at that point. It was on an ascending grade, equipped with air brakes, and could be quickly stopped. It was the motorman's duty to keep watch ahead of his car for vehicles, and it is to be presumed that he usually did his duty in that respect. Scott found other teams obstructing his course and requiring his attention to avoid them. It is not clear from the evidence that, even if he had looked when upon the track and had seen the car approaching, he would or should have anticipated the acceleration of its speed which the evidence indicates may have been given to it, or the culpable carelessness of the motorman in running the car at that speed in such a place without looking ahead, or that, from all the circumstances as then presented to his mind, reasonable prudence would have required greater effort in urging his horse forward, or a change in its course. He cannot be charged with negligence per se, under all the circumstances, unless we are prepared to say that in the crowded streets of a city one who presumes to drive in front of a street car just starting from a corner is guilty of negligence in law, if he does not expect and use due care to guard against the gross and culpable negligence of a motorman in propelling his car along the street in utter disregard of the safety of others. We should have to license those in charge of the cars at such places to act with the utmost recklessness, to the end that the travelers who failed to anticipate and avoid the danger therefrom could be charged with contributory negligence, and the company thereby escape liability. The greater their negligence, the better their defense. Whatever the rule may be with regard to the right of travelers at steam railroad crossings, reason and authority require that in the crowded streets of a city, where their rights are equal, the rule should be that a traveler has the right to assume until his senses, exercised with reasonable diligence, inform him to the contrary, that the persons operating street cars will use ordinary care, give the usual signals, and keep the usual lookout ahead. *Driscoll v. Cable R. R. Co.*, 97 Cal. 567, 32 Pac. 591, 33 Am. St. Rep. 208; *Strong v. S. & P. R. R. Co.*, 61 Cal. 328; *Shearman and R. on Neg. § 31*.

It is unnecessary to discuss at length the question of the sufficiency of the evidence to prove the negligence of the motorman. Out of his own mouth he stands convicted. Conceding that the actions of the horses standing in front of the store at his left attracted his attention in that direction, it did not justify him in proceeding blindly up the street without looking ahead or slackening his speed. In response to an interrogatory the jury found specially that the motorman, after he discovered the dangerous position of plaintiffs, used ordinary care, with the appliances under his control, to prevent the collision. As this issue was determined in favor of the defendant, it is unnecessary to

consider the refusal of the court to give instructions relating to the conduct of the motorman at that time. Such ruling must necessarily have been harmless in view of the instructions given.

The defendant asked the following instruction: "If the jury find from the evidence that defendant's employes in charge of the car at the time of the collision, as soon as they discovered the dangerous position of plaintiffs, used ordinary care to prevent the collision, the defendant would not be liable for the result of any collision which might have been prevented if such employes had been possessed at that time of other appliances for preventing the collision which they did not possess." The court gave it; but added the following: "Unless a mere running of the car without having it provided with such additional appliances, if there were any, would in itself have amounted to wanton and reckless conduct, on the part of the defendant." We do not think there was any error in this of which the defendant can complain.

The complaint alleged that the plaintiffs had suffered damage to the amount of \$14,000 by reason of the injuries to Mrs. Scott, and to the extent of \$1,000 by reason of expenses in curing her hurts. There was no evidence of any expense. The answer denied that plaintiffs had, by reason of the collision, sustained any damage in excess of \$1,000. The verdict fixed the damages at \$1,500. The court instructed the jury that if they found for the plaintiffs, the verdict should be "in such sum as damages, not exceeding the sum of \$15,000 asked for in the complaint, as may have been sustained by them on account of said collision." The defendant urges this as a prejudicial error, as from the evidence the plaintiffs were not entitled to more than \$14,000. The jury, in other instructions, were directed to estimate the damages "from the facts and circumstances in evidence," that in determining the amount "they should take into consideration all the facts and evidence before them," and that, if they found for the plaintiffs, "the plaintiffs are entitled to recover from the defendant such damages as you may find from the evidence" plaintiffs have sustained by reason of the accident. It is clear that the jury must have understood that they were not authorized to give damages for expenses which were alleged but not proven, and, hence, they must have entirely disregarded the claim for expenses. And as the verdict was much less than the \$14,000 claimed for the personal injury to Mrs. Scott, it is plain that the error in stating it as \$15,000 did not injure defendant.

There are no other points of sufficient importance to require notice.

The judgment is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.

183 Cal. 615

MCCAUGHEY et al. v. LYALL et al. (L. A. 1,967.)

(Supreme Court of California. Jan. 14, 1908. Rehearing Denied Feb. 14, 1908.)

1. ADMINISTRATORS—MORTGAGES—FORECLOSURE BY ACTION—PARTIES DEFENDANT—HEIRS OF MORTGAGOR.

In an action to foreclose a mortgage executed by a decedent, the heirs of decedent need not be joined, but the only necessary party defendant is the administrator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1779.]

2. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—RIGHTS OF HEIRS.

The Legislature has full control of descents and distributions of estates, and the rights of an heir are merely those which he takes under legislative provision, and it has full power to provide that, in actions for the enforcement of claims against an estate, only the administrator need be made a party defendant, and that the heir shall be represented by the administrator; and the question of the constitutionality as not being due process of law in violation of Const. art. 1, § 13, or as being in violation of Const. U. S. Amend. 14, or of Code Civ. Proc. § 1582, providing that actions for the recovery of any property, or to determine any adverse claim thereon, and actions founded on contracts, may be maintained by and against administrators, cannot arise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 929.]

Department 2. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by Edward Quigley McCaughey and others against Alexander Lyall and others to have it adjudicated that plaintiffs were the owners of an undivided half of certain land, and recover possession thereof. Judgment for defendants, and plaintiffs appeal. Affirmed.

McNutt & Hamon and Wm. G. Griffith, for appellants. B. F. Thomas and W. P. Butcher, for respondents. H. J. Finger, pro se.

McFARLAND, J. George McCaughey died intestate on March 1, 1890. The plaintiffs are his children and heirs at law. During his lifetime, on June 6, 1889, the deceased executed a mortgage on certain land to one H. J. Finger to secure a promissory note for \$500, which was due and unpaid at the death of the decedent. After his death Susan McCaughey was duly appointed and qualified as administratrix of his estate. The note and mortgage were duly presented to the administratrix, and were allowed by her and approved by the probate judge. In January, 1894, Finger commenced an action against the administratrix to foreclose the mortgage, but did not make plaintiffs parties to such action. Such proceedings were had that a judgment of foreclosure was regularly rendered under which the land was duly sold by the sheriff on April 10, 1895, to defendant Lyall, who in due time received a sheriff's deed therefor. Several years afterwards this present action was brought by said heirs to have it adjudicated

cated that they are the owners of an undivided one-half of the said land, that the claim of the defendants thereto be adjudged null and void, and that plaintiffs recover the possession of the land, etc. A general demurrer to the complaint was interposed by the defendant Lyall and by other defendants. The demurrers were sustained, and, plaintiffs declining to amend, judgment was rendered for defendants. From this judgment plaintiffs appeal.

The point relied on by appellants for reversal is that the judgment in the foreclosure suit was null and void as against them, because they were not made parties to that suit, and were not given notice of its pendency. Counsel for appellants say in their brief: "This cause is brought here for the purpose of having reviewed a single question arising from the record. This question is best suggested by the inquiry, can the heir at law be divested of the title which the law casts upon him at the death of his intestate ancestor by any proceeding to which he is not made a party? This court has more than once decided the question in the affirmative. We believe the decisions are wrong in the particulars to which we shall presently advert, and we, therefore, shall respectfully urge that they be overruled and the right rule of the law established." This statement and admission make it unnecessary for us to review the former decisions of this court to show that they do establish the law in the manner as admitted by appellants. Some of the cases are these: *Cunningham v. Ashley*, 45 Cal. 485; *Bayly v. Muehe*, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486; *Finger v. McCaughey*, 119 Cal. 59, 51 Pac. 13; *Dickey v. Gibson*, 121 Cal. 276, 53 Pac. 704. In these cases it is held that, in an action to enforce claims and liens against an estate where the same might have been maintained against the deceased, if living, the only necessary party defendant is the administrator; and as those decisions have established a rule of property under which no doubt many titles are held, we have no disposition at this time to review the question again and consider the correctness of those decisions. It is clearly a matter to which the rule of stare decisis should apply.

Appellants contend that the former decisions should not be taken as final because, if the construction which they give to certain sections of the Code, and particularly section 1582 of the Code of Civil Procedure, are correct, then those sections are unconstitutional as violative of section 13, article 1, of the Constitution of this state, which declares that no one can be deprived of property "without due process of law," which they say includes "notice" to the person who is to be deprived of property. The fourteenth amendment of the federal Constitution is also invoked. As our state Constitution does not deal in any way with heirship and descents and distributions of estates, it is somewhat difficult to imagine how, on that subject, any constitutional ques-

tion can be discovered or invented. At all events we see none here. The Legislature had full control of the whole subject, and the rights of an heir are merely those which he takes under legislative provision. The right to be an heir at all comes from the Legislature. Now the Code, which provides that upon the death of the ancestor the title to his land vests immediately in the heirs, has many other provisions which limit and qualify that title and subject it to many conditions deemed proper for the settlement of estates. There is no doubt that the Legislature has the power to provide that in suits for the enforcement of claims and liens against the estate only the administrator need be made a party defendant; and that is exactly what the Legislature did by section 1582 of the Code of Civil Procedure, as decided by the former decisions. Counsel contends that this construction of the section is wrong; but no constitutional question arises. The Legislature has also, beyond doubt, the power to declare that in proceedings against an estate like those above mentioned the heir should be represented by the administrator and therefore not entitled to notice; and the former decisions declare that such, under the law, is the rule. Counsel claim that this decision is also wrong; but still no constitutional question arises. The heir takes, subject to the conditions imposed by the statutory law, which alone gives him any right at all.

The judgment appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

7 Cal. App. 3d

SPENCER v. McCAMENT. (Civ. 437.)

(Court of Appeal, Second District, California.
Dec. 5, 1907.)

1. APPEAL—REVIEW—TRIAL JUDGE'S OPINION.

The opinion of the trial judge constitutes no part of the record on appeal, and, though the reasons assigned therein for his rulings are erroneous, error in the decision cannot be predicated thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2339.]

2. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—CONDITIONS IN CONTRACT—MODIFICATION OF CONDITIONS—ESTOPPEL.

In a suit to compel specific performance of a contract to convey land upon the removal by plaintiff of a planing mill from the land within 30 days thereafter, defendant having extended the time of removal at plaintiff's request, on which extension plaintiff relied and did not remove the mill until after the expiration of the 30 days, defendant is estopped to set up the failure to perform the provision requiring removal within 30 days as a defense.

3. PRINCIPAL AND AGENT—UNAUTHORIZED ASSUMPTION OF AGENCY—PAYMENTS TO ASSUMED PRINCIPAL—EFFECT.

It was immaterial whether a person receiving money as agent for another was in fact his agent for that purpose, where he deposited the money in bank to the credit of such other person.

4. APPEAL—REVIEW—QUESTIONS OF FACT—CONFLICT IN EVIDENCE.

Where there is a substantial conflict of evidence upon all the issues, the judgment of the trial court will be affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Franklin R. Spencer against J. O. McCament. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

C. M. Simpson (H. G. Simpson, of counsel), for appellant. D. Z. Gardner and Thos. L. Neal, for respondent.

SHAW, J. This is an action to enforce specific performance of a contract to convey real estate. Judgment was rendered for plaintiff, from which, and an order denying his motion for a new trial, defendant prosecutes this appeal.

The contract, dated November 9, 1905, is set out in *hæc verba* in the complaint. The consideration for the purchase was \$1,350. The sum of \$50 was paid upon execution of the contract, which provided that \$100 was to be paid upon the execution and delivery of a good and sufficient deed, and \$600 on or before one year from date, and \$600 on or before two years from date. It was also provided that, if the remaining payments be not made according to this agreement and contract, the above-mentioned deposit of \$50 should be forfeited without recourse. The contract also contained the following clause: "This sale is on the condition that the planing mill and appurtenances shall be moved from the north side of Center street within 30 days."

Plaintiff alleges that on December 7, 1905, he paid the \$100 mentioned in the contract, and duly performed on his part all of the conditions of said contract, but that defendant refuses to make the conveyance of the property in accordance with said contract. The answer denies the payment of \$100, denies that plaintiff removed said planing mill within 30 days, as agreed, and sets up affirmative matters to the effect that there was made contemporaneously with said written contract an oral agreement, whereby plaintiff covenanted as a part of the consideration for said purchase, that he would erect and operate said planing mill upon the land so purchased, provided he could obtain a license so to do from the proper city authorities. It is further alleged that this part of the agreement relating to the erection and operation of the said planing mill upon the lands purchased was, through inadvertence and mistake, omitted from the written contract; and defendant asks that the contract be reformed by inserting the same therein, and alleges that plaintiff has not erected and operated said planing mill upon said land so agreed to be conveyed.

1. The opinion of the trial judge, to which appellant devotes a great part of his argument, constitutes no part of the record on appeal. Assuming the reasons assigned for his rulings to be erroneous, error cannot be predicated thereon. *Higgins v. Los Angeles Ry. Co.*, 4 Cal. App. 722, 91 Pac. 344. Whatever views the trial court may have entertained with reference to the propriety of admitting testimony in support of the alleged contemporaneous oral agreement and its omission from the written contract, it nevertheless appears from the record that all evidence offered in support thereof was received, and that such testimony was contradicted by the defendant, and a finding made thereon.

2. There was no error in denying defendant's motion for nonsuit. The testimony on behalf of the plaintiff made out a *prima facie* case, showing that he had fully complied with the provisions of the written contract, as set out in his complaint, except as to the provision relating to the removal of the planing mill within 30 days. Upon this point the evidence shows that defendant had some 6 days before the expiration of the time, at plaintiff's request, extended the time within which to make the removal, and that plaintiff relied upon the extension so granted, and did not remove the mill until several days after the 30-day period had expired. This was sufficient to constitute an estoppel against defendant from exacting a strict performance of the contract in this respect.

3. The \$100 called for in the contract was paid to one Wilson, who signed a receipt therefor as agent of defendant. The purchase had been made through him, and the deposit of \$50 paid to him. It seems immaterial, however, whether or not he was such agent, for it appears that he deposited the \$100 in bank to defendant's account, of which fact defendant had notice.

There is a substantial conflict of evidence as to all the issues, and for that reason alone, if for no other, the conclusions of the trial court must be affirmed.

Judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

7 Cal. App. 99

PEOPLE v. WHITE et al. (Cr. 64.)

(Court of Appeal, First District, California.
Dec. 10, 1907.)

1. FALSE PRETENSES—SUFFICIENCY OF INFORMATION—REPRESENTATION CONCERNING EXISTING CONTRACTS.

An information for obtaining money under false pretenses alleged that defendants, intending by false representations to obtain money of F., fraudulently represented to him that a certain company was a responsible corporation, and that it would pay F. \$100 upon receiving from him \$1 per week for 65 consecutive weeks, that certain contracts between the company and F. were payable in \$100 at the end of 65 consecutive weekly payments of \$1, that F. believed the false representations and paid defendants money on the strength thereof. *Held*

that, as the only fair inference from the allegations as to the contracts referred to is that they had already been executed by F., defendants' representations were concerning existing contracts, and did not constitute the obtaining of money by false pretenses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, §§ 38-41.]

2. SAME—CONNECTION BETWEEN FALSE REPRESENTATIONS AND DELIVERY OF MONEY.

The information was insufficient, since no natural connection appeared between the representations charged to have been made by defendants and the delivery of the money to them and no connection was shown, inasmuch as it was not alleged that defendants had any connection with the company, nor that F. was induced to contract with it, nor that he had entered into the contracts described or any others by reason of defendants' representations, nor that the money was paid defendants under such contracts, nor for the company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, §§ 38-41.]

3. SAME—REQUISITES OF INFORMATION.

An information for obtaining money under false pretenses must show that it was obtained by the false pretenses alleged; and, where there appears to be no natural connection between the pretenses and the delivery of the money, the necessary additional facts must be alleged to show the relation, and a failure to show the connection is a material defect which is not cured by verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, §§ 38-41.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

J. L. White and another were prosecuted for obtaining money under false pretenses. From an order sustaining demurrers to the information, the people appeal. Affirmed.

Attorney General Webb, for appellant. Hiram W. Johnson, Aitken & Skaife, and Walter Gallagher, for respondents.

HALL, J. This is an appeal by the people from an order sustaining the demurrers of the defendants to an information drawn under section 532 of the Penal Code, and comes before us upon a bill of exceptions duly settled. The defendants were jointly charged, but demurred separately, the demurrers being both general and special.

We think the demurrers were properly sustained by the trial court. The information is quite long, and we do not think it necessary to set it out at length in order to make clear the point involved in the attack on the information. In substance it is alleged that the defendants, intending by false and fraudulent representations to obtain the personal property and money of J. M. Furrer, with intent to cheat and defraud said Furrer of the same, did "willfully and unlawfully, knowingly and designedly, falsely and fraudulently, pretend and represent to said J. M. Furrer that the Mutual Mercantile Company was a responsible business corporation, doing business at No. 121 Geary street, in the city and county of San Francisco; that the Mutual Mercantile Company would pay to the said J. M. Furrer one hundred dollars (\$100) in lawful money of the United States

of America, upon receiving from him one dollar (\$1.00) in lawful money of the United States of America a week for sixty-five consecutive weeks; that certain contracts in said Mutual Mercantile Company, known as 'Series A,' and numbered 198, 199, 200, 232, 233, 234, 235, 236, 237, and 271, between the said Mutual Mercantile Company and the said J. M. Furrer were each payable in the sum of one hundred dollars (\$100.00) in lawful money of the United States of America at the end of sixty-five (65) consecutive weekly payments of one dollar (\$1.00) in lawful money of the United States of America each." Here follow other representations affecting the responsibility of said company, followed by proper allegations of the falsity of the various pretenses and representations, and of the knowledge thereof of defendants. It is then in substance alleged that said Furrer believed said false representations and pretenses, and was induced thereby to deliver to, and did deliver to the defendants at the city and county of San Francisco, \$87 during the months of May and June, in the year 1905, of the money of said Furrer.

It is nowhere alleged in the information that the defendants had any connection with the Mutual Mercantile Company, or that said Furrer was induced to enter into any contract or business relation with said company. It is not alleged that said Furrer entered into the contracts described, or any contracts with said company, by reason of such representations, nor does it appear that the money alleged to have been paid to defendants was paid on or under such contracts, or for said company. The only fair inference from the allegations of the information is that the contracts referred to, "numbered 198, 199, 200, 232, 233, 234, 235, 236, 237, and 271, between the said Mutual Mercantile Company and the said J. M. Furrer," had already been entered into by said Furrer. In this respect the representation was concerning certain contracts "between the said Mutual Mercantile Company and the said J. M. Furrer." In other words, defendants' representations were concerning existing contracts.

From this analysis of the information it is apparent that there does not appear to be any natural connection between the representations charged to have been made by the defendants and the delivery of the money to defendants. The representations were concerning a company with which it is not alleged that defendants had any connection, nor with which said Furrer entered into any relations because of said representations. "The indictment must show that the property was obtained by means of the false pretense alleged. Accordingly, when there appears to be no natural connection between the pretense and the delivery of the property, such additional facts as are necessary to show the relation must be alleged. A defect in the indictment arising from failure to

show the connection between the false pretense and the obtaining is a material one, and it is not cured by verdict." 19 Cyc. 429, and numerous authorities cited under note 37.

Roper v. State, 58 N. J. Law, 420, 33 Atl. 969, is a case quite like the one at bar. The indictment charged that Roper made certain false representations to John J. Renshaw concerning the financial responsibility of the Mutual Land & Building Syndicate, which representations were properly set forth and negatived. It was then in the usual form alleged that thereby Roper obtained from Renshaw \$3,000. The court said: "If it be true, as stated, that Renshaw, the person defrauded, parted with his money to the defendant merely because the latter falsely asserted and represented that a certain association, with which neither he nor the defendant had any apparent connection, had a genuine existence, the inducement to his act was not what the law regards as a false pretense. * * * If A. should falsely in stating to B. that C. was a man of property, such fabrication would not per se in any conceivable way induce B. to part with his property to A. And yet this is the entire criminal case made in this indictment."

So in the case at bar Furrer parted with his money to defendants because defendants made representations as to the responsibility of a third party with which defendants had no apparent connection, and with which Furrer entered into no connection, contractual or otherwise, by reason of the representations. In Hurst v. State, 39 Tex. Cr. R. 196, 45 S. W. 573, it was held that an indictment for swindling by false representations concerning a collecting agency was insufficient because it did not appear that defendant had any connection with the agency.

In none of the cases cited by appellant concerning the sufficiency of the indictment (People v. Jordan, 66 Cal. 11, 4 Pac. 773, 58 Am. Rep. 73; People v. Wasservogle, 77 Cal. 175, 19 Pac. 270; People v. Cadot, 138 Cal. 527, 71 Pac. 649) did any such defect exist in the indictment or information as exists in the information in the case at bar.

For the reasons above set forth, the court did not err in sustaining the demurrers of defendants, and the orders and judgments are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 95
PARRISH et al. v. RIVERSIDE TRUST CO.,
Limited, et al. (Civ. 423.)

(Court of Appeal, Second District, California.
Dec. 7, 1907. Rehearing Denied Jan. 6, 1908;
Denied by Supreme Court Feb. 3, 1908.)

1. VENUE—CHANGE OF VENUE—STATUTORY PROVISIONS—DISCRETION OF COURT.

Code Civ. Proc. § 398, provides that if an action or proceeding is commenced or pending Cal. Rep. 92-94 P.—31

in a court, and the judge or justice thereof is disqualified from acting as such, it must be transferred for trial to the nearest and most accessible court where the like objection or cause for making the order does not exist. Held, that a disqualified judge has no discretion, and must perform the duty imposed by the provision. [Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, §§ 71, 72.]

2. SAME—AFFIDAVITS AS TO DISQUALIFICATION—WHO MAY FILE.

Code Civ. Proc. § 398, requires a judge who is disqualified to act in a matter pending in his court to transfer the case to the nearest and most accessible court where the like objection does not exist. Section 170 defines the disqualification, and provides that applications for transfer based thereon shall be made upon affidavits, and provides a right to file counter affidavits when the facts are in dispute; but there is no special provision restricting to either party the right to make and file affidavits. Defendants filed affidavits that both judges of the county where the action was brought were disqualified, and that R. county was the nearest and most accessible county. Plaintiff thereupon filed an affidavit, in no wise controverting such statements, but showing that the judge of R. county was also disqualified. Defendants thereupon filed an additional affidavit that the judge of O. county, the next nearest and most accessible county, was also disqualified, and the court thereupon made an order, reciting the disqualification of the judges of the three counties, and transferring the cause to another county as the nearest and most accessible court to which objection on account of the disqualification of the judges did not exist. Held that, though none of the affidavits were counter affidavits, they were properly considered, and the order was properly made.

3. SAME—EFFECT OF STATUTE—SELECTION OF JUDGE.

By entertaining the affidavits filed by plaintiff, the court did not exercise a discretion in transferring the cause, nor select the judge who was to try it, since the law makes the selection when the undisputed facts are before the court.

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Samuel B. Parrish and others against the Riverside Trust Company, Limited, and others. From an order of the superior court of San Bernardino county transferring the cause to Los Angeles county for trial, defendants appeal. Affirmed.

M. B. Kellogg, John G. North, and Collier & Carnahan, for appellants. Byron Waters and C. C. Haskell, for respondents.

ALLEN, P. J. Appeal by defendants from an order of the superior court of San Bernardino county transferring a cause for trial to the county of Los Angeles. The action was originally brought in San Bernardino county.

The defendants in due time filed affidavits showing that both judges of San Bernardino county were interested in the result of the suit, and therefore, under section 170, Code of Civil Procedure, disqualified to sit and act, and, further, that Riverside county was the nearest and most accessible county. The plaintiffs thereupon filed affidavits in no respect controverting those of defendants, but which show that the judge of the superior court of Riverside county was also interested in the result of the suit, and therefore dis-

qualified to sit and act. Defendants thereupon filed an additional affidavit showing that the superior judge of Orange county was also interested in the result of the suit, it appearing that Orange county, next to Riverside county, was the nearest and most accessible county to that of San Bernardino. The superior court of San Bernardino county thereupon made its order, reciting the disqualification of the judges of the three counties named, and ordering the cause transferred to Los Angeles county as the nearest and most accessible court to which objections on account of the disqualification of the judges did not exist. The authority for the transfer is contained in section 398, Code of Civil Procedure: "If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such, * * * it must be transferred for trial * * * to the nearest and most accessible court, where the like objection or cause for making the order does not exist."

A disqualified judge has no discretion, and must perform the duty imposed by this provision. *Livermore v. Brundage*, 64 Cal. 300, 30 Pac. 848. Section 170 defines the disqualification, and provides that applications for transfer based thereon should be made upon affidavits. There is nothing specifically stated in either section, or suggested thereby, which can be interpreted as restricting to any particular party the right to make and file the affidavits. It is true that section 170 confers the right to file counter affidavits when the facts are in dispute; but in this case no facts are in dispute, and none of the affidavits on file may be properly termed counter affidavits, but all are in line as establishing the facts warranting a transfer to the proper county.

Appellants insist that the court, in entertaining the affidavits filed by plaintiffs, was sitting and acting in the cause in which he was interested to the extent that he was passing upon the qualification of the judge in Riverside county, and that he was violating the well-established rule that "he should neither try his own cause nor select his judge." We do not construe the section as attempting to confer upon a disqualified judge a right to select a judge; but, on the contrary, the duty imposed is to accept the affidavits, when not controverted, as true, and transfer the cause, not to a judge of his own selection, but to the nearest and most accessible court where no disqualification exists. The law selects the judge when the undisputed facts are before the court. The Supreme Court of Wisconsin, in the case of *Northwestern Iron Co. v. Crane*, 66 Wis. 567, 29 N. W. 655, in construing a somewhat similar statute, says: "The primary purpose of this section was to prescribe the court to which such cause should be sent on such application." The application was made by both parties, and the nearest and most accessible county where the cause could be properly tried was made apparent. We are unable to see where the judge transcended his

authority, or did any act other than to perform a plain duty devolving upon him by statute. The court had jurisdiction to make the order, and we perceive no error therein.

The order is affirmed.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 87

MYERS et al. v. CITY OF OCEANSIDE.
(Civ. 415.)

(Court of Appeal, Second District, California.
Dec. 7, 1907. Rehearing Denied by Supreme Court Feb. 5, 1908.¹)

1. DEDICATION—REVOCATION.

Where after the execution of deeds of lots, "together with an interest in block 19, according to above plat as a public square forever," or "together with an interest in lots 7, 8, 9, 10, 11, and 12 in block 19, according to above plat as a public square forever," in some of the latter of which deeds "public park" was used instead of "public square," grantor filed a map displaying block 19 as subdivided into building lots, including lots 7, 8, 9, 10, 11, and 12, but in no manner indicating any intention to dedicate any part of the block to park purposes, conceding the declarations in the deeds to show an offer of dedication, the filing of the map was a complete revocation thereof, so far as the public was concerned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 79.]

2. SAME — ACCEPTANCE — NECESSITY — COMPLETE DEDICATION.

Where there is a complete dedication, no acceptance is required, it being presumed from the benefits arising from the dedication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 64, 65.]

3. SAME.

Where there is a mere offer of dedication, there must be an acceptance, and until there is the owner may at any time revoke the offer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 64-68.]

4. SAME.

Revocation of an offer of dedication may be evidenced in various acts inconsistent with the use for which it is claimed the land was dedicated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 77-79.]

5. SAME.

Where an offer of dedication has been revoked, later acts cannot operate to revive the revoked offer, even if sufficient to show an acceptance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 77-79.]

6. SAME—COMPLIANCE WITH CONDITIONS.

Use of land for purposes of a highway and as a camping place by strangers are insufficient to show an acceptance of an offer of dedication for park purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 73-76.]

7. SAME.

In determining whether an offer of dedication has been accepted, only such acts as tend to show an acceptance for the purpose for which

¹ BEATTY, C. J. This order is entered by direction of a majority of the Justices. I am of the opinion that the case should be reheard.

the dedication is offered to be made can be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 64-76.]

8. SAME—INTENT TO DEDICATE.

In all matters of dedication the question of intention is controlling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 13.]

9. APPEAL—REVIEW—QUESTION OF FACT—INTENT TO DEDICATE.

The question of intention in matters of dedication is one of fact, and the finding of the trial court must be sustained, if there be any evidence to support it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3317-3330.]

10. DEEDS—QUITCLAIM—EFFECT TO PASS TITLE.

A quitclaim deed is as effectual to transfer title as a deed of bargain and sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 49, 394-400.]

11. QUIETING TITLE—EVIDENCE—ADMISSIBILITY—INVENTORY AND APPRAISEMENT.

Where the decree of distribution in the estate of a decedent, through which title is claimed, referred to the inventory and appraisement for purposes of description, such inventory and appraisement are competent evidence for that purpose in an action to quiet title.

12. SAME.

In an action to quiet title to lots claimed by defendant city as a public park, evidence by the city to show how the property was assessed on the assessment roll of the city was properly excluded.

13. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in an action to quiet title in the admission of immaterial evidence was not prejudicial, where the case of the party introducing the same was made independent of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

14. SAME—ESTOPPEL TO ALLEGE ERROR—ERROR INVITED BY PARTY COMPLAINING.

A party introducing improper evidence may well be estopped to complain of the admission of evidence to rebut such improper evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3591-3610.]

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by Joseph E. Myers and another against the city of Oceanside. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

Dadmun & Belleu and W. T. Belleu, for appellant. Wright & Schoonover, for respondents.

TAGGART, J. This is an action to quiet title to one-half of a block of land in the city of Oceanside, county of San Diego, claimed by the defendant to have been dedicated as a public park by one Andrew J. Myers, the original owner by U. S. patent, and predecessor in title to the plaintiffs. Judgment was for plaintiffs, and defendant appeals from the judgment and an order of the superior court denying its motion for a new trial.

The findings of the court were affirmative of the allegations of the complaint, which was in the usual form of a complaint to quiet

title. The case made by the city is unlike that usually presented to show a dedication. The evidence establishes no express dedication, discloses no filing of a map displaying a park delineated thereon, and fails to show that any survey or location of the boundaries was ever made by the city. No permanent improvements were ever made upon the property to indicate that it was a public park, and it stands (according to the testimony of some of the witnesses), just as it has since 1883, all open, uninclosed, and crossed in various directions by teamsters at their pleasure, and in all respects the same as other unoccupied unimproved property in and about Oceanside.

The offer of dedication relied upon appears as declarations in 23 deeds of lots in the Oceanside town site, made to various persons by said Andrew J. Myers between August 11, 1883, and January 13, 1885. All of these refer to the "Lockling Survey," as shown by two different plats filed in the county recorder's office—one on June 11, 1883, and the other on October 13, 1883. Those referring to the former plat contain the clause "together with an interest in block 19, according to above plat, as a public square forever"; and those referring to the latter contain the clause "together with an interest in lots 7, 8, 9, 10, 11, and 12, in block No. 19, according to above plat, as a public square forever." In some of the latter the term used is "public park" instead of "public square." These maps were not filed at the request of Myers or of any one else claiming an interest in the land, and no words of dedication, or delineation of the so-called public square or park, appear upon either of them. They differ materially as to the location and subdivision of block 19, and the lots claimed as a park did not appear upon the one filed June 11, 1883. On July 1, 1885, a map of block No. 19, based upon a survey made by C. J. Coutts, C. E., in June, 1885, was filed by Myers. This was the first map filed at his request, and was some six months later in date than the last of the 23 deeds above mentioned. It displayed all of block 19 as subdivided into building lots 50x100 feet including the half block in question, which appears thereon as lots 7, 8, 9, 10, 11, and 12, but in no manner indicates any intention to dedicate any part of the block to park purposes. On October 18, 1889, Andrew J. Myers granted to A. O. Wallace all his "right, title, and interest in the land described in a patent," etc. (referring to a patent conceded to include the land in question), "except the block upon which I have filed a homestead, and any and all lands in said tracts heretofore conveyed by me." It is from Wallace that plaintiffs deraign their title. The city of Oceanside was incorporated the latter part of the year 1888, and it never at any time passed any formal resolution accepting the so-called dedication, and prior to the date of the deed to Wallace did no act tending to

show an intent to accept a dedication. There are other and later acts of the city relied upon to show an acceptance by it of an offer of dedication by Myers, but no attempt is made to show additional assent upon the part of him or his grantee to the treatment of the offer as still open. These evidences of acceptance consist of entries in the minutes of the meetings of the board of trustees in which the term "park" is used in relation to the purchase and planting of trees, furnishing water to, and collecting rates from campers for the use of the "park" in the years 1897, 1901, and 1902. As to the action taken by the officers of the city under these minutes, there is some conflict in the evidence; it appearing by the testimony of some of the witnesses that the trees were not planted on the park, and that the arrangement and care of the campers was for the purpose of collecting water rates, and incidental to keeping a camping place in order for campers who might desire to come to Oceanside.

If it be conceded that the declarations in the private deeds were sufficient evidence to show an offer of dedication, the court was justified in considering the filing of the Coutts map as evidence of a full and complete revocation or withdrawal of such offer so far as the public was concerned. That the easement created for the benefit of his grantees still existed, and that the grantor was estopped to deny them such rights in block 19 as he had expressly granted to them, did not affect the public. The rights created by the deeds might be enforced by the grantees against Myers and his successors in interest whether there was or was not a dedication to public use (*Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145), but, considered in connection with the question of dedication, the clauses creating the interest in block 19 were merely admissions on the part of Myers of an intention to dedicate. They did not constitute an express dedication, and were not evidence tending to show an express dedication. There was not a complete dedication, as would have been the case if the deeds had been made to the city or to some one for the benefit of the public, or if the map filed at Myers' request had shown words of dedication on its face. In case of a complete dedication no acceptance is required, it being presumed from the benefits arising from the dedication. *San Leandro v. Le Breton*, 72 Cal. 175, 13 Pac. 405. It is important, therefore, to observe the distinction between a complete dedication and a mere offer of dedication. In the latter case there must be an acceptance, and until there is the owner may at any time revoke and withdraw the offer. Revocation may be evidenced in various acts inconsistent with the use for which it is claimed the land was dedicated. This may be by filing a map or plat upon which the property is delineated as private property, or by conveying the title

of it to a third person without recognizing the easement. *Hayward v. Manzer*, 70 Cal. 476, 18 Pac. 141; *Schmitt v. San Francisco*, 100 Cal. 308, 34 Pac. 961. In the latter case, unless the grantee expressly indicates an intention to keep the offer open, it will be presumed that he does not intend to do so. *Forsyth v. Dunnagan*, 94 Cal. 441, 29 Pac. 770. The owner may revoke until some one has acted upon the offer in such a mode that they would be injured by the revocation. *Schmitt v. San Francisco*, *supra*.

A revocation before an acceptance having been shown, the whole question of dedication must be eliminated from the case in considering the findings. *Prescott v. Edwards*, 117 Cal. 301, 49 Pac. 178, 59 Am. St. Rep. 186. The filing of the Coutts map, the conveyance of the land to Wallace without reservation, and the sworn declarations of Myers on the witness stand, all tended to show an intention to revoke any offer of dedication that had been made or which could have been inferred from the deeds made by Myers, and were sufficient to support the finding of "no dedication." The later acts of the city could not operate to revive the revoked offer, even if sufficient to show an acceptance. But they were not sufficient for this purpose. Use of the land for purposes of a highway and as a camping place by strangers are not within the purposes of the dedication contended for. There was nothing shown in the way of planting and maintaining shrubbery and trees on the land and a keeping of it as a "park" in the common acceptance of that term. No intention to carry out the purposes of the dedication is shown. Only such acts as tend to show an acceptance for the purpose indicated can be considered. *Archer v. Salinas City*, *supra*. The question of intention is the controlling one in all matters of dedication, and it is one of fact, and the finding of the trial court in this respect must be sustained if there be any evidence to support it. *City of Los Angeles v. Kysor*, 125 Cal. 463, 58 Pac. 90; *Anaheim v. Langenberger*, 134 Cal. 608, 66 Pac. 855.

We cannot agree with appellant's contention that a quitclaim deed is no evidence of title. It was announced as the well-established doctrine in this state in *Graff v. Middleton*, 43 Cal. 344, that quitclaim deeds are as effectual to transfer title to lands as deeds of bargain and sale, and a decree quieting the title of a party claiming under a quitclaim deed was sustained in that case. That case has been frequently affirmed. *Rego v. Van Pelt*, 65 Cal. 254, 3 Pac. 867; *Spaulding v. Bradley*, 79 Cal. 456, 22 Pac. 47; *Taylor v. Opperman*, 79 Cal. 470, 21 Pac. 869; *Nidever v. Ayers*, 83 Cal. 42, 23 Pac. 192. While there are purposes for which the inventory and appraisal in the estate of a deceased person is not admissible as evidence, or at least is immaterial (*Nathan v. Dierssen*, 146 Cal. 63, 79 Pac. 739), in the case at bar the decree of distribution in the estate of A. O. Wallace.

deceased, through which plaintiffs claim title, referred to the inventory and appraisal in that estate for purposes of description. It was competent evidence for that purpose.

There was no material error prejudicial to defendant's case committed by the court in the 40 rulings excepted to by it. Some of these are covered by the foregoing views of the court, and those not so disposed of are not especially urged in the brief. The most important of them relate to rulings rejecting testimony offered by defendant to show how the property was assessed on the assessment roll of the city. This was entirely immaterial in the case as presented. It could not conclude the property owner. *San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405. At the time these books were made there was no pending offer to dedicate, and if there had been the assessor had no authority to accept for the public. *Schmitt v. San Francisco*, supra. The testimony of the county assessor in this same connection was admitted without objection to show that the property had not been assessed to Myers for a number of years, and in response to this plaintiffs were permitted to introduce certificates of sales of some of the lots for taxes. Conceding this to have been error, it in no manner prejudiced the case of defendant, as that of plaintiffs was made independent of this evidence. Defendant's estimate of the admissibility of the testimony in this respect appears to be governed by the question, what is its effect? While one error cannot be held to offset another, the party introducing improper evidence may well be estopped to complain of the court's permitting the introduction of evidence at the request of the other party to rebut such improper testimony. If either party were claiming under a title acquired by adverse possession, the question whether or not the property was assessed, and to whom and who paid the taxes, etc., might have been material, but no such title was attempted to be established here. The evidence introduced improperly was immaterial but not prejudicial.

The other exceptions do not require consideration, and, the record showing no prejudicial error, the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW,

WAGNER v. GOLDSCHMIDT.

(Supreme Court of Oregon. Feb. 11, 1908.)

1. ATTORNEY AND CLIENT—LIEN—SETTLEMENT BETWEEN THE PARTIES.

Unless an attorney has an interest in, or a lien on, a judgment, the client may in good faith settle the same without consulting the attorney, who has no right to interfere with or prevent a settlement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 209-216, 407-417.]

2 SAME—RIGHT TO LIEN—NOTICE.

Under B. & C. Comp. § 1063, giving an attorney a lien on a judgment to the extent of the compensation agreed on from the "giving notice thereof to the party against whom the judgment * * * is given, and filing the original with the clerk," an attorney has no lien on a judgment as against the judgment debtor unless the notice is given and filed, and, where the debtor in good faith pays or satisfies the judgment before notice, the attorney cannot enforce the judgment as against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 390-392.]

3. JUDGMENT — SATISFACTION PENDING APPEAL.

The pendency of an appeal from a judgment neither prevents the judgment debtor from in good faith paying the judgment nor the judgment creditor from satisfying the judgment of record; the satisfaction being the act of the party, and not an exercise of jurisdiction by the court or its officers over the judgment.

Appeal from Circuit Court, Multnomah County; Arthur L. Frazer, Judge.

Action by Henry M. Wagner against S. L. Goldschmidt. There was a judgment for plaintiff, and defendant appealed. From an order directing the cancellation of the satisfaction of the judgment entered pending the appeal, defendant appeals. Reversed.

Geo. W. Joseph, for appellant. N. H. Bloomfield and D. M. Donagh, for respondent.

BEAN, C. J. On April 5, 1906, plaintiff commenced an action in the circuit court of Multnomah county against defendant to recover \$500 alleged to be due for commission on sale of real estate. Issue was joined, and a trial had resulting in a judgment in favor of plaintiff for the amount demanded. Defendant appealed to this court, pending the determination of which the parties, without knowledge of their respective attorneys, settled and compromised their differences, and on the 16th of January, 1907, plaintiff acknowledged full satisfaction of the judgment on the judgment lien docket, but the appeal has never been dismissed, and is now pending and undetermined. A few days after the acknowledgment of satisfaction, the court below, on motion of plaintiff's attorneys, directed the clerk to cancel the same, from which order defendant appeals.

The original case of *Wagner v. Goldschmidt* having been settled by the parties, there remains no substantial controversy between them, and therefore this court will not proceed further with a consideration of the merits of the case, so far as their rights are concerned. The attorneys for Wagner, however, claim that they should be permitted to prosecute the appeal in the name of their client for the purpose of collecting their fees, and that the settlement made by the parties was in legal effect a fraud upon their rights. There is no evidence in the record that the settlement was collusive or made for the purpose of cheating or defrauding plaintiff's attorneys out of their fees, and no proof that

they had a lien upon or interest in the judgment recovered by them in favor of their client at the time of such settlement. The law is that, unless an attorney has an interest in or lien upon a judgment, his client may, in good faith, settle and compromise the same in any manner he chooses, without consulting the attorney, and he has no right to interfere with or prevent such settlement. The statute provides that an attorney has a lien upon a judgment or decree "to the extent of the compensation specially agreed on from the giving notice thereof to the party against whom the judgment or decree is given, and filing the original with the clerk where such judgment or decree is entered and docketed." Section 1063, B. & C. Comp. Unless this notice is given and filed, the attorney has no claim or lien upon the judgment as against the judgment debtor, and if he, in good faith, pays or satisfies it before such notice, the attorney cannot enforce the judgment as against him. *Day v. Larsen*, 30 Or. 247, 47 Pac. 101; *Stearns v. Wollenberg* (Or.) 92 Pac. 1079.

Counsel argue that upon the perfection of the appeal in the case of *Wagner v. Goldschmidt* the trial court lost jurisdiction of the cause, and thereafter had no power to make any order in the matter, except in furtherance of the appeal. But conceding, without deciding, that this position is sound, it did not prevent the defendant from, in good faith, paying the judgment and the plaintiff satisfying it of record, and the attorneys could not prevent or interfere therewith unless they had a lien thereon. The satisfaction was the act of the party, and was not an exercise of jurisdiction by the court or its officers over the judgment.

It follows that the order of the court directing the clerk to cancel the satisfaction must be reversed; and it is so ordered.

FINN v. OREGON WATER POWER & RY. CO.

(Supreme Court of Oregon. Feb. 11, 1908.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—BURDEN OF PROOF.

A servant suing for injuries caused by the failure of the master to provide safe appliances has the burden of proving the negligence charged, and, where the ground of recovery is a defect in appliances, he must show, not only that the injury resulted from the defect, but that the master had notice thereof, or, by exercise of ordinary care, could have known of it, and mere proof of the accident is insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 900-905.]

2. SAME—CIRCUMSTANTIAL EVIDENCE.

The negligence of a master in failing to provide safe appliances need not be shown by positive and direct evidence, but it may be inferred from the proof of facts, other than proof of an accident resulting in injuries to an employé, from which the master's conduct can be ascertained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954-968.]

3. SAME—SUFFICIENCY OF EVIDENCE.

A servant was injured by the breaking of a chain holding a block. Whether the chain broke because it was defective or not sufficient for the purpose intended, or because it was improperly used, was not shown. The servant testified that he did not know what caused the chain to break. *Held* insufficient, as a matter of law, to show negligence of the master in failing to provide a safe appliance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954-968.]

4. APPEAL—DISCRETION OF LOWER COURT—REFUSAL TO REOPEN CASE—REVIEW.

Where, in an action for injuries to an employé by the breaking of a chain, there was no evidence that the chain was defective or insufficient for the purpose, or that it was improperly used, the refusal of the court, during the motion for a nonsuit, to permit the employé to reopen his case to call another employé to ascertain whether he had the chain in his possession, with a view of offering it in evidence, was within the court's discretion, and its ruling would not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3851.]

Appeal from Circuit Court, Multnomah County; Calvin U. Gantenbein, Judge.

Action by William A. Finn against the Oregon Water Power & Railway Company. From a judgment for defendant, entered on a motion for a nonsuit, plaintiff appeals. Affirmed.

Henry E. McGinn, for appellant. R. W. Wilbur, for respondent.

BEAN, C. J. This is an action to recover damages for a personal injury, and is brought here on an appeal from a judgment in favor of defendant entered on a motion for a nonsuit at the close of plaintiff's testimony. Plaintiff was employed about a donkey engine, which was used by defendant in operating a scraper in connection with the construction of a dam across the Clackamas river at Cazadero. His principal duty was to assist in getting fuel for the engine. To obtain fuel the employés hauled or pulled in logs to the engine by its own power by means of a cable, one end of which was fastened to the log and the other to a drum on the engine. The cable passed through a block or pulley, which was fastened by a chain to a skid upon which the engine rested. On September 18, 1905, while a log was being thus pulled in, the chain which held the block parted, and plaintiff was struck by the cable, and injured. He charges that his injury was due to the negligence of defendant in not furnishing a chain of sufficient strength to stand the strain. But there is no evidence in the record, independent of the accident itself, to support this averment. Plaintiff is the only witness who testified on the trial in reference to the accident or its cause. He says he was put to work at the engine by the day foreman to cut wood and assist in pulling in logs from which to obtain bark to keep up steam; that on the night of the accident, while a log was being pulled in, the chain broke, and he was struck with the cable and injured; and that he does not know what caused the chain to

break. This is all the testimony as to the cause of the accident.

It is a settled law in this state that in an action by a servant against a master to recover for personal injuries sustained by the former while in the employ of the latter, due to alleged failure of the master to provide reasonably safe tools and appliances, the burden of proof is on the plaintiff to show the negligence charged; and, if the ground of recovery is a defect in machinery or appliances, to show, not only that the injury resulted from such defect, but that defendant had notice of the defect, or by the exercise of ordinary care could have known. Mere proof of the accident is not sufficient. *Duntley v. Inman*, 42 Or. 334, 70 Pac. 529, 59 L. R. A. 785; *Nutt v. S. P. Co.*, 25 Or. 291, 35 Pac. 653; *Kincaid v. O. S. L. Ry. Co.*, 22 Or. 35, 29 Pac. 3. It is, of course, not necessary that there should be positive and direct proof of negligence, but, like any other fact, it may be inferred from circumstances. *Geldard v. Marshall*, 43 Or. 438, 73 Pac. 330. There must, however, be proof of some facts other than the accident from which the defendant's conduct can be ascertained and determined. Now, in this case, there was no proof from which it could have been determined whether defendant was negligent. The only proof is that the chain broke while it was being used by plaintiff and his co-employes, but whether it broke because it was defective or not sufficient for the purpose intended, or because it was improperly used or put to unnecessary strain, the record is silent. Plaintiff states that he does not know what caused the chain to break, and there was no evidence that the chain was not of suitable size and strength for the purpose for which it was intended, or that there was any defect therein, or, if so, that such defect was known or should have been known by defendant. There is no error, therefore, in sustaining the motion for a nonsuit. During the argument on the motion for a nonsuit, plaintiff asked permission to reopen his case for the purpose of calling one of defendant's employes to ascertain whether such employe had in his possession the chain which broke, with a view of offering such chain in evidence, but this was a matter within the discretion of the trial court, and, as no abuse thereof is shown, its ruling cannot be disturbed on appeal.

In this view of the case the other question argued is not important, and need not be considered. Judgment affirmed.

MEIER v. NORTHERN PAC. RY. CO.
(Supreme Court of Oregon. Feb. 11, 1908.)

1. RAILROADS—KILLING STOCK—FENCES—PONDS.

B. & C. Comp. § 4342, subd. 7, provides that all ponds or other natural obstructions, "if equally secure against the trespass of any domestic animals, or made so by artificial means," shall be deemed lawful fences, and section 5140, requiring railroads to fence their tracks, declares

that complete natural defenses against the entrance of stock on the track, such as natural walls or deep ditches, shall be deemed a fence under the act. *Held* that, where a railroad's right of way crossed a pond 3½ feet deep, through which plaintiff's horse escaped onto the right of way and was killed, whether such pond was to be deemed a lawful fence was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1634.]

2. SAME—FAILURE TO FENCE TRACK—PLACE OF ENTRY.

In an action under B. & C. Comp. §§ 5139-5144, making railroad companies liable for killing or injuring live stock on an unfenced track, it is not necessary to allege or prove entry on the track at a particular place, except where the stock is killed at a point where the railroad company is not required to fence.

3. SAME—EVIDENCE—NEGLIGENCE.

When it was alleged and proved that a railroad company failed to fence its track, and that plaintiff's stock was killed or injured on or near such unfenced track by a moving train, the railroad's negligence was established, and a recovery could be defeated only by proof of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1411.]

4. SAME—IMMEDIATE CAUSE OF INJURY.

Where plaintiff's horse strayed on defendant's unfenced railroad track, it was immaterial to defendant's liability whether the horse was struck by a train and thrown onto a fence and injured, or whether he was so frightened that he jumped on the fence in an effort to escape from the train.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1529, 1530.]

5. EVIDENCE—CIRCUMSTANTIAL EVIDENCE—WEIGHT.

Where a fact is sought to be established by circumstantial evidence, it is only necessary that the conclusion desired be the more probable hypothesis, not that it should be the only conclusion that can fairly and reasonably be drawn from the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2436.]

6. RAILROADS—INJURIES TO ANIMALS—UNFENCED TRACK—EVIDENCE.

Circumstantial evidence *held* sufficient to support a finding that plaintiff's horse was on the right of way of defendant railroad company, and was either struck and thrown on a fence by a moving train or was so frightened in his effort to get away that he jumped upon the fence and was killed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1608½.]

7. TRIAL—NECESSARY PROOF—FACTS ADMITTED.

Where, in an action against a railroad company for killing plaintiff's horse, alleged to have escaped through an unfenced right of way, it was stipulated at the trial that defendant owned and operated the railway at all times mentioned in the complaint, plaintiff was not required to prove that the train which caused the injury belonged to defendant or was operated by it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 88.]

8. SAME—NONSUIT—MOTION—GROUNDS.

A motion for a nonsuit must specify the grounds on which it is demanded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 371.]

9. APPEAL—REVIEW—MOTION FOR NONSUIT—GROUNDS.

Where a motion for a nonsuit specified the particulars wherein plaintiff's evidence was

claimed to be insufficient, the Supreme Court would not consider other and additional assignments of insufficiency on appeal.

Appeal from Circuit Court, Columbia County; Thos. A. McBride, Judge.

Action by A. Meier against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Defendant has appealed from a judgment given against it for damages caused by its alleged negligence in failing to fence its track, which it is alleged resulted in the killing of plaintiff's horse upon or near defendant's right of way, by being struck or frightened by one of its moving trains, so that the horse was thrown or jumped upon a fence, a piece of which penetrated its body. The answer is a general denial of the averments of the complaint. At the conclusion of plaintiff's case defendant moved for a nonsuit on the ground that there was no evidence tending to establish three material facts particularly specified in the motion. It is therein asserted that the evidence fails to show (1) that the portion of the right of way claimed to have been unfenced was unfenced; (2) that the horse got upon the track at the place claimed; and (3) that there was no evidence that the train of defendant either threw the horse or frightened it, causing it to jump upon the fence, as charged in the complaint. The motion being overruled, defendant offered its testimony, and at the close moved for a directed verdict in its favor upon substantially the same grounds as stated in its motion for a nonsuit. This motion being also overruled, the cause was submitted to the jury, which returned a verdict in plaintiff's favor, upon which the judgment was entered. The only error relied upon is the overruling of these motions.

O. C. Spencer, for appellant. W. R. Dilard, for respondent.

SLATER, C. (after stating the facts as above). Defendant's road runs through plaintiff's farm, which is partly lowland, subject to overflow. At a point where the right of way crosses the farm there is a depression or slough across which a fill from 25 to 30 feet high, measured on the slope, has been made, and extending a distance of about 100 feet, and causing a pond of water to accumulate there, in the wet season, on the east side of the track, which, at the time of the accident, was about 3½ feet deep, according to plaintiffs' testimony. This is where it is claimed the track is unfenced, and where plaintiff's horses went upon the track. Plaintiff testifies that there is no fence there, and that it is 32 feet across this pond from a ridge on his premises to defendant's embankment, and that at that point the water was then 3½ feet deep. It is admitted by defendant that there is no fence along its right of way across this pond; but it claims that the pond is of sufficient depth to form

a natural barrier, and therefore, under the statute, to be equivalent to a lawful fence, and he asked the court to so declare as a matter of law. But it is not any pond that is to be deemed a lawful fence, but only if it be "equally secure against the trespass of any domestic animals, or shall be made so by artificial means." B. & C. Comp. § 4342, subd. 7. That is a question of fact for the jury to determine and not the court, and, there being some evidence that stock did cross the pond to the embankment, the question was properly submitted to the jury. Nor could the court say as a matter of law that such ponds are "complete natural defenses against the entrance of such stock upon said track, such as natural walls or deep ditches," as provided in section 5140, B. & C. Comp.

2. It is next asserted that there is no evidence that the horse went upon the track at the place claimed. There is, perhaps, no direct evidence to that effect. Some horses did enter at that place, for the plaintiff and his witnesses testify that the next morning after the accident they examined the embankment at that place and found horse tracks going obliquely up the embankment to the railroad track, and that they traced them down the track to the broken place in the fence where they went out. But in an action on the statute for the killing or injuring live stock on an unfenced track it is not necessary to allege or offer proof of entry at a particular place, except where stock is killed at a place where the company is not bound to fence, as a public highway. When it is alleged and proved that the company failed to fence, and that the plaintiff's stock was killed or injured upon or near such unfenced track by a moving train, the negligence is established, and can be defeated only by proof of contributory negligence. *Eaton v. O. R. N. Ry. Co.*, 19 Or. 371, 24 Pac. 413.

3. Finally it is urged that there is no evidence tending to prove that a train of defendant either threw the horse or frightened it, causing it to jump upon the fence. Here again plaintiff relies at least in part upon circumstantial evidence. Plaintiff swears that he owned three work horses, the one in question being a bay horse 7 years old; that the day before the accident his horses were in his field on a ridge not far from defendant's right of way, and close to the unfenced portion. On the afternoon of June 23, 1904, defendant's section foreman (Butler) observed a horse badly injured, but standing in plaintiff's field near the right of way, and opposite to it was a broken place in the fence. Butler paid no further attention to the horse, but a stranger that evening informed plaintiff's tenants of the injury to the horse. They in turn notified plaintiff by telephone that his horse had been badly injured. On the morning of the following day plaintiff went from Portland to his farm, and thence proceeded to the place where the

injured horse was discovered. On the way there he met Butler on the track, who turned and went with plaintiff to the place of the injury. In the meantime the horse had died, and had been buried by plaintiff's tenants about 50 feet from the right of way. Plaintiff found there a pointed fragment of a board about four feet long, two feet of which was covered with blood, and which it was said pierced the horse, causing its death. Plaintiff swears that in Butler's presence he fitted this piece of board into the fence from where it had apparently been broken. Then he and Butler examined the roadway and found tracks of horses leading to the broken place along the track from the direction of the unfenced portion of the right of way, and the appearance of the tracks indicated that the horses had been running, as plaintiff could see where they had dug up and thrown gravel with their hoofs. They traced these tracks back and down to the unfenced portion of the right of way, a distance covered by about 600 ties. F. H. Adams also testified in plaintiff's behalf that on or about June 23d he was passing down the county road on the west side of defendant's track where this embankment is, and that he was about 40 rods from the track; that at that time he saw a bay horse, which he took to be plaintiff's, feeding along the track about three or four rods up the track from the unfenced portion; that when he saw the horse a freight train came around the curve, and as it approached the horse it became frightened and ran along the track ahead of the engine; that at his right there was a bunch of brush which obstructed his continued view so that when the horse passed out of his view behind the brush he could not tell whether the train knocked it off or it jumped off, or on which side of the track it went off, but he knew that when the train came in sight again there was no horse ahead of the engine. Are these facts sufficient to make a prima facie case that the injury to the horse was caused by the train either striking and throwing it upon the fence, or so frightening it that it jumped upon the fence in its effort to get away? If either inference can be reasonably and fairly drawn from the proved facts, it will be sufficient, for it has been held by this court in *Meeker v. N. P. R. Co.*, 21 Or. 513, 28 Pac. 639, 14 L. R. A. 841, 28 Am. St. Rep. 758, that under the latter circumstance defendant is liable as well as under the former. A fact can be said to be established by circumstantial evidence in a civil action when the facts relied upon are of such a nature and are so related to each other that the conclusion sought to be established can fairly and reasonably be drawn from them. 1 Wigmore on Ev. § 38; *Schoepper v. Hancock Chemical Co.*, 113 Mich. 582, 71 N. W. 1081. In 1 Greenleaf on Ev. (15 Ed.) § 13a, the noted author says: "In civil cases it is sufficient if the evidence on the whole agrees

with and supports the hypothesis which it is adduced to prove, but in criminal cases it must exclude every other hypothesis but that of the guilt of the party." It may be that, where more than one inference can thus be drawn from the circumstantial facts in evidence, one favorable and another unfavorable to the conclusion sought to be established, the one favorable must be the more probable hypothesis in order to be of service to one having the burden of proof. But we do not think the rule is that it should be the only conclusion that can fairly and reasonably be drawn from such evidence, as stated in *Asbach v. Chicago, B. & Q. Ry. Co.*, 74 Iowa, 248, 37 N. W. 182, cited by defendant. There can be no doubt, however, that the circumstances here stated are sufficient to support plaintiff's contention that the horse was on the right of way, and was either struck and thrown upon the fence by a moving train, or was so frightened in its effort to get away that it jumped upon the fence and was thereby killed. It is argued by defendant in this connection that it is not shown that the train which caused the injury belonged to defendant or was operated by it; but it was stipulated by the parties at the trial that the defendant owned and operated the railway mentioned in the complaint at all the times therein stated, and this is conclusive of that contention.

Some other contentions were also made at the argument, such as that it was not there shown that plaintiff had ever lost a horse or that the horse injured and killed was, in fact, plaintiff's horse, but these matters seem not to have been questioned by defendant at the trial, but were impliedly admitted. At least it did not question them in its motion for a nonsuit, which is specific as to what the deficiencies in plaintiff's evidence were on which it relied to support the motion. The rule is well settled that the motion of an adverse party for a nonsuit must specify the grounds therefor, and, unless it does so, an appellate court will not review the action of the trial court in denying the motion, and, when it appears that the question sought to be reviewed was not thus submitted to such court, the presumption that its decision is correct ought to prevail. *Ferguson v. Ingle*, 38 Or. 43, 62 Pac. 760. None of these additional matters are suggested by defendant's motion, and they will not therefore be considered.

From these considerations it follows that the judgment should be affirmed.

(51 Or. 180)

DENNY v. BEAN et al.

(Supreme Court of Oregon. Feb. 11, 1908.)

1. CONTRACTS—CONSIDERATION.

An agreement by a judgment creditor, who had been paid only a part of the judgment, to cancel it, based on the debtor's agreement not to appeal made after the time to appeal had expired, is without consideration; but an agree-

ment to cancel the judgment, based on the debtor's agreement to cancel a debt due from the creditor, is supported by a valid consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 267, 325.]

2. STATUTES — CONSTRUCTION — RETROACTIVE OPERATION.

The rule that statutes will be construed to operate prospectively only, unless an intent to the contrary appears, is only a guide where the legislative intent is obscure, in which case the statute should not be given a retroactive construction, though within the wording thereof, if such construction impairs existing rights, creates new obligations, or imposes new duties in respect to past transactions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 344.]

3. SAME—"WHENEVER."

B. & C. Comp. § 2225, providing that "whenever a judgment is given" in a justice's court the judgment creditor may at any time thereafter, while the judgment is enforceable, file a transcript, etc., enacted in 1899, supersedes Hill's Ann. Laws 1892, § 2103, providing that whenever a judgment is given in a justice's court the judgment creditor may within one year thereafter file a transcript thereof, and operates prospectively only, the word "whenever" being an adverb of time, and when used with the present tense of the verb excludes the idea of a judgment theretofore given, and though construed to operate retroactively the statute cannot apply to a justice's judgment rendered in 1896, no transcript of which had been filed within one year after its rendition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 350.]

For other definitions, see Words and Phrases, vol. 8, pp. 7441, 7442, 7835.]

4. SAME.

Where a remedy has been once barred by statute, a subsequent enactment establishing a longer period of time in which the remedy may be enjoyed will not be given a retroactive construction to revive the lost remedy, unless that intention is affirmatively expressed in the act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 350.]

Appeal from Circuit Court, Polk County; William Galloway, Judge.

Suit by L. B. Denny against Agnes Bean and another. From a decree for plaintiff, defendants appeal. Modified and affirmed.

Plaintiff sues in equity to enjoin the issuance of a sheriff's deed to a purchaser at a sale on an execution issued out of the circuit court of Polk county on a transcript of a justice's judgment filed therein, to have declared void and canceled of record the transcript of the judgment and the execution thereon, and to cancel the judgment as settled and paid. Plaintiff alleges, in substance, that on April 23, 1896, W. S. Bean commenced an action against him in the justice's court for District No. 2, of Polk county, and that on the ——— day of June, 1896, Bean secured judgment against him for \$236.11; that about June 2, 1896, the sum of \$62.15 was made on execution; that thereafter, and in the same month, plaintiff threatened to institute proceedings to set aside the judgment, claiming that he was never indebted to Bean in a sum greater than \$54, and that before the time for appeal had expired he and Bean entered into an agreement and set-

tlement, whereby the latter was to satisfy the judgment in consideration that plaintiff would not appeal or institute any other proceedings to annul the judgment; that on December 10, 1903, in violation of his contract, Bean caused a transcript of the judgment to be filed in the circuit court of that county, and afterwards assigned the same to Agnes Bean, who is his divorced wife; that Agnes Bean caused an execution to be issued out of the circuit court on October 13, 1904, which was levied on plaintiff's land, and on November 26, 1904, the land was sold to Agnes Bean for the balance due on the judgment; and that the sale was confirmed about May 8, 1905. J. T. Ford, sheriff, is made a party defendant. The answer denies all of the averments of the complaint, excepting the issuance of the execution at the instance of Agnes Bean, the sale of the land, and its purchase by her and the confirmation thereof. After the taking of testimony findings were made in plaintiff's favor, and a decree was entered canceling the judgment and annulling all the proceedings taken for its enforcement, from which decree defendant appeals.

Oscar Hayter and Carey F. Martin, for appellants. Frank Holmes, for respondent.

SLATER, C. (after stating the facts as above). It was admitted at the trial that the judgment was, in fact, obtained on April 23, 1896, instead of in June as alleged, and that about December 10, 1903, a transcript thereof was made and filed in the circuit court at the instance of the judgment creditor. The plaintiff, however, has failed to establish the settlement and agreement to cancel the judgment, as alleged by him. The consideration alleged for the making of the agreement was that plaintiff would not appeal from the judgment, or institute any other proceedings to cause the same to be set aside. At the time of making the agreement not to appeal plaintiff had no right of appeal. That had been lost to him by the expiration of the time limited in the statute in which an appeal might have been taken. What other legal proceedings, if any, plaintiff had in contemplation to cause the judgment to be annulled, is not shown. There is some evidence that at that time he may have had a cause of action in debt against Bean upon which he might have recovered a judgment in an amount equal to or greater than the balance due on this judgment. An agreement, then, to surrender and cancel this indebtedness in payment and satisfaction of the judgment, and the actual surrender and cancellation thereof, with the correlative agreement by the judgment creditor to accept and receive the same in satisfaction and payment, would make a case, but it is not so alleged or proved. We are of the opinion, however, that there was no authority in law for the filing of the transcript of this judgment in the circuit court after the-

expiration of one year from its date, and consequently all of the proceedings based thereon are void. "Execution to enforce a judgment in a justice's court must not be issued against or levied upon the real property of the defendant; but when a judgment given by a justice has been duly docketed in the circuit court, thereafter it must be enforced as a judgment of such circuit court." Section 2232, B. & C. Comp. When this judgment was obtained the statute provided that, "Whenever a judgment is given in a justice's court in favor of any one for the sum of ten dollars or more, exclusive of costs or disbursements, the party in whose favor such judgment is given may, within one year thereafter, file a certified transcript thereof with the county clerk of the county wherein such judgment was given, and thereupon such clerk shall immediately docket the same in the judgment docket of the circuit court." Hill's Ann. Laws 1892, § 2103. By the next succeeding section such judgment is made a lien upon the real property of the defendant from the time of its docketing. No transcript of the judgment having been filed with the county clerk within one year after the judgment, the right to do so became extinguished, and the judgment creditor lost the means whereby he might obtain satisfaction thereof out of the defendants' real property. The former section of the statute, however, was repealed by the act of 1890, and a similar provision re-enacted, by which it was provided that, "Whenever a judgment is given in a justice's court * * * the party in whose favor the judgment is given may at any time thereafter, while such judgment is enforceable, file a certified transcript," etc. Section 2225, B. & C. Comp.

It is now contended by the defendants herein that this latter statute is general in its terms and contains no inhibitions or negative clauses denying the right to judgments given prior to the act, and that it applies generally to all judgments of justices' courts which were enforceable at the time the act came into force; in other words, that it is retroactive in its operation. The general rule is that statutes will be construed to operate prospectively, only, unless an intent to the contrary clearly appears. Lewis' Sutherland, Stat. Con. § 642; Endlich on Int. Stat. § 271. But in the case of *Judkins v. Taffe*, 21 Or. 89, 27 Pac. 221, it was held by this court that statutes which merely change the remedy or course and form of procedure, but which do not destroy all remedy for the enforcement of rights, are retrospective, and apply to causes of action existing and litigation pending at the date of their passage. In the course of the same opinion, at page 93, it is also said: "In fact, the rule as gathered from all the authorities seems to be that, 'where the enactment deals with the procedure only, unless the contrary be expressed, the enactment applies to all actions, whether

commenced before or after the passage of the act'"—citing *Broom's Leg. Max.* 35. The rule under consideration, however, is only a guide where the intention of the Legislature is obscure. *Broom's Legal Maxims*, 27. If the intention of the Legislature is obvious and plain, it must prevail; but, if it is obscure and doubtful, it should not be given a retrospective construction, although within the wording of the act, if such construction impairs existing rights, creates new obligations, or imposes more duties in respect to past transactions, unless such plainly appears to be the intent of the Legislature. *Sutherland, Stat. Con.* § 643. The case of *Larkin v. Saffarans* (C. C.) 15 Fed. 147, cited and approved by this court in *Judkins v. Taffe*, supra, quotes the above rule of construction taken from *Broom's Legal Maxims*, and applies it to the facts of that case; but at page 151 of the opinion the distinction is clearly made that, when a case has gone to judgment, there is no pending case on which to act, as it is past and gone from the court, and, in one sense, there then vests a right in the defendant to the judgment. It becomes a sort of property, and should not ordinarily be taken from him. In such a case the rule of construction stated would not apply, and nothing less than a specific direction in the statute would authorize the court to make it retrospective. The intent of the Legislature as to whether the act under consideration should operate prospectively only or retrospectively also is to be determined mainly from the words "whenever a judgment is given." The word "whenever" is an adverb of time, which, speaking from the date of the act, looks to the future rather than to the past. *Kennebec & Portland Ry. Co. v. Portland & Kennebec Ry. Co.*, 59 Me. 9-61. It may, of course, be controlled by the tense of the verb which it modifies. When used, as in this instance, with the present tense of the verb, it would appear to exclude the idea of a judgment which had theretofore been given. In the case of *McGovern v. Connell*, 43 N. J. Law, 106, the court construed these words of a statute, "when any judgment is obtained," occurring in a statute which authorized an alias execution to issue under certain conditions to a constable of another county. It was contended that the act applied to judgments obtained before the passage of the act. The court say: "The most that can be said in favor of this construction is that the language used is indefinite as to time. If it may mean 'when any judgment has been obtained,' it may, at least, as plainly be understood to mean 'when any judgment shall be obtained.'" But, after considering and applying the rules for statutory construction, the phrase was held to mean "when any judgment is hereafter obtained." And that is the meaning we would derive from the words "whenever a judgment is given," used in the act under consideration. If there can be

said to be any doubt, in view of the rule stated in *Broom's Legal Maxims*, quoted and approved by this court in *Judkins v. Taffe*, supra, or should the contrary conclusion be reached that the act should be made to apply to judgments previously given, there is no doubt that it could not apply to a state of facts disclosed in the present case, because the legal effect of the act, if applied, would be not to effect a change in the course or form of the procedure of a cause then pending, nor to enlarge the time in which a present right may be exercised, but would be a re-establishment of a right once existing, but lost and barred by the statute before the passage of the new act. When a remedy has been once barred by statute, a later enactment establishing a longer period of time in which the remedy may be enjoyed will not be given a retroactive construction to revive the lost remedy, unless that intention is affirmatively expressed in the act. *Dyer v. Belfast*, 88 Me. 140, 33 Atl. 790; *Mann v. McAtee*, 37 Cal. 11; *Garfield v. Bemis*, 2 Allen (Mass.) 445.

The decree should be modified so that the judgment may stand and the remainder be affirmed.

STURGIS v. STURGIS.

(Supreme Court of Oregon. Jan. 28, 1908.)

1. APPEAL—DECISIONS REVIEWABLE—FINALITY OF DETERMINATION—INTERLOCUTORY DECISIONS.

Const. art. 7, § 6, provides that "the Supreme Court shall have jurisdiction only to revise the final decisions of the circuit courts." B. & C. Comp. § 547, as amended by Laws 1907, p. 313, c. 162, § 6, provides that "a judgment or decree may be reviewed as prescribed in this chapter and not otherwise. An order affecting a substantial right and which in effect determines the action or suit so as to prevent a judgment or decree therein, * * * for the purpose of being reviewed, shall be deemed a judgment or decree." Section 548 provides that "any party to a judgment or decree other than by confession or for want of an answer, may appeal therefrom." One adjudged a spendthrift and placed under guardianship married in another state without the guardian's consent, returned, and was sued for divorce; the guardian being made a defendant so as to subject the ward's estate to the payment of suit money and alimony. The court ordered defendants to pay a certain amount as suit money and a specified sum monthly as temporary alimony pending the suit. *Held*, that as against the guardian, who has no personal interest in the divorce litigation and no right to appeal from the final decree in the suit, the order is a "final decision," so as to be appealable.

2. SAME.

A void order or decree is appealable; and hence, in a suit for divorce against a spendthrift in which his guardian was made a party defendant only to subject the spendthrift's estate to the payment of suit money and alimony, there being no cause of action alleged against the guardian, an order directing defendants to pay a certain amount as suit money and a specified sum monthly as temporary alimony pending the suit, being void as to the guardian, the court

having no jurisdiction to render a personal judgment against him, is appealable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 749.]

3. MARRIAGE—WHAT LAW GOVERNS.

In general, a marriage valid where solemnized is valid everywhere, not only in other states generally, but in the state of the domicile of the parties, even when they left their own state to marry elsewhere to avoid the laws of the state of their domicile.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 3.]

4. SAME—PERSONS' ACTIONS—MERITS.

Marriages contrary to the law of nature as generally recognized in Christian countries, such as involve polygamy and incest, and marriages which the local lawmaking power has declared shall not be allowed any validity, are exceptions to the rule that a marriage valid where solemnized is valid everywhere.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 3.]

5. SAME—CIVIL STATUS.

If the marriage of a ward takes place in this state without the consent of the guardian, it involves the violation of the law only as to ceremony, form, or qualification; and although the violation of the law in the issuance of the license, making the affidavit therefor, or by the officer in solemnizing the marriage, may subject the offender to punishment therefor, yet the marriage is not therefor void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 5.]

6. SAME.

B. & C. Comp. § 5216, provides that "marriage is a civil contract which may be entered into by males of the age of 18 years, and females of the age of 15 years, who are otherwise capable." Section 5218 provides that "when either party to a marriage shall be incapable of consenting thereto, for want of legal age or sufficient understanding, * * * such marriage is voidable, but only at the suit of the party laboring under the disability," etc. Section 543 provides that marriages declared voidable by section 5218 shall be void from the time they are so declared by the decree. Plaintiff and defendant, a spendthrift, desired to marry; but the latter's guardian refused his consent thereto. Thereupon the parties, to avoid the marriage laws of the state, went to another state and were married. *Held*, that such marriage, being neither within sections 5217 and 502, which specifically prohibit certain marriages, making them absolutely void, nor contrary to the law of nature as generally recognized in Christian countries, is valid, being within the general rule that a marriage valid where solemnized is valid everywhere.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 3.]

7. DIVORCE—TEMPORARY ALIMONY—APPLICATION AND PROCEEDINGS THEREON—SCOPE OF INQUIRY.

A wife, in a divorce suit against her spendthrift husband, his guardian being made a party defendant, so as to subject the ward's estate to the payment of suit money and alimony, secured an order directing defendants to pay a certain amount as suit money and a specified sum monthly as temporary alimony pending the suit. *Held*, on a motion to set aside the order, that the question as to collusion in the divorce suit between plaintiff and the ward defendant to wrest from the guardian part of the estate should not be tried on affidavits, since it involved the merits of the suit, and plaintiff was entitled to a full hearing and to the privilege of cross-examination of the defendant's witnesses.

8. GUARDIAN AND WARD—CUSTODY AND CARE OF WARD'S PERSON AND ESTATE—GUARDIAN'S LIABILITY ON CONTRACTS FOR WARD'S BENEFIT.

A guardian's liability upon his own contracts for the benefit of the ward is personal, and the judgment of a court rendered for such a debt is against him personally, and not against the ward's estate; and if he is compelled to pay such debt, and it was one properly made on behalf of the ward, the county court will allow it out of the ward's estate, but the liability of the estate in such a case is one to be settled in the county court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, § 454.]

9. SAME — ACTIONS — RIGHTS OF ACTION AGAINST GUARDIAN OR WARD.

An action cannot be maintained against a guardian upon the liability of the ward, but only against the ward; and the guardian, being a proper party, may appear and defend the action in the interest of the ward, but is not a party for the purpose of establishing a personal liability against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, § 431.]

10. SPENDTHRIFTS—STATUTORY PROVISIONS.

All proceedings provided by statute relating to guardian and ward subsequent to the appointment of the guardian apply equally to the guardianship of a spendthrift.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Spendthrifts, §§ 13-16.]

11. GUARDIANS AND WARD—MANAGEMENT OF ESTATE.

The property of the ward is in the custody of the law, and is not subject to attachment or execution, and the estate is administered under the direction of the county court; the powers and duties of the guardian in the management of the estate and payment of debts being specified in the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, § 457.]

12. SPENDTHRIFTS—ACTIONS.

The liability of a spendthrift for alimony pending a divorce suit against him is not upon the contract of either the spendthrift or his guardian, but, if it exists at all, is statutory, and may be established in any competent court by judgment against the ward.

13. GUARDIAN AND WARD—ACTIONS—STATUTORY PROVISIONS.

By B. & C. Comp. §§ 5276, 5277, the personal or real estate of the ward can be converted into cash only by proper proceedings under the direction of the county court, and so the enforcement of a judgment against the ward can be accomplished only through the county court, and not by process against either the ward's estate or the guardian.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, § 457.]

14. SAME—RIGHTS OF ACTION AGAINST WARD.

In an action for divorce against a spendthrift husband, the marriage being a valid one and the complaint stating a cause of action for divorce, it is not erroneous to allow plaintiff suit money and support pending the trial, as provided by statute, there being no suggestion that the amount is so excessive as to constitute an abuse of discretion, merely because defendant is under guardianship.

15. SPENDTHRIFTS—ACTIONS—GUARDIANS.

In an action for divorce against a spendthrift husband, his guardian being made a party defendant, so as to subject the ward's estate to the payment of suit money and alimony, an order directing defendants to pay a certain amount as suit money and a specified sum monthly as temporary alimony pending the suit is erroneous as against the guardian, since debts

against the ward can be enforced only against the estate, as provided by B. & C. Comp. § 5275, and not by process from the circuit court against the guardian or the ward's estate.

Appeal from Circuit Court, Umatilla County; H. J. Bean, Judge.

Action for divorce by Ada V. Sturgis against Wm. P. Sturgis, a spendthrift; James A. Fee, his guardian, being a party defendant. From an order directing defendants to pay suit money and temporary alimony pending the suit, the guardian appeals. Decree reversed as to the guardian personally.

This is a suit for divorce and alimony. Defendant W. P. Sturgis was adjudged a spendthrift by the county court of Umatilla county in 1905, being then 24 years old, and Jas. A. Fee was appointed the guardian of his person and estate, which was of the value of about \$10,000. Thereafter, while such guardianship continued, viz., on January 13, 1906, plaintiff and defendant Sturgis desired to intermarry, but said guardian refused his consent thereto; and for the purpose of avoiding the marriage laws of this state, of which they were residents, they thereupon went to the state of Washington, where they were married, returning immediately. The said guardian is made a party defendant for the purpose of subjecting the estate of the defendant Sturgis to the payment of suit money and alimony. The court made an intermediate order directing that defendant pay to the clerk of the court for plaintiff as suit money \$600 and \$50 per month as temporary alimony pending the suit, which order the guardian thereafter moved to set aside. Many affidavits were filed by the defendant in support of his motion, and counter affidavits by the plaintiff; said affidavits being directed to the question of the validity of the marriage, plaintiff's knowledge of the guardianship at the time of the marriage, and as to collusion between plaintiff and defendant Sturgis in the divorce suit for the purpose of wresting from the guardian part of the estate. Upon the hearing the court modified the order, and ordered and decreed that defendants pay to the clerk of the court forthwith \$150 as suit money and \$50 as temporary alimony the 15th of every month pending the suit, from which order defendant James A. Fee appeals.

John McCourt, for appellant. J. P. Winter, for respondent.

EAKIN, J. (after stating the facts as above). It is first insisted by the plaintiff that the order appealed from is not an appealable order. By the Constitution of this state (article 7, § 6) it is provided that: "The Supreme Court shall have jurisdiction only to revise the final decisions of the circuit courts." This provision of the Constitution, it is held in *Portland v. Gaston*, 38 Or. 533, 68 Pac. 1051, is not self-executing, and the cases that may be appealed must be prescribed

by the Legislature, and therefore the provisions of the statute prescribing the cases that may or may not be appealed is conclusive. B. & C. Comp. § 547, as amended in 1907 (Laws 1907, p. 313, c. 162, § 6), provides that: "A judgment or decree may be reviewed as prescribed in this chapter, and not otherwise. An order affecting a substantial right and which in effect determines the action or suit so as to prevent a judgment or decree therein, or a final order affecting a substantial right, and made in a proceeding after judgment or decree, or setting aside a judgment and granting a new trial for the purpose of being reviewed, shall be deemed a judgment or decree." Section 548, Id., provides that: "Any party to a judgment or decree other than a judgment or decree given by confession, or for want of an answer, may appeal therefrom." The terms of this section are very general, and constitute no limitation upon the constitutional provision above quoted. Section 547, supra, after the first sentence, is not a limitation of the cases that may be appealed, but an enlargement thereof, by which certain orders are included within the term "judgment or decree." Therefore, if the judgment or decree comes within the terms of the Constitution, viz., a "final decision," it is appealable.

Without determining whether an interlocutory order for suit money, rendered against a party to the suit, is appealable, which is not necessary to this decision, it is clear that the order or decree here is a final decision as to Jas. A. Fee, the guardian. He is not a party to the litigation. The suit is properly only against the ward, but the guardian appears in his behalf to defend for him, and not to defend any proceeding against himself, as we shall see further on; and as the order or decree is against the guardian, and he has no personal interest in the litigation and no right to appeal from the final decree in the suit, his appearance being only for the ward, therefore the decree is final as to him. Furthermore, the decree is void as to the guardian, the court having no jurisdiction to render a personal judgment against him, as no cause of action is alleged against him, and a void order or decree is appealable. *Deering v. Quivey*, 26 Or. 556, 38 Pac. 710. In this proceeding Jas. A. Fee alone appeals on his own behalf.

The validity of the marriage is questioned by the guardian upon the ground that it was consummated without his consent, and that, even if valid under the laws of the state of Washington, where it was solemnized, yet, both parties being domiciled in this state and having secured the marriage in Washington for the purpose of avoiding the marriage laws of this state, the marriage is void here. Section 5216, B. & C. Comp., provides that: "Marriage is a civil contract, which may be entered into by males of the age of eighteen years, and females of the age of fifteen years,

who are otherwise capable." Section 5217, Id., prohibits certain marriages, viz., "when either party thereto had a wife or husband living at the time of such marriage; (2) when the parties thereto are first cousins or any nearer of kin to each other; (3) when either of the parties is a white person and the other a negro, or Mongolian, or a person of one-fourth or more of negro or Mongolian blood." Section 5218, Id., provides that: "When either party to a marriage shall be incapable of consenting thereto, for want of legal age or sufficient understanding or when the consent of either party shall be obtained by force, or fraud, such marriage is voidable, but only at the suit of the party laboring under the disability, or upon whom the force or fraud is imposed." Under chapter 8, relating to divorce proceedings, section 503, Id., provides that marriages declared voidable by section 5218, supra, shall be void from the time they are so declared by the decree. Section 502, Id., provides in effect that all marriages prohibited by section 5217, supra, "shall, if solemnized within this state, be absolutely void." Thus it will be seen by section 5218, supra, that the marriage of the plaintiff and defendant Sturgis, even if solemnized in this state, would not be void, but only voidable. The rule as gathered from the authorities seems to be that in general a marriage valid where solemnized is valid everywhere, not only in other states generally, but in the state of the domicile of the parties, even when they have left their own state to marry elsewhere for the purpose of avoiding the laws of the state of their domicile.

There are two exceptions to this rule, viz., marriages which are deemed contrary to the law of nature as generally recognized in Christian countries, such as involve polygamy and incest, and marriages which the local lawmaking power has declared shall not be allowed any validity, either in express terms or by necessary implication, viz., such as are prohibited by section 5217, supra. *Jackson v. Jackson*, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773; *State of Georgia v. Tutty* (C. C.) 41 Fed. 753, 7 L. R. A. 50; *Conn v. Conn*, 2 Kan. App. 419, 42 Pac. 1006; *Pennegar and Haney v. State*, 87 Tenn. 245, 10 S. W. 305, 2 L. R. A. 703, 10 Am. St. Rep. 648; *Parton v. Hervey*, 1 Gray (Mass.) 119; *Ex parte Chace*, 26 R. I. 351, 58 Atl. 978, 69 L. R. A. 493; *Commonwealth of Mass. v. Graham*, 157 Mass. 73, 31 N. E. 706, 16 L. R. A. 578, 34 Am. St. Rep. 25; *Everett v. Morrison*, 69 Hun (N. Y.) 146, 23 N. Y. Supp. 377. This distinction is also referred to in *McLennan v. McLennan*, 31 Or. 480, at page 483, 50 Pac. 802, at page 803, 38 L. R. A. 863, 65 Am. St. Rep. 835, where Mr. Justice Bepp says: "There is a distinction made in the books between the marriage of divorced parties declared by law incapable of remarriage and a marriage in violation of some statutory prohibition penal in its nature. In the one case the marriage is abso-

lutely void, and in the other it is often held to be valid, although the party may be punished criminally for violating the prohibitory statute." The marriage in this case does not come within the first exception, as being contrary to the law of nature as generally recognized in Christian countries, such as polygamy or those involving incest; neither is it one specially prohibited by our statute. B. & C. Comp. § 5217. Nor does our statute contemplate that such marriages as the one involved here shall be deemed void, but, if in violation of the statute, are only voidable.

If the marriage of a ward under guardianship takes place in this state without the consent of the guardian, it involves the violation of the law only as to ceremony, form, or qualification; and although the violation of the law in the issuance of the license, making the affidavit therefor, or by the officer in solemnizing the marriage, may subject the one so violating the law to punishment therefor, yet the marriage is not by reason thereof void. In *Parton v. Hervey*, 1 Gray (Mass.) 119, 122, in discussing the statutory requirements as to the ceremony, form, and qualification, the court say: "But the effect of these and similar statutes is not to render such marriages, when duly solemnized, void, although the statutory requirements may not have been complied with." In *Ex parte Chace*, 26 R. I. 353, 58 Atl. 979, 69 L. R. A. 493, 494, in discussing the status of a minor who married in another state while under guardianship, the court say: "Furthermore, it is not clear that, even if the marriage had been solemnized in this state, it would have been void. Pub. Laws 1898-99, p. 49, c. 549, § 11, merely provides that no marriage license shall issue to a person under guardianship without the written consent of the guardian; but it by no means necessarily follows that a marriage procured without first obtaining such license would be void, although the official or other person who performed the ceremony might be liable to punishment under section 19 of the same chapter. Coming now to the case in hand, it requires no argument to show that, even if the marriage might have been void if solemnized in this state, it is nevertheless not such a union that it can in any sense be considered so subversive of good morals, or so threatening to the fabric of society, as to fall within the exception to the general rule regarding foreign marriages. In other words, if valid in Massachusetts, it is equally valid here." The case of *Hills v. State*, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155, is to the same effect, and in an exhaustive note to that case in 57 L. R. A. 155, in discussing the matrimonial capacity of the parties, it is suggested that most of the decisions that seem to hold that the law of the domicile of the parties determines their matrimonial capacity "are reducible to one or the other of the exceptions * * * to the general principle that the va-

lidity of the marriage is to be determined by reference to the *lex loci*, namely, (1) marriages which are polygamous, or which are incestuous according to the general view of Christendom; (2) marriages which the local lawmaking power has declared shall not be allowed any validity. By the first exception the Christian standard of marriage is applied to every marriage wherever celebrated and without reference to the domicile of the parties at the time of its celebration. If the marriage falls below this standard, it will be held void, although it may be valid according to the *lex loci* and *lex domicilii*." We conclude, then, that the validity of the marriage is beyond question.

The question as to the collusion between plaintiff and defendant Sturgis to secure a divorce is one that should not be tried out by affidavit under this collateral issue, as it involves the merits of the suit for divorce. It can be made an issue in the case and tried upon the evidence; but plaintiff is entitled to a full hearing and the privilege of cross-examination of the defendant's witnesses.

But it is more difficult to determine the extent of the liability of the guardian in such a proceeding as this. A guardian's liability upon his own contracts for the benefit of the ward is personal, and the judgment of a court rendered for such a debt is against him personally, and not against the ward's estate (*Pendexter v. Cole*, 66 N. H. 556, 22 Atl. 560; *Baird v. Steadman*, 39 Fla. 40, 21 South. 572; *Lewis v. Edwards*, 44 Ind. 333; *Sanford v. Phillips*, 68 Me. 431; *Rollins v. Marsh*, 128 Mass. 116; *Municipal Court v. Le Valley*, 25 R. I. 236, 55 Atl. 640; 15 Am. & Eng. Ency. 77); and if he is compelled to pay such debt, and it was one properly made on behalf of his ward, the county court will allow it out of the ward's estate; but the liability of the estate in such a case is one to be settled in the county court. *Pendexter v. Cole*, supra. An action cannot be maintained against a guardian upon the liability of a ward, but only against the ward, and, the guardian being a proper party, he may appear and defend the action in the interest of the ward, but is not a party for the purpose of establishing a personal liability against him. *Rollins v. Marsh*, supra; *Municipal Court v. Le Valley*, supra; *Raymond v. Sawyer*, 37 Me. 406; *Stumph v. Goepper*, 76 Ind. 323; *Baird v. Steadman*, supra. We make no reference here to the question of the personal liability of a guardian *ad litem* or a general guardian for costs in a suit prosecuted or defended by him, if such litigation is decided adversely to him. All proceedings provided by statute relating to guardian and ward subsequent to the appointment of the guardian apply equally to the guardianship of a spendthrift. This statute makes no special provision in relation to actions or judgments against the guardian, the ward, or

his estate. The property of the ward is in the custody of the law, and is not subject to attachment or execution (1 Freeman, Executions [3d Ed.] § 131; Harrington v. La Roque, 13 Or. 344, 10 Pac. 498), and the estate is administered under the direction of the county court; the powers and duties of the guardian in the management of the estate and payment of debts being specified in the statute.

Without deciding whether an ordinary creditor of the ward's estate may, in the first instance, bring an action therefor, it appears that this is not a liability upon the contract of either the ward or the guardian; but, if there is a liability, it is statutory, and may be established in any competent court by judgment against the ward. *Gregg v. Gregg*, 48 Hun, 451, 1 N. Y. Supp. 453. The payment by the estate, if judgment is obtained, may depend upon various contingencies, such as whether the estate has available money, or it must be procured from the sale of personal assets or from the sale of real estate, or whether the estate is sufficient to pay all the debts and liabilities of the ward or can only make a pro rata payment and render it necessary that the payment even of a judgment be secured through the county court. By B. & C. Comp. § 5276, 5277, the personal or real estate of the ward can be converted into cash only by proper proceedings under the direction of the county court. *Coffin v. Elsminger*, 75 Iowa, 30, 39 N. W. 124; *Bates v. Dunham*, 58 Iowa, 310, 12 N. W. 309; *Grant v. Humbert*, 114 App. Div. 462, 100 N. Y. Supp. 44. This is the policy of our whole probate law with reference to estates of deceased persons, as well as to those under guardianship. Therefore the enforcement of a judgment against the ward can be accomplished only through the county court, and not by process against either the ward's estate or the guardian.

The marriage being valid, and assuming for the purposes of this proceeding that the complaint states a cause of suit for divorce, we see no reason why the plaintiff is not entitled to the provisional remedies of the statute, if otherwise entitled thereto, even though the defendant is under guardianship; and, in so far as the order of the court grants her suit money and support pending the trial as against the defendant Sturgis, there is no error, there being no suggestion that the amount is so excessive as to constitute an abuse of discretion by the lower court. But to the extent that the order is personal against the guardian it is erroneous. The order or judgment establishes the debt or liability against the ward; but it can be enforced only against the estate as provided by B. & C. Comp. § 5275, and not by process from the circuit court against the guardian or the ward's estate.

The decree will be reversed, in so far as it affects the guardian personally.

(14 N.M. 368)

KINGSTON et al. v. WALTERS.

(Supreme Court of New Mexico. Jan. 17, 1908.)

1. FRAUDS, STATUTE OF.

The statute of frauds is in force in this territory.

2. SPECIFIC PERFORMANCE — STATUTE OF FRAUDS.

Even where a contract required to be in writing, because it relates to the transfer of real estate, is verbally changed as to the time of payment, a court of equity will intervene and order a performance, when the refusal to assume jurisdiction on account of the statute of frauds would amount to permitting a fraud to be committed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 270-276.]

3. ACTION—FORM—LEGAL OR EQUITABLE.

Under our Code of Civil Procedure (Comp. Laws, § 2685), there is in this territory but one form of civil action, and a complaint will not be dismissed when it sets up a cause of action which is good either in law or equity, because the plaintiff has misconceived the nature of his remedial right, and has asked for a legal remedy when it should have been equitable, or for an equitable remedy when it should have been legal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 313-319.]

Parker, J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Chaves County; before Justice W. H. Pope.

Action by John H. Kingston and W. D. Mahoney against J. W. Walters. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

The record in this case discloses that on August 11, 1904, the defendant and plaintiffs entered into a written agreement regarding the sale and purchase of certain lands, which agreement is in words and figures as follows, to wit:

"McMillan, N. M. Aug. 11th, 1904.

"Received of John H. Kingston and W. D. Mahoney, one hundred dollars, part payment for 400 acres of land located in section 19 and 20, in Twp. 19 S., range 26 E. There is to be \$200 more paid on or before the 15th day from date.

"On payment of said \$200 as stipulated the undersigned will place with the Citizens' National Bank of Roswell quit-claim deeds for said land to be delivered on payment of \$900 on or before 90 days from date.

"Failure to make payments as stipulated works a forfeiture of amount paid.

"J. W. Walters."

The complaint sets out that at the same time and place mentioned in the written contract the defendant entered into and made a subsequent oral contract extending for the period of five days the time in which to make the second payment of \$200, and that afterwards, on the 20th day of August, 1904, plaintiffs paid the defendant the sum of \$100 to apply on said contract, and again, on August 31, 1904, plaintiffs were ready and willing

to pay the remaining \$100, to be paid within the time in which said \$200 was to be paid, and were prevented from so doing by defendant, who absented himself from his usual place of business in Roswell, N. M., and remained absent for some time.

Plaintiffs also allege that they have always been ready and willing, and are still ready and willing, to fulfill said agreement, and that on November 9, 1904, at Roswell, N. M., they tendered to defendant the balance \$1,000 of said purchase money, and requested a conveyance to the real estate, but defendant refused and still refuses to execute and deliver same to plaintiffs. Plaintiffs claim damages in the sum of \$2,800. To the complaint the defendant demurred, which demurrer was sustained by the court, and, plaintiffs electing to stand on their demurrer, the cause was dismissed. Motion for rehearing was filed and overruled, and an appeal to the Supreme Court was granted.

Alexander J. Nisbet and D. D. Temple, for appellants. Richardson, Reid & Hervey, for appellee.

MILLS, C. J. (after stating the facts as above). To the complaint filed in this case the defendant demurred, and the principal ground relied on in the demurrer is the statute of frauds, defendant claiming that the complaint shows on its face that the entire contract sued on, and which concerned the transfer of lands, was not in writing, as the complaint sets out that a verbal alteration was made in the terms of the written contract by which the time for the payment of the second installment of the purchase price was extended, and that the complaint does not show that there was any consideration for the extension of the time of such payment. After argument the demurrer was sustained, and, plaintiffs refusing to plead further, although time was given them so to do, the action was dismissed.

This court has held that the statute of frauds, being general in its nature and not local to England, and forming a part of the common law, is in force in this territory. *Childers v. Talbott*, 4 N. M. 336, 16 Pac. 275.

As in this case the plaintiffs have only asked for monetary damages, and not for any equitable relief, prior to the introduction of the reformed system of pleading, the demurrer was undoubtedly well taken, for the Supreme Court of the United States has announced the doctrine to be that in common-law cases, "a written contract within the statute of frauds cannot be varied by any subsequent agreement of the parties unless such new agreement is also in writing." *Emerson v. Slater*, 22 How. (U. S.) 28, 16 L. Ed. 360; *Swain v. Seamens*, 9 Wall. (U. S.) 254, 19 L. Ed. 554.

It is also a well-settled rule that courts of equity are as much bound by the statute of frauds as courts of law, and that they cannot specifically enforce contracts embrac-

ed by the statute any more than courts of law can give damages for their nonperformance. But courts of equity have always been clothed with the salutary power of preventing fraud, or affording positive relief against its consequences; and this power they have not hesitated to exercise by compelling the specific execution of a verbal contract to which the provisions of the statute of frauds apply, where the refusal to exercise it would amount to practicing a fraud. *Browne on Statute of Frauds* (5th Ed.) § 437.

This case seems to us to come within the rule as laid down in *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818, where the court says: "But there are other principles, founded in justice, that must control the decision of the present case. Even where time is made material, by express stipulation" (and in the case at bar such is not the case), "the failure of one of the parties to perform a condition within the particular time limited will not in every case defeat his right to specific performance, if the conditions be subsequently performed, without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give such relief. The discretion which a court of equity has to grant or refuse specific performance, and which is always exercised with reference to the circumstances of the particular case before it (*Hennessey v. Woolworth*, 128 U. S. 438, 442, 9 Sup. Ct. 109, 32 L. Ed. 500), may, and of necessity must often, be controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions (*Seton v. Slade*, 7 Ves. 263, 279; *Levy v. Lindo*, 3 Merivale, 81, 84; *Hudson v. Bartram*, 3 Madd. 440, 447; *Lilley v. Fifty Associates*, 101 Mass. 432, 435; *Potter v. Tuttle*, 22 Conn. 512, 519. See, also, *Ahl v. Johnson*, 20 How. [U. S.] 511, 518, 15 L. Ed. 1005)."

Believing that this is a case of which a court administering equitable relief should take cognizance, provided it can do so under the pleadings, we will now proceed to briefly examine the complaint, to ascertain whether or not it sets up such a cause of action as would warrant the court to disregard the statute of frauds in order to prevent a fraud. In this territory the practice is no longer controlled by the common-law forms, for under our Code of Civil Procedure (section 2685, Comp. Laws 1897) there is but one form of civil action, and a plaintiff may unite in the same complaint several causes of action, both legal and equitable. In other words, under the reformed system of pleadings which our Legislature has adopted, litigants are given the relief which the facts in the pleadings show them to be entitled to in one action, whether the relief is equitable or legal, or both.

The defendant demurred to the complaint, and thus admitted the truth of everything

contained in it which is well pleaded, so we must of necessity examine the complaint to see if it sets up a cause of action which is good either in law or equity. It is immaterial that the prayer for relief only asks for a judgment for monetary damages, for it is not the prayer that the court looks to, but the facts as they appear in the body of the complaint. Some courts have gone so far as to hold that under the reformed system of pleading a complaint is good without any prayer for relief, and it now seems to be the well-settled doctrine that if a plaintiff has set forth facts constituting a cause of action, and entitling him to some relief, either legal or equitable, his action shall not be dismissed because he has misconceived the nature of his remediable right and has asked for a legal remedy when it should have been equitable, or for an equitable remedy when it should have been legal. In *Emery v. Pease*, 20 N. Y. 62, the complaint set out facts which entitled the plaintiff to an accounting, but did not ask for one. It did not aver any settlement, nor ascertain balance due, and demanded judgment for a sum certain. On the trial the case was dismissed, on the ground that it did not set forth facts sufficient to constitute a cause of action. Comstock, J., after stating the old rule by which the action would have been properly dismissed, proceeds: "In determining whether an action will lie, the courts are to have no regard to the old distinction between legal and equitable remedies. Those distinctions are expressly abolished. A suit does not, as formerly, fail because the plaintiff has made mistake as to the form of the remedy. If the case which he states entitled him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled." The rule is tersely and accurately stated in *Grain v. Aldrich*, 38 Cal. 514-520, 99 Am. Dec. 423, where the court says: "Legal and equitable relief are administered in the same form and according to the same general plan. A party cannot be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when upon his facts he is entitled to no relief, either in law or in equity." This doctrine is held in nearly all the states where codes of procedure or practice acts have been adopted, and is the general rule. *Pomeroy, Code Remedies* (4th Ed.) § 11, note 1. The complaint alleges that "at the same time and places set out in the written contract * * * the defendant entered into and made a subsequent oral contract extending for the period of five days the time in which to make the second payment of \$200"; that on August 20, 1904, plaintiffs paid the defendant the further sum of \$100 to apply on the contract, and on August 31, 1904, were ready and willing to pay the remaining \$100, but

that defendant absented himself from his usual place of business in Roswell, and remained absent for some time, thereby defeating said payment at that time. A tender of the balance of the purchase price is also alleged. As above remarked, the demurrer admits the truth of everything in the complaint which is well pleaded. It admits the payments of \$100 on August 11, 1904, and a similar amount on August 20, 1904, before any of the second payment became due; it admits that the time of the second payment was orally extended, as alleged in the complaint, and that defendant absented himself from his usual place of business in Roswell, "and remained absent for some time, thereby defeating said payment at that time."

It is evident that the facts as set out in the complaint and admitted by the demurrer are such that a court of equity in order to prevent a fraud will take jurisdiction of this cause, take proofs, and, if the facts warrant it, order a specific performance of the contract, or, in lieu thereof, award plaintiffs damages, or, if the plaintiffs fail in their proof, enter a judgment in favor of defendant.

For the reasons given above, the cause is reversed and remanded to the district court of Chaves county for further proceedings in accordance with this opinion, and it is so ordered.

McFIE, ABBOTT, and MANN, JJ., concur. PARKER, J., dissents. POPE, J., having heard this case below, took no part in this decision.

(14 N.M. 341)

In re GENTZ'S ESTATE.

GAMMON v. GALLES.

(Supreme Court of New Mexico. Jan. 13, 1908.)

APPEAL—FROM PROBATE COURT—FINAL ORDER.

An appeal does not lie from a probate court to the district court, except from a final order, decision, or judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 329-343.]

(Syllabus by the Court.)

Error to District Court, Sierra County; before Justice Frank W. Parker.

In the matter of the estate of J. E. Gentz. Action by Willie E. Gammon against Louis W. Galles. From the judgment, Gammon appealed to the district court, and from a judgment dismissing the appeal he brings error. Affirmed.

A. N. Elliott, for plaintiff in error. Mark B. Thompson, for defendant in error.

MANN, J. It is conceded by counsel for the plaintiff in error that the order from which plaintiff in error attempted to appeal to the district court of Sierra county was merely an interlocutory order, but counsel contends that

under section 40, c. 81, p. 158, Sess. Laws 1901, appeals from such orders were authorized by the Legislature.

Prior to the enactment of chapter 81, *supra*, this court held in the case of *Territory ex rel. Lee v. Hubbell*, 9 N. M. 500, 58 Pac. 344, that an appeal did not lie from a merely interlocutory order of the probate court, and such is still undoubtedly the law, unless there is an express statutory authority for such appeals. Section 40, c. 81, p. 158, Sess. Laws 1901, reads as follows: "That any person aggrieved by any decision of any probate court of any county in this territory, may appeal to the district court of the county in which such decision may be rendered, by filing within ninety days of the rendering of any such decision with the clerk of such probate court a motion praying such appeal and a bond, with two or more sureties, conditioned that such appellant shall prosecute his said appeal with diligence and effect, and pay all costs of such appeal as shall lawfully be adjudged against him; and thereupon it shall be the duty of such probate clerk to prepare and forthwith transmit to the district court of said county all such papers and copies of all such records as such appellant shall in writing designate as necessary to be considered upon said appeal, and upon the receipt by the clerk of said district court of said papers from said probate clerk, the clerk of said district court shall docket said appeal and papers as a cause in said district court and thereafter said appeal, so docketed as aforesaid, shall be tried *de novo* and determined in said district court as other causes are therein tried and determined: Provided, that this section shall not affect any proceeding or proceedings now provided by law for the review in the district court of any decision of any probate court upon the approval or disapproval of any last will or testament." "In some jurisdictions appeals from enumerated interlocutory orders are authorized by statute; but, as such appeals are the creation of statute, they cannot be extended by implication, and will only lie when expressly authorized." 2 Cyc., and cases cited; *Sutherland on Statutory Construction*, §§ 393, 394.

It will be observed that the statute in question does not enumerate any interlocutory orders or decisions of the probate court from which appeals may be taken, but merely provides that any person aggrieved by any decision of any probate court in any county may appeal to the district court of the county in which the decision is rendered by following the regulations therein laid down. Nowhere in the statute does it appear that the Legislature had in mind an enlargement of the appellate jurisdiction of the district courts to include interlocutory orders or decisions of the probate court. In fact, it affirmatively appears that only a regulation of the mode of taking appeals was being provided. Already the district court had appellate jurisdiction over the probate courts under section 900, Comp. Laws 1897, and this act (section 40, c.

81, p. 158, Laws 1901) did not attempt to repeal section 900, Comp. Laws, but merely provided a method of taking the appeals therein provided for, and under which this court had held in *Territory ex rel. Lee v. Hubbell*, *supra*, that appeals from interlocutory orders of probate courts did not lie. It was said in *Northpoint C. I. Co. v. Utah & Salt Lake Canal Co.*, 14 Utah, 155, 46 Pac. 824, and quoted by this court with approval in *Jung v. Meyer*, 11 N. M. 378, 68 Pac. 933: "It would be presuming too much to say that the framers of the Constitution were fearful that the Legislature would enact laws preventing appeals from final judgments, and that, therefore, this provision was inserted giving a guarantee of the right of appeal from final judgments, thus leaving to the Legislature the right to enact laws allowing appeals from interlocutory orders. Especially is this so when we consider the fact that nearly every state in the Union allows appeal from final judgments and restricts or prohibits appeal from interlocutory orders as being against the policy of the law. The framers of the Constitution could not have anticipated that the Legislature would do an unreasonable thing, and thus take away the right of appeal from a final judgment when the right has grown to be almost inherent, and yet use words sufficient to authorize it to do that which in most states is considered questionable and by eminent writers to be against the policy of the law."

It will be observed that section 3305 of the Compiled Laws, providing for appeals from justices of the peace to the district court, is in almost the identical language of the section in question. It reads that: "Any person aggrieved by any judgment rendered by any justice, may appeal," etc., "to the district court of the county where the same was rendered." Yet it would hardly be contended that an order of a justice of the peace dissolving an attachment or quashing a service merely interlocutory in its nature would be appealable under that statute. True, section 40, c. 81, p. 158, Laws 1901, uses the word "decision," instead of "judgment," as in section 3305, *supra*, but in the sense it is here used the meaning is the same. 13 Cyc. 427, and cases cited. 1 *Bouvier (Rawles' Revision)* 517.

The judgment of the district court dismissing the appeal was right, and is affirmed.

MILLS, C. J., and McFIE, POPE, and ABBOTT, JJ., concur. PARKER, J., having heard the cause below, did not sit.

(14 N.M. 375)

McKENZIE v. KING.

(Supreme Court of New Mexico. Jan. 17, 1908.)

1. EVIDENCE — DOCUMENTARY EVIDENCE — BOOKS OF ACCOUNT.

Section 3031 of the Compiled Laws of New Mexico of 1897 supplemented the law governing the introduction of books of account in evidence, but did not destroy or wholly supersede

it, and the conditions imposed by it do not apply to books kept by a clerk of the one in whose business they were kept, if such clerk is produced as a witness and testifies that he made the entries in the account offered in evidence as bookkeeper in the regular course of business and substantially at the time of the transactions recorded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1628-1646.]

2. APPEAL—REVIEW—OBJECTIONS TO EVIDENCE.

This court will not ordinarily reverse the judgment of a trial court for error in the admission of evidence, unless the objection made to its admission at the trial was well founded, although on other grounds it might have been inadmissible.

(Syllabus by the Court.)

Appeal from District Court, Union County; before Chief Justice William J. Mills.

Action by John King against Alexander McKenzie. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action on a promissory note given by the defendant, McKenzie, here the appellant, to the firm of H. J. Collins & Co., September 18, 1901, payable December 1, 1901. At the time when the note was given, the plaintiff, King, here the appellee, was a member of the firm of H. J. Collins & Co., which was dissolved November 23, 1901. The plaintiff alleged the making of the note to Collins & Co., that it was transferred to him with the other property of that firm November 23, 1901, and had not been paid. The defendant admitted the making of the note to Collins & Co., but alleged that he paid it October 28, 1901, to Collins, the other member of the firm, and that if it was transferred to the plaintiff, which he did not admit, it was with full knowledge on the plaintiff's part that it had already been paid. The case was tried with a jury at the March, 1906, term of the district court of Union county, and a verdict was rendered for the plaintiff. A motion for a new trial was made and overruled and judgment entered on the verdict, from which the defendant appealed.

Charles A. Spiess and S. B. Davis, Jr., for appellant. J. Leahy, for appellee.

ABBOTT, J. (after stating the facts as above). In the brief for the appellant but two of the errors assigned in his behalf are discussed, and only those need be considered.

The first is the admission of evidence of certain entries in the ledger of H. J. Collins & Co., relating to the account between said firm and the defendant; the contention of the appellant being that it was, in effect, the admission of the plaintiff's books of account, and that the statute requirements for such admission had not been met. Even if the contention for the appellee be sound that the entries objected to were offered to corroborate the testimony of the bookkeeper, Gaylord, that no interest had been paid on the note, and not for the purposes covered by the statute, and so were not subject to the

conditions imposed by it, yet we prefer to deal with the question broadly, and declare what seems to us to be the rational and necessary meaning of the important statute in question. Section 3031 of the Compiled Laws of 1897. It provides that "the books of account of any merchant, shopkeeper, etc., may be admitted in evidence as proof of such accounts upon the following conditions: First. That he kept no clerk or else the clerk is dead or inaccessible. Second. Upon proof, the party's oath being sufficient, that the book tendered is the book of original entries. Third. Upon proof, by his customers, that he usually kept correct books. Fourth. Upon inspection by the court to see if the books are free from any suspicion of fraud." The contention for the appellant is that these four conditions must in all cases "be complied with before books of account can be admitted in evidence in this territory"; that is, that the statute superseded whatever law theretofore existed on the subject. That there are expressions in opinions by this court which lend support to that claim cannot be denied; but we think that, so far as they have come to our notice, they were inadvertent, and not essential to the conclusions reached in the decisions in which they occur. The argument for the appellant as to the applicability of the first condition in the case at bar leads to a conclusion so manifestly against reason that we are forced to question the soundness of its premises. "There is no proof that H. J. Collins & Co. kept no clerk. In fact, the proof is exactly to the contrary, that the firm did keep a clerk who was present and testified;" and thereby the contention is the book was rendered inadmissible. This is on the assumption that the statute contains the entire law of New Mexico on the subject. To so hold would be to say that the best kept and most reliable books of account in the territory cannot be used in evidence solely because those who were employed to keep them because of their skill, who have no interest in the litigation in which it is sought to use the books, are present or obtainable as witnesses, while books unskillfully kept by the parties to the litigation themselves may be introduced in evidence. Such an intention could not be imputed to the Legislature, unless it is clearly necessary. An examination of the statute itself and of the law on the subject as it was when the statute was enacted relieve us of that necessity. The statute is not in terms exclusive. It provides that books of account may be admitted in evidence on certain conditions, but not that they shall be admitted only on those conditions. That it was designed to supplement, and not to abolish the rule of law that already existed, is in accord with the principle of construction usually applied in such cases. Wigmore on Evidence, § 1520; Lewis' Suth. Stat. Con. §§ 267, 487. And, as we have seen, the adop-

tion of the opposite view of its meaning would lead to a manifest absurdity. At the time the statute was enacted it had "long been the common-law rule that entries made in the regular course of business in shop books, by the clerk or agent of a person, are, with proper restrictions, admissible in evidence after the death of such clerk on proof of his handwriting," and this has been extended by the general practice of the American courts to the admission of such entries during the life of the person who made them when authenticated by his oath. This has been done sometimes on the ground of necessity, and sometimes on the view that the entries are a part of the acts they purport to record; in other words, a part of the *res gestæ*. Jones on Evidence, § 582; 1 Greenleaf on Evidence (12th Ed., 1866) § 117 et seq. Wigmore, § 1560, however, declares that the modern and sound basis of admission of such entries is that they are the records of past recollections. To be such, they must, of course, have been made when the one who made them did have the knowledge on which they were based, not necessarily, for instance, of an actual sale made in a great mercantile establishment, but of the fact that such a sale was reported to him by one whose business it was to make and report such sales in the course of his employment there, and that he, the bookkeeper, made the entry in the course of his employment at the time. Obviously it is impossible that any one should remember for any great length of time more than an inconsiderable fraction of the transactions which occur in the immense business houses of to-day, and the doctrine advanced by the learned author we have quoted commends itself to us as sound in theory and necessary in practice. The general removal in this country of the disqualification to testify in his own behalf of a party to a suit had the effect of allowing the introduction in evidence of his books kept by himself on the same ground on which those kept for him by his clerk were admitted. That proved to be open to serious objections. Such, then, having been the state of the law, the purpose of such statutes as that under consideration becomes obvious. For one who would produce books of account, kept in the regular course of his business by a clerk who was present to testify to the entries he had made, the law remained as it was; but, if he offers in evidence merely the books without the testimony of a clerk who kept them, he must conform to the conditions prescribed by the statute, and prove that he had no clerk, or, if he kept one, that he cannot be produced as a witness. He must also prove by his customers that he usually kept correct books, and the court must be satisfied upon inspection of the books that they are free from any suspicion of fraud. The provision for proof that the book tendered is

the book of original entry made no substantial change in the law as it then was. In the case at bar the witness Gaylord testified that he kept the account which was admitted in evidence as bookkeeper for the firm of H. J. Collins & Co., and, after its dissolution, for the plaintiff.

The defendant offered in evidence two receipts from said firm which he claimed had a bearing on the issues between the parties. The entries which were admitted in evidence tended to explain those receipts and some of them related directly to the note in suit. We think there was no error in admitting the account.

It is objected in the brief for the appellant, although that question was not very clearly raised at the trial, that the ledger containing the account in question was not a book of original entry. It appeared that the entries which were especially in point were copied into the ledger from loose slips of paper on which they were originally made in duplicate, and that the slips retained by the plaintiff or his firm had been destroyed by fire. As to those entries, the ledger was a book of original entry within the meaning of the law. Jones on Evidence, § 584.

The appellant further claims that the trial court erred in refusing to strike out as hearsay the testimony of a witness for the plaintiff, O. T. Toombs, who acted as attorney in the matter of the dissolution of the firm of Collins & Co., that he saw the note in question on the list of the property of the firm which had been prepared for the purpose of enabling the partners to make a "give or take" offer. The objection made to the admission of the evidence at the time it was offered was that it was not "material," and the appellant cannot now be allowed to substitute a different objection. *Coleman v. Bell*, 4 N. M. 21, 27, 12 Pac. 637; *Lamy v. Catron*, 5 N. M. 373, 380, 23 Pac. 773; *Coler v. Board of County Commissioners*, 6 N. M. 88, 115, 27 Pac. 619; *Pearce v. Strickler*, 9 N. M. 467, 471, 54 Pac. 748.

Under the pleadings in the case, it was incumbent on the plaintiff to prove that the note had been transferred to him by Collins & Co., and that he was the sole owner of it at the time suit was brought. He testified that, when he took over the property of Collins & Co., November 23, 1901, the note was there, and was examined as a part of the property, and was then delivered to him either by Collins, or by Toombs, as his attorney. If the note was listed, as Toombs testified it was, that certainly tended to corroborate the plaintiff on a material question.

The judgment of the district court is affirmed.

POPE, PARKER, McFIE, and MANN, JJ., concur. MILLS, C. J., having heard the case below, did not participate.

(14 N.M. 300)

STEARNS-ROGER MFG. CO. et al. v. AZTEC GOLD MIN. & MILL. CO. et al.

(Supreme Court of New Mexico. Jan. 13, 1908.)

1. MECHANICS' LIENS—EVIDENCE.

Under the facts disclosed by the record, it is held that the appellees were entitled to mechanics' liens for the material furnished and the labor performed by them, respectively.

2. SAME—PROPERTY SUBJECT.

The trial court did not err in holding that the lien extended to the Aztec mine as well as the mill site, where the evidence showed the title in the same parties, and that the one was necessary for the convenient use and occupation of the other, and that the mill and mine were connected by a tramway, the mill being used and capable of being used only for the sole purpose of treating the ores extracted from the mine, under our statute which makes it the duty of the trial court to determine upon what amount of land the lien attaches in rendering judgment.

3. SAME—POSTING NOTICE—LIEN OF MORTGAGE.

The mortgagee of a mortgage, or the trustee and cestuis que trust of a trust deed in the nature of a mortgage, have no such interest in the real estate upon which a mechanic's lien is claimed as to compel them to post the notice required under section 2226, Comp. Laws, where the mortgage or trust deed was given and duly recorded as required by law, prior to the time the work was performed, or the materials commenced to be furnished for which the mechanic's lien is claimed.

4. SAME—CORPORATIONS—NOTICE TO MANAGER.

Notice to the general manager of a corporation of the erection of improvements upon the lands owned by it, or to which it has or claims some interest, is sufficient notice to the corporation, so that its interest will be subject to a mechanic's lien in the absence of the posting of the notice required by section 2226, Comp. Laws 1897.

(Syllabus by the Court.)

5. WORDS AND PHRASES—"GENERAL MANAGER."

A "general manager" is the person who has the most general control of the affairs of a corporation, with knowledge of its business and property, and who can act in emergencies on his own responsibility, and may be considered the principal officer.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3073-3074.]

Appeal from District Court, Colfax County; before Chief Justice William J. Mills.

Action by the Stearns-Roger Manufacturing Company and others against the Aztec Gold Mining & Milling Company and others. Judgment for plaintiffs, and defendants appeal. Reversed, and decree rendered.

This is a suit brought by appellees the Stearns-Roger Manufacturing Company, a corporation of Denver, Colo., and one Smith McKay, also of Denver, to foreclose certain mechanics' liens claimed by them on a certain mine in Colfax county known as the "Aztec Mine" and the mill site adjoining said Aztec mine, together with the mill and machinery, tramway, etc., in and about said mine and mill. The Stearns-Roger Company claims a lien by virtue of certain materials and machinery furnished by it to the Aztec Gold Mining & Milling Company for use in

said mill and a tramway which connects said mill and the working shaft of the Aztec mine, while McKay claims his lien by reason of labor performed and furnished by him in supervising and constructing the mill, heretofore referred to. The record and pleadings are quite voluminous, but the principal facts appearing thereby are as follows:

The Aztec mine and the adjoining mill site are situated on the Maxwell land grant, and the fee to an undivided seven-twelfths interest hereto is in said company. Some time in the year 1884 the Maxwell Land Grant Company executed a lease on their interest in said Aztec mine to one Valentine S. Shelby for 35 years. The remaining five-twelfths of the Aztec lode or mine appears to have been vested in James Lynch and Thomas B. Catron, and on August 15, 1893, Shelby, Lynch, and Catron, who then appear to have been the joint owners of the lease from the Maxwell Company to Shelby, and of the remaining five-twelfths of the fee, conveyed the same, viz., the undivided five-twelfths of the Aztec lode or mine and the lease, to one Clinton Butterfield, which deed was duly acknowledged and recorded in the same month, and on the same day Butterfield executed a deed of trust to Henry F. Moote, trustee of Valentine S. Shelby, James Lynch, and Thomas B. Catron, on the same property to secure the sum of \$135,000, as shown by the terms thereof. This deed of trust was duly filed for record and recorded in the records of Colfax county, N. M., August 16, 1893. It further appears (although the deed is not set out in the record) that Butterfield in some manner transferred and conveyed all his interest in the Aztec mine or lode to the Aztec Gold Mining & Milling Company about the 21st of September, 1903. As the deed of trust from Butterfield to Moore is of vital interest in the outcome of this case, we set it out in full, as follows:

"This indenture made this fifteenth day of August, in the year of our Lord one thousand eight hundred and ninety-three, between Clinton Butterfield, of the county of Arapahoe and state of Colorado, party of the first part, and Henry F. Moore, of Trinidad, Las Animas county, Colorado, trustee, party of the second part, witnesseth: That said party of the first part, for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold, and by these presents does grant, bargain, sell and convey unto said party of the second part, his heirs and assigns, all the following described real estate in the county of Colfax and territory of New Mexico, to wit: The undivided five-twelfths (5/12) part of that certain mine, quartz, lode or lead situate on the eastern slope of Baldy Mountain, near the head of Ute creek, and known and called by the name of the Aztec mine, being three thousand feet in length and extending in direction

nearly east and west, as far as can be ascertained without an exact survey, being the same lead or lode discovered by Timothy Faley, Mathew Lynch and Mamey Dougherty, and extending two thousand feet on the eastern side of the discovery shaft sunk on said lead from said shaft and one thousand feet on the western side of the discovery shaft from said shaft, said mine and quartz, lode or lead, being situate and lying within the limits of the grant and tract of land formerly known and called the Beaublen and Miranda grant, and now better known and called by the name of the Maxwell land grant, together with all the dips, spurs, angles and variations thereof, and with all the rights of water, timber and other privileges appertaining and belonging thereto; also, the leasehold estate of the party of the first part in and to the undivided seventieths (7/12) of said mine and tract of land which the said party of the first part holds and owns by virtue of an assignment of that certain deed or lease made and executed by the Maxwell Land Grant Company, on the 16th day of July, A. D. 1884, to and in favor of Valentine S. Shelby for the period of thirty-five years from said 16th day of July, 1884, together with the reversion, reversions, remainder and remainders, rents, issues and profits of all and singular the said premises and every part and parcel thereof, with the appurtenances. To have and to hold unto the said party of the second part his heirs and assigns forever; In trust, nevertheless, to the intent and purpose following, to wit:

"Whereas, the said Clinton Butterfield has made, executed and delivered his three (3) certain promissory notes, bearing even date herewith, payable to Valentine S. Shelby, James Lynch, and Thomas B. Catron, or order, for the sum of one hundred and thirty-five thousand dollars (\$135,000) the first of said notes being for the principal sum of fifteen thousand dollars (\$15,000) and payable on or before January 15, 1894, the second of the notes being for the principal sum of fifty thousand dollars (\$50,000) payable on or before July 1, 1894, and the last of said notes being for the principal sum of seventy thousand dollars (\$70,000) payable on or before January 1, 1895, with interest thereon in the manner following to wit: On said first note for fifteen thousand dollars (\$15,000) from July 1, 1893, until paid at the rate of 12 per cent. per annum, on said note for fifty thousand dollars (\$50,000) from date until January 1st, 1894, at six per cent. (6%) per annum, and after January 1, 1894, at twelve per cent. (12%) per annum, and on said note for seventy thousand dollars (\$70,000) at the rate of six per cent. (6%) per annum from date until July 1, 1894, and on twenty thousand dollars (\$20,000) thereof at the rate of twelve per cent. (12%) per annum from January 1, 1894, and with interest upon all of said notes after maturity at 12 per cent. per annum principal and interest payable at the office of

the Aztec Gold Mining & Milling Company, Denver, Colorado. And the party of the first part, for himself, his heirs and assigns, agrees that he or they will, on or before the 25th day of each and every month, commencing with the month of September, 1893, deposit in the Colorado National Bank, Denver, the amount of the net earnings of said mine for the then preceding month, such net earnings to include all earnings over and above the cost of development, maintenance, operation and all necessary improvements placed upon said property from and after the date when the party of the first part, his heirs and assigns, shall take possession thereof and it being agreed that such improvements shall remain upon and shall become part and parcel of said premises, the amount of such net earnings, when as received by said bank shall be credited and applied upon said note for fifteen thousand dollars (\$15,000) in reduction thereof, and in order to enable said bank to make such application said note for fifteen thousand dollars (\$15,000) shall be deposited in said bank and shall be held by it until the amount of said net earnings shall be sufficient to cancel and discharge said note, whereupon it shall be delivered up to the said party of the first part, his heirs and assigns. Provided, however, that if the amount of such net earnings shall not have been sufficient to cancel such note on or before the 15th day of March, 1894, it shall then be delivered up to the said Shelby, Lynch and Catron, their heirs and assigns.

"Now, therefore, if the said party of the first part shall well and truly pay said notes when the same shall become due and payable according to their tenor and effect, with interest as aforesaid, then this indenture shall become void and of no effect, but in case default be made in the payments of the said notes or either of them or the interest thereon or any part of such principal or interest, then the party of the second part may at any time thereafter take possession of said property and the improvements which may then be thereon, give notice by advertisement published once each week for four successive weeks in one weekly newspaper then published in said county of Colfax, and in one weekly newspaper published in the city of Denver, Colorado, that he will sell the premises, property and improvements therein conveyed by public outcry, at a day and hour to be by him fixed, at the front door of the building at that time used as a courthouse in said county of Colfax, and territory of New Mexico, for cash, to the highest and best bidder, and thereupon shall proceed to sell the same according to the terms of such notice, and shall make, execute, acknowledge and deliver to the purchaser at such sale a good and sufficient deed in fee simple, absolute, conveying the hereinbefore described premises, without liability, upon such purchaser for the subsequent disposition of the proceeds of such sale, provided, nevertheless, that no sale of said premises

shall be made by reason of such default in the payment of said notes or either of them or the interest thereon, until ninety (90) days after such defaults have occurred; and out of the proceeds of such sale, the said trustee shall pay, first, the costs incident to such notices, sale and conveyance, together with a reasonable attorney's fee; second, the amount of said notes and interest remaining unpaid or so much thereof, as such proceeds shall amount to, and the balance, if any, he shall pay to the party of the first part, his heirs and assigns. In case of default in the payment of any one or more of said notes or the interest thereon when the same shall become due and payable according to the terms thereof, and such default shall continue for the period of ninety (90) days from and after the date when such notes shall become due and payable according to the terms thereof, then the whole of said notes shall become immediately, thereupon, due and payable.

"In witness whereof the said party of the first part has hereunto set his hand and seal.

"Clinton Butterfield. [Seal.]"

On September 4, 1894, the Maxwell Land Grant Company entered into a contract of sale with the Aztec Gold Mining Company to sell said company its seven-twelfths interest in the Aztec lode and other property adjoining and surrounding same, containing in all about 320 acres of land, reserving some property included in the boundaries, but including the Aztec mine, and, as we understand it, the mill site and all other property involved in this suit. In March, 1894, the Aztec Company having acquired the Butterfield interests to the Aztec lode or mine, contracted with the Stearns-Roger Company for certain tramway material, stampmill material, and mill extras, and stock material, amounting in all, to \$17,332.96. Of this sum all was paid except a balance of \$5,000, and on December 8, 1894, the Stearns-Roger Company filed a verified statement for a lien, and on said date filed a duly verified statement for a further mechanic's lien of \$810.41 as a balance due it for further machinery sold and furnished over and above that enumerated in the written contract of March, 1894. On June 14, 1894, the Aztec Gold Mining & Milling Company entered into a contract with one Smith McKay, as follows:

"This agreement made and entered into this 14th day of June, A. D. 1894, by and between Smith McKay, of the city of Denver, state of Colorado, party of the first part, and the Aztec Gold Mining & Milling Company, a corporation organized and existing under and by virtue of the laws of the state of Colorado, party of the second part, witnesseth: Said party of the first part hereby agrees: First, to furnish all tools, labor, and to pay all expense of every character for such labor, for the erection complete, of a certain 40 stampmill on site to be selected by the party of the second part, which said mill is more

fully described in a certain contract between the said party of the second part and the Stearns-Roger Manufacturing Company, and by a certain set of drawings furnished by the Stearns-Roger Manufacturing Company, all the machinery, with pipings, settings, whether of timber or masonry, and the placing of all bolts, and in short, the complete erection of all the machinery comprising the said mill from the grizzly through to the copper tables; to start up and run said machinery complete for a term of not less than ten (10) days, and to turn over same to the satisfaction of said party of the second part, or its representatives, subject, however, to the proviso hereinafter contained. And said party of the first part hereby guarantees that should any part of the work be wrong or incomplete that he will at his expense make same good. Second, to supervise the construction of the mill building as per plans furnished by the Stearns-Roger Manufacturing Company, or such modifications of such plans as may be agreed upon by the parties hereto. In consideration of which the said party of the second part hereby agrees to furnish to said party of the first part all materials of every character whatsoever for the construction of the mill building, the machinery and the material for the setting thereof, as above specified, to be delivered on the site of the mill to said party of the first part, and pay unto said party of the first part the sum of three thousand dollars (\$3,000.00) as follows, to wit: One-third ($\frac{1}{3}$) on the completion of the boilers set in place, and of the engine foundation, and of the stamp battery foundation; one-third ($\frac{1}{3}$) on completion of the stamp battery frame with stampmill set in place, and of the pulleys, boxes and line shafts; balance on the satisfactory completion and turning over of the entire work in first class running order. In witness whereof said parties have hereunto attached their hands and seals the day and year first above written.

"Smith McKay. [Seal.]

"The Aztec Mining & Milling Co. [Seal.]

"By Sherman G. Sackett, Supt."

On December 11, 1894, McKay filed a duly verified statement and claim of lien for a balance of \$575, claimed to be due him on his contract. These mechanics' liens are all claimed on the mill site where said mill was situated, and also on the Aztec lode or mine, and it is alleged that they were all filed within 90 days from the completion of the contracts or furnishing of the materials as above set forth. This suit was brought to foreclose the mechanics' liens thus claimed, and the Aztec Gold Mining & Milling Company, the Maxwell Land Grant Company, James Lynch, receiver, Henry F. Moore, trustee, Valentine S. Shelby, James Lynch, and Thomas B. Catron are made defendants. The case was referred to a master who found for the lien claimants, and his findings of fact and conclusions of law were in the main confirmed, and a decree

entered in favor of the appellees sustaining their liens and adjudging them first and prior to the lien of the trust deed from Butterfield to Moore, and from the decree of the district court of Colfax county appellants, the Maxwell Land Grant Company, Thomas B. Catron, and Mary Lynch, administratrix of the estate of James Lynch, deceased, bring the case here for review on appeal.

T. B. Catron, C. A. Spiess, and E. V. Long, for appellants. W. L. Hartman, C. A. Ballreick, and Veeder & Veeder, for appellees.

MANN, J. (after stating the facts as above). Counsel in this case have filed very able and exhaustive briefs discussing and presenting every phase and feature of the mechanic's lien laws, and indeed nearly every possible question arising under that branch of the law has been raised by the record in this case, making it necessary for the court to examine at some length our mechanic's lien laws in order to answer the following questions presented: (1) Did the Stearns-Roger Company acquire a mechanic's lien for the materials furnished the Aztec Mining & Milling Company, and did McKay acquire such lien for the labor furnished and performed by him for such company? (2) If such liens were acquired, what property was subjected thereto? (3) Were such liens, if acquired, superior to the trust deed from Butterfield to Moore, trustee, for the benefit of Shelby, Catron, and Lynch? (4) Was the interest of the Maxwell Land Grant Company subject to such liens? While the case may be disposed of before all of these questions are disposed of, yet they are all fairly raised and argued by counsel in the briefs that we feel they are entitled to the full consideration of the court, especially as they are of vital interest to a complete understanding of the mechanic's lien law of the territory.

Taking up, then, the first question referred to, it is contended by counsel for appellants that the contract having been made in Colorado, and, as they contend, performed there by delivery of the materials f. o. b. at Pueblo, in Colorado, it thereupon became the property of the Aztec Gold Mining & Milling Company, in Colorado, and was placed in the mill and tramway as the property of the Aztec Company, and that therefore no lien attaches, the sale and delivery being complete, and the property being vested in the Aztec Company before it entered the territory where the lien must attach, if at all. Section 2217, Comp. Laws, provides that "every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road or aqueduct to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or

materials furnished by each respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent, and every contractor, subcontractor, architect, builder, or other person having charge of any mining, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this act." This court passed upon the very question presented upon the furnishing and delivery of materials outside the territory in *Genest v. Las Vegas Bldg. Ass'n*, 11 N. M. 251, 67 Pac. 743. In that case Mr. Justice Crumpacker, delivering the opinion of the court, says (pp. 269, 270 of 11 N. M., p. 748 of 67 Pac.): "It is fifthly contended by counsel for appellants that as the contract between the Newton Lumber Company and the Contractor Kean was made out of the territory, and the materials used in the construction of the building were delivered by it to the contractor, f. o. b. cars Pueblo, no lien in the company's favor can arise under the New Mexico statute. We are of the opinion that under the circumstances presented by the record in this case the rights of the subcontractor to enforce the lien claimed are not destroyed or impaired by the fact that by said contract the Newton Lumber Company agreed to and did sell and deliver the goods in another state. It appears from the complaint, the copy of notice of lien therein set forth, and the proofs that the Newton Lumber Company agreed to furnish the materials for use in the construction of the building, and that it agreed to perform certain labor to and for the Contractor Kean and for use in the construction and completion of said Masonic Temple, and that it did so furnish the material, perform certain work in Las Vegas on the building, put up the stairs, set the front, and finish the Montezuma Club. * * * It is the furnishing of materials to be used in the construction and the putting them into the building which entitles the subcontractor to the lien upon the premises to the extent of the value of that material. The case cited by counsel for appellants of *Birmingham Iron Foundry v. Glencon Starch Mfg. Co.*, 78 N. Y. 30, is under a statute much more restrictive in its terms than ours, * * * and these cases are therefore not a guide to correct judgment in the present case. The statute of New Mexico is general, and does not restrict the right of lien to cases where materials are sold and delivered in this territory, and we conclude that the contention of counsel for appellants in this regard is not tenable. *Malloy et al. v. Abbatoir Co.*, 80 Wis. 170, 49 N. W. 1071; *Campbell v. Coon*, 149 N. Y. 556, 44 N. E. 300, 38 L. R. A. 410; *Gaty v. Casey et al.*, 15 Ill. 189." We have quoted extensively from this case for the reason that it discusses and decides the very point raised by counsel, and seems to us sound in

principle and fully sustained by authority. 27 Cyc.—citing *Great Western Mfg. Co. v. Hunter*, 15 Neb. 32, 16 N. W. 759; *Parker Land, etc., Co. v. Reddick*, 18 Ind. App. 616, 47 N. E. 848; *Badger Lumber Co. v. Mayes*, 38 Neb. 822, 57 N. W. 519; *Mallory v. La Crosse Abbattoir Co.*, 80 Wis. 170, 49 N. W. 1071; *Atkins v. Little*, 17 Minn. 342 (Gil. 320). But counsel contend that the contract between the Aztec Company and the Stearns-Roger Company does not show specifically that the materials were to be used in the construction of the identical stampmill and tramway in question, the same not being described or mentioned in the written contract set out in the claim of lien and in the complaint, and that therefore it cannot be shown by parol that such materials were to be used. We think, however, that as a written contract is wholly unnecessary to entitle appellees to its liens, under the statutes of the territory, it may show by parol testimony, which neither disputes nor alters the terms of the writing, that such material was furnished for use in the construction of the improvement of the property on which the lien is claimed. The written contract not being the basis of the action, it may be shown by any competent proof, the contract need not describe the land unless the statute requires it. 27 Cyc. Law & Pro. 69—citing *Montandon v. Deas*, 14 Ala. 33, 48 Am. Dec. 84; *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111; *San Diego Lumber Co. v. Wooldredge*, 90 Cal. 574, 27 Pac. 431. See, also, *Mountain Electric Co. v. Miles*, 9 N. M. 512, 56 Pac. 284. The bill and notice of lien state specifically that the materials were furnished for the identical mill and tramway in controversy, and this is sustained by the oral evidence of the witness Stearns (page 51, Record) and other witnesses, including the correspondence between the parties, and there seems to be no doubt from the evidence that the materials were duly received by the Aztec Company and placed in the mill and tramway. The notices of lien of the Stearns-Roger Company were filed within the time required by law, as found by the trial court, and we see nothing in the record that would justify a reversal of that finding. As to the McKay lien, the contention of counsel is that part of his services were for superintendence and part for labor, and that he cannot acquire a lien for superintendence, and, further, that as his notice of lien does not disclose what portion was for actual labor performed, and what part was for superintendence, therefore he cannot maintain his lien, and in support of their contention counsel cite the case of *Boyle v. Mountain Key Mining Co.*, 9 N. M. 237, 50 Pac. 347. We think, however, that the distinction between the nature of the employment between Boyle in that case and McKay in the case at bar is clearly distinguishable, and that the right of the latter to a lien for his services is clear. In the case of *Mining Co. v. Cullins*, 104 U. S. 176, 26

L. Ed. 704, cited with approval by this court in the Boyle Case, Mr. Justice Woods used the following language, which is applicable to this case: "The finding of the district court makes clear the character of the services rendered by the defendant in error. He was not the general agent of the mining business of the plaintiff in error. That office was filled by Patrick. He was not a contractor. His services were not of a professional character, such as those of a mining engineer. He was the overseer and foreman of a body of miners who performed manual labor on the mine. He planned and personally superintended and directed the work, with a view to develop the mine and make it a successful venture. His duties were similar to those of a foreman of a gang of track hands upon a railroad, or of a force of mechanics engaged in building a house." In the Boyle Case the lien claimant was the general superintendent of the mining company on a salary of \$3,000 per year, and had general oversight of the company's business, its mine, mill, boarding house, etc., and was in fact a salaried general agent of the company, not charged with a special oversight of the improvement of the property itself as the foreman of certain development work, while under this contract McKay was charged by his contract with the erection of this mill by a certain set of drawings furnished him by the Aztec Company, thus showing that he was engaged in the personal oversight of building the mill according to plans and specifications furnished him. The difference in the two cases is obvious, and we think there can be no question but McKay was and is entitled to a lien for the services performed by him.

2. Having decided that the Stearns-Roger Company and McKay were each entitled to mechanics' liens under the statute of the territory, the next question which naturally arises is, to what property do such liens attach? It will be observed that the stampmill which McKay built for the Aztec Company and the materials for which, in the way of machinery, were furnished by the Stearns-Roger Company, was located about 1,000 feet from the mouth of the tunnel or working shaft of the Aztec mine. It is described in the latter's claim for lien as being "situated at a point 1,350 feet south 53° 30' west from the southeast corner No. 1 of the Aztec mining claim or lode," and as that lode ran 3,000 feet in an easterly and westerly direction the mill was not located between the side lines of lode claim, if indeed there were any well-established surface lines. There was, however, a tramway from the mouth of the tunnel or workings on the Aztec mine from which the ores were taken to the mill, and as the materials for this tramway were furnished by the Stearns-Roger Company, and as both the Stearns-Roger Company and McKay claim that the Aztec mine is "required for the convenient use and occupation" of

the mill, they claim that their lines attach to the mine as well as the mill site. The master to whom this case was submitted found as one of his findings of fact as follows: "Eighteenth. That said 40 stampmill, mill building, tramway, tracks, and all other of said buildings, erections, and improvements were made, constructed, and erected under one general design and plan, and all to be used solely for the purpose of altering, constructing, and repairing said mining claim, and for working and developing the same and extracting the ores from said Aztec mine, and for transporting the same to said mill, and for treating such ores and extracting the gold therefrom, in and by said 40 stampmill, and that said mine and mill are of very little value or practical utility separate and apart from each other, and that therefore said Aztec lode or mining claim and said mill site or tract of land adjacent to said Aztec lode, and on which said mill is located, together with said mill, mill building, tramway, track, and other improvements constitute and are 'one mining claim,' and that all of the said Aztec lode or mining claim, and all of said mill site or tract of land adjacent thereto, on which said mill or other erections and tramway are located, are necessary for the convenient use, occupation, operation, and enjoyment of said mining claim or Aztec lode, and also are necessary for the convenient use, occupation, and operation of said tramway and 40 stampmill." The amount of land upon which the building, improvement, or structure is constructed, and which is to be included in the lien, is to be "so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment." Section 2219, Comp. Laws, 1897. Under the pleadings and proofs in this case it appears quite clearly that the fee to all this land, including the mill site and Aztec mine or lode, was in either the Maxwell Land Grant Company or the Aztec Gold Mining & Milling Company, and that that portion to which the former company held the fee the latter company held and occupied under lease or contract at the time the improvements were made. It was perfectly competent for the trial court to determine the amount of land to which the liens should attach in rendering judgment, and it did do so by adopting and confirming the master's report. As is said in *Springer Land Association v. Ford*, 168 U. S. 513, 530, 18 Sup. Ct. 170, 176 (42 L. Ed. 562): "The truth is that what area of land is subject to lien in a given case depends upon the character of the improvement." The Supreme Court of the United States was then construing the very statute here under consideration, and it held that the lien for building and constructing the ditch system there involved covered the entire amount of lands irrigated by the system, saying of the land and ditches: "Each

was dependent upon the other, and both were bound together in the accomplishment of a common purpose," viz., the irrigation of the lands susceptible of irrigation from the system of ditches which were the improvements on which the lien claimants there contended for a lien. In the case at bar the findings of the master, which were adopted and confirmed by the court, are to the same effect, and we cannot say that from the pleadings and record before us such finding was not justified. If the record showed that these properties, the mill site and the mine, were in every sense separate and distinct and owned by different parties as appellants' counsel contend in their brief, we might be confronted by a very different question; but it seems certain that the mine and mill were operated by the same company and for the sole purpose of treating the ores taken from the Aztec mine, and there is at least no evidence that it was a custom mill, or used for any other purpose than the treatment of its own ores, taken from this one certain mine.

3. The next question is a far more serious one, that is, whether or not the mechanics' liens of the Stearns-Roger Company and McKay are superior to and take precedence over the trust deed from Butterfield to Moore for the benefit of Shelby, Lynch, and Catron. Section 2220, Comp. Laws, reads as follows: "The liens provided for in this act preferred to any lien, mortgage or other incumbrance which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage or other incumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done; or the materials were commenced to be furnished." Section 2226 reads: "Every building or other improvement mentioned in section two thousand two hundred and seventeen, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this act, unless such owner or person having or claiming an interest therein, shall within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon."

These sections of the mechanic's lien law of the territory are both parts of the same act, the former appearing as section 5 and the

latter as section 11, of the laws of 1880 (pp. 65, 67, c. 16), when the present mechanic's lien statutes were enacted, and were therefore passed by the same Legislature and at the same time. It is the contention of appellees that section 2226 makes it obligatory upon the mortgagee of a prior recorded mortgage, in order to maintain the priority of his lien, to give the notice therein provided, and that on failure to do so within the three days, as prescribed in that section, a subsequently accrued mechanic's lien takes precedence over the mortgage. They contend that the term "having or claiming any interest" in the land upon which the improvement is erected is broad enough and was intended to cover the lien of a mortgage upon the property. But we cannot concur in this contention, nor do we think the mechanic's lien law of 1880 is susceptible of such a construction. The fact that section 2220 (section 5 of the act in question) explicitly made the liens provided for in the act preferred "to any lien, mortgage or other incumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done or materials commenced to be furnished; also to any lien, mortgage, or other incumbrance of which the lienholder had no notice, and which was unrecorded at the time"—just as effectually prefers the liens and incumbrances not coming within the class enumerated as though so enacted in express terms under a well-settled rule of statutory construction. Sutherland on Stat. Con. §§ 326-328. We think the Legislature clearly intended to and did make a distinction between mortgagees, lienholders, and those having an incumbrance, duly recorded and accrued prior to the accruing of the mechanic's lien, and those having or claiming any interest in the lands upon which the lien is claimed. This court, in *Cleland v. Alexander* (N. M.) 86 Pac. 425, speaking through Chief Justice Mills, makes use of the following language: "However created, a lien (and a mortgage is a lien) is not an interest in land, but merely a security for the payment of a debt"—citing numerous authorities in support of that statement; and, while the court did not then have this statute under consideration, yet the principle is the same, and is sustained by the great weight of authority in the United States, and may be said to be the modern doctrine and generally accepted as the true one in this country. 27 Cyc. 961, and authorities cited; 1 Jones on Mortgages (2d Ed.) § 58. This has always been the doctrine held to by the courts of equity, and "the equitable view has largely encroached upon and sometimes quite superseded the legal even in courts of law." 1 Jones on Mtgs. § 8. The mortgagee has no interest in the land described in his mortgage until default in the terms of the mortgage. He cannot take the possession, nor interfere in its management or control, unless his security may be diminished. A transfer of the in-

debtedness as the indorsement and delivery of the note secured carries with it the mortgage, which is only an incident to the debt, and, unless the mortgage carries with it a power of sale, he must foreclose by a suit in equity before he can apply the proceeds to the payment of his debt when due. The Legislature evidently had in mind the difference between the mortgagee or other lienholder and those having or claiming an interest when the two sections (2220 and 2226) were both included in the act. The first was evidently intended to secure a preference to prior recorded mortgages and liens, and to give the benefit of the statutes against unrecorded mortgages and liens, of which the lien claimant had no knowledge, while the latter section (2226) referred to lessees, vendees under contract of sale, and like persons, who claim the fee or some estate or interest in the land itself. The trust deed from Butterfield to Moore was in effect a mortgage. "A deed of trust to real estate, executed for the purpose of securing a debt conditioned to be void upon payment of the debt, and containing a power of sale upon default, is essentially a mortgage, and does not differ in its legal operation and effect from an ordinary mortgage with power of sale. Like a mortgage, such a deed is a mere security for a debt, or for the performance of certain undertaking by the grantor. It is a mere incident to the debt which it secures, upon which it depends, and which it follows and will pass with an assignment of the debt to the holder." 27 Cyc. 967—citing numerous authorities, including *Arkansas, California, Connecticut, District of Columbia, Georgia, Idaho, Illinois, Massachusetts, Nebraska, North Carolina, Oregon, Pennsylvania, Texas, Utah, and Wisconsin*. *Shillaber v. Robinson*, 97 U. S. 68, 24 L. Ed. 967; 2 Jones on Mortgages, § 1769. It is contended that this trust deed is a grant coupled with an interest, and is not in the nature of a mortgage; but a scrutiny of the instrument, which is set out in the statement of facts, must convince one of its nature. There appears on its face no other intention of the parties than that of security for the debt named therein, and the court will always look at the substance rather than the form. The Legislature in thus securing to the bona fide mortgagee who had complied with the recording acts a preference over the person performing labor or furnishing material for improvements on the land, acted justly and in accordance with equity and common sense. The laborer or materialman has notice of the prior lien, or may have by searching the records, before his labor is performed or his material furnished, and it is only just that he use the ordinary caution of ascertaining as to prior liens beforehand, while, on the other hand, if the mortgagee had filed his mortgage for record, and thus given notice of it to the world, it would be absurd to compel him to watch his security lest some laborer or materialman enter the premises and "improve"

him out of it. Indeed to compel a mortgagee living more than a three days' journey from his security to post a notice thereon within three days of his obtaining knowledge of such improvement would be very near to confiscation of it.

4. The Maxwell Land Grant Company, in its answer, admits its interest in the property upon which the mechanics' liens of the Stearns-Roger Company and McKay are sought to be enforced, but denies any knowledge of the improvements being made, so that the only question as to whether or not its interests are subject to these liens is the question of notice. The evidence offered by appellees on this point is to the effect that Mr. M. P. Pels, the general manager of the Maxwell Land Grant Company, knew of the improvements at the time they were being constructed, and so informed Mr. Stearns, and that said Pels told him personally that he knew of no notice being posted. There also appears in the record a contract between the Aztec Company and the Maxwell Land Grant Company, which is signed by Mr. Pels as general manager, on behalf of the last-named company. Nowhere in the record is there any denial by the Maxwell Company of the fact that Pels was its general manager during that time. "The general rule is that notice of a fact acquired by an agent while transacting the business of his principal operates constructively as notice to his principal. As corporations from their nature can never act except through the instrumentality of their agents, and can never be acted upon except through the instrumentality of their agents or their property, this principle applies with peculiar force to them." 10 Cyc. 1053, and cases cited. The general manager of a corporation is defined in 4 Words and Phrases Judicially Defined (p. 3073) as "the person who really has the most general control over the affairs of a corporation, and who has knowledge of all its business and property, and who can act in emergencies on his own responsibility, and who may be considered the principal officer"—citing *Robert Lee Silver Min. Co. v. Omaha & G. S. Co.*, 16 Colo. 118, 26 Pac. 326, 327; *Kansas City v. Cullinan*, 65 Kan. 68, 68 Pac. 1099, 1102. We think, in the absence of any evidence tending to dispute Pels' authority as general manager and of his knowledge of the improvements being made and the materials furnished as shown by appellees, the trial court was justified in finding that the Maxwell Land Grant Company had due notice, and, as it is not claimed that it posted any notice under section 2226, Comp. Laws, it follows that its interests in the property are subject to the liens of the appellees.

Numerous questions are discussed in the briefs of counsel, such as the reasonableness of the amount of attorney's fees by the trial court which we have not commented upon, but suffice it to say that, with the exception of the questions of priority of the liens created by

the deed of trust from Butterfield to Moore and the mechanics' liens of the appellees, we think the trial court was fully justified in its findings of fact and conclusions of law as finally adopted, and that there was no error in its decree, except in that respect.

For the reasons given, the decree of the trial court is reversed, and a decree will be rendered in this court in accordance with the views expressed herein, and it is so ordered.

McFIE, PARKER, POPE, and ABBOTT, JJ., concur. MILLS, C. J., having heard this cause below, did not participate.

POPE, J. (concurring). The opinion of the court contains an announcement of the doctrine that under the laws of this territory a mortgage passes no legal estate but is a mere lien. While assenting fully to this conclusion, the practical importance of this question, which has been a much mooted one in this territory for many years, leads me to record my reasons for concurring in this decision of the court, and in so doing to trace briefly the history of the doctrine thus adopted as the rule in our own jurisdiction. At common law the rule was undoubted that a mortgage vested the title to real estate in the mortgagee with the accompanying right of possession, and as between mortgagor and mortgagee the latter was the legal owner. *Brobst v. Brock*, 10 Wall. (U. S.) 519, 19 L. Ed. 1002; *Cotton v. Carlisle*, 85 Ala. 175, 4 South. 670, 7 Am. St. Rep. 31. This doctrine has been superseded in many jurisdictions by statute, in others without statute, and, even in those jurisdictions which have retained the common-law rule, it has been limited so that the mortgagee's interest is treated as real estate only so far as is necessary for his protection and to give him the full benefit of his security. *Hutchins v. King*, 1 Wall. (U. S.) 53-60, 17 L. Ed. 544; *Waterman v. MacKenzie*, 138 U. S. 259, 11 Sup. Ct. 334, 34 L. Ed. 923; *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 221. And it has been held that a sale or conveyance of the estate is not one of the purposes for which the mortgagee's interest is to be so treated. *Bell v. Morse*, 6 N. H. 205. The tendency of the decisions is shown by *Carpenter v. Longan*, 16 Wall. (U. S.) 275, 21 L. Ed. 313, where it is held that "the debt is the principal thing and the mortgage an accessory," and by *Waterman v. MacKenzie*, supra, where it is said that mortgages of real estate have "come to be more and more considered as a mere security for the debt, leaving the title in the mortgagor." The New York courts at an early date led in a departure from the common-law rule, and their influence is shown in the fact that practically all of the states west of the Mississippi now hold that a mortgage is a mere lien, passing no title. The views of the various state courts are fully set out in 1 *Jones on Mortgages* (6th Ed.) §§ 13-59, where it is said, after reviewing the several

state doctrines (section 59): "Grouping the states geographically, it will be noticed that the English doctrine of the nature of mortgages, with slight modifications, prevails east of the Mississippi in a large majority of the states, while west of the Mississippi, except only in the states of Missouri and Arkansas, the doctrine everywhere prevails that a mortgage passes no legal estate or right of possession." This condition of things is ascribed by the same learned author (section 59) not so much to statute as to the influence of the early New York cases and the civil law, and in California, whose Supreme Court, speaking through Mr. Justice Fields, has been most potent in implanting the New York doctrine west of the Mississippi, the courts, in addition to holding that "a mortgage is mere security for the debt and vests no title either before or after condition broken" (*McMillan v. Richards*, 9 Cal. 410, 70 Am. Dec. 655; *Nagle v. Macy*, 9 Cal. 426), indicate that such holding is not the result of statute, but is equally applicable upon sound principle to mortgages executed prior to the California statute (*Dutton v. Warschauer*, 21 Cal. 623, 82 Am. Dec. 765; *Mack v. Wetzlar*, 39 Cal. 255). It is undoubtedly true, however, that the divergence from the common law not only in New York but in the Western jurisdictions has been largely the result of statutes, some of them declaring that the right of possession shall continue in the mortgagor, and others declaring in terms that a mortgage shall be construed as a mere lien. *McMillan v. Richards*, 9 Cal. 410, 70 Am. Dec. 655, and *Fogarty v. Sawyer*, 17 Cal. 592, indicate the influence of the New York and California statutes on the subject. The Oregon statute is discussed in *Teal v. Walker*, 111 U. S. 250, 4 Sup. Ct. 420, 28 L. Ed. 415, and is held to "cut up by the roots" the common-law doctrine and to "give effect to the view of the American courts of equity that a mortgage is a mere security for a debt." The same statute is considered in *Savings Society v. Multnomah Co.*, 169 U. S. 426, 18 Sup. Ct. 392, 42 L. Ed. 903. Among the cases developing the doctrine, mostly as to the result of statutory provisions, are *Chick v. Willetts*, 2 Kan. 384; *Caruthers v. Humphrey*, 12 Mich. 270; *Humphrey v. Hurd*, 29 Mich. 44; *Hoffman v. Harrington*, 33 Mich. 392; *Gallatin v. Beattie*, 3 Mont. 173; *Balduff v. Griswold*, 9 Okl. 438, 60 Pac. 223; *Stevens v. South Ogden Company*, 20 Utah, 267, 58 Pac. 843; *State v. Superior Court*, 21 Wash. 564, 58 Pac. 1065; *Wood v. Trask*, 7 Wis. 566, 76 Am. Dec. 230; *Wright v. Henderson*, 12 Tex. 43; *Drake v. Root*, 2 Colo. 685; and cases cited in 1 *Jones on Mortgages*, §§ 13-59. While the precise question has never been expressly decided by this court, it is held in *Territory v. Co-operative Bldg. & Loan Ass'n*, 10 N. M. 337, 62 Pac. 1097, that real estate mortgages are personal property, and this court in speaking in this case, through Mr. Justice McFie, uses expressions which indicate the views of the

court to be that a mortgage is primarily a security. There are expressions to the same effect in *Cleland v. Alexander* (N. M.) 86 Pac. 425, cited *supra*, in the opinion of the court. Considering the question, however, as an open one up to the present time, and recognizing the common-law rule as prevailing in this territory, unless altered by statute, I am of the opinion that the Legislature by Comp. Laws, § 2365, has changed the common-law rule, and that the reason of all the cases above cited from Western jurisdictions applies to this territory. At common law, as we have seen, the making of the mortgage conferred the right of immediate possession upon the mortgagee as in the case of any other grantee. But our Legislature has provided by Comp. Laws, § 2365, that, in the absence of stipulation to the contrary, "the mortgagor of real * * * property shall have the right of possession thereof." This, by withholding from the mortgagee the right of possession until foreclosure, sale, and purchase, "cuts up by the roots the common-law doctrine" (*Teal v. Walker*, *supra*), and "deprives the mortgagee of the only material advantage which remained to him from being considered the owner of the fee" (*Chief Justice Emmett in Adams v. Corriston*, 7 Minn. 456 [Gil. 365]). This statutory provision in my judgment changes the common-law rule and places the law in this territory upon the same bases as in California and the other Western jurisdictions.

This is the view evidently taken by the learned author of *Jones on Mortgages*, for at section 43 he quotes our Comp. Laws, § 2365, and at sections 58 and 59 names New Mexico expressly as being among the jurisdictions in which the mortgage "passes no title or estate * * * to the mortgagee, and gives him no right of possession before foreclosure." It is not a cause for regret that this statutory provision makes it possible to declare the law in New Mexico to be thus in accord with common sense, as opposed to a common-law fiction. In popular opinion a mortgage is universally regarded as a lien. Men buy and sell mortgaged realty, and always consider that they are purchasing, not a mere equity of redemption, but the property itself, subject only to the obligation to pay off the lien of the mortgage. The nearer law can be brought to the bases of common sense and every day comprehension, the nearer it will be a rule of conduct lived up to in public and private life, and the stand taken by the Western courts on this subject has tended very strongly to this salutary result. As is well said by the Supreme Court of Kansas in *Chick v. Willetts*, 2 Kan. 386: "In this state a clean sweep has been made by statute. The common-law attributes of mortgages have been wholly set aside; the ancient theories have been demolished; and, if we could consign to oblivion the terms and phrases—without meaning except in reference to those theories—with which our reflections are still

embarrassed, the legal profession on the bench and at the bar would more readily understand and fully realize the new condition of things." For these reasons I concur in the doctrine announced by the opinion of the court on this subject.

(14 N.M. 334)

RICHARDSON et al. v. PIERCE.

(Supreme Court of New Mexico. Jan. 13, 1908.)

1. TRIAL.—RECEPTION OF EVIDENCE.—ORDER OF PROOF.

In the discretion of the court the declaration of a partner may be received, to become competent against himself and the remaining partner, should a partnership relation become established later in the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 133-153.]

2. ACCOUNT, ACTION ON.—VERIFICATION.—EVIDENCE.

Under section 2931, Comp. Laws 1897, a verified account attached to a complaint was properly admitted in evidence to prove the debt, when the answer does not, under oath, deny its correctness, and it was not necessary to prove the account by the books of original entry.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Account, Action on, § 37.]

3. APPEAL.—REVIEW.—FINDINGS OF FACT.

There being substantial evidence in the record to sustain the findings of the court as to the existence of the partnership between Richardson and Cravens, this court will not disturb the judgment to that effect given by the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

(Syllabus by the Court.)

Error to District Court, Otero County; before Justice Edward A. Mann.

Action by R. H. Pierce against George Richardson and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. E. Wharton, for plaintiffs in error. Byron Sherry, for defendant in error.

MILLS, C. J. This is a suit brought by R. H. Pierce against George Richardson and J. C. Cravens, formerly partners doing business under the name of Richardson & Co. The suit is based on a balance claimed to be due for goods and merchandise sold by Pierce to Richardson & Co. between September 9, 1902, and February 20, 1903, and the sum claimed to be due is \$393.68, with interest from February 1, 1904, at the rate of 6 per cent. per annum. Attached to the complaint and made a part thereof is an itemized copy of the account sued on. The complaint is duly sworn to. A jury was waived, and the cause was tried by the court, and on September 28, 1905, a judgment was entered against the defendants for the sum of \$436.31.

The transcript of record in this case is an imperfect one, as an examination of it discloses that it was filed in the office of the clerk of the Supreme Court on December 28, 1906, while the certificate of the clerk of the district court of Otero county, certifying to

its correctness, is dated December 29, 1906, and the certificate of the presiding judge of the Sixth judicial district of this territory is dated December 31, 1906, which is after the transcript of record was filed in this court. If a transcript is not certified to as correct by the proper persons, it should not be received and filed by the clerk of this court, and if it is inadvertently so received and filed it will not be considered by this court, if objection is made thereto; for, as it is not certified to as correct, there is no proof before us that it is a true record of the proceedings held before the trial court. We have held in a criminal case (*Haynes et al. v. United States*, 9 N. M. 519, 56 Pac. 282) that when a district judge signs and seals a bill of exceptions at a later date than authorized by the statute he exceeds his authority, and, on motion, the bill of exceptions will be stricken from the record; and this rule would seem to apply to the case at bar, although it is a civil proceeding. More than the statutory time also elapsed between the taking out of the writ of error and the filing of the same in this court; but, as no objection has been made by the defendant in error, we have concluded to consider the case on its merits.

1. The first error assigned by the plaintiff in error is that the court erred in permitting R. H. Pierce to testify that Richardson told him that Cravens was a member of the firm of Richardson & Co.; Cravens not being present at the conversation. In support of this proposition the plaintiff in error cites no authorities; but we incline to the opinion that, if this was all of the evidence as to the partnership introduced at the trial, the court would not have been justified in giving a judgment in favor of Pierce. But this is not the case, as Pierce testifies that prior to the beginning of this suit he had several conversations with the defendant Cravens in relation to the claim against Richardson & Co., and that Cravens promised to pay it; that in one conversation in relation to the claim Cravens stated that he could not pay it then, but that he would be able to do so later on; that in a talk had in April or May, 1904, Cravens told him that he was going to send him some money on account, and that he afterwards did send him \$200, which was credited on the account. He also testified that at no time during these conversations did Cravens ever deny being a partner of the firm of Richardson & Co. Mr. Richardson, one of the partners comprising the firm of Richardson & Co., testified that Cravens was a member of that firm, and James Boone also testified to the existence of the partnership, and that plaintiff in error admitted the existence of the indebtedness and expressed the desire to settle it.

This evidence of Pierce, as to the statement made by Richardson as to Cravens being his partner, may have been admitted in evidence somewhat prematurely; but the

learned judge who tried the case below no doubt admitted it under the rule that in the discretion of the court the declaration of a partner may be received as against himself, to become competent against the remaining partners, should a partnership relation become established later in the trial. *Jennings v. Estes*, 16 Me. 323; *Fogerty v. Jordan*, 2 Rob. (N. Y.) 319. It is true that plaintiff in error denied that he was a member of the firm of Richardson & Co., and introduced some evidence to corroborate his statement; but the trial court heard the witnesses testify, noted their manner on the stand, and was better able to weigh the evidence than we, who only read it. In accordance with the rule which we have frequently laid down, we will not disturb the judgment given by the trial court, when there is substantial evidence in the record to sustain it. *Green v. Browne & Manzanara Co.*, 11 N. M. 658, 72 Pac. 17, and cases cited therein.

2. The second assignment of error is that the court committed error in admitting the verified account attached to the bill of complaint to prove the amount due. We do not consider this point well taken, for the answer of the plaintiff in error is almost solely made up of the denial of the fact that he was a partner of the firm of Richardson & Co. at the time the debt was contracted. He nowhere directly denies the truth of the verified statement attached to the complaint. If he had done so, then it might have been necessary to prove the truth of the account by the original books of entry. Pierce swears that the account is correct, and the only paragraph of the answer that in any way attacks its correctness is the fourth, which reads: "This defendant says, in answer to the plaintiff's fourth paragraph of his said amended complaint, that he has not sufficient knowledge or information sufficient to form a belief as to whether or not the plaintiff sold and delivered to the said firm of Richardson & Co. the goods, wares, and merchandise, or any item of the same, contained and set out in his itemized account, marked 'Exhibit A,' and made a part of his said amended complaint." We submit this is not a denial under oath of the correctness of the verified account sued on, and, while it would probably be good under the Code practice as it exists in many of the states of the Union and in this territory still we have another statute in addition to the Code, to wit, section 2931 of the Compiled Laws of 1897, which provides that "accounts duly verified by the oath of the party claiming the same, or his agent, * * * shall be sufficient evidence in any suit to enable the plaintiff to recover judgment for the amount thereof, unless the defendant, or his agent shall deny the same under oath." The account is sworn to, and we do not think that the mere statement of the defendant, although made under oath, "that he has not knowledge or information suffi-

cient to form a belief as to whether or not the plaintiff sold and delivered to the said firm of Richardson & Co. the goods, wares, and merchandise," is such a denial of the verified account as is contemplated by our laws. The very purpose of retaining section 2931 of the Compiled Laws of 1897, which was passed some five years before the enactment of our Code of Civil Procedure, and which subsection 123 of section 2685 (our Code) recognizes as still being in force, would seem to be to obviate the necessity of the introduction of the books of original entry, often a tedious proceeding, in the proving up of verified accounts in the trial of cases, where the truth of such accounts is not directly denied under oath. This view also seems to us to be in accord with the dictates of common sense and reason, for a litigant may often be willing to swear that he had no knowledge or information sufficient to form a belief of the correctness of an account, when he would not be willing to deny under oath the truth of an account sued on.

3. The third error assigned is that the court erred in permitting H. E. Chipman to testify that Richardson told him that Cravens said it was all right for him (Richardson) to buy Chipman out; such testimony being admitted to show the interest of Cravens in the firm of Richardson & Co., the same being hearsay and incompetent. We have already referred to the declarations made by a partner as to who composed the partnership in passing on the first error assigned, and in disposing of this alleged error we will simply quote from the brief of the defendant in error, which we think correctly states the law: "Evidence had already been adduced showing the partnership between Richardson and Cravens, so that it was clearly competent to show what one of the partners said in relation to the partnership. Now, while it is true that the declarations of one partner, not made in the presence of his copartner, are not competent to prove the existence of the partnership, it is also true that, when the partnership had been otherwise proved, the declarations of one partner are evidence against the other as to the conduct of the partnership business. Defendant contends that, as the evidence of the witnesses Pierce, Richardson, and Boone, which preceded the testimony of the witness Chipman, proved the existence of the partnership of Richardson & Co. as alleged in the petition. Then the testimony of Chipman as to what one of the partners said to him in relation to the partnership was competent."

4. The last error assigned is that the court erred in adjudging that a partnership existed between Richardson and Cravens at the time the account sued on was made. There certainly is much evidence in the record to sustain the findings of the court as to the existence of the partnership between Richardson and Cravens, and, such evidence being

of a substantial nature, this court will not disturb the judgment given by the trial court. *Greene v. Browne & Manzanares Co.*, 11 N. M. 658, 72 Pac. 17, and cases cited therein.

There is no such error apparent in the record as would justify us in reversing this case, and the same is therefore affirmed; and it is so ordered.

PARKER, McFIE, POPE, and ABBOTT, JJ., concur. MANN, J., having tried the case below, took no part in this decision.

(14 N.M. 340)

R. H. PIERCE CO. v. RICHARDSON et al. (Supreme Court of New Mexico. Jan. 13, 1908.)

WRIT OF ERROR—DISMISSAL—MISTAKE IN CITATION.

When a writ of error is improperly directed, and the defendant in error is cited to appear before this court under the name of "R. H. Pierce," and not under the name of "R. H. Pierce Company," who was plaintiff in the court below, the case will be dismissed on the ground that the real defendant in error has not been cited to appear before this court and is not before us.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2109, 2117, 2125; vol. 3, Appeal and Error, § 3126.]

(Syllabus by the Court.)

Error to District Court, Otero County; before Justice Edward A. Mann.

Action by the R. H. Pierce Company against George Richardson and J. C. Cravens. Judgment for plaintiff, and defendants bring error. Dismissed.

J. E. Wharton, for plaintiffs in error. Byron Sherry, for defendant in error.

MILLS, C. J. The transcript of record in this case contains all of the imperfections which are referred to in the case of *Richardson et al. v. R. H. Pierce* (decided at this term of court) 93 Pac. 715, and in addition thereto no writ of error seems to have ever been sued out in the Supreme Court, as the writ of error attached to the transcript in this case is made out in the name of "R. H. Pierce," and not "R. H. Pierce Company," a corporation, who was the plaintiff in the court below; and therefore, as the defendant in error is not before us, we will dismiss this case. We would ordinarily dislike to take this course, based upon what is apparently only a clerical error; but in the case of *Richardson et al. v. R. H. Pierce*, supra, there is a stipulation to the effect that the evidence in that case shall be the evidence in this, and as, with that evidence before us, we would have to affirm the judgment of the trial court in this case, we do not think that we are doing the plaintiff in error any injury, and the case will therefore be dismissed; and it is so ordered.

POPE, McFIE, ABBOTT, and PARKER, JJ., concur. MANN, J., having tried the case below, took no part in this decision.

(14 N.M. 345)

SANDOVAL v. ALBRIGHT.

(Supreme Court of New Mexico. Jan. 13, 1908.)

1. JUDGMENT—CONCLUSIVENESS.

A judgment in quo warranto against the incumbent of an office which adjudges that relator is the de jure officer is conclusive on his right to the office in an action for the fees of the office received by the incumbent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1234–1251.]

2. COMMON LAW—ADOPTION.

The common law is in force in New Mexico, except as modified by statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Common Law, § 10.]

3. OFFICERS—COMPENSATION—RECOVERY BY DE JURE OFFICER.

By the common law, not modified by statute, a de jure officer may recover the fees of the office received by a de facto officer intruding into the office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 134.]

4. SAME.

In an action by a de jure officer for the fees of the office received by the incumbent thereof holding the office in good faith, the reasonable expenses of the incumbent in administering the office should be allowed him.

Appeal from District Court, Bernalillo County; before Justice Ira A. Abbott.

Action by Jesus Ma. Sandoval against George F. Albright. From a judgment for plaintiff, defendant appeals, and plaintiff cross-appeals. Affirmed.

This is a suit brought by the appellee to recover from the appellant the sum of \$6,184.16, alleged to be the amount of fees and emoluments of the office of assessor of Bernalillo county, to which the appellee had been duly elected and qualified, received by the appellant between the 27th day of March, 1903, and the 19th day of November, 1904, during which time the appellant had usurped the said office. It is further alleged that a judgment of ouster was obtained against the appellant; but that he refused to pay over to the appellee said fees and emoluments. Demurrer to the complaint having been overruled, answer was filed. At a later period this answer was withdrawn and an amended answer was filed, the second paragraph of which is as follows: "The defendant admits that the plaintiff was elected at the general election held in the territory of New Mexico to the office of assessor of Bernalillo county, for the term of two years, from the 1st day of January, A. D. 1903, and duly qualified as such assessor, as alleged in paragraph 1 of said complaint, but this defendant denies so much of said paragraph of said complaint as is in words and figures as follows, to wit: 'And plaintiff alleges that he has ever since been, and still is, the only person lawfully authorized to discharge the duties and enjoy the emoluments and privileges appertaining to said office.'" The appellant admitted in the ninth paragraph of his amended answer that he had received \$6,648.

80, but alleged that he had expended \$2,142.25 for clerical assistance and other necessary expenses. By a series of allegations, appellant sought to set up his title to the office in question and the ineligibility of the appellee, and by the closing paragraph of the answer he alleged that he became the incumbent of the office in good faith, believing he had a right thereto, and claimed a set-off for the amount of his necessary expenses against the claim of the appellee. Upon demurrer, the first, second, third, fourth, and fifth grounds were sustained, and the sixth, seventh, and eighth grounds overruled. This left nothing of the answer except the plea of set-off to which the appellee replied, denying the claim and right of set-off, and enlarging his demand, to that admitted by appellant. A trial by jury was had, and the jury, by direction of the court, returned a verdict for the appellee for \$5,360.53, for which judgment was rendered. Appeal and cross-appeal were prayed, and granted.

William B. Childers, for appellant. Neill B. Field, for appellee.

McFIE, J. (after stating the facts as above). The parties to this suit have been before this court on two former occasions as contestants for the office of assessor of Bernalillo county, the fees and emoluments of which are now sued for. *Territory ex rel. Sandoval v. Albright* (N. M.) 78 Pac. 205; *Albright v. Territory ex rel. Sandoval* (N. M.) 79 Pac. 719; *Albright v. Territory ex rel. Sandoval*, 200 U. S. 9, 26 Sup. Ct. 210, 50 L. Ed. 346. The right of office and that the appellee was the de jure officer were fully determined in the former suits, and cannot be considered in this. Therefore the court below properly sustained the demurrer to all such parts of the answer as sought to raise this issue. Counsel for appellant, evidently conceding the correctness of the ruling below, admitted that the appellee was the lawful incumbent of the office, but contends that, even so, the appellee cannot recover the fees and emoluments for the period of appellant's incumbency, but that, if the court should hold otherwise, appellant would still be entitled to recover as a set-off the actual and necessary expenses incurred by him while he was in possession of the office, upon the ground that he took possession in good faith, believing that he was the rightful incumbent thereof. The cross-appellant denies the correctness of this position.

Counsel for appellant, in support of his position that the appellee cannot recover, refers this court to the case of *Sturh v. Curran*, 44 N. J. Law, 181, 43 Am. Rep. 353. This case, according to the opinion of the majority of the court, does not sustain appellant's contention, for in the concluding paragraph the court says: "Under the facts disclosed in this case, an action will not lie

against a de facto officer. He yielded obedience to the law when he performed the services, and on principles of natural justice he may retain the reward he has received." In deciding this case, the New Jersey court, divided seven to five, and the dissenting opinion, written by chief justice and concurred in by four of the associate justices, is such a complete answer to the opinion of the majority that practically all of the courts passing upon this question since that case was decided have adopted the views expressed in the dissenting opinion; so that it may be said that the great weight of authority, both in England and America, is contrary to the doctrine declared to be the law by the majority of the court in that case. The case of *the United States v. Addison*, 6 Wall. (U. S.) 291, 18 L. Ed. 919, holds that there can be a recovery, and, while the amount of the recovery is limited, the reason is that the suit was brought upon a supersedeas bond given upon appeal; but the principle decided by the court was that contended for in the dissenting opinion in the case of *Sturh v. Curran*, supra. Chief Justice Beasley refers to many of the cases referred to in the majority opinion, and, after stating that the English authorities sustain the right of recovery, says: "With regard to the American cases, I can say, after an extended research, that not one of them that has come to my attention denies the right of the de jure officer to recover in some form for an intrusion into his office. *Dolan v. Mayor of New York*, 68 N. Y. 274, 23 Am. Rep. 168; *Hunter v. Chandler*, 45 Mo. 452; *Glascok v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Douglass v. State*, 31 Ind. 429; *People v. Miller*, 24 Mich. 458, 9 Am. Rep. 131; *Dorsey v. Smyth*, 28 Cal. 21; *Nichols v. McLean*, 101 N. Y. 538, 5 N. E. 347, 54 Am. Rep. 730; *Kreits v. Behrensmeyer*, 149 Ill. 503, 36 N. E. 983, 24 L. R. A. 59.

Counsel for appellant in his brief says: "It is said the weight of authority is the other way. Much depends in New Mexico upon what was the common law, as we have no statute on the subject, and it is an open question for the court to decide." It is true that we have no statute in this territory governing this subject, but the common law, in the absence of statute, authorizes a recovery by the de jure officer in such cases. In speaking of the common law upon this subject, Selwyn, 1 N. P. 81, says: "That where a person has usurped an office belonging to another, and taken the known and established fees of office, an action for money had and received will lie at the suit of the party really entitled to the office, against the intruder, for the recovery of such fees." Chitty, also, in his work on Pleadings, says that an action will lie "against a person who has usurped an office and received the known and accustomed fees of office." The state of Illinois, like

New Mexico, adopted the common law, and still retains it except as modified by statute. The case of *Kreitz v. Behrensmeier*, 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59, is a very instructive case upon this subject, as the state of the law, at the time, was similar to our own. The court says: "It is conceded that no statute exists in this state declaring the right of a *de jure* officer to recover from a *de facto* officer the salary paid such *de facto* officer who has discharged the duties of the office under a wrongful or mistaken purpose. There is no legislation on that subject in this state. The right of recovery, if it exists, depends, therefore, on the principles of the common law. * * * By reference to the decision of the common-law courts of England, the common law of that country is to be found. An examination of the decisions of the courts of that country shows a uniform declaration of the principle that a *de jure* officer has a right of action to recover against an officer *de facto* by reason of the intrusion of the latter into the office and his receipt of the emoluments thereof. Among others the following opinions of English courts may be referred to as sustaining this right of recovery: *Vaux v. Jefferson*, 2 Dyer, 114; *Arris v. Stukley*, 2 Mod. 260; *Lee v. Drake*, 2 Salk, 468; *Webb's Case*, 8 Rep. 45. By the adoption of the common law of England, the principle announced in these cases was adopted as the law of this state; for the principle is of a general nature and applicable to our condition. On the basis of a sound public policy, the principle commends itself, for the reason that one would be less liable to usurp or wrongfully retain a public office, and defeat the will of the people or the appointing power, if no benefit but a loss would result from such wrongful retention or usurpation of an office. The question has frequently been before the courts of the different states and of the United States, and the great weight of authority sustains the doctrine of the common law, as shown by the opinions of the judges in different states, and which, in most of the states, are based on the common law, without reference to any statute. * * * Whilst it is true that in this state a public office is not a franchise or an incorporeal hereditament, but a mere public agency created for the benefit of the state, yet the salary or emoluments annexed to a public office are incident to the right to the office, and not to the mere exercise of its duties, or its occupancy. * * * In support of the views expressed by the court in this case, many cases are cited, but we do not deem it necessary to refer to them, as we regard this case conclusive of the law of the case now before us, and, being applied, disposes of the case so far as the appellant is concerned. There being no doubt of the right of recovery by the appellee, and no conflict of evidence concerning the amount the appellee was en-

titled to recover, it was not error for the court to direct a verdict as was done in the court below.

A cross-appeal was taken by the appellee, and will now be considered. The court below allowed to be set off against, and deducted from, the total amount received by the appellant during his incumbency of office the sum of \$2,142.25, which was shown to be the amount of expenses incurred in administering the affairs of the office. Counsel for cross-appellant does not question the amount of the set-off, nor seeks relief upon any technical ground of error; but, on the contrary, takes the broad ground that cross-appellant is entitled to recover the full amount of the fees and emoluments received by appellant, Albright, during his incumbency, without any allowance whatever for the expenses incurred in conducting the affairs of the office. In other words, that cross-appellant is entitled to the gross receipts, and not the profits of the office. There is some conflict of authority on this subject; but the weight of authority is to the effect that where the *de facto* officer entered in good faith, believing he was entitled to the office, the profits, and not the entire amount received, are recoverable. A leading case to this effect is *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52. Counsel for cross-appellant has expressed criticism of this case, but we find the law as therein declared adhered to in the latter cases. *Farwell v. Adams*, 112 Ill. 57; *Waterman v. Chicago & Iowa R. Co.*, 139 Ill. 669, 29 N. E. 689, 15 L. R. A. 418, 32 Am. St. Rep. 228; *Kreitz v. Behrensmeier*, 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59; 23 Am. & Eng. Ency. of Law, pp. 403-404; 9 Am. & Eng. Corp. Cases (Tex.) p. 91. The acts of the Legislature providing for the appointment of an assessor for Bernalillo county, and the testimony of Albright as to his appointment and that he entered upon the office under advice of counsel, were before the court when the court directed the jury to allow the set-off, and we think the good faith of Albright must be conceded from these facts, aided, as they were, by the stubborn contest in the courts to settle the title to the office in dispute, disclosed by the decisions of this court, of which the trial court took judicial notice. The question of good faith seems to be the controlling consideration for the allowance of expenses to an ousted *de facto* officer in a majority of cases thus holding, and the rule would doubtless not be applied in case of an intruder entering in bad faith and without color of right.

We feel disposed to adhere to this rule in this case, and therefore hold that the court below did not commit error in allowing the amount shown by the evidence as the reasonable expenses of appellant's administration of the office, and instructing the jury to that effect.

The judgment of the court below, both up-

on the original and cross appeals, will be affirmed, with costs. It is so ordered.

MILLS, C. J., and MANN, PARKER, and POPE, JJ., concur. ABBOTT, A. J., having heard this case in the court below, did not participate in this decision.

(33 Utah, 243)

STATE ex rel. DAVIS v. EDWARDS, State Auditor.

(Supreme Court of Utah. Jan. 25, 1908.)

1. PLEADING—DEMURRER—WAIVER OF DEMURRER.

Under the statute, an answer may be filed with a demurrer without waiving the demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 404-407.]

2. COURTS—STENOGRAPHERS—COMPENSATION—AUDIT BY BOARD OF EXAMINERS.

Laws 1899, pp. 111, 112, c. 72, §§ 1, 2, authorize a district court judge to appoint a stenographer to hold during his pleasure, and to agree on the compensation to be paid by the state, not exceeding a maximum fixed, and provide that such stenographer may also be paid mileage not to exceed a fixed amount a mile, and that the amount of such mileage shall be certified by the court to the State Auditor, who shall draw his warrant for the same. Const. art. 7, § 13, creates a board of examiners with power to examine all claims against the state, except salaries or compensation of officers fixed by law. Rev. St. 1898, § 946, enacted pursuant to Const. art. 7, § 13, forbids the State Auditor to draw his warrant for any claim unless approved by the board, except for salaries or compensation of officers fixed by law. *Held*, that a claim by a stenographer for mileage was a claim for compensation fixed by contract, not by law within the exception to Const. art. 7, § 13, and Rev. St. 1898, § 946, and hence the State Auditor could not be required to draw a warrant for the same until first approved by the board of examiners.

3. MANDAMUS—SUBJECTS OF RELIEF—ALLOWANCE AND PAYMENT OF SALARIES.

The allowance and payment of salaries or compensation of public officers fixed by law may be enforced by mandamus against auditing and disbursing officers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 211-216.]

4. MANDAMUS—SUBJECTS OF RELIEF—AUDIT OF CLAIMS.

The board of examiners created by Const. art. 7, § 13, with power to examine all claims against the state, except salaries or compensation of officers fixed by law, may in a proper case be subject to mandamus.*

Original application for mandamus by the state, on the relation of Justin R. Davis, against J. A. Edwards, State Auditor. Writ denied.

Thurman, Wedgwood & Irvine, for petitioner. M. A. Breeden, Atty. Gen., and A. R. Barnes, Asst. Atty. Gen., for respondent.

FRICK, J. On the 29th day of June, 1907, Justin R. Davis (hereinafter styled "petitioner") made an application to this court for an alternative writ of mandate to be directed to J. A. Edwards, as State Auditor of the state

of Utah (hereinafter designated "respondent"), in which the petitioner asked that said respondent show cause why a peremptory writ should not issue against him requiring him to allow a certain claim against the state, and in favor of petitioner, and to issue a warrant upon the State Treasurer for the amount claimed. The petitioner based his claim upon certain facts which, in his petition, are stated, in substance, as follows: That on the 3d day of January, 1905, he duly entered into a contract with Hon. C. W. Morse, one of the judges of the district court of the Third judicial district of this state; that said contract was entered into in pursuance of the provisions contained in sections 1, 2, c. 72, pp. 111, 112, Laws Utah 1899; that by virtue of said contract and the law referred to said C. W. Morse, as such district judge, on the 3d day of January, 1905, duly appointed the petitioner as court stenographer of said district court, and that the petitioner ever since said date has been, and now is, the duly appointed, qualified, and acting court stenographer of said court, during all of which time he has faithfully discharged the duties of court stenographer for said court in pursuance of said contract and appointment; that said contract and appointment ever since said date have been and now are in full force and effect; that, by the terms of said contract, it is provided that the petitioner shall be paid the sum of 10 cents per mile for each mile actually traveled by him in the discharge of his official duties; that in the months of April and May, 1907, the petitioner in the discharge of his official duties necessarily traveled a distance of 336 miles, for which he is entitled to receive, under the terms of said contract, from the state of Utah the sum of \$33.60; that in compliance with the provisions of section 2, c. 72, p. 112, Laws Utah 1899, the petitioner obtained from the said C. W. Morse, as judge of said district court, a certificate in which said judge duly certified that the number of miles as claimed by the petitioner was correct, and that he had actually traveled said distance; that thereupon petitioner presented said claim for mileage, duly certified, to the respondent, as State Auditor, for allowance, and requested him to allow the same, and to issue his warrant drawn upon the State Treasurer, in favor of petitioner, for said sum of \$33.60, which respondent refused, and still refuses to do; that there is due the petitioner from the state of Utah for the mileage aforesaid the sum of \$33.60. An alternative writ was duly issued by this court, to which the respondent appeared. Respondent attacks the petition by general demurrer for want of facts. He also filed an answer at the same time, which under the statute he was permitted to do without waiving his demurrer. A reply to the answer was also filed by the petitioner.

In view of the law in force in this state, the first question that arises is as to the sufficiency of the petition. This question is raised

**Marionaux v. Cutler* (Utah) 91 Pac. 355.

ed by the general demurrer. The petitioner relies upon sections 1, 2, c. 72, pp. 111, 112, aforesaid, which, so far as material, are to the effect that the judges of the district court of this state may enter into contracts with and appoint competent persons as stenographers to report the proceedings of said courts. These sections enumerate what shall be specified in the contract, and, among other things, authorize the judges to agree upon the compensation to be paid by the state to the stenographers for services not exceeding the sum of \$8 for each sitting of the court. It is further provided in section 2 that "such contract shall further provide that the said stenographer shall hold his employment at the pleasure of the judge of the court appointing him, or his successor, and may also provide that said stenographer shall be paid not to exceed ten cents per mile for each mile actually traveled by him in the performance of his part of said contract, and the amount of such mileage shall be certified by the court to the state auditor, who shall draw his warrant upon the state treasurer for the amount so certified, and the same shall be paid out of the state treasury." The petitioner, in substance, contends that, if it be made to appear to the State Auditor by the certificate referred to in the statute that the services were rendered, or that the claim for mileage arises by virtue of the contract and appointment made by the district judge and the amount is certified to by him as correct, that it then becomes the duty of the Auditor to draw his warrant upon the State Treasurer for the amount stated in the certificate in favor of the stenographer named in the certificate. He urges further that it appears from the petition that he has complied with the provisions of sections 1 and 2, above referred to, and that, therefore, he is entitled to the relief prayed for. In this contention we at first blush were inclined to agree with the petitioner, and, if it were not for a constitutional provision, which we think stands in the way, we would be inclined to hold that the petitioner should prevail in this proceeding. Section 13 of article 7 of the Constitution provides for a board of examiners "with power to examine all claims against the state, except salaries or compensation of officers fixed by law." Pursuant to this constitutional provision the first state Legislature passed an act which is designated as title 19, and comprises sections 920 to 963 of the Revised Statutes of 1898. In these sections the duties of the board of examiners are more particularly specified. Section 946, which relates to the duties of the respondent, as State Auditor, with respect to claims against the state, provides: "The State Auditor shall not draw his warrant for any claim, unless it has been approved by the board, except for salaries or compensation of officers fixed by law, or for moneys expressly appropriated by law." The powers conferred upon the board of examiners, with regard to claims against the state,

by the constitutional provision quoted above, are general and sweeping. The power would include all claims against the state, were it not for the exception which excludes salaries or compensation of officers fixed by law. An exception of this character may not be enlarged nor extended by implication. An exception which specifies the things that are excepted from a general provision strengthens the force of the general provisions of the law. 2 Lewis' Sutherland, Stat. Const. § 494. It is an elementary doctrine that, if there are any provisions in a statute which in any way conflict with a constitutional provision, the Constitution controls. Does the claim of the petitioner come within the constitutional exception? If it does not, then by virtue of section 946, Rev. St. 1898, above quoted, the respondent cannot legally be required to draw his warrant upon the State Treasurer therefor until it has been approved by the board of examiners. The petitioner does not state in his petition that the claim has been so approved. In order to state a complete cause of action against the State Auditor for relief in case the auditor refuses to draw a warrant, it must appear from the application either that the claim has been approved by the board of examiners, or that it is one that comes within the constitutional exception. Is the claim presented by the petitioner a claim for salary or compensation of an officer fixed by law? It certainly is not for an official salary. It seems equally clear that it is not for official compensation which is fixed by law. Conceding that the petitioner falls within the designation of public officer for certain purposes, as held in *Dull v. Mining Co.*, 28 Utah, 467, 79 Pac. 1050, and assuming, further, that mileage may, under certain circumstances, constitute or form a part of official compensation, as held in *Marionaux v. Cutler* (Utah) 91 Pac. 355, still the claim in question is not for a compensation that is fixed by law.

It must not be overlooked that the exception in the Constitution does not apply to every claim for official compensation, but applies only to those that are fixed by law. If we assume that the amount claimed by the petitioner is ascertained and fixed by the court's certificate, this still does not meet the objection that it is not fixed by law. How does the claim arise? As stated by the petitioner, it arises out of a contract entered into by him with the district judge, who by law is made the agent of the state for that purpose. The amount that the petitioner is to receive from the state, both for services and for mileage, is a matter that he and the judge agreed upon and fixed. If the law had authorized the district judge to enter into contracts with stenographers, and to agree upon the compensation and mileage for such an amount, as under the circumstances might seem fair and reasonable, and had directed the judges to certify to the amount agreed upon and to the miles actually traveled, no

one could successfully contend that the compensation agreed upon was fixed by law. The only difference between such a law and the one we are dealing with is that the present law limits the authority of the judges, while the supposed law would not. The mere fact that the law imposes limitations, which the judges may not exceed, in no way changes the fact that it is a limitation of authority, and not the fixing of compensation by law. This is made clearer still by the fact that the compensation and mileage may be one amount in one district, and a different amount in another district. It may be the maximum amount for services and less than that for mileage, or vice versa. Moreover, the contract remains in force only at the pleasure of the judge. He may recall it at any time, and may increase or reduce the stipulated amount so long as it is not increased beyond the highest amount he may contract for. While the compensation of stenographers, to some extent, is regulated by law, it nevertheless is not a compensation within the constitutional provision fixed by law. It is a compensation fixed by the contract made between the stenographer and the judge. If this should be held to constitute compensation fixed by law, then any compensation authorized by law which was agreed to in an authorized contract would also be fixed by law. The authority conferred by the state upon certain officials to enter into contracts with other persons, and to agree upon the compensation to be paid for public services contemplated by the contract, not exceeding a specified sum, as we view it, falls far short of fixing such compensation by law as contemplated by the Constitution. That the allowance and payment of the salaries or compensation of public officers fixed by law may be enforced by mandamus proceedings against auditing and disbursing officers is well settled. *Merrill on Mandamus*, § 105; *High, Extra. Leg. Rem.* (3d Ed.) §§ 101, 113; *Mechem on Public Officers*, § 968; *Fowler v. Peirce*, 2 Cal. 165; *Reynolds v. Taylor*, 43 Ala. 420; *Bryan v. Catell*, 15 Iowa, 538; *Black v. Auditor of State*, 26 Ark. 237. But all these authorities simply make it clear that the salary or compensation, of which payment may be compelled in such a proceeding, must be certain and fixed by law, and, further, that it must appear that it is the legal duty of the officer, upon whom the demand is made, to allow or pay the amount claimed. We have not been able to find any case where the compensation was fixed by contract, or where the amount is subject to change at the pleasure of the person authorized to agree upon and fix it, wherein it was

held that such compensation is one fixed by law. The mere fact that the Legislature has, in effect, made the certificate of the judge the only evidence that is required to fix the amount due, cannot affect the conclusion that it is not fixed by law. It is the judge, and not the law, that determines and fixes the amount to be allowed under the particular contract under which the stenographer claims. The attempt by the Legislature to require the Auditor to allow a claim which by the Constitution must first be approved by the board of examiners can avail nothing. The Auditor is bound by the constitutional provision. The Legislature is so bound, and so are we. The Legislature may make certain evidence conclusive with regard to a specific matter, but it may not interfere with powers conferred or duties imposed by the Constitution. This, in effect, is what is attempted to be done in section 2, c. 72, p. 112, aforesaid. To the extent that the provisions of that section are in conflict with the constitutional provision governing salaries and compensations of officers fixed by law, the Constitution must prevail. The conclusion is, therefore, forced upon us that the petitioner's claim is not within the constitutional exception, and therefore comes within the general class of claims which must be submitted to the board of examiners, and that the respondent, as State Auditor, cannot be compelled to draw a warrant therefor until the same is approved by that board. As there is no allegation in the petition that the claim has been so presented and allowed, the petition does not state sufficient facts to authorize us to issue a peremptory writ of mandate against the respondent. The demurrer, therefore, is well taken, and should be sustained.

In view that the writ must be denied for the reasons stated, we cannot now pass upon the other questions raised by the respondent. The board of examiners whose duty it is under the Constitution to pass upon the claim is not before us; and hence would not be concluded by a decision upon these questions. *Merrill on Mandamus*, § 315. No doubt the board of examiners, in a proper case, may be subject to a proceeding in mandamus. *Merrill on Mandamus*, § 126; *Mechem on Public Officers*, § 968; *High, Ex. Leg. Rem.* (3d Ed.) §§ 101, 113; *Marloneaux v. Cutler* (Utah) 91 Pac. 355.

From the foregoing, it follows that the writ must be denied, and the petition dismissed. It is so ordered. Respondent to recover costs.

MCCARTY, C. J., and STRAUP, J., concur.

CLAYTON v. DINWOODEY et al.

(Supreme Court of Utah. Jan. 20, 1908.)

1. EXECUTORS AND ADMINISTRATORS—ALLOWANCE AND PAYMENT OF CLAIMS—PRESENTATION—CLAIMS WHICH MUST BE PRESENTED—TIME FOR PRESENTATION.

Plaintiff purchased from defendant's testator property by warranty deed. After paying the taxes on the property due before the testator's death, he sued defendants for the amount of the taxes so paid. *Held*, the claim arose from a breach of a covenant in a deed, and was a claim arising on contract within Rev. St. 1898, § 3851, providing that "all claims arising upon contracts * * * must be presented within the time limited in the notice" given by the executor or administrator to creditors of the estate.

2. SAME—TAXES.

The taxes were not claims which need not be presented to the executor within the exception of Rev. St. 1898, § 3858, providing that an action may be brought against the representatives of the estate without notice by any holder of a lien to enforce it against the property of the estate subject thereto, the lien of the taxes being against the land bought and not against any property of the estate.

3. SAME.

Rev. St. 1898, § 2613, requiring the district court to require executors and administrators to pay all taxes due from the estate and forbidding discharge till such taxes are paid, does not affect the necessity of presenting to the representatives of a deceased vendor of land by warranty deed a claim by the purchaser for reimbursement for taxes paid by him which were liens on the land at the time of the purchase.

4. SAME.

An administrator or executor is affected with notice of taxes levied against property of the estate in his custody, or against property of the decedent in his lifetime which has become property of the estate, and such claims need not be presented to the representative for allowance.

5. SAME.

The executor or administrator is not affected with notice of unpaid taxes on property which the decedent conveyed in his lifetime, and in which he had no interest at the time of his death.

6. SAME—PRESENTATION OF CLAIMS—ACTIONS.

Rev. St. 1898, § 3851, provides that "all claims" against an estate "arising upon contracts * * * must be presented within the time limited in the notice." Section 3852 provides that every claim when presented to the executor or administrator must be supported by the affidavit of the claimant, that the amount is justly due, etc., and a copy of the instrument on which the claim is based must accompany it. *Held*, the commencement of a suit, the complaint in which contains substantially all the averments required for a regularly verified claim, to have a claim established and paid out of the general funds of the estate and the service of the complaint upon the executors within the time in which a claim could have been properly presented, operated as a presentation of the claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 823.]

7. SAME—NECESSITY FOR PRESENTATION OF CLAIMS.

Mere knowledge on the part of the executor or administrator of the existence of the debt or claim against the estate is not sufficient to dispense with the necessity of presentation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 766.]

8. SAME—JURISDICTION.

The presentation of the claim to the executors is not jurisdictional to such an action.

9. SAME—ACTIONS—DEFENSES BY EXECUTORS OR ADMINISTRATORS.

The defense that the claim is barred by the statute of limitations cannot be waived by the executor or administrator.*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 750, 750½.]

10. SAME—PRESENTATION OF CLAIMS—ACTIONS—COSTS.

Where a suit is begun against executors without a presentation of the claim, and the executors find the claim to be just, and confess the demand within the time to appear and plead to the merits, there should be no judgment for costs, but, if issue is joined on the merits and plaintiff is required to prove his claim, costs should follow as though suit had been brought on a rejected claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1943.]

11. SAME—ACTIONS—TIME TO SUE.

Where an action on a claim against an estate is brought against the executors within the time in which a claim could have been presented, but without a previous presentation of the claim, the action, at most, is only prematurely brought, which is merely ground for a plea in abatement but not for a plea in bar.

12. PLEADING—PLEA IN ABATEMENT—TIME TO PLEAD—WAIVER OF RIGHT.

Where a suit on a claim against the estate of a decedent was brought without a previous presentation of the claim and no plea of that fact either in abatement or in bar was made by defendants, but they pleaded to the merits, on which issues the case stood until too late for the presentation of the claim when the failure to present the claim was pleaded in bar of the action, such a plea was addressed to the merits, and, not being effectual at the commencement of the suit, could not be so later, under the rule, that a defendant having the right to plead matter in abatement must do so at the first opportunity and before or at the time of pleading to the merits or it will be waived, nor can it be made available by a plea in bar.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 208-212.]

13. EXECUTORS AND ADMINISTRATORS—ACTIONS—JUDGMENT.

Under Rev. St. 1898, § 3862, providing "a judgment rendered against an executor or administrator upon any claim for money against the estate of his testator * * * must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due," a judgment against executors on a claim against the estate is improperly entered against them personally.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 1886-1889.]

Appeal from District Court, Third District; M. L. Ritchie, Judge.

Action by W. Clayton against Henry M. Dinwoodey and other executors of a will. From a judgment for plaintiff, defendants appeal. Affirmed, with a modification in conformity with the statute.

Ray Van Cott, for appellants. Young & Snow, for respondent.

*Fullerton v. Bailey, 17 Utah, 85, 53 Pac. 1020.

STRAUP, J. On the 20th day of July, 1905, Henry Dinwoodey, in consideration of the sum of \$42,500, by warranty deed sold and conveyed to the plaintiff certain realty, free from all incumbrances, situate in Salt Lake City. By statute it is provided that every tax upon real property is a lien against the property assessed, which attaches as of the first Monday in February of each year. On July 19, 21, 25, 28, and 31, 1905, the rates were fixed as provided by law, and the amount of taxes against the property ascertained to be \$1,078.14. The taxes became delinquent November 15, 1905. Henry Dinwoodey died on October 1, 1905. The taxes had not been paid by him. On the 28th day of October his will was admitted to probate. Letters testamentary were issued to the appellants, who qualified and entered upon the discharge of their duties as executors. On the 28th day of October, 1905, the first publication of notice to creditors was made. The estate exceeded in value the sum of \$10,000. Creditors were required to present their claims to the executors on or before September 10, 1906, the time fixed in the published notice. On the 3d day of January, 1906, the plaintiff paid the taxes to the county treasurer. On the 23d day of March, 1906, the defendants accepted service of summons issued in this action and a copy of a verified complaint, the original of which was filed in the district court by the plaintiff on the 31st day of March. The substance of the complaint is: That on the 20th day of July, 1905, the deceased, by warranty deed, conveyed to the plaintiff certain real estate, fully described, free from all incumbrances; that at the time of the making and delivery of the deed the property was not free from all incumbrances, but was subject to county, state, and school taxes, specifying the amount of each, which aggregated the sum of \$1,078.14; that said taxes were at the time of the making and delivery of the deed due and remained unpaid, and were liens and incumbrances on the property; that the plaintiff was obliged to pay, and did pay on the 3d day of January, 1906, the sum of \$1,078.14, in extinguishing the liens and incumbrances; that the deceased died on the 1st day of October, 1905, leaving a will, and that the defendants were appointed executors, and letters testamentary issued to them, etc. To the complaint was attached a copy of the deed and made a part thereof. The defendants were required to appear and plead to the complaint 20 days after the service of summons. On the 11th day of April they appeared and demurred to the complaint for want of facts. The hearing on the demurrer was set for the 21st day of April, at which time counsel for both parties appeared. The demurrer was submitted without argument, and overruled. The defendants were given five days in which to answer the complaint. In due time they answered, admitting the death of the decedent and their appointment as executors. Respecting the allegations of the execution of the

deed, the taxes due and unpaid, and that they were liens and incumbrances on the property and had been paid by the plaintiff, they averred they had not sufficient knowledge or information, and on that ground denied them. The case was set for trial on the 24th day of October. On the 17th day of October the defendants filed an amended answer, in which it was alleged that the cause of action stated in the complaint was barred by sections 3851, 3852, 3853, and 3856, c. 9, tit. 74, of the Probate Code, Rev. St. 1898. The plaintiff's demurrer to the amended answer was sustained. Plaintiff applied for and was given leave to file an amended complaint, which was done on the 3d day of November, 1906. The amendment contained the following additional allegations: That the taxes became delinquent November 15, 1905, and, were due and should have been paid prior to that date out of the funds of the estate in the due course of administration, but that the defendants, notwithstanding the request of the plaintiff, refused to pay them. The defendant's demurrer to the amended complaint was overruled. They thereafter answered on the 26th day of December, and, in addition to their original answer, averred that notice had been published to creditors, the first publication appearing on the 28th day of October, 1905, and that creditors were required to present their claims on or before the 10th day of September, 1906; that the plaintiff failed to present any claim, and because thereof he was estopped from asserting his claim and his action was barred.

On the trial, evidence was given in support of the allegations of the complaint. There was no substantial conflict in the evidence respecting them. Proof was also made that notice to creditors was given by the defendants, as executors, and as alleged in their answer. The evidence further shows that the plaintiff did not present any claim prior to the commencement of the action. The court found the facts respecting the sale of the property by the deceased to the plaintiff, the execution and delivery of the warranty deed, the conveyance of the property free from all incumbrances, that the taxes were unpaid by the deceased, and that the plaintiff paid them, as alleged in the complaint. As conclusions of law the court held that the taxes were incumbrances on the property at the time of the execution and delivery of the deed; that they became delinquent on the 15th day of November, 1905, and "were due from and should have been paid prior to that date out of the funds of the estate of the said Henry Dinwoodey by the defendants, as executors as aforesaid, in due course of administration"; and that the plaintiff was entitled to judgment in the sum of \$1,188.14, and costs taxed at \$10. The judgment, however, is entered: "Adjudged and decreed that said plaintiff do have and recover of and from the said defendants the sum of \$1,188.14, together with interest thereon at the rate of 8 per cent. per annum from the 18th day of April, 1907, until

paid, together with \$10, plaintiff's costs incurred in this action."

From this judgment the defendants have appealed. They assail the conclusions of law, the judgment, the rulings of the court overruling their demurrers to the plaintiff's complaints and sustaining plaintiff's demurrer to their amended answer. These alleged errors are all predicated on the theory that the plaintiff's claim required presentation to the executors as by statute in such case made and provided, and that the plaintiff failed to make such. On the other hand, it is argued by the plaintiff that his claim was not of such character as, under the statute, required presentation. The statute provides that the executor or administrator must publish notice to creditors, in which must be expressed the time within which claims may be presented. This was done. The time fixed was September 10, 1906. Section 3851, Rev. St. 1898, provides: "All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; provided, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court, or judge thereof, that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before a decree of distribution is entered; provided further, that nothing in this title contained shall be so construed as to prohibit the foreclosure of liens or mortgages as hereinafter provided." By section 3852 it is further provided that every claim when presented to the executor or administrator must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of the affiant. If the claim be founded on a bond, bill, note, or any other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited, if demanded, unless it be lost, etc. Section 3853 provides that when a claim accompanied by the required affidavit is presented to the executor or administrator he must indorse thereon his allowance or rejection, with the date thereof. If he refuses or neglects to indorse such allowance or rejection for 10 days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day. It is further provided that when the claim is rejected the holder must bring suit in the proper court against the executor or administrator within three months after the date of its rejection. Section 3858 provides as follows: "No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, except that an action may be brought without notice by any

holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented." The following sections of the statute in regard to taxes are also relied on: Section 2613 which provides that "the district court must require every administrator or executor to pay out of the funds of the estate all taxes due from such estate; and no order or decree for the distribution of any property of any decedent among the heirs or devisees shall be made until the taxes against the estate are paid"; and section 2597, which provides that every tax upon real property is a lien against the property assessed, and attaches as of the first Monday in February of each year.

The arguments made by the respondent that he was not required to present his claim (1) because the taxes were a lien upon the property at the time of its conveyance, and (2) for the reason that the taxes were due from and against the estate within the meaning of section 2613, are not tenable. Plaintiff's claim arose from a breach of a covenant in the deed. It is a claim arising on contract. It is very clearly expressed by the statute that all claims arising on contracts, whether due, not due, or contingent, must be presented. The only exception made by the statute is that a mortgage or lien "against the property of the estate subject thereto" may be enforced without first presenting a claim to the executor or administrator "where all recourse against any other property of the estate is expressly waived in the complaint." But this was not an action to enforce a lien. It was not one seeking to have the claim satisfied out of specific property of the estate, or to subject any particular property of the estate to the satisfaction thereof. It was one seeking compensation out of the general funds of the estate. Furthermore, the taxes upon the realty were a lien "against the property assessed." It was not a lien against the general property of the decedent or any property of the estate. The property subject to the lien was not owned by the deceased at the time of his death. It was not, and never became, property of the estate. Plaintiff's claim does not fall within the exception contained in section 3858. Nor do we think the case falls within the provisions of section 2613. That section pertains to taxes assessed against, or which are due upon, property of the estate. Taxes on such property are not claims against the estate which need presentation to the administrator or executor for allowance, as is well illustrated by the case of *People v. Olivera*, 43 Cal. 492. To the same effect are the cases cited by the respondent. In the case of *Bonaparte, Ex'r, v. State*, etc., 63 Md. 465, it was held that executors and administrators were held affected with notice

of taxes due upon property in their custody, and that it was their legal duty to ascertain and pay them, after funeral expenses, before proceeding to the further administration of the estate. In *Re Goodheart's Estate* (Sur.) 81 N. Y. Supp. 1030, it was held that taxes levied on real estate in the lifetime of the decedent and which was owned by him at the time of his death, but which was devised to the executor in his individual capacity, were entitled to be treated as debts of the decedent, and to be paid out of his personal estate. To the same effect is *Findley v. Taylor*, 97 Iowa, 420, 66 N. W. 744. On an examination of all the cases cited by the respondent on this point, we find that they all pertain to taxes against property which was owned by the deceased at the time of his death, and which came into the custody of the administrator or executor as property of the estate, or which were levied against such property while in his custody. In such case a presentation of the claim is not required. As stated by the authorities, the administrator or executor is affected with notice of taxes levied against property of the estate in his custody, or which was levied against the property of the decedent in his lifetime and became property of the estate. In such case it is his legal duty to pay them in due course of administration, and before the property is distributed. But we cannot understand upon what theory it may be said that the executor or administrator should be charged with notice of unpaid taxes on property which the deceased had conveyed in his lifetime, and in and to which he had no interest at the time of his death, and which did not become property of the estate nor come into the custody of the administrator or executor. If such were the case, he would be required to ascertain from the records, or from other sources, what realty was owned and conveyed by the deceased in his lifetime, whether at the time of the conveyance there were unpaid taxes against the property, whether the deceased by his deed of conveyance had agreed to pay them, and whether they remained unpaid. Such a requirement would be onerous and unreasonable. It seems quite clear to us that the executor or administrator is affected with notice of unpaid taxes on property only of the estate, property which was owned by or in which the deceased had an interest at the time of his death, and of which the administrator or executor was entitled to the custody for administration and distribution. We are therefore of the opinion that plaintiff's claim required presentation.

This brings us to the further question as to whether the proceedings had in the premises were equivalent to the presentation of a claim. As before observed, no claim was presented to the executors before the commencement of the suit. The plaintiff had until the 10th day of September, 1906, in which to present his claim. Without first presenting it to the executors, he commenced this action on the

23d day of March, 1906. The complaint filed by him was verified. To it was attached a copy of the deed. The complaint contained substantially all the averments necessary to be set forth in a regularly verified, presented claim, and was served upon the executors. The action was brought to have the claim established and paid out of the general funds of the estate. We are of the opinion that the commencement of the suit and the service upon the executors of the verified complaint within the time in which a claim could have been properly presented operated as a presentation of the claim. In this we are amply sustained by the authorities. On this question, in 18 Cyc. 452, it is said: "According to the weight of authority, the commencement of a suit and its continuous prosecution operates as a presentation of the claim or obviates the necessity of presentation." The text, among other cases cited there, is supported by the following: *Fillyau v. Laverty*, 3 Fla. 72; *Roberts v. Platt*, 142 Ill. 485, 32 N. E. 484; *Floyd v. Clayton*, 67 Ala. 265; *Moore v. McKinley*, 60 Iowa, 367, 14 N. W. 768. The case of *Fillyau v. Laverty*, supra, is much in point. There the statute provided that "all debts and demands, of whatsoever nature, against the estate of any testator or intestate, which shall not be exhibited within the said two years, shall be forever barred." As to the necessity of presenting claims, and what will be regarded as equivalent to a presentation, the court said: "As to the question, what shall constitute an exhibition of a debt or demand against an estate, we think there should be actual presentation of the claim within the time prescribed, or something done by the party equivalent to it. The presentation need not be in any particular form, but sufficient to give such notice to the executor or administrator of the existence of the debt or demand, its character and amount, as would enable him with reasonable certainty to provide for its payment. Mere knowledge on the part of the executor or administrator of the existence of the claim is not enough. The party holding the claim or demand must pursue some measures to present his demand, and not remain passive, or sleep upon his right. The bringing of a suit or action at law or in equity we would regard as equivalent to an actual presentation." Cases from the courts of New Jersey are cited in Cyc., supra, as being contrary to the text, principally *Newbold v. Feulmore*, 53 N. J. Law, 307, 21 Atl. 939, and *Robins v. Arnold*, 42 N. J. Eq. 511, 8 Atl. 721. The second case does not appear to be much in point, for it seems the bill filed in chancery was unverified, and it was observed that "there was therefore neither verification nor admission of the claim in question within" the period in which a claim could have been properly presented. The reason given in the first case doubtless has much force when applied to the procedure there, but it is not persuasive when applied to our procedure.

It is: "The presentation of claims of creditors within the limited time is, moreover, important to enable the personal representative to determine whether the estate is to be settled as a solvent or insolvent estate, or whether real estate must be resorted to for payment of debts. Upon the construction contended for, such determinations could not be made until after final judgment in every suit brought during the time limited in the rule to bar creditors."

The reason given why claims are required to be presented is proper enough, but the statement that "such determinations could not be made until after final judgment" has no force when applied to our probate procedure. The apparent purpose of the statute requiring presentation of claims is said to be: "First, to furnish the administrator with pertinent evidence touching their validity and justness, by means of which he may determine for himself whether they ought to be paid out of the funds of the estate; and, second, to enable him to justify his acts, in some measure at least, in accounting with the county court." *Willis v. Marks*, 29 Or. 493, 45 Pac. 293. And, as stated in 1 *Abbott's Probate Law*, § 468, "to give creditors and other persons interested notice of the condition of the estate and to expedite its settlement." Of course, mere knowledge on the part of the executor or administrator of the existence of a debt or claim against the estate is not sufficient to dispense with the necessity of presentation. But when, as here, the executors are served with a copy of a verified complaint in an action commenced seeking to establish a claim, and which substantially contains all the averments required in a regularly presented claim, and such suit is commenced and the summons and complaint served upon the executors within the time in which a claim could be properly presented, we can perceive no good reason why they were not afforded equal opportunity and given every means to determine the justness of the claim, and whether it ought to be paid out of the funds of the estate, as fully as though the claim had been regularly presented within the time fixed in the published notice without suit. When a claim is regularly presented, the administrator or executor has 10 days to determine whether he will allow or reject the claim. Presented in the form it was, the executor had 20 days before he was called on to act to determine the justness of the claim and whether it ought to have been paid out of the estate. If the plaintiff had not filed his suit, but had waited until the 1st day of September, 1906, and then had regularly presented his claim to the executors, in what way would they have been afforded better means to investigate the justness of the claim, and in what manner could they better have determined whether it ought to have been paid out of the estate, or in what respect would it better have facilitated or expedited the settlement

of the estate? If such had been done, and if the executors had then denied what they denied here in their answer, the claim would have been rejected and the plaintiff would have been required to establish it in court, as was done by him. If, on the other hand, the executors in such case had allowed the claim and avoided the necessity of a suit to establish it, they equally had the opportunity in April, 1906, after the suit had been commenced, to confess the demand, if, on investigation, they found it to be just, and end the litigation.

It cannot be said that the presentation of the claim to the executors was jurisdictional. *O'Brien v. Larson*, 71 Minn. 371, 74 N. W. 148. It is quite true that it was held in *Harp v. Calahan*, 46 Cal. 222, that, without having first presented a claim for allowance, the claimant had no cause of action, and that the administrator could not waive the necessity of presenting a claim for allowance. But the particular question under consideration—whether the commencement of a suit within the time in which a claim could have been properly presented operates as a presentation of the claim—was not there involved. What was said by the court was in respect of a fact which was a material, and not a jurisdictional, averment. This is apparent from both prior and subsequent holdings of that same court. In the case of *Bank of Stockton v. Howland*, 42 Cal. 129, and in *Drake v. Foster*, 52 Cal. 225, it was held, under statutes identical with ours, that an objection to a recovery on a claim against the estate of a deceased person on the ground that it was not presented to the executor for allowance cannot be made for the first time in the Supreme Court, nor on motion for a new trial. In *McCann v. Pennie*, 100 Cal. 547, 35 Pac. 158, in speaking of section 1500 of the California Code of Civil Procedure, which corresponds with section 3858 of our Code, and where it is provided that no holder of any claim against an estate shall maintain any action thereon unless the claim was first presented to the executor or administrator, the court said it was "analogous to the statute of frauds, which declares that no action shall be maintained on, etc., unless, etc.; and the bar of the statute must be pleaded in defense, unless the complaint shows upon its face that the contract is void under the statute; and a similar rule prevails in regard to the statute of limitations." And in *Falkner v. Hendy*, 107 Cal. 49, 40 Pac. 21, 386, it was held that proof of the presentation of the claim was not essential to the validity of the judgment. This case was cited with approval in the subsequent case of *Frazier v. Murphy*, 133 Cal. 95, 65 Pac. 326. This principle, however, must not be confused with that involved, where the claim is barred by the general statute of limitations, and because of the bar cannot be allowed by the executor or administrator or the judge, as provided in section 3857, or where the claim

was neither presented nor suit commenced within the time in which the claim could properly have been presented. For the defense that the claim is barred by the statute of limitations cannot be waived by the executor or administrator. *Fullerton v. Bailey*, 17 Utah, 85, 53 Pac. 1020; *Reay v. Heazleton*, 128 Cal. 335, 60 Pac. 977.

Had the claim here been barred by the general statute of limitations, or by the special statute, such as where a claim had been presented and rejected by the executors and suit was not commenced within the time provided by the statute, or where no claim had been presented nor suit commenced within the time in which a claim could have been properly presented, the bar of the statute would be a complete defense. But where the suit is commenced under the circumstances heretofore shown, the commencement of the suit operates as a presentation of the claim. In such case, if the executor or administrator, on investigation, finds the claim to be just, and determines that it ought to be paid by the estate, he may confess the demand within the time in which he is required to appear in the action and plead to the merits, and, if he does so, there should be no judgment for costs. If, however, issues are joined as to the merits of the claim and material allegations with respect thereto are denied, and the plaintiff is put upon his proof to establish his claim, then costs should follow as though suit had been brought on a rejected claim. The plaintiff having commenced the action within the time in which a claim could have been presented, before giving the executors an opportunity to pass on the claim, the action at most was only prematurely brought. A premature institution of a suit may be ground for a plea in abatement, which, if interposed, has the effect to defeat or suspend the suit for the time being; but it is not ground for a plea in bar, and cannot have the effect to impair or defeat the action altogether. *Giboney v. German Ins. Co.*, 48 Mo. App. 185; *Collette v. Weed*, 68 Wis. 428, 32 N. W. 753; *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466.

No plea in abatement was interposed. Without pleading this matter either in abatement or in bar, the defendants, in April, pleaded to the merits, and, on oath, denied all the constituent elements of the claim set forth in the complaint. Upon such issues the case stood until after the time in which a claim could have been regularly presented had expired. The defendants then, and after

the case had been set for trial, for the first time pleaded the failure to present a claim in bar of the action. Had such fact been pleaded before joining issues in April, or at any time prior to the 10th day of September, 1906, and, though it should be that the commencement of the suit was not equivalent to the presentation of the claim, the plaintiff could have presented a verified claim to the defendants and thus utterly destroyed the pretended plea in bar. Such a plea in bar is addressed to the merits, and, not being effectual when the suit was commenced, could not become so after the suit had been pending for nearly six months. It is apparent the matter was here in abatement and not in bar. It is a well-recognized principle of pleading that a defendant having a right to a plea in abatement must avail himself of it at the first opportunity and before or at the time of pleading to the merits, and, if he does not do so, it is waived. Nor can that which is available by plea in abatement be made available by plea in bar.

We are of the opinion that the conclusion reached by the trial court, that the plaintiff was entitled to a judgment and to have his claim paid out of the funds of the estate, was correct. We are, however, of the opinion that the judgment must be modified for the reason that the judgment as entered is a personal judgment against the defendants. By section 3842 of the statute it is provided that: "A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the original docket of the judgment must be filed among the papers of the estate in court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment."

The cause is therefore remanded to the trial court, with directions to modify the judgment in conformity with the statute. With such modification the judgment of the court below is affirmed. Neither party is given costs on appeal.

MCCARTY, C. J., and FRICK, J., concur.

CLAWSON v. CLAYTON et al.

(Supreme Court of Utah. Jan. 16, 1908.)

1. CORPORATIONS—MEMBERS AND STOCKHOLDERS—INSPECTION OF CORPORATE BOOKS AND RECORDS.

Under section 329, Rev. St. 1898, providing that the books of every corporation organized in this state shall at all reasonable hours be subject to the inspection of any bona fide stockholder of record, the right to make an inspection and examination of the books at reasonable times, by a stockholder, is an absolute, and not a qualified, right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 674-685.]

2. SAME.

The fact that the right of a stockholder to inspect the corporate records is sought to be strictly enforced by section 4415, Pen. Code, providing that a refusal to allow a stockholder to inspect the books is a misdemeanor, emphasizes the existence of the right, rather than qualifying it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 674-685.]

3. SAME.

The right of a stockholder to inspect the corporate books is qualified only, in that he must examine them at reasonable times, and shall not unnecessarily interfere with the corporation's work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 674-685.]

4. MANDAMUS -- INSPECTION OF CORPORATE BOOKS—RIGHT OF STOCKHOLDER—ENFORCEMENT—PRESUMPTIONS.

Where a stockholder demands an inspection of the corporate books from a bad motive, or at a time and in a manner which unnecessarily interferes with the corporate officers or their work, the exercise of the right will not be enforced by the court, but these objections are matters of defense, and not things the stockholder must negative in the first instance, nor will they be presumed because he selects an agent to make the inspection for him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 264.]

5. CORPORATIONS — STOCKHOLDERS — INSPECTION OF CORPORATE BOOKS.

The doctrine that an act which is not a mere personal privilege or which does not involve a personal trust may, as a general rule, be done through another, applies to the right of a stockholder to inspect corporate books.*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 674-685.]

6. SAME.

The business hours of a corporation are "reasonable hours" in which to inspect its books, within the meaning of section 329, Rev. St. 1898, providing that the books of every corporation organized in this state shall at all reasonable hours be subject to the inspection of any bona fide stockholder of record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 674-685.]

Appeal from District Court, Third District; T. D. Lewis, Judge.

Action by Spencer Clawson against I. A. Clayton and the Clayton Investment Company. From a judgment for plaintiff, defendants appeal. Affirmed.

Young & Snow, for appellants. Young & Moyle, for respondent.

FRICK, J. The plaintiff, as a stockholder, made application to the district court for an order requiring the defendants to permit him to inspect the books of the defendant company. The plaintiff, after alleging the incorporation of the defendant company, in substance, states that he is a bona fide stockholder of record of the defendant corporation; that at various times during business hours of the corporation he had applied to the corporation and its secretary for permission to inspect the corporate books, through an accountant, in his behalf; that the defendant I. A. Clayton is the secretary and treasurer of said corporation, and as such has charge of all of its books; and that said defendants have, at all times, refused, and still refuse, to permit the plaintiff to inspect the books of said corporation through an accountant as aforesaid. The defendants admitted the corporate existence of the defendant company; admitted that I. A. Clayton was the secretary and treasurer thereof, and that as such, at all times, had the custody and control of all of the books of the corporation; and further admitted that the plaintiff is a bona fide stockholder of record of the defendant corporation. The defendants denied all the other allegations, and averred that the plaintiff at all times was acquainted with the system of bookkeeping adopted by said corporation, and that he was well qualified and competent to examine and inspect said books personally; that the defendants always were ready and willing to have the plaintiff make a personal examination and inspection of said books, but that they refused the plaintiff the right to make such examination and inspection through an agent and accountant. Upon a hearing to the court, it made findings in favor of the plaintiff, and, as a conclusion of law, found that the defendant unlawfully denied the plaintiff the right to examine and inspect the books of said corporation through an accountant, and ordered the defendants, their agents, servants or employes forthwith to permit the plaintiff, through an accountant, to examine and inspect the books of the corporation during business hours at its office and in the absence of the plaintiff. From this judgment, the defendants appeal.

All the assignments of error may be determined upon the one that the court erred in making the order permitting an inspection of the books of the corporation through an accountant, where, as in this case, the right to a personal inspection by the stockholder is not denied. At common law the inspection of corporate books by the stockholder was held to be a matter of privilege, rather than a matter of right. At all events the right, if we call it such, was held to be a qualified right, and to some extent at least discretionary. In this view, it was sometimes held that

*Harkness v. Guthrie, 27 Utah, 248, 75 Pac. 624, 107 Am. St. Rep. 664.

the right of inspection was personal to the stockholder, and, unless he made it appear that he was physically unable or otherwise disqualified to make a proper examination of the corporate books, that such an examination by an agent or attorney would not be permitted. In some cases it was further held that the stockholder should make it appear what the purpose of the examination was, and that he had some good reason for demanding an inspection. The foregoing doctrine is invoked by the defendants as applicable to this case. Most of the states have enacted statutes upon the subject. These statutes while somewhat varied in phraseology are in harmony with regard to their purpose. Section 329, Rev. St. 1898, as contained in the chapter devoted to private corporations, reads as follows: "The books of every corporation organized under the laws of this state must be so kept as to show the original stockholders, their interests, the amount paid on their shares, and all transfers thereof; all books of any corporation shall, at all reasonable hours, be subject to the inspection of any bona fide stockholder of record." This section is supplemented by section 4415 of the Penal Code, which, in substance, provides that every officer or agent of any corporation who has in his custody or control any book, paper, or document of such corporation, and who refuses a stockholder, upon lawful demand, during office hours, the right to inspect or take a copy of the same, or any part thereof, is guilty of a misdemeanor. It is contended by the defendants that, since a refusal of inspection involves a penal offense, the statute should receive a strict construction, and that a reasonable construction of it would limit the right of inspection to the stockholder personally, unless some good reason is shown by him why he cannot make it.

It is further contended that the stockholder should be required to give some reason why he desires an inspection of the books. We cannot assent to these contentions. As we view the matter the right to make an inspection and examination of the corporate books, at reasonable times, by a stockholder, is an absolute, and not a qualified, right. The right is given by statute without a qualification, except that it be made at reasonable hours. The fact that the right is sought to be strictly enforced by a penal statute emphasizes the existence of the right, rather than qualifies it. The officers of the corporation, while directly its agents conducting its affairs, are nevertheless selected and chosen by the stockholders. The corporation is the creature of the stockholders. They are not the creatures of the corporation. The stockholder thus having a beneficial interest in the corporate property is interested in the conduct of its affairs, and he also has an interest in knowing whether or not the officers of the corporation, for whose selection he

is in part, at least, responsible, are faithfully discharging their respective duties. In what way may he ascertain this fact better than by an inspection of the books and records in which all the proceedings and transactions of these officers, as agents of the corporation, are recorded? Is he not entirely within his rights, as well as within the provisions of the statute, when he demands an inspection of the books and records at any reasonable time? We think he is. But it is asserted that the right is personal to the stockholder. What reason is there for this contention in view of what we have said above? The purpose of inspection and examination of the books is to give the stockholder all the information he may desire with regard to the corporate affairs. To obtain this information is his absolute right. Since he had a choice, with the other stockholders, and, if he held the majority of the stock, he had this choice alone, in selecting the officers and agents of the company, we think that he also has the right to say whom he will choose in obtaining the information he desires. Nor do we think it lies with the officers or agents of the corporation, whose acts bind the stockholder, to say in what way or through whom he shall ascertain the manner in which the corporate affairs are conducted by them, provided he does this at reasonable times, and does not unnecessarily impede or interfere with their work. Nor may they pass upon the motives that prompt him in seeking the information. At all events, it will not be presumed, in the first instance, that the stockholder in seeking the information to which he is entitled as a matter of right does this with bad motives, or that he thereby intends to inflict an injury upon the corporation, or upon any one. If there be such a motive, and this is the only reason why an inspection is desired, or if the stockholder demands inspection at such times, and in such manner as unnecessarily interferes with the corporate officers, or unduly impedes their work, no doubt this would not be a proper exercise of the right, but an abuse of it, and would not be permitted by the court. These things, however, are matters of defense, and not matters that the stockholder must negative in the first instance. Nor are these things presumed from the fact that the stockholder selects some agent to make the inspection or examination in his behalf. An act which is not a mere personal privilege, or which does not involve a personal trust may, as a general rule, be done through another. This doctrine, we think, applies to the right of a stockholder to inspect corporate books.

In 10 Cyc. 958, the law upon this subject is stated in the following language: "The stockholder is not confined to a personal inspection by himself, but may exercise the right through an agent, attorney, solicitor, counselor, or expert." The case of Cinclin-

nati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707, involved this very question. In passing upon it at page 199 of 62 Ohio St., page 1035 of 56 N. E. (48 L. R. A. 732, 78 Am. St. Rep. 707) the court say: "The contention is that whatever right of examination the statute gives is a personal right, and must be exercised by the stockholder in person. Since when, we would inquire, has it been the law that one who has given him a clear right as to property may not exercise it by any proper agent? The proposition has the quality of novelty, but it is not sound. It must be apparent, on reflection, that, if so circumscribed a limit were placed on the right, its exercise in many instances would be futile." That the right of inspection may be exercised through an agent or an attorney is also held by the following authorities: *Foster v. White*, 86 Ala. 467, 6 South. 88; *Clason v. Nassau Ferry Co.*, 86 Hun, 128, 33 N. Y. Supp. 244; *Mitchell v. Rubber Co. (N. J.)* 24 Atl. 407; *Burke v. Citizens' Bank*, 51 La. Ann. 426, 25 South. 318; 2 Cook on Corporations (5th Ed.) § 516. The following authorities hold that the right is an absolute one, and that the motives of the stockholder are not material, except, perhaps, defensively: *State v. Sportsman's Park Ass'n*, 29 Mo. App. 326; *People ex rel. McDonald v. U. S. Merc. Rep. Co.*, 20 Abb. N. C. (N. Y.) 192; *Ellsworth v. Dorwart*, 95 Iowa, 108, 63 N. W. 588, 58 Am. St. Rep. 427. While the question of the inspection of corporate books was presented from a somewhat different point of view in *Harkness v. Guthrie*, 27 Utah, 248, 75 Pac. 624, 107 Am. St. Rep. 664, yet we think the views we have expressed herein are supported in that case. The English case cited by counsel—*In re West Great Consols Mine*, 27 Ch. Div. 106—in no way conflicts with the doctrine announced in the foregoing authorities. Under the statute passed upon in that case, the English court held that discretionary powers were vested in the court to whom the application was made, and, such discretion having been exercised, the appellate court would not review it in that case. It is true that one of the judges stated that the right should be held to be a personal one of the stockholder, and should be exercised by him only. But this was not necessary to the decision. The court in the case of *Clarke v. Eastern*

Bldg. & Loan Ass'n (C. C.) 89 Fed. 779, held that in that case an inspection would not be ordered for the reason that the books could be produced by a subpoena duces tecum, and the same result obtained as if an inspection were had. It may also be stated that in some of the other cases, in discussing the proposition, the language of some of the judges may be taken as indicating that the right was in some respects qualified and contingent. But the judgments pronounced are to the contrary, and are emphatic that the right is an absolute one.

The contention that the court exceeded the provisions of the statute in giving the right of inspection during business hours, instead of "at all reasonable hours," as stated in the statute, seems to us untenable. The business hours of the corporation, it would seem, are reasonable hours in which to inspect its books. It is during these hours that the officers and agents of the corporation are supposed to be present at the office of the company, and the books accessible. The claim that inspection might unduly interfere with the work of the employees of the corporation is more apparent than real. Undoubtedly, if all the stockholders of the corporation made it a practice to continuously demand the books and to keep them from the employees, it might so interfere. The demand, however, must be at reasonable hours, and must be reasonably exercised. The court, in this case, found the demand to have been reasonable, and authorized the inspection to be made only in a reasonable manner. When a demand is made which, under the circumstances, is unreasonable, and is sought to be exercised in an unreasonable manner, or for illegitimate purposes, the corporation may refuse it. The court, upon proper allegation and proof being made of such facts, no doubt would protect the interests of the corporation, and either sustain it in its refusal, or require the inspection to be made at reasonable times, and in a proper manner. But the officers of the corporation may not cast the burden in this regard upon the stockholder, but must assume it themselves.

We are of the opinion that the judgment appealed from should be, and it accordingly is, affirmed; respondent to recover costs.

McCARTY, C. J., and STRAUP, J., concur.

LEWIS v. MAMMOTH MINING CO.

(Supreme Court of Utah. Jan. 20, 1908.)

MASTER AND SERVANT—INJURIES TO SERVANT
—VIOLATION OF INSTRUCTIONS—LIABILITY
OF MASTER.

That an engineer in charge of a donkey engine in a mine had no authority to vacate his post as engineer, or to permit another to operate the engine, and in so doing violated his contract of employment, and that the employé, who was incompetent, attempting to operate the engine, likewise violated his instructions, and did that which he was forbidden to do when he took charge thereof, does not relieve the employer from liability for injury to another employé due to such attempted operation of the engine; the test being not whether an employé was acting in accordance with the instructions given him, but whether he was performing a service in furtherance of the employer's business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1210-1225.]

Appeal from District Court, Third District; T. D. Lewis, Judge.

Action by Almira Lewis against the Mammoth Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Edwards, Smith & Price, for appellant.
Powers & Marioneaux, for respondent.

MCCARTY, C. J. Plaintiff brought this action to recover damages for the death of her son Edward Lewis, alleged to have been caused through the negligence of the defendant while said Lewis was at work for defendant in its mine at Mammoth, Juab county, Utah. The complaint alleges in part as follows: "That on or about the 13th day of October, 1904, while said Edward Lewis was in the employ of said defendant and in pursuance of its directions, engaged at work in a shaft in said mine, about 2,160 feet beneath the surface, said defendant, without notice or warning to said Lewis, and without fault on his part, wrongfully, negligently, and carelessly caused and suffered a bucket to fall down said shaft from a station therein about 160 feet above where said Lewis was at work, and to then and there strike said Lewis with great force." Then follows a description of the injuries inflicted, from which injuries, it is alleged, Lewis died on or about September 22, 1905, at Richfield, Utah. Defendant in its answer admitted that Lewis was in its employ and at work at the time and place alleged in the complaint; but denied that he was killed through any negligence upon its part. A trial was had which resulted in a verdict in favor of plaintiff for the sum of \$5,000. From the judgment entered on the verdict, the defendant prosecutes this appeal.

At the time of the accident described in the complaint, Edward Lewis, the deceased, was at work in the bottom of the shaft in defendant's mine, 2,160 feet below the surface. A cage was operated in the shaft between the 300 and 1,900 foot level by machin-

ery located in the 300-foot level. It was the duty of one Forcey to run cars off and on to the cage at the 300-foot level, and sometimes, in the absence of the employé whose duty it was to put the loaded cars on the cage at the lower levels, Forcey would be directed by the superintendent or shift boss to "cage the cars," or "ride the cage," as the work was sometimes called. On the day in question he was at work on the 1,900-foot level, putting cars on the cage and sending them up to the 300-foot level, known as the "tunnel level." The shaft extended downward from the 1,900-foot level about 160 feet, but the cage did not run below the 1,900-foot level. An iron bucket, attached to a cable which was operated by means of a donkey engine situated at the 1,900-foot level, was used in the shaft below said level. Defendant had in its employ one Jesse Meyers, who was a competent engineer, whose duty it was to operate this donkey engine, and by means thereof to raise and lower the bucket up and down the shaft below said level. This he would do upon bell signals from the men at work in the bottom of the shaft. The engineer had no other duties aside from operating the engine. And Forcey's duties on the day in question were, as stated, to "cage" the ore cars at the 1,900-foot level. This was the only work assigned to him by defendant, and his duties did not require him to operate the donkey engine. The testimony given by Forcey shows that he was not an engineer, and that he did not understand the method of operating an engine. On the day in question Forcey proposed to exchange work with the engineer, who was in charge of, and whose duty it was to operate, the donkey engine mentioned. To this proposition Meyers, the engineer, assented, and at once placed Forcey in charge of the engine. The facts in relation to what then took place are fully set forth by Forcey in his testimony, wherein he says: "I started to lower the bucket down the shaft below the 1,900. Lewis [referring to the deceased] was working down the shaft that is below the 1,900 in the bottom. * * * I had received no signal to lower the bucket. * * * After I started to do it, I got rattled and let it go, and the bucket went down to the bottom. I don't know whether I put on the brakes or not. * * * It has been a long while, and I kind of got frightened, and I don't remember about it. The bucket went to the bottom. When I started to run the engine, there was a mark there to stop it by, and I didn't know how to stop it I guess. * * * I didn't do anything. I was too scared to do anything. I had never lowered a bucket before that time. It was the first time I ever tried." Counsel for appellant, defendant below, in their brief concede that, when Forcey undertook "to run said engine, he lost control of it, and the bucket fell down the shaft at a high rate of

speed, striking the said Edward Lewis and injuring him." And there is abundant evidence in the record to support the finding of the jury that his death was the result of the injuries received.

The court, among other things, instructed the jury as follows: "(12) Under the facts of this case, and the statutes of Utah [referring to section 1343, Rev. St. 1898], neither the engineer who had charge of the engine, who raised and lowered the bucket, nor Forcey, who manipulated the engine at the time of the accident, were fellow servants of the deceased, and, if the deceased was injured by the negligence of either the engineer or Forcey, or the combined negligence of both, the defendant is liable therefor; and, if the deceased died from injuries sustained by reason of the negligence of the engineer or of Forcey, or both combined, and he himself was free from contributory negligence, then your verdict must be for the plaintiff in such sum as will compensate her for such damages as she has proven.

"(13) That the engineer and Forcey in allowing Forcey to manipulate the engine acted contrary to the express orders of the defendant company does not relieve the defendant from liability for the results of any negligence, if any is shown by the evidence, of said engineer or Forcey while Forcey was so manipulating the engine."

Counsel for appellant do not challenge the correctness of the first part of the foregoing instructions, wherein the court charged that, under the statutes of this state, the engineer and Forcey were not fellow servants with the deceased, but they insist that the giving of the balance of the said instructions was error. It is contended that, when Forcey took charge of and proceeded to operate the donkey engine referred to, he acted without authority and outside of the scope of his employment, and that, therefore, appellant cannot be held liable for any damage resulting from the negligent manner in which the engine was operated on the day in question. It may be conceded—in fact, we think the record shows—that Meyers had no authority to vacate his post as engineer, nor to permit some other person to operate the engine, and that, when he placed Forcey in control of the engine on the day in question, he did so in violation of the duties imposed upon him by his contract of employment, and that Forcey likewise violated the instructions of his employer, and did that which he was forbidden to do when he assumed control of the engine and attempted to operate it; but it does not follow necessarily that when Meyers and Forcey thus violated the instructions, and did something which the rules and regulations of their employment forbade, they, or either of them, acted beyond the scope of their employment. The important question is not whether they acted in accordance with the instructions given them by the defendant,

but were they at the time of the commission of the alleged negligent acts performing a service for the defendant in furtherance of its business. If they were, then, under all of the authorities, the defendant is responsible for their negligent acts. It was the duty of the engineer, Meyers, to operate the engine, and to raise and lower with care the buckets in the shaft, and, when he placed an incompetent person in charge of the engine, he violated a duty in the line of his employment, but did not act beyond the scope of his employment; that is, he was authorized, in fact it was his duty, to perform the service in which he was engaged, and in the course of which he put Forcey in control of the engine, who, it is conceded, was incompetent to properly operate it. Therefore his negligence in this regard was the negligence of the defendant. "The master is responsible for the negligent acts or omissions of his servants in the course of their employment, though unauthorized or forbidden by him, and although outside of their 'line of duty,' and without regard to their motives. He cannot limit his responsibility for any servant by employing him only with reference to a single branch of the business." 1 Shear. & Redf. Neg. § 146. This same doctrine is well illustrated in the case of *Railway v. Shields*, 47 Ohio St. 387, 24 N. E. 658, 8 L. R. A. 464, 21 Am. St. Rep. 840, wherein the court says: "A servant * * * cannot depart from the duty intrusted to him when that duty regards the right of others in respect to the employment of dangerous instruments by the master in the prosecution of his business, without making the master liable for the consequences; for the first step in that direction is a breach of the duty by the master, and his negligence in this regard becomes at once the negligence of the master, other wise the duty required of the master in respect to the custody of such instruments employed in his business may be shifted from the master to the servant, which cannot be done so as to exonerate the master from the consequences of a neglect of duty." Likewise in the case of *Barmore v. Vicksburg, S. & P. Ry. Co.*, 85 Miss. 426, 38 South. 210, 70 L. R. A. 627, it is said: "If the master intrusts the custody of dangerous agencies to his servants, the proper custody as well as the use of them becomes a part of the servant's employment by the master, and his negligence in any regard is imputed to the master in an action by one injured thereby. And, where the injury received results from the negligence of the servant in the custody of the instrument, it is immaterial, so far as the liability of the master is concerned, as to what use may have been made of it by the servant." *Railway v. Shields*, 47 Ohio St. 387, 24 N. E. 658, 8 L. R. A. 464, 21 Am. St. Rep. 840. In such cases the duty of the servant is to carefully guard and control such instrument, and a failure in this respect is not a

departure from the master's service, but a negligent discharge of that service." The following authorities illustrate and declare this same doctrine: 20 Am. & Eng. Ency. Law, 163; Reynolds v. Witt, 13 S. C. 5, 36 Am. Rep. 678; Philadelphia, etc., R. R. Co. v. Derby, 14 How. (U. S.) 468, 14 L. Ed. 502; Duggins v. Watson, 15 Ark. 118, 60 Am. Dec. 560; Lakin v. Railroad Co., 15 Or. 220, 15 Pac. 641; Birmingham W. C. Co. v. Hubbard, 85 Ala. 179, 4 South. 607, 7 Am. St. Rep. 35; Erie Ry. Co. v. Salisbury (N. J.) 50 Atl. 117, 55 L. R. A. 578; Tex. & Pac. R. R. Co. v. Scoville, 62 Fed. 730, 10 C. C. A. 479, 27 L. R. A. 179; Alsever v. Minn. & St. L. R. Co., 115 Iowa, 338, 88 N. W. 841, 56 L. R. A. 748; Dimmitt v. Hannibal & St. J. Ry. Co., 40 Mo. App. 654; Althorf v. Wolfe, 22 N. Y. 355; Quinn v. Power, 87 N. Y. 535, 41 Am. Rep. 392; Wharton, Negligence, § 160.

We find no error in the record. The judgment is therefore affirmed, with costs.

STRAUP and FRICK, JJ., concur.

ACORD v. BOOTH et al.

(Supreme Court of Utah. Jan. 20, 1908.)

MUNICIPAL CORPORATIONS—PROCEEDINGS OF COUNCIL—RIGHT OF PUBLIC TO BE PRESENT—COMMITTEE OF THE WHOLE.

Rev. St. 1898, § 202, requiring a city council to sit with open doors, extends to a session of the council while sitting as a "committee of the whole," and the public cannot be excluded therefrom.

Appeal from District Court, Fourth District; J. E. Booth, Judge.

Action by A. F. Acord against A. L. Booth and others, members of the city council of Provo City, and William K. Henry, marshal, for damages for exclusion from a session of the council while sitting as a committee of the whole. Judgment for plaintiff, and defendants appeal. Affirmed.

D. H. Thomas, Booth & Cluff and Thurman, Wedgwood & Irvine, for appellants. J. W. N. Whitecotton, for respondent.

FRICK, J. The plaintiff in his complaint, after alleging his citizenship, the corporate existence of Provo City as a municipal corporation, and the official positions of the defendants, proceeds in substance as follows: That on the 18th day of June, 1906, the defendants, except William K. Henry, were holding a regular session of the city council of Provo City in the council chamber provided by that city; that plaintiff was present and attended said council meeting; that during the session of said council, for the purpose of carrying on the deliberations of said council in secret, and to prevent the public, and especially the citizens of Provo City, from knowing what was being done by

said council in said session, upon motion made and carried for that purpose, said council resolved itself into a committee of the whole council, and wrongfully and unlawfully ordered that all persons, except the members thereof, the mayor of Provo City, and the defendant William K. Henry, as city marshal, be excluded from said council chamber while said defendants as the city council of Provo City were discussing matters affecting the general welfare of said city; that plaintiff was lawfully present at said session, and his conduct was quiet and inoffensive, and he desired to remain in attendance on said session, and so informed said defendants; that, notwithstanding his right to be present and his insistence upon such right, said defendants, as members of and constituting said council, unlawfully and wrongfully instructed said William K. Henry, as city marshal, to remove the plaintiff from said chamber and said session; that in pursuance of said order said Henry, as city marshal, told the plaintiff that he must leave said chamber, and that, if he did not leave immediately, he, said Henry, would forcibly eject the plaintiff from said chamber; that, to avoid forcible ejection, plaintiff left said chamber, and that he, by the means and manner aforesaid, was excluded from said session of said council; that, if plaintiff had not left said chamber, said marshal would have put the plaintiff out by the use of force and violence; that by reason of being forced to leave said council chamber and the session of said council the plaintiff did suffer great humiliation, chagrin, and indignity, and was deprived of his right to be present at and hear the deliberations of said council, to his damage in the sum of \$50. The defendants filed a general demurrer to the complaint. The demurrer was overruled, and the defendants answered jointly, admitting the official capacity of the defendants, the corporate existence of Provo City, and denying all the other allegations of the complaint. A trial was had to a jury upon the issues joined, which resulted in a verdict for plaintiff, in which the jury assessed his damages at one cent. Judgment was duly entered upon the verdict. Defendants appeal.

It is urged that the court erred in not sustaining the demurrer, for the reason that the complaint does not directly nor sufficiently allege that the plaintiff was either forcibly ejected from or against his will compelled to leave the council chamber while the council was in session as in committee of the whole council. It will be observed that the plaintiff does not predicate his right of recovery upon an assault and battery, nor for an injury arising from such a cause. The right of action is based upon his right to be present during the session of the city council as a public body while discharging public duties. The action is for the purpose of

vindicating a right rather than for the purpose of recovering damages as compensation for injuries sustained. If the plaintiff had not a legal right to be present and the city council had the right to hold secret sessions and exclude the public therefrom, then the complaint perhaps is vulnerable to the objection urged. Chapter 3 of the Revised Statutes of Utah of 1898 covers the subject of council meetings, of which section 202 is a part, and provides: "It shall sit with open doors and keep a journal of its own proceedings." The question, therefore, is: Did the city council have the right to exclude the public, including the plaintiff, from its sessions while sitting in the capacity of what, in parliamentary law, is termed the "committee of the whole"? The practice of conducting business through the committee of the whole has for many years prevailed in legislative and deliberative bodies. Such a committee is no more than the assembly or body itself transacting a part of its business through what is termed the committee of the whole. The committee, therefore, as its name implies, amounts to this: That the particular body or assembly is carrying on a part of its legislative or deliberative functions as a committee composed of all its members. The committee, as is well known, cannot be in session unless the legal or parliamentary body of which it is composed is in session. It cannot adjourn to meet again at some other time or place. Whenever it rises, it must at once report its conclusions to the main body, and that body either rejects, approves, or modifies any matter reported to it. It is quite true that, since a majority of the committee is also generally a majority of the whole body, any matter agreed to in committee of the whole will likely be agreed to when it comes before the main body. The committee of the whole has, in modern times, in legislative and deliberative bodies become almost a matter of necessity. When the main body resolves itself into such committee, it does so for the purpose of escaping from the restraint that is placed upon its members under the rules governing the procedure of the main body. Debate and discussion are freer, and the secretary or clerk is relieved from recording all motions made and proceedings had, since all these are finally incorporated into the report which the presiding officer of the committee makes to the presiding officer of the main body. The report is addressed to the presiding officer of the main body, and is made to the same assembly and to the same members from whom it emanates. The whole purpose, therefore, of forming the committee of the whole, is to consider matters coming before the main body in an informal manner, as it is sometimes called. The committee of the whole, therefore, is nothing but the main body considering its business under suspended rules applicable to the main

body. It is the same body transacting business in an informal instead of a formal manner under strict rules. All this is made clear by L. S. Cushing in his work entitled "Law and Practice of Legislative Assemblies," pp. 1009-1018, in paragraph 32 of Roberts' Rules of Order, and likewise at pages 220 and 237 of Waples' Handbook of Parliamentary Practice. Mr. Cushing, in the work referred to, after tracing the history of the committee of the whole at some length, in speaking of its modern purpose, at page 1018, says: "In the foregoing remarks, the history of the introduction and establishment of this form of proceeding has been traced. It remains now to be seen what advantages, if any, it possesses over the ordinary mode; for, except that it furnishes an occasional relief to the speaker and that members are allowed in committee to speak more than once to the same question, it is difficult at the present day to perceive any other difference between the house and the committee of the whole house than that the speaker presides in the former and a chairman in the latter."

The foregoing remarks with regard to the difference between the procedure of the committee of the whole house of Congress and the House itself is as applicable in principle to other legislative or deliberative bodies. No one would seriously contend that the lower house of Congress was not actually in session when sitting as the committee of the whole house. This, it seems to us, is true of all bodies when transacting business through a committee of the whole. That the committee of the whole city council of Provo City conformed, in a general way at least, to the usual methods pursued by such committees, the record leaves no room for doubt. The city council of Provo City, while sitting as a committee of the whole, still was the city council and conducting public business, which, we think, the public, including the plaintiff, had a legal right to hear. The statute would be robbed of nearly all of its force if it were construed to mean that the sessions of the city council should be open only so long as it transacted its business under the strict rules applicable to legislative bodies, but when it relaxed those rules so as to make debate and discussion freer it could close the doors against the public. To this the contention that no public business may actually be completed and no ordinances adopted or passed in the committee of the whole, and that the yeas and nays must be recorded so that any one may know just how each councilman casts his vote upon any question, is no answer. No one need be present to ascertain the councilmen's vote. These are matters of record, and may be ascertained at any time. This the Legislature knew when it adopted the statute requiring sittings to be open. The purpose was not that the public might know how the vote stood, but the purpose evidently was that the public might

know what the councilmen thought about the matters in case they expressed an opinion upon them. Moreover, the public have the right to know just what public business is being considered, and by whom and to what extent it is discussed. These discussions and deliberations could thus all be taken up in committee of the whole, and the public be excluded from the very proceedings which the statute intended should be conducted with open doors.

It is, however, urged that there are certain matters pertaining to the city's business that, in the nature of things, might adversely affect public interests if conducted and discussed openly. This no doubt is true. In this regard, all such matters may be referred to and considered by special committees which may convene at any time and adjourn from time to time to consider and discuss any matter referred to them. To these committee meetings the statute does not apply. It does not follow, as is urged by the defendants, that, since the statute does not apply to these committee meetings, therefore it does not apply to the sessions of the whole body when it calls itself the committee of the whole. If there are matters which require special attention from the whole membership of the council, we know of no law, nor of any rule of procedure, which prohibits the mayor from including all the members in such a special committee which must hear and consider the facts and report its findings thereon to the council the same as any other committee must do. While this would be a committee

composed of all the members, it still would not be a committee of the whole, as that term is used in parliamentary law and procedure; nor could such a committee be formed as the committee of the whole is formed, nor could it transact the business in the manner as is done by the committee of the whole. We are of the opinion, therefore, that city councils have not the right to exclude the public, or any individual, from its sessions while sitting as a council under the ordinary rules, nor while sitting as a committee of the whole council. In either form of session public business is being discussed and transacted which the statute contemplates shall be open to the public. In this view the complaint stated a good cause of action.

It also follows from what has been said that the evidence is sufficient to sustain the verdict, since the evidence supports the allegations contained in the complaint. From these views it further follows that the other errors assigned need no special consideration. The defendants could not have been prejudiced by the questions put to and the answers elicited from the defendant Henry. If the principle insisted upon by defendants' counsel were as broad as they claim it to be, then there might possibly be error with regard to the questions and answers aforesaid, but it is not so broad, and, as we view it, is not applicable to this case.

The judgment therefore is affirmed, with costs to respondent.

McCARTY, C. J., and STRAUP, J., concur.

MATNEY v. KING, Judge.

(Supreme Court of Oklahoma. Jan. 15, 1908.)

1. CLERKS OF COURT—OFFICERS OF COURT.

The clerk of the district court is an officer of the court, and, in order to properly perform the duties devolving on him by law, it is the duty of the judge of the court to recognize him as such officer.

2. SAME—RECOGNITION—MANDAMUS.

The office of clerk of the district court, under the law, is to be filled by election, and the respondent had no authority to fill the office by appointment. One of the persons voted for at the election was entitled to be recognized by the respondent as clerk, and that one was the person holding the prima facie title to the office. When the respondent refused to recognize the person holding prima facie title, mandamus was the proper remedy to compel such recognition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Clerks of Courts, §§ 4-7.]

3. SAME—SCOPE OF INQUIRY—QUO WARRANTO—TITLE TO OFFICE.

Quo warranto is the proper method of determining disputed questions of title to public office, yet a mere groundless assumption of an election on the part of a person claiming title to public office, and the apparent exercise of the functions of the office de facto, will not deter the court, as a preliminary question, from examining the uncontroverted facts before it for the purpose of determining who has prima facie title, notwithstanding the person claiming adverse title may not be a party to the proceedings.

4. CLERKS OF COURTS—TITLE TO OFFICE—DETERMINATION BY JUDGE.

Where two persons claiming title to the office of clerk of the district court present their credentials on which they base their claim to the office to the judge of the district court, and each requests the judge to recognize him as such clerk, it is the duty of the judge to examine such credentials for the purpose of determining which one of the claimants holds the prima facie title to the office, and such examination does not constitute passing upon the title to public office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Clerks of Courts, § 31.]

5. MANDAMUS—RESTORATION TO PUBLIC OFFICE.

Title to public office, based upon mistakes of fact or misconceptions of law, may impart a color of right which will bar the allowance of a mandamus; but palpable disregard of law renders the action whereby an office is seized merely colorable, and in a clear case will be brushed aside as affording no obstruction to the exercise of a plain legal duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 161-169.]

(Syllabus by the Court.)

Application of Toney Matney for writ of mandamus to John H. King, judge of the district court of Muskogee county. Writ granted.

This matter was presented to the court upon the petition of the relator, the response of the respondent, and the agreed statement of facts, signed by counsel for the relator and respondent, respectively, all of which are hereafter set out in full in the above order:

Petition.

"Comes now the plaintiff, Toney Matney, and represents and shows to this court that

at the general election held in the state of Oklahoma on the 17th day of September, 1907, he was duly and legally elected to the office of district clerk of the county of Muskogee, state of Oklahoma, having received a majority of the votes of said county cast at said election for said office, and that he has since received his certificate of election from the clerk of said county, and has taken the oath of office and given the bond as required by law; that on the 30th day of October, 1907, in a mandamus proceeding in the United States court for the Western District of the Indian Territory at Muskogee, in which Carl Bucher et al. were plaintiffs and the county commissioners of said county of Muskogee were defendants, which was a proceeding to require said defendants as such commissioners to canvass the vote of said county for all the county offices of said county, said court rendered judgment against said plaintiffs and in favor of said defendants by then and there discharging the rule and dismissing said cause upon said defendants' response in obedience to the terms of the alternate writ of mandamus issued by said court, in which response said defendants stated that they had canvassed the vote of said county; that said commissioners found by canvassing the vote of said county that your petitioner had been duly elected to the office of district clerk of said county, and that the certificate issued by the clerk of said county to your petitioner was in obedience to the canvass of said commissioners; that there has been no appeal taken from the judgment of said court; that said court had jurisdiction to determine the question of the petitioner's right to said office, and that said judgment was in favor of your petitioner; that after having qualified as required by law, and as above stated, to wit, on the 18th day of November, 1907, your petitioner entered upon the discharge of the duties of his office as such district clerk, and has remained in the active discharge of said duties up to this time; that the records belonging to his office as district clerk of said county are in the control and custody of John H. King, judge of the Third judicial district of the state of Oklahoma, which district is composed of the counties of Muskogee and Wagoner in said state; that on the 21st day of November, 1907, your petitioner presented to the said John H. King, sitting as a court at Muskogee in said county, his petition in writing, stating that he was the duly elected clerk of said court; that he had qualified as such and requested said court to turn over to him as such clerk the records and papers which properly belong to him as clerk of said court. And he further states that said court refused to recognize your petitioner as said clerk, and refused to turn over to him any of the papers or records which belonged to him as clerk of said court; that the said Carl S. Bucher has no legal right to hold said office, and is a usurper. The plaintiff

further states that he is remediless in the premises, by or through ordinary process or proceedings at law, and he therefore prays this honorable court to award against the said district court a writ of mandamus, commanding and requiring it to recognize your petitioner as the district clerk of said court, and to vacate all orders heretofore made inconsistent therewith, and to turn over to your petitioner all papers and records which legally belong to him, and for such other process and orders and remedies as may to the court seem meet.

"J. E. Wyand,

"Thos. H. Owen,

"Baker & Purcell,

"Attorneys for Petitioner.

"State of Oklahoma, County of Muskogee
—ss.:

"Toney Matney, of lawful age, being duly sworn, says that he is the plaintiff above named; that he has read the foregoing petition, and knows the contents thereof; and that the facts therein set forth are true.

"Toney Matney.

"Subscribed and sworn to before me this 23d day of November, A. D. 1907.

"E. A. Eker, Notary Public.

"My commission expires June 22, 1910."

Response of Defendant to Plaintiff's Petition.

"Comes now the respondent, John H. King, judge of the Third judicial district for the state of Oklahoma, composed of the counties of Muskogee and Wagoner, by and through his counsel George S. Ramsey, and for answer to the plaintiff's petition for a writ of mandamus in this case says that he neither denies nor admits that the petitioner, Toney Matney, was duly and legally elected to the office of district clerk of the county of Muskogee, state of Oklahoma, on the 17th day of September, 1907, but he states in response to this allegation by the petitioner that said Toney Matney was a candidate before the people at said election for the office of clerk of the district court of said county of Muskogee on the Democratic ticket, and that Carrol S. Bucher was a candidate for the office of district clerk in and for the said county of Muskogee at said election held on September 17, 1907; and this respondent further states in this connection that both said Toney Matney, the petitioner, and said Carrol S. Bucher, claim to be clerk of the district court in and for Muskogee county by the result of the said election held on September 17, 1907. In so far as this respondent is concerned it is of no importance to respondent as to which of said candidates, that is, Toney Matney or Carrol S. Bucher, was elected to the office of district clerk at said election; but this respondent here states that he has a well-founded opinion as to which of the two said candidates was elected to said office, and that this opinion disqualifies him from hearing and adjudicating any

contest by either of said applicants in a suit to try the title to said office.

"Respondent states that on November 21, 1907, under the order of this court he convened the district court at Muskogee in and for Muskogee county, as judge of the Third judicial district of the state of Oklahoma, and was confronted by contending candidates for each county office in the county of Muskogee. Respondent states that it seems to be the impression of all the candidates and claimants for county offices in the county of Muskogee that he possessed, as judge of said judicial district, authority to determine, upon convening his court, who were entitled to each county office in Muskogee county, and that each claimant for county office in Muskogee county presented to him, upon the opening of his court, certificates of election, and asked that he recognize them as county officials. Respondent states that upon said date, that is, November 21, 1907, Carrol S. Bucher presented to him a certificate of election, dated November 8, 1907, and signed by Frank R. Applegate as county clerk of the proposed county of Muskogee, in the proposed state of Oklahoma, a copy of which certificate of election is hereto attached and marked 'Exhibit No. 1' to this response, and made a part hereof. Respondent also states that the petitioner, Toney Matney presented to him upon said November 21st a certificate of election, dated October 30, 1907, and signed by Porter Spaulding as county clerk, Muskogee county, in the proposed state of Oklahoma, a copy of which certificate your respondent cannot furnish.

"Your respondent also states in this connection that Fred Cook presented on that occasion a certificate of election, dated November 8, 1907, and signed by Frank R. Applegate as county clerk of the proposed county of Muskogee, in the proposed state of Oklahoma, certifying that said Fred Cook had been elected to the office of sheriff in and for Muskogee county at the election held on September 17, 1907, said certificate being filed herewith as Exhibit No. 2. Respondent also states in this connection that Remus B. Ramsey presented on that date a certificate of election, dated October 30, 1907, and signed by Porter Spaulding as county clerk of Muskogee county, in the proposed state of Oklahoma, certifying that said Remus B. Ramsey had been elected sheriff in and for Muskogee county at said election. Respondent also states that Alexander Richmond on said date presented to him a certificate of election, dated November 8, 1907, and signed by Frank R. Applegate, county clerk of the proposed county of Muskogee, in the proposed state of Oklahoma, certifying that Alexander Richmond was elected county judge in and for the said county of Muskogee at the election held on November 17, 1907. Respondent also states that on the same date W. C. Jackson presented a certificate of election, dated October 30, 1907, and signed by Porter

Spaulding as county clerk of Muskogee county, in the proposed state of Oklahoma, certifying that said W. C. Jackson was elected county judge in and for Muskogee county at said election, a copy of which certificate is hereto attached, marked 'Exhibit No. 3,' and made a part of this response. Respondent also states that on said date, November 21, 1907, W. F. Rampendahl presented to him a certificate of election, dated November 8, 1907, and signed by Frank R. Applegate as county clerk of the proposed county of Muskogee, in the proposed state of Oklahoma, certifying that said W. F. Rampendahl had been elected county attorney in and for said county of Muskogee at the said election held September 17, 1907. Respondent also states that on said date, November 21st, W. J. Crump presented a certificate of election, dated October 30, 1907, signed by Porter Spaulding as county clerk, Muskogee county, in the proposed state of Oklahoma, certifying that said W. J. Crump was elected county attorney in and for said county of Muskogee at said election on the 17th of September, 1907, a copy of which certificate of election is hereto filed as Exhibit No. 4 to this response, and made a part hereof.

"Your respondent further states that there was upon that occasion presented to him certificates of election by adverse claimants for each county office in the county of Muskogee, none of which he received and acted upon, except for district clerk, sheriff, county judge, and county attorney. Your respondent states that it was necessary for him to convene the district court in Muskogee county; that the public welfare required the organization of his court; that in order to organize his court it was necessary for him to have a clerk, for him to recognize some one as sheriff, some one as county attorney, and some one as county judge, each of these offices, as above shown, were claimed by two parties under certificates of election in due form. Your respondent states that he was then of the opinion and is now of the opinion that he had no power to judicially determine who the rightful claimants to any of the said county offices were and are, but that from necessity it was required of him that he recognize some one as such official in each case, that is, for district clerk, for sheriff, for county attorney, and for county judge. Your respondent then made and filed an order recognizing as district clerk Carrol S. Bucher, as sheriff Fred Cook, as county attorney W. J. Crump, and as county judge W. C. Jackson.

"Your respondent states that the Republican candidates for county offices had each a certificate of election, and the Democratic candidates for county offices had each a certificate of election, and not desiring to appeal partisan in his action this respondent made an order recognizing two Republican claimants and two Democratic claimants. A copy of said order of the court, signed and entered, is herewith filed as Exhibit No. 4 to this

response, and made a part hereof. Your respondent at the time he organized his court did not have in his possession any of the records of the United States Court for the Western District of the Indian Territory at Muskogee, and could not, and did not, take judicial notice of any proceedings had in said United States court at its October term, 1907, in regard to the mandamus proceedings alleged in the plaintiff's petition filed in this case. Your respondent admits that a mandamus proceeding was had in the United States Court for the Western District of the Indian Territory, in which Carrol S. Bucher was plaintiff and the county commissioners of the county of Muskogee were defendants; said proceedings being instituted for the purpose of compelling said county commissioners to canvass the vote of said county for county officers. Your respondent states that upon an examination of the record in that proceeding he finds it difficult to tell what was done or what was accomplished, but he admits that J. E. Wyand and William Noel filed on October 30, 1907, a response, being one among many responses, wherein they stated that they had canvassed the votes and determined the persons who had received the greatest number of votes in Muskogee county for the several county and township offices, and that such findings were reduced to writing, signed by the commissioners, and the work of said commissioners entirely completed, and the board adjourned on October 29, 1907, sine die. Said J. E. Wyand and William Noel in this report stated that they had not delivered to the several candidates who received the greater number of votes for the county and township offices any certificates of election, because they were not authorized by law to do so, such power being lodged exclusively in the county clerk. A copy of said response is herewith filed as Exhibit No. 5 to this response, and made a part thereof. On October 31, 1907, the records of the United States Court for the Western District of Indian Territory, at Muskogee, show in that case that upon the response signed by J. E. Wyand and William Noel, as shown by Exhibit No. 5 to this response, the rule was discharged by the court and the proceedings dismissed.

"Respondent states further that during the mandamus proceedings had in the United States court heretofore referred to it was judicially determined by decree of the court, made on October 16, 1907, and accordingly entered, that on the 25th day of September, 1907, J. E. Wyand, J. W. Brady, and William Noel were the legal county commissioners of the proposed county of Muskogee, a copy of which judgment as entered is herewith filed as Exhibit No. 6, and made a part of this response. Your respondent further states that Carrol S. Bucher, claimant to office of district clerk, and Fred Cook, as claimant to office of sheriff, contend and allege that on October 9, 1907, J. W. Brady and William

Noel, under the provisions of section 16 of the election ordinance made by the constitutional convention, removed Porter Spaulding as county clerk for having failed and refused to do his duty under said election ordinance, and appointed Frank R. Applegate to the position of county clerk. A copy of said records of the county commissioners removing said Porter Spaulding is herewith filed as Exhibit No. 7, and made a part of this response. Respondent states that it is claimed that Frank R. Applegate was the legal county clerk in and for Muskogee county from October 9, 1907, up to the date of the statehood proclamation. Your respondent avers and pleads that said Frank R. Applegate acted as such county clerk and signed the commissions or certificates of election held by said Carrol S. Bucher and Fred Cook, as heretofore set out. Your respondent, therefore, denies that petitioner, Toney Matney, has received his certificate of election from the clerk of said county of Muskogee. Your respondent further states that both the plaintiff, Toney Matney, and Carrol S. Bucher, have claimed to be the district clerk for Muskogee county ever since statehood went into effect on November 16, 1907. Your respondent also states that both the plaintiff, Toney Matney, and the said Carrol S. Bucher, have not only each claimed to be district clerk, but have each undertaken to maintain offices as such district clerk, and each had held himself out to the world and to the public as such district clerk since statehood became effective.

"Your respondent avers and pleads that this is a proceeding to try the title to office, which cannot be tried by a mandamus proceeding. Your respondent states that since November 21, 1907, Carrol S. Bucher has been recognized by him as the district clerk, and has been discharging all the duties of such office, and is in possession and has custody of the records of the district court in and for Muskogee county. Your respondent avers and pleads that the plaintiff, Toney Matney, has a full, complete, and adequate remedy at law by a proceeding to try title to the office in the nature of a quo warranto proceeding. Respondent denies that the plaintiff is remediless in the premises by or through ordinary process or proceedings at law. Respondent, therefore, asks that the complaint be dismissed and the rule discharged.

"Geo. S. Ramsey,

"Attorney for Respondent.

"State of Oklahoma, Muskogee County—ss.:

"John H. King, being duly sworn, on oath, states that he has read over the above response to plaintiff's petition in the above-styled cause, and that the statements and allegations therein contained are true.

"John H. King.

"Subscribed and sworn to before me on this 28th day of November, 1907.

"[Seal.] Edward Merrick, Notary Public.

"My commission expires, Nov. 5, 1911."

Exhibit No. 1.

"Certificate of Election. County of Muskogee, State of Oklahoma.

"To Carrol S. Bucher: This is to certify that at the election held in the proposed county of Muskogee, in the proposed state of Oklahoma, on the 17th day of September, A. D. 1907, for the election of officers for a full state and county government, including members of the Legislature and five representatives in Congress for the proposed state of Oklahoma, as provided by election ordinance passed April 22, A. D. 1907, and amended July 15, A. D. 1907, by the constitutional convention of said proposed state, you were duly and legally elected to the office of clerk of the district court in said proposed county of Muskogee, in said proposed state of Oklahoma, as appears from the canvass of the votes and the determination of the board of county commissioners for the proposed county of Muskogee, in the proposed state of Oklahoma, of said election now on file in the office of the county clerk of the proposed county of Muskogee, in the proposed state of Oklahoma.

"In witness whereof I have hereunto set my hand this 8th day of November, A. D. 1907.

"[Signed] Frank R. Applegate,

"County Clerk of the Proposed County of Muskogee, in the Proposed State of Oklahoma."

Exhibit No. 2.

"Certificate of Election. County of Muskogee, State of Oklahoma.

"To Fred Cook: This is to certify that at the election held in the proposed county of Muskogee, in the proposed state of Oklahoma, on the 17th day of September, A. D. 1907, for the election of officers for a full state and county government, including members of the Legislature and five representatives in Congress for the proposed state of Oklahoma, as provided by election ordinance passed April 22, A. D. 1907, and amended July 15, A. D. 1907, by the constitutional convention of said proposed state, you were duly and legally elected to the office of sheriff in said proposed county of Muskogee, in said proposed state of Oklahoma, as appears from the canvass of the votes and the determination of the board of county commissioners for the proposed county of Muskogee, in the proposed state of Oklahoma, of said election now on file in the office of the county clerk of said proposed county of Muskogee, in the proposed state of Oklahoma.

"In witness whereof I have hereunto set my hand this 8th day of November, A. D. 1907.

"[Signed] Frank R. Applegate,

"County Clerk of the Proposed County of Muskogee, in the Proposed State of Oklahoma."

Exhibit No. 5.

"Order.

"Whereas, there now exists in Muskogee county a deplorable and unfortunate condition of affairs in that there are two adverse claimants holding certificates of election for each county office; and

"Whereas, I, as the judge of the district court for the Third judicial district, including Muskogee and Wagoner counties, in the absence of a duly instituted contest over the respective offices, have no authority to judicially determine the rightful claimant to any of said county offices in Muskogee county; and

"Whereas, it is necessary for this court to have a clerk, and that some one should perform the duties and functions of district clerk in Muskogee county; and

"Whereas, it is necessary and required by public necessity that this court recognize some one as sheriff of Muskogee county, by whom process may be served and the peace and quietude of the county maintained; and

"Whereas, public necessity requires that this court recognize some one as county attorney to perform the functions of that office, as required by law, and act as public prosecutor; and

"Whereas, the Constitution requires this court, as successor to the United States Court for the Western District of the Indian Territory, to turn over and transfer to the county court of this county all matters, proceedings, records, books, papers, and documents appertaining to all causes or proceedings relating to estates; and

"Whereas, public necessity requires that this be done at once; and

"Whereas, in order to make such transfer necessary requires this court to recognize some one as judge of the county court of Muskogee county, into whose hands, as such official, such records should be placed:

"Now, therefore, it is ordered that Carrol S. Bucher be and is hereby recognized as the district clerk in and for Muskogee county, and as such district clerk he will file his certificate of election as such clerk and enter the same on the records of this court, with attached thereto a certificate copy of his bond and oath of office, and said Carrol S. Bucher will act as such district clerk for Muskogee county until otherwise ordered, and as such district clerk will take and retain custody of the records of this court and issue any and all process issuing from this court.

"It is further ordered that Fred Cook be, and is hereby, recognized by this court as the sheriff of Muskogee county, and said Fred Cook will file with the clerk of this court a certificate of his election as such sheriff, with attached thereto a certified copy of his bond and oath of office, which are hereby ordered spread upon the records of this court; and said Fred Cook will receive and serve all summonses and other process issued from

this court, and perform any and all the duties of sheriff of Muskogee county in so far as this court is concerned until otherwise ordered.

"It is further ordered that W. J. Crump be, and is hereby, recognized as county attorney in and for Muskogee county, and said W. J. Crump will file with the clerk of this court his certificate of election, with a certified copy of his bond and official oath of office, which are hereby ordered entered upon the journal of this court; and said W. J. Crump will in all things as provided by law act as and perform the duties of county attorney for Muskogee county until otherwise ordered.

"It is further ordered that W. C. Jackson be, and is hereby, recognized as the county judge in and for Muskogee county, and is hereby ordered to file his certificate of election as such county judge, with attached thereto a certified copy of his official bond and oath of office, with the clerk of this court, and the same are ordered entered of record on the journal of this court; and it is hereby ordered and directed that all matters, proceedings, records, books, papers, and documents appertaining to all causes or proceedings relating to estates be and the same are hereby transferred to the county court of Muskogee county, and the clerk of this court is hereby ordered and directed to turn over to W. C. Jackson as county judge in and for Muskogee county all said matters, proceedings, records, books, papers, and documents appertaining to all causes and proceedings relating to estates in this county obtained by this court from the recent clerk of the United States Court for the Western District of the Indian Territory at Muskogee.

"It is further ordered that all certificates of election be returned to the respective parties by the clerk of this court immediately upon their being entered upon the journal of this court, as directed in this order.

"[Signed] John H. King, Judge."

Exhibit No. 6.

"In the United States Court of the Western Judicial District of Indian Territory,
Sitting at Muskogee.

"Carrol S. Bucher, Relator, v. J. E. Wyand et al., Respondents. No. 7,909.
Mandamus.

"And now on this 16th day of October, A. D. 1907, the same being one of the judicial days of the October term of this court, the above-styled cause came on for hearing. The relator appears by G. W. Wheatley, Esq., Waldron & Cramer, and Deroos Bailey, Esq., his attorneys. The respondents J. W. Brady and William Noel appear by William F. Shuermeyer, Esq., their attorney; and, this cause having been heretofore heard upon the amended petition and responses thereunto hereinbefore filed together with the agreed statements of fact, the court had the matter under advisement, and finds as follows, viz.:

That on the 25th day of September, A. D. 1907, the said respondents J. E. Wyand and J. W. Brady and William Noel were the legal county commissioners of the proposed county of Muskogee, in the proposed state of Oklahoma, and authorized to canvass the votes cast in the said county of Muskogee, in the said state of Oklahoma, at the election held on the 17th day of September, A. D. 1907; that no legal canvass thereof had been had; and that it is the duty of the said J. W. Wyand, J. W. Brady, and William Noel, or their lawful successors in office, to at once proceed with the canvass of the returns of the said election in the said county, and cause to be prepared and forwarded the proper abstracts and certificates of election to the persons found to be elected. Therefore it is ordered by the court that you, J. E. Wyand, and you, J. W. Brady and William Noel, or the duly commissioned and legally qualified successors of either of you, do forthwith proceed to canvass the returns of the votes cast at the election held in the proposed county of Muskogee, in the proposed state of Oklahoma, on the 17th day of September, A. D. 1907, and do promptly certify the result of said canvass, as required by law, by causing to be forwarded to Charles H. Filson, secretary of the territory of Oklahoma, an abstract showing the total number of votes cast at said election, and abstract showing the total number of votes cast in the said county for each of the candidates for the various state offices, for congressman of the Third and Fourth congressional district, for judge of the Third judicial district, and for members of the Legislature of the proposed state of Oklahoma; also that you canvass the returns of votes cast for candidates for the various county and township offices, and cause to be prepared and delivered to each candidate found to have the highest number of votes a proper certificate of his office, and that you thereafter make due and proper return of your compliance with this order. Also it is further ordered that the county clerk of the said county of Muskogee, of the proposed state of Oklahoma, do expose the returns of said election unto the said county commissioners for canvass. To all of which the respondent, J. E. Wyand, excepted, and his exception is noted.

"[Signed.] Wm. R. Lawrence, Judge."

Exhibit No. 7.

"Minutes of Meeting of County Commissioners of Muskogee County.

"Commissioners J. W. Brady and William Noel met in the city of Muskogee on October 9, 1907, J. E. Wyand being absent, and the said J. W. Brady and William Noel being the majority of said board, did proceed to organize by electing William Noel chairman and J. W. Brady temporary clerk, Porter Spaulding not being present. And it appearing from the statement of Charles McLees, deputy United States marshal, who had the

writ of mandamus, that the said Porter Spaulding, county clerk, was out of the jurisdiction of the officers, and further that on the 8th day of October, 1907, after the order of the United States court was made to the county clerk, and J. E. Wyand, commissioner, canvassed the votes of Muskogee county, the two commissioners, J. W. Brady and William Noel, went to the office of Clerk Spaulding, at room 5 in the Madden Building, of the City of Muskogee, and same was locked up and closed, and further that on a previous occasion, to wit, on the 24th day and 25th day of September, 1907, these two commissioners, J. W. Brady and William Noel, while at the office of County Clerk Spaulding in the said Madden Building, demanded of him that he turn over the election returns of the general election held on the 17th day of September, 1907, in the proposed county of Muskogee, for the proposed state of Oklahoma, for the purpose of canvassing the same, and the said Porter Spaulding refused to turn over or expose said returns for canvass, and it appearing that under section 16 of the election ordinance passed by the constitutional convention of the proposed state of Oklahoma that the county commissioners have power and it is their duty to remove the county clerk when he fails and refuses to do his duty, and the said Porter Spaulding, county clerk, having failed and refused to do his duty under the said election ordinance, he, the said Porter Spaulding, is hereby removed from the office of county clerk by virtue of the power vested in us, and Frank R. Applegate, a duly qualified elector, and qualified to hold the position of county clerk, is hereby appointed county clerk of the proposed county of Muskogee, proposed state of Oklahoma, to take place of the said Porter Spaulding, and the bond is hereby fixed in the sum of \$5,000. No other business coming before the board at this meeting, the meeting is adjourned subject to the call of the chairman."

Exhibit No. 5.

"In the United States Court for the Western District of the Indian Territory, at Muskogee.

"Carrol S. Bucher, Relator, v. J. E. Wyand et al., County Commissioners et al., Defendants. No. 7,909.

"Come now J. E. Wyand and William Noel, and for their answer to the notice served on them on the evening of the 29th of October, 1907, alleging that the board of county commissioners of the proposed county of Muskogee had unlawfully failed and refused to canvass the election returns from precinct No. 2 of township No. 1, polling place Yahola, and from precinct No. 1 of township No. 5, polling place Fort Gibson, and requiring said board to canvass said returns from said precincts, and enumerate the same along with the other election returns of said county, and enter same along with the other election returns of said county, and

enter the result thereof, and cause the proper abstract to be forwarded of the vote on representatives, and cause to be delivered unto the several candidates who received the highest votes for county and township offices the proper certificates thereof, or to show cause why the same has not been done, respectfully respond that the board of county commissioners of the proposed county of Muskogee had, prior to the service of said notice, canvassed the returns of the two precincts mentioned therein along with all other returns placed in their hands, and had determined the persons who had received the greatest number of votes in the county of Muskogee for the several county and township offices, and that such findings were reduced to writing, signed by the commissioners, and the work of said commissioners, under the law, was entirely completed, and said board of commissioners had adjourned, and did on the 29th day of October, 1907, adjourn sine die. Further responding, they say that they have not delivered to the several candidates who received the greatest number of votes for the county and township offices any certificates, because they are not authorized by law so to do, such power being lodged exclusively in the county clerk.

"De Ross Bailey and W. T. Hutchings,
Attorneys for Respondents.

"United States of America, Indian Territory,
Western Judicial District—ss.:

"J. E. Wyand, being first duly sworn, says that the statements made in the foregoing response are true. J. E. Wyand.

"Subscribed and sworn to before me this 30th day of October, 1907.

"[Seal.] Minnie P. Dumas,
Notary Public.

"My commission expires Jan. 16, 1911."

Agreed Statement of Facts.

"It is agreed by J. E. Wyand, counsel for plaintiff, and George S. Ramsey, counsel for defendant, that this case may be heard and determined by the court upon the plaintiff's petition and defendant's response as the only pleading in the cause, the response being treated as a return to an alternative writ of mandamus. It is also agreed that respondent's answer be taken as true on the statements and allegations of fact set up therein, and it is agreed that the exhibits attached to the answer are true and correct copies of the actual records they purport to be copies of. It is also agreed that the following is a correct copy of an order signed by J. E. Wyand and William Noel as county commissioners on October 30, 1907, and before their sine die adjournment, addressed to Porter Spaulding, which is in words and figures as follows:

"We, the undersigned commissioners of the proposed county of Muskogee, in the proposed state of Oklahoma, recognize Porter Spaulding as the county clerk of the said

proposed county of the proposed state of Oklahoma, and hereby authorize him to issue certificates of election to the candidates receiving the highest number of votes, as found by the canvass made by us and completed on the 29th day of October, 1907, under the order of the judge of the United States Court of the Western District of the Indian Territory. And we further instruct him to deliver to all said candidates certificates of election, as provided by law, the votes to be determined by abstract made by us from said canvass.

"Given under our hands and seal this 30th day of October, 1907.

"[Signed] J. E. Wyand. [Seal.]
"Wm. Noel."

"It is agreed that after October 30th, and while the returns were still in the possession and custody of R. P. Harrison, clerk of the United States Court for the Western District at Muskogee, Indian Territory, the following order was made and signed by the court, to wit:

"It is hereby ordered that the clerk of this court do turn over to the county clerk of the provisional county commissioners of the proposed county of Muskogee, in the proposed state of Oklahoma, or Morgan Garaway, his deputy, the election returns of said county of the election held therein on the 17th day of September, A. D. 1907, now in his custody, for the purpose of the canvass thereof, taking his special receipt therefor.

"Given this the 15th day of November, A. D. 1907, at Muskogee, Indian Territory.

"[Signed] William R. Lawrence,
Judge of Said Court."

"The said Harrison, as said clerk, turned the returns over to Morgan Garaway, acting deputy clerk for Frank R. Applegate, on November 5, 1907, and thereupon another canvass of the returns was made by Irvin Blanchard, one of the county commissioners, and by — Russell, holding appointment as county commissioners, to fill an alleged vacancy, created by the alleged nonresidence of Wm. Noel. It is agreed that the Republican candidates, Carroll S. Bucher, Fred Cook, and others, claim and counted that Noel was not legally a commissioner at the time the canvass was made, under which Porter Spaulding was ordered by the commissioners above set forth to issue certificates as shown by order heretofore set out. It is also agreed that on the application of L. E. Smith, Republican candidate for register of deeds, the United States court did, on October 29, 1907, make the following order, to wit:

"In the United States Court for the Western District of the Indian Territory,
at Muskogee.

"Carroll S. Bucher, Relator, v. J. E. Wyand et al., County Commissioners et al.,
Defendants. No. 7,900. Notice.

"Whereas an affidavit has been filed in the above cause on behalf of the aforesaid

relator showing that the board of county commissioners have unlawfully failed and refused to canvass the election returns from precinct No. two (2) of the township No. one (1), polling place Yahola, in the proposed county of Muskogee, of the proposed state of Oklahoma; also from precinct No. one (1) of township No. five (5), polling place at Fort Gibson, in said county:

"Now, therefore, you, the said J. E. Wyand, William Noel, and Irvin Blanchard, county commissioners as aforesaid, are hereby required to forthwith canvass the returns from the said precincts and enumerate the same along with the other election returns of said county and enter the result thereof, and cause the proper abstract to be forwarded of the vote on representatives, and cause to be delivered unto the several candidates who received the highest votes for county and township offices the proper certificates thereof, or that you show cause why you have not done so to the court sitting in Muskogee on the 30th day of October, A. D. 1907, at 9 o'clock a. m.

"Given this 29th day of October, A. D. 1907.

"[Signed] William R. Lawrence,
"Judge of Said Court.

"Attest: R. P. Harrison, Clerk, by W. E. Mattern, Deputy."

"It is agreed that Frank R. Applegate, as alleged county clerk under the appointment alleged to be made by Noel and Brady on October 9, 1907, never had possession of the election returns until November 5, 1907. It is also agreed that on November 5, 1907, Carol S. Bucher filed motion in the United States court at Muskogee to vacate order of dismissal entered October 31, 1907; that affidavits were filed, motion heard, and denied by the court. We agree that this cause may be heard and determined on this statement of facts, plaintiff's petition, and respondent's answer as a return, this November 29, 1907.

"J. E. Wyand,
"Counsel for Plaintiff.

"George S. Ramsey,
"Counsel for Respondent.

"Filed November 29, 1907.

"W. H. L. Campbell, Clerk Supreme Court.

"It is agreed that the result of this case shall control and be judgment of this court in cases of *Remus B. Ramsey v. John H. King*, 93 Pac. 754, and that this statement of facts be considered in the Ramsey Case. It is also agreed that the response of John H. King in case of *Charles H. Eberle*, 93 Pac. 748, be and the same is admitted to be true in fact, that is, facts alleged in that answer are true, and that said case of *Charles H. Eberle* be submitted on this statement of facts, complaint, and answer as whole accord, the answer to be treated as a return to an alternative writ.

"J. E. Wyand, Counsel for Plaintiff.
"Geo. S. Ramsey, Atty. for Defendant."

In addition to the pleadings and agreed statement of facts the court takes notice that by the election ordinance providing for the election of state, district, county, and township officers Porter Spaulding was appointed county clerk for the county of Muskogee.

J. E. Wyand, Thomas H. Owen, and Baker & Purcell, for relator. George S. Ramsey, for respondent.

KANE, J. (after stating the facts as above). Section 2, art. 7, of the Constitution, provides that: "The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts, and all commissions and boards created by law. The Supreme Court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law, and to hear and determine the same." This provision practically places the Supreme Court in the same relation to the inferior courts of the state as the court of King's Bench bore to the inferior courts of England, under the common law. Chief Justice Marshall in an early case (*Ex parte Crane et al.*, 5 Pet. [U. S.] 190, 8 L. Ed. 92), discussing the supervisory powers of the Supreme Court of the United States over the proceedings of the inferior courts by the writ of mandamus according to the principles of the common law, said: "In England the writ of mandamus is defined to be a command issued in the King's name from the court of King's Bench and directed to any person, corporation, or inferior court of judicature within the King's dominions, requiring them to do some particular thing therein specified which appertains to their office or duty, and which the court of King's Bench has previously determined, or at least supposes, to be consonant of the right and justice. Blackstone adds that: 'It issues to the judges of any inferior courts, commanding them to do justice according to the powers of their office whenever the same is delayed. For it is the peculiar business of the court of King's Bench to superintend all other inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the Crown or Legislature have invested them, and this, not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice.'" The Supreme Court of New York, in *Sikes v. Ransom*, 6 Johns. 279, discussing the power of the Supreme Court of that state to compel judges of the court of Common Pleas to amend a bill of exceptions according to the truth of the case, uses the following language: "Why cannot the writ of mandamus issue from this court? We have the general superintendence of all inferior courts, and are bound to enforce obedience to the statutes, and to oblige subordinate courts and magistrates to do those legal acts which it

is their duty to do." At common law the writ of mandamus is a writ of right every day made use of to oblige inferior courts to do justice, but it will not be made use of to control the exercise of discretion. In general, it lies where one has refused to be admitted or turned out wrongfully from any office or franchise. *People v. Superior Court*, 5 Wend. (N. Y.) 126; *Commercial Bank v. Canal Commissioners of New York*, 10 Wend. (N. Y.) 29, 3 Burr. 1206. The clerk of the district court is an officer of the court, and in order to properly perform the duties devolving on him by law it is the duty of the judge of the court to recognize him as such officer.

In the case at bar the respondent states in his return that he did not pass judicially upon the certificates of election presented to him by the relator, or Carroll S. Bucher, giving as his excuse therefor that by reason of the claim of Carroll S. Bucher to the same office, the respondent could not pass upon the claim of either party without passing upon the title to the office. So the question of interference with judicial discretion is not in this case, as I view it. This case is quite distinguishable from *In re Parsons et al.*, 150 U. S. 150, 14 Sup. Ct. 50, 37 L. Ed. 1034. It will be seen by the statement of Mr. Chief Justice Fuller in the *Parsons Case* that the court below "considered, in connection with the evidence introduced by the respondent, the commission of O'Neal under which he had duly qualified, which was exhibited to the court on the 19th of June, 1893, when he was recognized as United States Attorney. This commission bore date May 26, 1893, and appointed O'Neal the attorney for the United States for the Northern District of Alabama, in due form." After hearing all the evidence offered by the parties the court entered its judgment in due form. In the case at bar the respondent states in his return that he did not take into consideration any of the evidence or certificates offered by the various claimants, and did not pass judicially on the claim of the relator, or Carroll S. Bucher. The following is taken from the response of the respondent: "Your respondent states that he was then of the opinion and is now of the opinion that he had no power to judicially determine who the rightful claimants to any of the said county offices were and are. Your respondent states that the Republican candidates for county offices had each a certificate of election, and the Democratic candidates for county offices had each a certificate of election, and, not desiring to appear partisan in his action, this respondent made an order recognizing two Republican claimants and two Democratic claimants." The respondent was in error in refusing to consider the evidence offered by the relator to support his claim. The office of clerk of the district court, under the law, is to be filled by election, and the respondent had no authority to fill the office by appointment. One of the persons voted for at the

election was entitled to the office, and that one was the person holding the *prima facie* title to the office. When the respondent refused to recognize the person holding *prima facie* title, mandamus was the proper remedy to compel such recognition.

The Supreme Court of Oklahoma, in *Cameron v. Parker*, 2 Okl. 277, 38 Pac. 14, laid down this rule: "In an elective office the law requires that the credentials of the persons declared duly elected shall be a certificate of election, or, in an appointive one, as in the case at bar, a commission from the Governor. This is the highest evidence of title the law requires, and it is not for an individual to assert the invalidity of the law authorizing it, the want of authority for its issuance, or the legal exercise of the power conferring it. These are questions for the courts to determine. But in the meantime the person holding the commission or certificate of election, legal upon its face, evidencing the absolute *prima facie* title to the office, is entitled to the possession of the books, records, and official belongings thereto, notwithstanding the actual title may be in controversy at the time, and in the same or another tribunal." This case has a good many of the features of the case at bar. It is true that in the *Cameron Case* the writ ran against Parker, the adverse claimant to the office, but in the case at bar the respondent makes the certificate of Carroll S. Bucher part of his response. So both certificates, and all the facts on which respondent bases his refusal to act, are before the court, as were the certificates and facts upon which the parties based their respective titles in the *Cameron Case*. In that case the court went far enough into the claim of each of the parties to determine which held the *prima facie* title to the office, not for the purpose of trying the title to the office, for this it is well settled may not be done in a mandamus proceeding. Quo warranto is the proper method of determining disputed questions of title to public office, yet a mere groundless assumption of an election on the part of a person claiming title to public office, and the apparent exercise of the functions of the office *de facto*, will not deter the court, as a preliminary question, from examining the uncontroverted facts before it for the purpose of determining who has *prima facie* title, notwithstanding the person claiming adverse title may not be a party to the proceeding.

On this point the case of *Delgado v. Chavez*, 140 U. S. 586, 11 Sup. Ct. 874, 35 L. Ed. 578, is strongly in point. The facts in the *Delgado Case*, as stated by Justice Brewer, are as follows: "On the 13th of January, 1891, Abraham Staab, William Nesbitt, and Juan Garcia filed in the district court of the First judicial district of the territory of New Mexico, and presented to the judge thereof, their petition showing, as they claimed, that they had been elected at the general election in November preceding members of

the board of county commissioners of Santa Fé county, in the territory of New Mexico; and further alleged that on the 2d day of January, 1891, they had duly qualified as such commissioners; that at the same election Pedro Delgado had been duly elected probate clerk of said county, and had qualified as such officer; that by virtue thereof he became and was the acting clerk of the board of county commissioners, and had possession of the records, books, files, and papers of that office; that after their qualifications as such board they demanded of him to produce the books, and to record their proceedings as such board; and that he refused so to do, or to in any manner recognize them as the board of county commissioners. They prayed that a writ of mandamus might issue commanding him to recognize them as the board of county commissioners, that he act with them as such board, and that he enter of record their proceedings as a board. Upon this petition an alternative writ was issued; and on the 15th day of January, in obedience to such writ, appellant appeared and filed his answer, alleging facts, which, as he claimed, showed that three other persons were at the November election elected county commissioners, and that the petitioners were not, and further averring that two of those other persons on the 1st of January, 1891, duly qualified as members of the board of county commissioners, entered into possession and assumed the duties of such office, met on that day in the courthouse of the county as the board of county commissioners, and proceeded to transact the business of the county, and that they were still in possession of their offices of county commissioners. He admitted that he refused to recognize the petitioners as a board of county commissioners, and alleged as his reason therefor that they were not the legally elected commissioners, and had never been in possession of such offices. On the same day, January 15th, the matter came on to be heard on these pleadings, and a peremptory mandamus was ordered commanding the appellant that he record on the records of the county the proceedings of the petitioners as the board of county commissioners of the county, and that in all things he recognize them as the only lawful county commissioners of the county." After noticing other questions involved in the case, Justice Brewer continues: "This brings us to the principal question in the case; and that is, the real import of the proceedings was to try the title to office, that quo warranto is a plain, speedy, and adequate, as well as the recognized, remedy for trying the title to office, and that the familiar law in respect to mandamus, reinforced by statutory provisions in New Mexico, is that mandamus shall not issue in any case where there is a plain, speedy, and adequate remedy at law. On this the invalidity of the proceedings is asserted. But the obvious reply is that this

was not a proceeding to try the title to office. The direct purpose and object was to compel the defendant to discharge his duties as clerk, and to forbid him to assume to determine any contest between rival commissioners. It was enough in this case for the court to determine, and it must be assumed, that the evidence placed before it was sufficient to authorize an adjudication that these petitioners were commissioners de facto. As such, the clerk is bound to obey their commands and record their proceedings. It is true the pleadings disclose the existence of a contest between these petitioners and other parties, and it is true that the answer would tend to show that the others were the commissioners de facto; but that was a question of fact to be determined by the court hearing this application, and it, as must be assumed from the decision, found that these petitioners, rather than their contestants, were the commissioners de facto. It was proper for it, then, to issue a mandamus to compel the defendant to recognize them as the commissioners of the county, and this irrespective of the question whether or not the petitioners were commissioners de jure. No one would for a moment contend that this adjudication could be pleaded as an estoppel in quo warranto proceedings between the several contestants. If that has not already been determined in a suit to which all the contestants are parties, it is still a matter open for judicial inquiry and determination." The foregoing case undoubtedly sustains the doctrine that, where two persons claiming title to the office of clerk of the district court present their credentials on which they base their claim to the office to the judge of the district court, and each requests the judge to recognize him as such clerk, it is the duty of the judge to examine such credentials for the purpose of determining which one of the claimants holds the prima facie title to the office, and such examination does not constitute passing upon the title to the public office.

Having reached the conclusion that the court has the power to examine all the facts presented by the parties for the purpose of determining which of the claimants has prima facie title to the office, we will briefly set out the claim of each as gleaned from the response and agreed statement of facts: The relator has a certificate signed by Porter Spaulding, who was appointed county clerk by the election ordinance passed by the constitutional convention. This certificate was based on a canvass of the vote cast, made by J. E. Wyand, J. W. Brady, and William Noel, who, all parties seem to concede, were the legal county commissioners of Muskogee county; and the canvass was made in pursuance to a writ of mandamus issued out of the United States Court of the Western Judicial District of the Indian Territory, at Muskogee. It also appears, by the pleadings and agreed statement of facts, that af-

ter the canvass was made as above stated, to wit, on the 30th day of October, 1907, J. E. Wyand and William Noel, two of the county commissioners, entered an order recognizing Porter Spaulding as county clerk, and specifically ordering him as county clerk to issue certificates of election to the candidates receiving the highest number of votes. After this, on the same day, to wit, the 30th day of October, 1907, this board of county commissioners adjourned sine die. Carroll S. Bucher, according to the response and agreed statement of facts, holds a certificate of election signed by Frank R. Applegate, who claims to have been appointed by J. W. Brady and William Noel, two of the members of the board of county commissioners, after they had, as they stated, removed Porter Spaulding from office, for the reason that Spaulding refused to turn over to them or expose the returns for canvass. These commissioners claim to derive their power to remove Mr. Spaulding and appoint Mr. Applegate from section 16 of the election ordinance, which reads as follows: "In the event any county clerk shall fail or refuse to perform or discharge any of the duties aforesaid, or be disqualified, the county commissioners shall appoint some one to act as county clerk in the performance of such duties." The election certificate issued by Mr. Applegate is based upon a canvass "made by Irvin Blanchard, one of the county commissioners, and by ——— Russell, holding appointment as county commissioner to fill an alleged vacancy, created by the alleged nonresidence of William Noel." This canvass seems to have been made on the 5th day of November, 1907.

The only irregularity apparent in the certificate of the relator is that it was signed by Mr. Spaulding after his alleged removal by the two commissioners above named. I am of the opinion that section 16 of the election ordinance does not give the county commissioners power summarily to remove the county clerk for the reasons stated; but, as disclosed by the response and agreed statement of facts, as the same board of county commissioners, after the order of removal was made and after the vote was canvassed, recognized Mr. Spaulding as county clerk, and specifically authorized and directed him to issue the certificates of election, and under this authorization and direction he did issue them, I do not deem it necessary to enter into a lengthy discussion of the powers of the commissioners to remove the county clerk. It is enough to say that, in my opinion, under the circumstances of this case, Mr. Spaulding, as county clerk, had authority to issue the certificate of election to the relator in this case, and its possession by the relator is prima facie evidence of his title to the office.

A careful scrutiny of the response and the agreed statement of facts fails to show the authority under which the alleged commis-

sioners, who made the canvass on which Mr. Bucher's certificate of election was presumably based, acted when they made their recount of the vote. It was not only judicially determined that the board that made the canvass on which the relator's certificate of election was based was the legally constituted board of county commissioners, but all the parties recognized them as such. There cannot be two legally constituted boards at the same time, each authorized to canvass the returns and order certificates of election issued. From the response and statement of facts there can be but one conclusion drawn on this point, and that is that the board that canvassed the returns on which the relator's certificate of election is based was the legally constituted board. But, admitting that the board that canvassed the vote upon which Mr. Bucher's certificate of election was based was the legally constituted board, still there appears to be no reason why there should be a recanvass of the vote. The old board made their canvass in pursuance to a writ of mandamus directing them to do so. Unless the facts disclose circumstances justifying another canvass, and in this case they do not, the canvass so made would be illegal and void.

From the facts before the court it must be found that the relator has a prima facie title to the office; that the certificate of election of Carroll S. Bucher is palpably without legal warrant, and absolutely void. "Title to public office, based upon mistakes of fact or misconceptions of law, may impart a color or right which will bar the allowance of a mandamus; but palpable disregard of law renders the action whereby an office is seized merely colorable, and in a clear case will be brushed aside as affording no obstruction to the exercise of a plain legal duty." *State of New Jersey v. Mayor*, 52 N. J. Law, 332, 19 Atl. 780, 8 L. R. A. 697. This is also a rule at common law. Thus in *Rex v. Bankes*, 3 Burr. 1452, Lord Mansfield proposed, upon the argument, that affidavits be laid before him that he might determine whether it was a doubtful election and fit to be tried upon an information in the nature of a quo warranto, or whether it was merely colorable, and clearly void; saying that in the former case the court might not grant a mandamus, while in the latter case they ought. This case falling fully within the rule sanctioned by the common law, and well supported by decisions of courts of last resort, both state and federal, and this court having all the facts before it, should render effective relief. This proceeding does not in any way affect the title to the office; but the person having prima facie title to it is entitled to recognition as clerk of the district court by the respondent as judge of the court until his title is upset by a proper proceeding.

The relator is entitled to a peremptory writ of mandamus commanding the respondent, as judge of the district court of Mus-

kogee county, to recognize the relator as clerk of the district court of Muskogee county and to permit said relator to record such proceedings of said court as it is the duty of the clerk to record, and to do and perform such other services as are required by law of the clerk of the district court and to turn over to the relator such books, records, papers, files, seals, and other property belonging to said office as may be in his possession. It is so ordered. All of the Justices concur.

EBERLE v. KING, Judge.

(Supreme Court of Oklahoma. Jan. 10, 1908.)

1. MANDAMUS—SUBJECTS OF RELIEF—SPECIFIC DUTY.

To entitle relator to a peremptory writ of mandamus, he must show that the act, to compel the performance of which the writ is invoked, is one which the law specially enjoins on respondent as a duty resulting from an office, trust, or station.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 39.]

2. SAME—TITLE TO AND POSSESSION OF OFFICE.

Mandamus will not lie at the instance of relator holding prima facie title to the office of register of deeds to compel the judge of the district court to enter an order recognizing him as such.

3. STATES—NEW STATES—ADMISSION OF TERRITORY—RECORDS.

Prior to the admission of this state into the Union the records of the clerk or deputy clerk of the United States court in the Indian Territory, as ex officio recorder, at Muskogee, were the property of the United States. As such, it required the concurrent action of both the federal and state governments to pass them under the jurisdiction of the latter when organized. Irrespective of the intent of the enabling act, or the act of Congress amendatory thereto, approved March 4, 1907, Act March 1, 1907, c. 2285, 34 Stat. 1026, was sufficient on the part of the federal government, and article 4, § 1274, Wilson's Rev. & Ann. St. Okl. 1903, extended and put in force throughout the state, eo instante, on the admission of the state into the Union, together with sections 8 and 9 of the schedule of the Constitution, were sufficient concurrent action on the part of the state government to pass said records under its jurisdiction when organized, and vest their legal custody and right of possession in relator as register of deeds, upon relator qualifying and giving bond as required by law.

4. SAME.

For the reason just stated, respondent could not, by receiving unauthorized possession of said records from the clerk or deputy clerk of the United States Court in the Indian Territory as ex officio recorder, after the state was admitted into the Union and consequent abolition of that court, and when said office of clerk or deputy clerk as ex officio recorder had become functus officio, thereby pass said records under his jurisdiction as judge of the district court and, hence the custody and control over said records, alleged and admitted to be exercised by respondent, was such as was done in his individual capacity and not in his official capacity as a court.

5. MANDAMUS—INDIVIDUAL DUTIES—RECORDS OF OFFICE.

Mandamus will not lie at the instance of relator holding prima facie title to the office of register of deeds, and who has qualified and given bond as such, as required by law, to com-

pel the judge of the district court to turn over to him the books, papers, and records belonging to the office of register of deeds, the unauthorized custody of which respondent holds, not as a court, but as an individual, and refuses to surrender on demand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 275.]

(Syllabus by the Court.)

Original application for mandamus by Charles H. Eberle against John H. King, judge of the district court, to compel him to recognize relator as register of deeds and to deliver to him the records of that office. Application denied.

In the case of Toney Matney v. John H. King, Judge, etc., recently decided by this court, it was, by counsel on both sides, "agreed that the response of John H. King in case of Charles H. Eberle be, and the same is admitted to be, true in fact; that the facts alleged in that answer are true; and that the case of Charles H. Eberle be submitted on this state of facts—complaint and answer as whole record—the answer to be treated as return to alternative writ." The petition for the writ in this case is by relator, "Charles H. Eberle, and represents and shows to this court that at the general election held in the state of Oklahoma on the 17th day of September, 1907, he was duly elected to the office of register of deeds of the county of Muskogee, state of Oklahoma, having received a majority of the votes of said county cast at said election for said office, and that he has since received his certificate of election from the clerk of said county and has taken the oath of office and given the bond as required by law; * * * that after having qualified as required by law, as above stated, to wit, on the 18th day of November, 1907, your petitioner entered upon the discharge of the duties of his office as such register of deeds, and has remained in the active discharge of the duties of said office up to this time; that the records belonging to his office as register of deeds of said county are in the control and custody of John H. King, judge of the Third judicial district of the state of Oklahoma, which district is composed of the counties of Muskogee and Wagoner in said state; that on the 21st day of November, 1907, your petitioner presented to the said John H. King, sitting as a court at Muskogee in said county, his petition in writing stating that he was duly elected register of deeds of said county; that he had qualified as such, and requested said court to turn over to him, as such register of deeds, the records and papers which properly belong to him as register of deeds of said county; and further states that said court refused to recognize your petitioner as said register of deeds, and refused to turn over to him any of the papers or records which belong to him as such register of deeds of said county; * * * that he is remediless in the premises, by or through ordinary

process or proceedings at law, and he therefore prays this honorable court to award against the said district court a writ of mandamus commanding and requiring it to recognize your petitioner as register of deeds of said county, and to vacate all orders heretofore made inconsistent therewith, and turn over to your petitioner all papers and records which legally belong to him," etc. In his answer "the respondent, John H. King, judge of the district court for the Third judicial district of the state of Oklahoma, * * * says: That he neither admits nor denies that the plaintiff, Charles H. Eberle, was duly and legally elected to the office of register of deeds of Muskogee county, in the state of Oklahoma, at the election held in the state of Oklahoma and in the county of Muskogee on September 17, 1907; but respondent states that L. E. Smith, not a party to this proceeding, does deny the election of Charles H. Eberle, and claims with equal earnestness that he (L. E. Smith) was duly and legally elected register of deeds in and for Muskogee county at said election held on September 17, 1907; * * * that Charles H. Eberle was the Democratic candidate at said election for the office of register of deeds of Muskogee county, and that L. E. Smith was the Republican candidate for register of deeds at said election for Muskogee county, and that each claims to have received the larger number of votes, and each claims to hold title to said office by a certificate of election, signed by the county clerk in and for Muskogee county; * * * that he has taken no action in regard to said register of deeds in and for Muskogee county, and has recognized neither L. E. Smith nor plaintiff, Charles H. Eberle, as register of deeds; * * * that the facts set up in his answer to the petition filed by Toney Matney against him in this court are equally applicable to this case; * * * that both these matters grew out of the same election, and same court proceedings, and he now asks that this cause be consolidated and heard with the case of Tony Matney against himself (93 Pac. 737), in so far as his response in that case is applicable in this case; * * * that he has no records in his possession which the plaintiff is entitled to possession of, whether he be the legally elected register of deeds or not; * * * that there is no law in the state of Oklahoma, either in the enabling act or in the Constitution, requiring the district court, as successor of the United States Court in the Indian Territory, to turn over to the register of deeds for any county the books, papers, and records received by the court from the clerk of the United States court, or deputy clerk of the United States court, as ex officio recorder, for the respective district of the Indian Territory."

J. E. Wyand, Thomas H. Owen, and Baker & Purcell, for relator. George S. Ramsay, for respondent.

TURNER, J. (after stating the facts as above). By this it will be seen that the same statement of facts in the case of Matney v. King, 93 Pac. 737, so far as applicable, governs in this. In that case the relator successfully invoked the aid of the writ to be recognized by the respondent, as clerk of the district court of Muskogee county, and by virtue of a certificate of election dated October 30, 1907, signed by Porter Spaulding, county clerk of Muskogee county, showed prima facie title to the office as against Carrol S. Bucher, who claimed title thereto by virtue of a certificate of election dated November 8, 1907, signed by Frank R. Applegate. In this case the relator invokes the aid of the writ to be recognized by the respondent, as register of deeds of Muskogee county, and, like the relator in that case, by virtue of a certificate of election dated October 30, 1907, signed by Porter Spaulding, county clerk of Muskogee county, shows prima facie title to the office as against L. E. Smith, who claims title thereto by virtue of a certificate of election dated November 8, 1907, signed by Frank R. Applegate, alleged county clerk of Muskogee county, which latter certificate is merely colorable, if not void. Having thus shown prima facie title to the office of register of deeds of Muskogee county, without attempting to inform this court as to just what records are intended, relator simply states "that the records belonging to his office as register of deeds of said county are in the control and custody of John H. King, judge of the Third judicial district, etc.; * * * that said court refused to recognize your petitioner as said register of deeds," and refused to turn them over to him, as such, and prays that the writ of mandamus issue requiring him to do so.

We might be at a loss to know just what records are intended but for that part of the answer of the respondent wherein he states "that he has no records in his possession which the plaintiff is entitled to the possession of, whether he be the legally elected register of deeds or not; * * * that there is no law in the state of Oklahoma, either in the enabling act or the Constitution, requiring the district court, as successor of the United States Court in Indian Territory, to turn over to the register of deeds for any county the books, papers, and records received by the court from the clerk of the United States court, or the deputy clerk of the United States court, as ex officio recorder, for the respective recording district in Indian Territory." By this the issue herein appears to be that the respondent is alleged and admitted to be in possession of certain "books, papers, and records received by" him, as a "court, from the clerk of the United States court, or deputy clerk of the United States court, at Muskogee, as ex officio recorder," to which relator, as register of deeds of that county, claims the right of possession, and which respondent has refused to turn over to him

on demand. Now let us determine the legal status of these records and see who, under the law, is entitled to their possession, and if it be relator we will then determine whether the writ should run requiring respondent to turn them over to him. In order to do this let us review briefly the legislation out of which these records grew. On March 1, 1889, the Congress of the United States passed an act, entitled "An act to establish a United States Court in the Indian Territory, and for other purposes" (Act March 1, 1889, c. 333, 25 Stat. 783), and therein, among other things, provided for a judge, marshal, clerk, etc., and prescribed its jurisdiction, both civil and criminal, and "that two terms of said court shall be held at Muskogee in said territory." On May 2, 1890, Congress passed another act, entitled "An act to provide a temporary government for the territory of Oklahoma, to enlarge the jurisdiction of the United States Court in Indian Territory, and for other purposes" (Act May 2, 1890, c. 182, 26 Stat. 81), which, among other things, for the purpose of holding terms of court, divided Indian Territory into three divisions, known as the First, Second, and Third divisions; provided that Muskogee should be the place of holding court in the First division, and that the judges of said court should hold at least two terms of said court each year in each division; provided for deputy clerks in each division, and "that the general laws of the state of Arkansas in force at the close of the session of the General Assembly of that state of 1883, as published in 1884 in the volume known as Mansfield's Digest of the Statutes of Arkansas, * * * are hereby extended and put in force in the Indian Territory, * * *" naming them by chapter, including chapter 110 on "Mortgages"; and in section 38 provided that "clerks and deputy clerks shall be also ex officio recorders within their respective divisions, and as such they shall perform such duties as are required of recorders of deeds under the laws of Arkansas. * * *" On March 1, 1895, Congress passed another act, entitled "An act to provide for the appointment of additional judges for the United States Court in Indian Territory and for other purposes" (Act March 1, 1895, c. 145, 28 Stat. 693), which, among other things, divided Indian Territory into three judicial districts, known as the Northern, Central, and Southern; provided for the holding of at least two terms of the United States court each year in each place of holding court in each district, of which there were four in the Northern, four in the Central, and five in the Southern; designated Muskogee as one of the places of holding said court in the Northern district; and provided for the appointment of two additional judges, and "that the clerk of the United States Court in the Indian Territory now in office shall be the clerk of the Southern district, and the clerk of the Central and Northern districts

shall be appointed by the respective judge thereof * * * and keep his office at one of the places of holding court in his district. He shall perform the same duties * * * as clerk of the district courts of the United States. * * *" And "each of said clerks shall appoint a deputy clerk for each court in his district where he himself does not reside."

Other and further legislation by Congress affecting the United States courts in Indian Territory from the passage of this act up to February 19, 1903, included, among other things, the appointment of additional judges and the carrying out of an additional district, known as the Western district (Act May 19, 1902), wherein Muskogee was retained as a place of holding court, and perhaps additional places designated, the recital of none of which is material to this inquiry. On February 19, 1903, Congress passed another act, entitled "An act providing for record of deeds and other conveyances and instruments of writing in Indian Territory" (Act Feb. 19, 1903, c. 707, 32 Stat. 841), the material part of which (omitting the enacting clause) is as follows:

"That chapter twenty-seven of the Digest of the Statutes of Arkansas, known as Mansfield's Digest of eighteen hundred and eighty-four, is hereby extended to the Indian Territory, so far as the same may be applicable and not inconsistent with any law of Congress: Provided, that the clerk or deputy clerk of the United States court of each of the courts of said territory shall be ex officio recorder for his district and perform the duties required of recorders in the chapter aforesaid, and use the seal of such court in cases requiring a seal, and keep the records of such office at the office of said clerk or deputy clerk.

"It shall be the duty of each clerk or deputy clerk of such court to record in the books provided for his office all deeds, mortgages, deeds of trust, bonds, leases, covenants, defeasances, bills of sale, and other instruments of writing of or concerning lands, tenements, goods or chattels; and where such instruments are for a period of time limited on the face of the instrument they shall be filed and indexed if desired by the holder thereof and such filing for the period of twelve months from the filing thereof shall have the same effect in law as if recorded at length. The fees for filing, indexing and cross-indexing such instruments shall be twenty-five cents, and for recording shall be as set forth in section thirty-two hundred and forty-three of Mansfield's Digest of eighteen hundred and eighty-four. * * *

"Such instruments heretofore recorded with the clerk of any United States court in Indian Territory shall not be required to be again recorded under this provision, but shall be transferred to the indexes without further cost, and such records heretofore made shall be of full force and effect the

same as if made under this statute. * * *

"All instruments of writing the filing of which is provided for by law shall be recorded or filed in the office of the clerk or deputy clerk at the place of holding court in the recording district where said property may be located, and which said recording districts are bounded as follows: [Designating twenty-five recording districts and naming Muskogee as the place of record for District No. 10.]"

Thus it will be seen that the records in controversy were, at the time of the passage of the so-called enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267), in the custody and under the control of the clerk or deputy clerk as ex officio recorder of the United States Court in the Indian Territory at Muskogee, and were the property of the United States, subject to be disposed of, on admission of that territory into the Union and the consequent abolition of that court, by that or some other act of Congress, as Congress should see fit. As is usual in such cases Congress might see fit to turn them over to the state government, when formed; but, in order to make this transfer effectual, it seems that concurrent action on the part of the state is necessary to pass them under state jurisdiction. *Benner et al. v. Porter*, 9 How. (U. S.) 235, 13 L. Ed. 119, we think, correctly states the rule. In that case the court said: "The territorial courts were the courts of the general government, and the records in possession of their clerks the records of that government; and it would seem to follow necessarily from these premises that no one could legally take the possession or custody of the same without the assent, express or implied, of Congress. Such assent is essential, upon the plainest principles, to authorize change of custody. On the admission of a territorial government into the Union as a state the concurrence of both the federal and state government would seem to be required in the transfer of the records in cases of appropriate state jurisdiction from the old to the new government. An act of Congress would be incapable of passing them under the state jurisdiction, as would be an act of the Legislature of the state to take the record out of the custody of the federal government. Both must concur." See, also, *Hunt v. Palao*, 4 How. (U. S.) 589, 11 L. Ed. 1115; *In re Inerarity, Adm'r. v. Curtis & Griswold, Trustees*, 4 Fla. 175.

Whatever might have been the intent of the enabling act, or the act of Congress amendatory thereto, approved March 4, 1907, c. 2911, 34 Stat. 1286, with reference to the transfer of these records from the federal to the state government, when organized, there is no doubt as to the intent of the act of March 1, 1907, commonly called the "Indian Appropriation Bill" (Act March 1, 1907, c. 2285, 34 Stat. 1026), which, in part, is as follows: "The Attorney General be, and he is hereby, authorized to make all necessary ar-

rangements for the transfer from the clerks of the United States courts in the Indian Territory and their deputies in their capacities as clerks and as ex officio recorders, to the proper state or county officials of the state of Oklahoma when organized, all records, papers, and files now in the custody of said clerks and their deputies, and he is authorized to pay the necessary expense incident thereto out of the excess emoluments earned by said clerks, and their deputies whether as clerks and deputy clerks or as ex officio recorders of deeds and other instruments. * * * " By virtue of this act, and that part of section 13 of the enabling act which provides " * * * that the laws in force in the territory of Oklahoma, so far as applicable," when admitted as aforesaid, "shall extend over and apply to said state until changed by the Legislature thereof," which later act put in force, eo instante, on the admission of this state into the Union, article 4 Wilson's Rev. & Ann. St. Okl. of 1903, which provides for the office of register of deeds for each county in the state, and, after providing for his term of office, qualification, and bond (section 1274), provides: "That the register of deeds shall have the care and custody of all books, records, deeds, maps, papers and fixtures deposited and kept in his office. * * * " We are of the opinion that the right to the possession of the records in controversy in this case passed immediately, on the admission of these territories into the Union, from the federal to the state government, and thus to relator, on his qualifying and giving bond as required by law. As to concurrent action on the part of the state intended to accept and pass these records under the jurisdiction of the state, we think that section 8 and 9 of the schedule of the Constitution of this state is ample for that purpose.

Having determined that relator has shown prima facie title to the office of register of deeds of Muskogee county, and that he has qualified and given bond as such, as required by law, and that he is entitled to possession of the records in controversy, let us next inquire whether mandamus will lie to compel this respondent to turn them over to him. Before doing so, however, let us again examine the issue in this case, and somewhat more closely, in order to determine in what capacity respondent holds and controls these records—whether as a court or as an individual. Relator alleges "that the records belonging to his office as register of deeds of said county are in the control and custody of John H. King, judge of the Third judicial district; * * * that said court refuses to recognize your petitioner as said register of deeds," and refuses to turn them over to him as such. Respondent, answering, alleges "that he has no records in his possession which the plaintiff is entitled to possession of, whether he be the legally elected register of deeds or not; * * * that there is no

law in the state of Oklahoma, either in the enabling act or the Constitution, requiring the district court as successor of the United States Court in Indian Territory to turn over to the register of deeds for any county the books, papers, and records received by the court from the clerk of the United States court, or deputy clerk of the United States court, as ex officio recorder, for the respective recording districts of the Indian Territory." In short, the facts affirmed on one side are that respondent holds and controls, as a court, the records to which relator is entitled. To this respondent answers, in effect, that he does hold and control them as a court; that he, as such, rightfully received them from the clerk or deputy clerk of the United States court at Muskogee, as ex officio recorder; and that there is no law by which relator can compel respondent to turn them over to him. The one thing agreed upon between these parties is that respondent is in control of the records in controversy as a court. Let us see if this is true in point of law. We take judicial notice of the fact that this state was admitted into the Union on November 16, 1907; that at that time the United States courts in Indian Territory ceased to exist (*Inerarity v. Curtis*, 4 Fla. 175), and the office of clerk or deputy clerk as ex officio recorder of the United States Court in Indian Territory at Muskogee became functus officio; and that the district court for the Third judicial district of the state of Oklahoma was organized and held its first session at Muskogee on November 21, 1907, with respondent presiding as judge. Up to the time, if indeed it could ever be done, it was a legal impossibility for these records to be received by the district court at Muskogee and passed, under its jurisdiction, from the clerk or deputy clerk as ex officio recorder of the United States Court in Indian Territory, not only for the reason, as stated, that he as such was functus officio and disqualified to act as such, but for the further reason that the act of March 1, 1907, supra, had, in effect, directed them to be turned over "to the proper state and county officials of the state of Oklahoma when organized," which proper "state and county official" we have just held was the relator in this case. It might be plausibly contended in the absence of that act that the district court at Muskogee, as successor of the United States Court in the Indian Territory at Muskogee, came in possession of and extended its jurisdiction over these records by reason of that fact. But this is assuming that the records of the clerk or deputy clerk of the United States court as ex officio recorder were a part of the records of the United States Court in Indian Territory, which we are not willing to concede. But let that be as it may, if such they were prior to that act (March 1, 1907), that act cuts them off as such, and sends them in another direction and divests the district court at Muskogee of the custody,

control, or jurisdiction over them. It follows that the custody respondent is alleged and admitted to be exercising over these records is the unauthorized custody and control of an individual and not of a court, and certainly not of the district court of the Third judicial district of the state of Oklahoma.

The question, then, to be determined is, can the aid of this writ be invoked by relator holding prima facie title to the office of register of deeds, and, as such, entitled to the records pertaining to said office, against a private individual claiming no right to the office who is wrongfully in possession of said records and refuses to turn them over to relator on demand? It will be noted that respondent is not in possession of these records as a former incumbent in office, or under color of being elected thereto. If that were the case, the rule is clear that: "Mandamus is a proper remedy to compel the delivery by a former incumbent of a public office of the books, papers, records, seals, money, and other paraphernalia thereof to the person having a clear prima facie title to the office and its belongings. The writ has been used to compel the surrender of public buildings and the delivery over of prisoners by a sheriff. In this class of cases mandamus is granted upon the theory that it is the official duty of every officer to surrender possession of the office and its belongings to his lawfully chosen and qualified successor." 19 Am. & Eng. Enc. of Law (2d Ed.) p. 776, citing cases from a number of states in the Union, also from England and Canada; High on Ex. Legal Rem. §§ 73-76; Merrill on Mandamus, §§ 142, 152, 154. But the case under consideration does not come within that rule, but falls within a very well-defined exception thereto, for further on (page 776, 19 Amer. & Eng. Enc. of Law, cited supra) we read: "Such a duty does not rest upon a mere private individual who happens to be in possession of official books, etc., and it has accordingly been held that mandamus will not lie in such a case to compel their delivery to the officer entitled thereto." See, also, Merrill on Mandamus (1892) §§ 23, 24.

State of Missouri ex rel. Cooper County, Respondent, v. Wilson W. Trent, Appellant, 58 Mo. 571, was an appeal to the Supreme Court of the state from Cooper county circuit court in which that court issued a writ of mandamus to compel a private person, not acting in any official capacity, to deliver to the county clerk a book of surveys and plats of county roads, made under order of the court, and paid for by the county, but which respondent had refused to surrender on demand. The judgment of the lower court was reversed, and in passing on this point the court said: "An examination of the authorities show that, although the granting of the writ referred to is of common occurrence, where there is no other specific legal remedy, in case an ex-officer, whether of a public or private corporation, company, church, or so-

clety, or the executor or widow of such officer, refuses, upon demand made, to deliver to his successor in office the insignia, books, papers, etc., pertaining to such office (Town Clerk in Nottingham's Case, Sid. 31; Anon., 1 Barn. 402; Rex v. Wildman, 2 Stra. 879; Kings v. Ingram, 1 W. Bl. 50; Rex v. Clapham, 1 Wils. 805; Walter v. Belding, 24 Vt. 658; People v. Kilduff, 15 Ill. 492, 60 Am. Dec. 769; People v. Head, 25 Ill. 325; Burr v. Norton, 25 Conn. 103), yet the most thorough search has signally failed to discover a single instance where a private person, as in the case at bar, has ever been held answerable in such a method of procedure for books of a public nature which were detained by him."

People ex rel. Lyman Austin et al. v. Orin S. Curtis, Register of Deeds of Kalkaska County, 41 Mich. 723, 49 N. W. 923, was where "a conveyance, executed by a married woman, was left with respondent, who was register of deeds, but who did not receive it in that capacity, in escrow, upon an alleged understanding that upon the performance of certain conditions the conveyance should become completely operative, and he should record it. That grantor before it had been recorded notified Curtis not to record it, and he accordingly withheld it from record and made no further delivery of it. A mandamus is now asked to compel him to put it on record." The court, in rendering its opinion, said: "The return shows, and the case made by relator is to the same effect, that the respondent did not receive the paper officially, but as a private person, and to hold it in escrow. * * * He never had possession of the document in his official capacity, and has no official duty to perform concerning it" and the writ was refused.

State of Georgia ex rel. Henry Hodges v. A. P. Powers, Judge of the Superior Court of Macon Circuit, 14 Ga. 388, was an application before the Supreme Court for a writ of mandamus. "The application of Henry Hodges in this case shows that he was the defendant in a cause tried in Dooley superior court; that to the decision of the court in that case he had filed a bill of exceptions, which was duly signed and certified by Hon. A. P. Powers, the presiding judge; * * * that after filing the bill of exceptions he was informed and believed that Judge Powers had applied to the clerk and obtained the bill of exceptions, and materially changed the same by taking out thereof two of the sheets and substituting three others in lieu thereof," and prayed for a mandamus nisi to require Judge Powers to show cause why the original leaves should not be restored to the bill of exceptions. In its opinion the court on this point said: "This application for a mandamus must be refused. In Heard v. Heard, 8 Ga. 380, this court held that the circuit judge had no right to interfere with the bill of exceptions after it had been signed and certified by him and filed with the clerk;

that his duty is then performed, and his control over the bill of exceptions is at an end. Adhering to the opinion there expressed, and we see no cause to change it, the alteration made in the bill of exceptions in this case, after the same had been filed with the clerk, together with the original notice, writ of error, and citation, as required by law, must be deemed to have been done by the judge individually, and not in his official character. He had no more authority to make it than any other person. * * * It is scarcely necessary to remark that mandamus does not lie against a private citizen." See, also, 19 Am. & Eng. Enc. of Law (2d Ed.) p. 744, and note, citing authorities.

In other words, where the writ is sought to be invoked, the proper inquiry is, does the duty sought to be enforced clearly result from an office, trust, or station? If so, the writ should run; otherwise not. 28 Cyc. pp. 163, 164. This is the common law, and is embodied in Wilson's Rev. & Ann. St. Okl. 1903, § (4884) 686, which is as follows: "The writ of mandamus may be issued by the Supreme Court or the district court, or any justice or judge thereof, during term or at chambers, to any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty, resulting from an office, trust or station. * * *"

This statute was taken from Kansas, and in Charles L. Hussey v. Oliver P. Hamilton, 5 Kan. 462, on application for the writ, the application set forth substantially: "That at the general election held November, 1868, Hamilton received a majority of the votes cast for probate judge of the county of Saline. That the vote then cast was afterwards, at the proper time, duly canvassed, and Hamilton declared duly elected probate judge for two years from January, 1869. A certificate of his election was properly issued to him by the county clerk. Hamilton then gave a bond as required by law, which bond was approved by the proper officer. Hamilton thereupon took the oath of office prescribed by law, and entered upon the discharge of its duties. Hussey was Hamilton's immediate predecessor in office, and as soon as Hamilton gave bond and took the oath Hussey turned over to him the county seal, and a part, if not the whole, of the books, records, papers, and furniture belonging to the office. Hamilton took possession of the office February 3, 1869, and continued to discharge the duties of the same, and remained in possession of the books, papers, and seal thereof, until February 12, 1869. On that day Hussey clandestinely entered the office of Hamilton, and surreptitiously removed a part or the whole of the books, records, papers, and furniture pertaining to said office, and also the seal thereof to his own house, or some other place. The pretense therefor was that Hamilton's bond was not legal. On the 20th of February, 1869, Ham-

lton demanded the seal, books, records, papers, and furniture belonging to said office of Hussey, who refused to deliver them up. Thereupon this proceeding was instituted to recover the possession of said records, etc. Upon the filing of the affidavit and motion by Hamilton, Hussey came in and by his counsel waived the usual preliminary proceeding to obtain the peremptory writ, and made motions to dismiss the proceeding, which motions were overruled by the court. Hussey then filed an answer denying generally the matters set forth in the petition or affidavit, and setting forth other grounds of defense. In order to expedite matters it was then admitted by Hussey that all the matter set forth in the affidavit and petition was true, except as to the sufficiency of the bond, and Hamilton admitted that the bond was not signed by him until more than 30 days after the second Monday in January, 1869. Upon this state of facts * * * a peremptory writ of mandamus was allowed and duly issued, and Hamilton placed in possession of the seal, records, and other property pertaining to his office. From decision Hussey brings that petition in error."

In its opinion the court said: "The court below granted a peremptory writ of mandamus commanding the plaintiff in error to deliver up to the defendant in error the books, papers, records, seal, and insignia of office pertaining to the office of probate judge of said county of Saline. Of the several errors alleged we shall notice but one, as that disposes of the whole case. The case was tried on the affidavit and petition of the relator, to which the respondent answered as to an alternative writ, and this case was tried as though such writ had issued. The petition which was sworn to and formed the affidavit in the case did not state facts that would authorize the award of the peremptory writ of mandamus. If it be conceded that the relator, Hamilton, was duly elected and qualified, and his bond good and sufficient, and duly and properly approved, and his right to the office and its insignia perfect and complete, and his possession and enjoyment thereof as absolutely right and perfect in law as in any conceivable case, and the taking possession by Hussey of the books, papers, seal, etc., belonging to the office, as wrongful as is alleged in the affidavit, still the writ ought to have been refused. The affidavit nowhere alleges in terms, or by any fair or reasonable implication, that Hussey, the respondent, took possession of the books and other property of the office under any pretense of a color of right to such property or the possession thereof, or to the office itself, or that he was in any way exercising the duties of the office, or pretended that he had any right to do so. * * * There is no allegation that he pretended any right to the office, or exercised any functions pertaining to it. He had been probate judge, but had surrendered the same and delivered over the

property to the relator 10 days before he took the property into possession, as above mentioned. * * * A writ of mandamus may only issue to an inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, and may not issue in such cases where there is a plain and adequate remedy at law. The affidavit in this case does not profess to show that Hussey held or pretended to hold any office, trust, or station from which any duty resulted. He is nowhere represented as any other than a private person, with no more special duty than pertains to any and every inhabitant. For this insufficiency of the affidavit the writ ought to have been refused. * * * Did the pleadings or evidence anywhere show that the respondent was acting as probate judge, or that he was pretending to hold the records, books, and papers, etc., by any color or pretense of right as such officer, then the cases referred to would be applicable, and entitled to careful consideration. * * * The judgment of the district court is reversed, with directions to refuse the writ of mandamus."

We are therefore of the opinion that relator, as register of deeds of Muskogee county, not being an officer of the court and entitled to recognition as such by respondent as judge of the district court for the Third judicial district of the state of Oklahoma, does not come within the rule laid down in *Matney v. King*, Judge, etc., and, as the turning over and delivery of the possession of the records in controversy to relator is not a duty such as the law specially enjoins upon respondent, as an individual, resulting from an office, trust, or station, the writ of mandamus should be refused.

KANE and DUNN, JJ., concur. WILLIAMS, C. J., and HAYES, J., concur as to the result.

(20 Okl. 67)

RAMSEY v. KING, Judge of the District Court of Muskogee County.

(Supreme Court of Oklahoma. Jan. 15, 1908.)

Application by Remus B. Ramsey for writ of mandamus to John H. King, judge of the district court of Muskogee county. Writ granted.

J. E. Wyand, Thomas H. Owen, and Baker & Purcell, for relator. George S. Ramsey, for respondent.

KANE, J. This proceeding was submitted to the court upon the same response and agreed statement of facts as the case of *Toney Matney v. John H. King*, Judge of the District Court of Muskogee County, State of Oklahoma, 93 Pac. 787; the only difference in the cases being that the relator in the *Matney*

Case sought, by mandamus, to be recognized as clerk of the district court, and in this case the relator seeks recognition as sheriff of Muskogee county. Both relators being officers of the court, the same rule will apply in both cases. On the authority of the Matney Case, let a peremptory writ of mandamus issue commanding the respondent as judge of the district court of Muskogee county, state of Oklahoma, to recognize the relator as sheriff of said county and state, and to permit said relator to do and perform all the duties which, under the law, he is required to do and perform as sheriff of said county and state.

It is so ordered. All the Justices concurring.

CHICAGO, R. I. & P. RY. CO. v. GROVES. (Supreme Court of Oklahoma. Jan. 21, 1908.)

1. NEW TRIAL — GROUNDS — VERDICT CONTRARY TO LAW.

When the evidence on the trial establishes the fact so clearly and indisputably that the court may instruct the jury to bring in a particular verdict, but neglects to do so, and is not requested to do so, and the jury returns a verdict contrary to what the law demands, then and then only should the court set aside the verdict of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 132-134.]

2. COURTS — RULES OF DECISION — PREVIOUS DECISIONS AS PRECEDENTS — CIVIL LAW.

The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, in aid of the general statutes, being in force in this state, precludes the following of decisions based on the civil law as governing authority in this jurisdiction.

3. WATERS AND WATER COURSES — NATURAL WATER COURSES — RIGHTS OF RIPARIAN OWNER — COMMON LAW.

Where the common law prevails, every proprietor, upon water flowing in a defined channel, so as to constitute a water course, has the right to insist that the water shall continue to run as it has been accustomed, and no one can change or obstruct its course injuriously to him without being liable to damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 42, 43.]

4. SAME — SURFACE WATERS — RIGHTS AND LIABILITIES.

Surface water flowing naturally or falling upon the soil may be diverted in its course, and even thrown back on the dominant estate whence it came, but with certain qualifications.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 127, 128.]

5. SAME.

The exercise of such right by a lower proprietor must be reasonable, for proper purposes, in good faith, and with due care to inflict injury only when necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 128.]

6. SAME.

The doctrine that the right may not be exercised wantonly, unnecessarily, or carelessly is a common-law doctrine, resting upon the common law, as well as upon the civil law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 128.]

7. SAME.

A class of cases, based upon the adoption of the old common-law rule, hold without qualifi-

cation that no cause of action can arise from throwing back surface waters upon the land of the dominant estate; but this is not supported by the weight of common-law authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 128.]

8. SAME.

The weight of authority in England and in the United States, though the cases are often difficult to reconcile, supports the proposition that one must so use his own property with due regard to the rights of another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 128.]

9. SAME.

Where the surface water has been accustomed to gather and flow along a well-defined channel, which by frequent running it has worn or cut into the soil, so as to have well-defined banks, it may not be obstructed to the injury of the dominant proprietor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 128.]

10. SAME — WATERWAY — WHAT CONSTITUTES.

Where the natural conformation of the surrounding country necessarily collects therein so large a body of water, after heavy rain or the melting of large bodies of snow, as to require an outlet to some common reservoir, and where such water is regularly discharged through a well-defined channel which the force of the water has made for itself, and which is the accustomed channel through which it flows or has ever flowed, it constitutes a water course or waterway.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 30.]

(Syllabus by the Court.)

Error from District Court, Comanche County; Frank E. Gillette, Judge.

Action by Alva Groves against the Chicago, Rock Island & Pacific Railway Company for damages due to the overflow of land, caused by the negligent construction of defendant's roadbed. Judgment for plaintiff, and defendant brings error. Affirmed.

On the 17th day of February, 1903, Alva Groves, the herein defendant in error, as plaintiff, commenced an action in the probate court of Comanche county, in the territory of Oklahoma. Afterwards, on the 18th day of April, 1903, plaintiff filed his amended petition, and on the same day the plaintiff in error, the defendant in the court below, filed his answer, which was a denial of each and every allegation, except that the defendant was a corporation. The case was tried in the probate court, and resulted in a judgment for the plaintiff, and was appealed to the district court. Thereafter, on the 21st day of October, 1904, the case was tried, and a judgment resulted in favor of the plaintiff for the sum of \$443.75.

For cause of action the plaintiff's petition consisted of three paragraphs or counts. In the first count he alleged: That the defendant constructed a line of railway across his homestead in the month of May, 1902, and in constructing it threw up an embankment on said land "in crossing a draw or ravine thereon, which draw or ravine was in a natural water course created by the flow of surface water caused by the fall of rain in that community, and was and is the natural

outlet for such water." That defendant in constructing said embankment failed to make a sufficient provision for the outlet of the water that might reasonably accumulate in said draw or ravine, but put in a small tiling, wholly insufficient to carry off said water, and that it accumulates about the track of said defendant after each heavy rain, and stands upon and covers for some length of time about 35 acres of plaintiff's land, killing all vegetation and making said amount of land valueless. He further alleged that the same was good agricultural land, and worth \$11.25 per acre, or the total value of \$393.75. That prior to the construction of said embankment said water course was unobstructed, and water did not stand upon said land, but naturally flowed off; and plaintiff alleges, as a result of said obstruction, the destruction of the whole value of said land, in the sum of \$393.75. In the second count the same facts are alleged with reference to the building of the road, the obstruction of the ravine, the accumulation of the water, and the rendering of the land valueless, with the additional allegation that the said 35 acres of land rendered valueless extended in a strip almost the entire width of his homestead, thereby dividing the remainder of his homestead or claim in two parts, and damaging the balance of the homestead independent of the 35 acres, which were absolutely rendered valueless, in the sum of \$200 additional. In the third count substantially the same allegations are made with reference to the construction of the road and the obstruction of the ravine, with the further allegation that on the 21st day of September the water which came down the draw or ravine was caused, on account of this construction of said embankment with insufficient outlet, to stand above the embankment, flooding 35 acres of the land to such an extent as to flow in his residence, a half dugout, a depth of four feet or thereabout, damaging the dugout to the value of \$40, household goods to the value of \$10, and wearing apparel to the value of \$20, carrying away wood and posts to the value of \$4, two saddles and three sets of harness to the value of \$30, and injuring his well to the value of \$50; also claiming damage to his pasture to the amount of \$150, and causing the necessity of moving his fence, to his damage in the sum of \$50. Plaintiff therein prayed judgment in the total sum of \$947.45.

On the trial the plaintiff withdrew his claim for damages to the pasture, and limited his claim for damages from the overflow in September, 1902. The defendant on the trial admitted that the railroad company constructed the line or lines mentioned in the petition, and that it was, at the time of the trial, owned and operated by said railway corporation. On the part of the plaintiff, without objection on the part of defendant in error, he testified in his behalf that at the time of the institution of said action he was the owner of said land; that he, having

homesteaded the same, had lived on the place ever since the 6th day of September after the opening, which was in August, 1901. On cross-examination plaintiff testified that he entered and filed on said quarter section of land under the homestead laws, and that he had proved up his claim. He further stated that he could not tell the date of his filing, but his best recollection was it was the 6th of September, 1901, and, further, that he had made no conveyance or mortgage to the same prior to the time of the alleged damage in 1902. It was admitted that plaintiff made no conveyance whatever to the railway company, but that the railway company acquired right of way prior to plaintiff's homestead entry, and that the railroad embankment was constructed after plaintiff filed and entered upon said land. The testimony of plaintiff tended to show that the defendant's road and the embankment were constructed about May, 1902; that there were heavy rains, equal to the September, 1902, rain, causing the overflow in question, prior to the time of the construction of said embankment, but that the same, prior to the construction, did not flood or overflow the said land; that the embankment was 13 or 14 feet high and about 200 yards long, practically the entire width of the homestead; that the distance from said embankment to the head of said creek or ravine is about $3\frac{1}{2}$ miles; that, after the overflow had reached to the channel, said ravine would run for several days; that the creek below the said road was something like it was above; that below the same the water spread out over the flat lands; that where they scraped dirt to make a fill the water was run around through the fill and on over a little bottom to the section line, the outside line of plaintiff's land; that, as a result of said overflows as a result of said embankment, said 35 or 40 acres had been rendered valueless for farming and grazing purposes; that for such purposes it formerly had a value ranging from \$11.25 to \$15 per acre; that said house or dugout was damaged in the sum of \$40, household goods, \$10, wearing apparel, \$20, bridles, harness, and saddle, \$21, and well in the sum of \$50. The evidence on the part of the plaintiff tended to show that the tiling or sewer was not of such a size as might have reasonably been considered sufficient to carry off the volume of water that might naturally have been anticipated at times to flow through Snake creek or this ravine.

The testimony on the part of plaintiff as to the stream in question being a water course is as follows: "Q. State whether or not there is any water course or ravine running through that land. A. Yes, sir; there is. Q. Has it any name? A. Yes, sir; called 'Snake Creek.' * * * Q. Describe to the jury the nature of that ravine there, as to banks, how far from one bank to the other, and about the nature of the channel. A. Well, the channel some places is cut out deep

and broad, and runs crooked, and it will go right across after it strikes a rocky place, and finally there will not be any channel there for a little ways. Q. State if there is any natural reason why it has not worn a channel in all the places. A. It is because the creek bed is crooked, and there is rock there, and when it reaches that rock it shoots right across. Q. How far is it to the head of this creek, or what is the lay of the land where it drains the water into the creek? A. It is about 3 miles—I mean to the head of the creek. Q. About 3 miles to the head of the creek? A. It drains about $3\frac{1}{2}$ miles—I don't know exactly—right across there. Q. You may state the distance of the drain on either side of the channel. A. On the west side about a mile and a half a little northwest, and on the east about a mile and a half north and east. Q. State whether or not you lived there on this land prior to the construction of this railroad across it. A. Yes, sir; I did. Q. State whether or not, during the time you lived there, or prior to the construction of this road, there were any heavy rains. A. Yes; lots of them. Q. State whether or not these rains overflowed your land. A. No, sir; nothing to amount to anything at all. Q. State whether or not, prior to the month of September, 1902, there were any rains. A. Yes, sir. Q. State what effect it had on your land, as to whether it flooded. A. Yes, sir; flooded about 35 acres. * * * Q. How deep is that creek? A. Some places it is over waist deep, and some places it is shallow. Q. Is it running now? A. No, sir. Q. How much of the time does it run? A. It don't run very much at a time. Q. Just after rains? A. Yes, sir; when it does run, it will probably run for a week or such a matter. I could not say exactly how long it does run. Q. Did you ever know it to run a week? A. Yes, sir. Q. That was a week when it had been raining a week? A. It had been raining some. Q. Rained for several days? A. Yes, sir; it rained quite a bit. Q. Where does the water come from that comes down that ravine? A. Part of it shoots off from the west side, and part of it from the east. Q. Is there not a little slough there in your land where the water stands? A. You mean Snake creek? Q. Yes, sir. A. Yes, sir; there is water standing there in Snake creek. Q. A little water hole? A. Pretty good-sized water hole; lasts the year around. Q. Did you ever see it last the year around? A. It lasts the year around. * * * Q. Did you ever make any measurement of the height or depth of the creek? A. Do you mean how deep the creek is? Q. Did you ever actually measure that creek with a yardstick or tapeline? A. No, sir. Q. Did you ever measure it with anything that was intended to measure height or distance? A. No, sir; never measured it. Q. The creek has no channel all the way? I understood you to say it washes out the soil in some places where it is soft, and made little holes

where it runs over? A. In some places there is a channel, and in some places there is not."

J. A. Vanderford, on the part of plaintiff, among other things, testified: "Q. Is that creek straight or crooked? A. It is crooked. Q. Is that water course through there natural or artificial? A. It is a natural water course. * * * Q. You speak of pools of water along that ravine or depression there on plaintiff's land. How many pools of water are there there? A. I never counted them. Q. When was you there last? A. About a month ago. Q. Was water running then? A. No, sir. Q. Have you seen it since a month ago? A. No, sir. * * * Q. Well, now, do you know of any pools of water along there, except the one down close to the railroad track? A. Yes, sir; I know in particular of three. Q. When were they there? A. They were there about—I believe it is one year since I have been along there. Q. You say they were there a year ago? A. Yes, sir. Q. Was there any running water there at that time? A. No; not at that time. Q. How long since had there been any running water there at that time? A. That was sort of dry spell. I could not say just how long. Q. Is that a live stream that goes down through there? A. No, sir; I don't consider it a live stream. Q. When does the water run down there? A. After heavy rains. Q. Does the water that falls in that scope of country drain down through there? A. Yes, sir."

D. J. McCoy, on the part of defendant, testifies in part as follows: "Q. What is the character, or what are the surface features, of plaintiff's land? A. When I first saw his land it was rolling prairie, draining from the west side gently toward the depression. Q. And how was the slope to the east of the depression? A. To the east of the depression on another gentle slant about the same way. Q. Describe that depression. A. It was a natural depression in the ground. I should call it a ravine. Taking clear across, it was an average of about 400 feet wide. There are no marked banks to this, or any known channel, otherwise than a few pockets of water, pools, and puddles. Q. You say there are no banks? A. Nothing I should call that. Q. How does the land lie? Does it slope from the lowest point out? A. No, sir; you might say that, in the lowest line of it, which is about 400 feet wide, that is just a wide slough—the way I would call it—or a ravine. Q. At the time of the construction of the railroad did the water stand in that slough? A. Yes, sir. Q. To what depth? A. We drove our teams into the middle sometimes; and the water never did at any time come over the hub. Q. How long was that slough? A. I should judge it was about 500 feet. Q. Were there any abrupt banks to it? A. No, sir. Q. How were the edges? A. The edges looked like the banks had simply broke away, and it had got into softer ground underneath. Q. How was the slope or rise or fall of the land from the outer

edges of the slough each way? A. Gradual. Q. Now, between these banks of the slough, what was the formation? A. It seemed to be just the usual formation of the land; never noticed anything different. Q. Was there any channel there? A. No, sir. Q. By what were those banks made? How were they formed? A. I couldn't say. All I know was that they appeared to me to be natural, or the water at some time had started a place under the grass roots. Q. How wide were these places? A. No more than 25 feet. Q. Any living water there? A. No, sir. Q. Any springs you know of? A. None that I know of. Q. What was between these banks you speak of (meaning banks of the pools)? Was there any channel? A. No channel at all; just natural ground and grass. Q. What was the character of the lowest place in there between those banks? A. Just seemed to be natural soil such as we found in building the dam. Q. Did you find it changed in that respect when you examined it after the flood? A. No, sir."

At the close of taking testimony in the case the defendant moved the court for an order to the jury to return a verdict in its favor. Said motion was taken under advisement, and the record fails to show that it was ever ruled upon by the court, or that any exception was taken in regard to said motion whatever. The following instruction, among others, was given to the jury: No. 3: "The jury are instructed that, under the laws of this territory, 'every corporation, constructing, owning, or using a railroad shall restore every stream of water, watercourse, street, highway, plank road, toll or wagon road, turnpike, or canal, across, along, or upon which said railroad may be constructed, to its former state, or to such conditions that its usefulness shall not be materially impaired, and thereafter maintain the same in such condition, against any effect in any manner produced by such railroad.' The provision of our statute here quoted is mandatory in its terms, and the failure to comply therewith in the construction of a line of railroad renders the person or corporation so failing liable to damages to any person injured by reason of such failure."

The plaintiff in error relies upon the following assignments of errors: (2) "That the court erred in refusing the peremptory instruction offered by plaintiff in error." (1) "That the evidence was insufficient to entitle the plaintiff to recover, for the reason that he did not show the existence of a watercourse or waterway." (3) "That the court erred in its instruction defining a watercourse." (4) "That the court erred in its instructions in assuming the existence of facts which were in issue." (5) "That the court erred in directing the consideration of the jury to overflow subsequent to the alleged overflow of September 2, 1902." (6) "That the court erred in instruction No. 8, by submitting improper elements of damage." (7)

"That the court erred in admitting incompetent evidence to show damage by the alleged destruction of the well." (8) "That the court erred in submitting to the jury the question of the amount of damages to land caused by the overflow." (9) "That by reason of the errors above enumerated the court erred in refusing to grant the plaintiff in error a new trial."

M. A. Low, C. O. Blake, E. E. Blake, H. B. Low, and W. C. Stevens, for plaintiff in error. Cherryholmes & Norman, for defendant in error.

WILLIAMS, C. J. (after stating the facts as above). It is contended by plaintiff in error that the evidence was insufficient to entitle the plaintiff below, the defendant in error here, to recover, for the reason that he did not show the existence of a "water course" or "waterway." The defendant below moved the court to instruct the jury to return a verdict in its favor. However, the motion was never acted upon, nor was there any exception reserved, either on account of the failure of the court to act or to sustain the same. In defendant's motion for a new trial he alleges that the verdict was contrary to law, and not supported by sufficient evidence. The question, then, arises, when is a verdict contrary to law? "Where the evidence on the trial establishes the fact so clearly and indisputably that the court may instruct the jury to bring in a particular verdict, but neglects to do so, and is not requested so to do, and the jury returns a verdict contrary to what the law directs in such a state of facts, then and then only can the court set aside the verdict of the jury." Marshall's *Kans. Trial Brief*, p. 607, § 3080. By this record the question is presented as to whether or not the obstruction of the servitude of the lower heritage to the injury of the owner of the dominant estate, subjects him to liability for the resulting damage. Some of the adjudicated cases seem to go to the full extent of the civil-law doctrine of the servitude of the lower tenement, holding that the superior or dominant tenement has the absolute right to the discharge of its surface waters on the lower, under all or any circumstances in the nature of a common easement. *Martin v. Riddle*, 26 Pa. 415; *Miller v. Laubach*, 47 Pa. 155, 86 Am. Dec. 521; *Ogburn v. Connor*, 46 Cal. 347, 13 Am. Rep. 213; *Kauffman v. Griesemer*, 26 Pa. 407, 67 Am. Dec. 437; *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *Martin v. Jett*, 12 La. 501, 32 Am. Dec. 120; *Butler v. Peck*, 16 Ohio St. 339, 88 Am. Dec. 452; *Mayor v. Sikes*, 94 Ga. 30, 20 S. E. 257, 26 L. R. A. 653, 47 Am. St. Rep. 182. However, the common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, in aid of the General Statutes of Oklahoma (section 4200, *Wilson's Rev. & Ann. St. 1903*), being in force in this state, we feel that we are precluded

from accepting decisions based on the civil law as governing authority in this jurisdiction. Wherever the common law prevails, every proprietor upon water flowing in a definite channel so as to constitute a water course has the right to insist that the water shall continue to run as it has been accustomed, and that no one can change or obstruct its course injuriously to him without being liable to damages. With regard, however, to surface water not confined to marked channels or banks, there has been a recognized difference. At common law, for the purpose of drainage, construction, or any other lawful purpose, every proprietor had the right to elevate the surface of his own land, or to erect embankments whereby the natural flow of the water from the upper ground shall be stopped, without liability. However, as a result of new conditions and the loathness of the courts to apply principles or conditions to which they were not applicable, and not from any intrinsic force of the civil law as the rule of decisions, modifications or qualifications of the ancient common-law doctrine have been adopted.

Practically all of the common-law courts agree that the surface water, flowing naturally or falling upon the soil, may be diverted in its course, and even thrown back upon the dominant estate whence it came. But is this right absolute at the will of the lower proprietor, or must such exercise be reasonable, for proper purposes, and with due care to inflict injury only when it is necessary? The question of good faith and the manner of doing it are necessarily involved in determining whether or not such right may be exercised. When necessary, and with due care and regard as to the rights of others, although injury may accompany its exercise, under the common law there is no relief. The doctrine that the right may not be exercised wantonly, unnecessarily, or carelessly does not rest upon the civil law so much as upon the common law. "Sic utere tuo ut alienum non ledas." *Nininger v. Norwood*, 72 Ala. 281, 47 Am. Rep. 412; *L. R. & Ft. S. R. R. Co. v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280; *Ill. Cen. R. R. Co. v. Miller*, 68 Miss. 764, 10 South. 61; *Sinai v. L., N. O. & T. Ry. Co.*, 71 Miss. 552, 14 South. 87; *Livingston v. McDonald*, 21 Iowa, 173, 89 Am. Dec. 563; *McClure v. City of Red Wing*, 28 Minn. 186, 9 N. W. 769; *Gillham v. M. C. R. R. Co.*, 49 Ill. 487, 95 Am. Dec. 627; *Rowe v. St. P., M. & W. Ry. Co.*, 41 Minn. 384, 43 N. W. 76, 16 Am. St. Rep. 708; *Porter v. Durham et al.*, 74 N. C. 778; *N. & W. R. R. Co. v. Carter*, 91 Va. 593, 22 S. E. 517; *Town v. Mo. Pac. Ry. Co.*, 50 Neb. 775, 70 N. W. 402. A class of cases, based upon the adoption of the old common-law rule, hold without qualifications that no cause of action can arise in any case from throwing back surface waters upon the land of the dominant estate. *Gannon v. Hargadon*, 10 Allen (Mass.) 109, 87 Am. Dec. 625; *Dickinson v. Worcester*, 7 Allen (Mass.) 19; *Inhabitants of Franklin v. Fish*, 13 Allen

(Mass.) 212, 80 Am. Dec. 194; *Parker v. Newburyport*, 10 Gray (Mass.) 28; *Flagg v. Worcester*, 18 Gray (Mass.) 601; *Pettigrew v. Village of Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Hoyt v. City of Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Morrison v. Bucksport & Bangor Ry. Co.*, 67 Me. 355. However, in England and in many of the states, though the cases are often difficult to reconcile, the right under the common-law doctrine has been qualified. *Nininger v. Norwood*, 72 Ala. 281, 47 Am. Rep. 412; *Little Rock & Ft. S. R. R. Co. v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280; *Carriger v. E. T. V. & G. R. R. Co.*, 7 Lea (Tenn.) 388; *K. C., M. & T. R. R. Co. v. Smith*, 72 Miss. 690, 17 South. 78, 27 L. R. A. 762, 48 Am. St. Rep. 579; *Ill. Cen. R. R. Co. v. Miller*, 68 Miss. 764, 10 South. 61; *Boyd v. Conklin*, 54 Mich. 591, 20 N. W. 595, 52 Am. Rep. 831; *Sinai v. L., N. O. & T. Ry. Co.*, 71 Miss. 547, 14 South. 87; *Bowlsby v. Speer*, 31 N. J. Law, 354, 86 Am. Dec. 216; *McClure v. City of Red Wing*, 28 Minn. 186, 9 N. W. 769; *Rowe v. St. P., M. & W. Ry. Co.*, 41 Minn. 384, 43 N. W. 76, 16 Am. St. Rep. 708; *R. & A. Ry. Co. v. Wicker et al.*, 74 N. C. 226; *Porter v. Durham et al.*, 74 N. C. 778; *Adams v. Walker*, 34 Conn. 466, 91 Am. Dec. 742; *Town v. Mo. Pac. Ry. Co.*, 50 Neb. 775, 70 N. W. 402. This qualification, being based upon that golden maxim of the common law that one must so use his own property as not to injure the rights of another, also finds expression in the civil law, in the words of Pothier: "Each of the neighbors may so do upon his own heritage what seemeth good to him, in such manner, nevertheless, that he doth not injure the neighboring heritage." If for any purpose of improving and cultivating his land the landowner raises or fills it so that the water which falls in rain or snow upon an adjacent owner's land, and which formerly flowed upon the first-mentioned parcel, is prevented from so doing to the injury of the adjacent parcel, the owner of the latter is without remedy. *Washburn on Easements* (3d Ed.) § 353 et seq. However, the improvement may not be made carelessly, but must be done with a just regard to the rights of others. *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 270; *Porter v. Durham*, 74 N. C. 767; *Raleigh & A. R. R. Co. v. Wicker et al.*, 74 N. C. 220; *Yazoo & Miss. V. R. R. Co. v. Davis*, 73 Miss. 678, 19 South. 487, 32 L. R. A. 262, 55 Am. St. Rep. 562; *Little Rock & Ft. S. R. R. Co. v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280; *Jungblum v. M. N. U. & S. W. R. R. Co.*, 70 Minn. 156, 72 N. W. 971; *Sheehan v. Flynn*, 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632.

But the right thus qualified has also exceptions. One is that the owner of the land cannot collect the water into an artificial channel or volume and pour it upon the land of another to his injury. *Davis v. Fry*, 14

Okl. 340, 78 Pac. 183, 69 L. R. A. 460; *Davis v. City of Crawfordsville*, 119 Ind. 1, 21 N. E. 449, 12 Am. St. Rep. 361; *City of Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Patoko Township v. Hopkins*, 31 Am. St. Rep. 417; *Rychlicki v. City of St. Louis*, 98 Mo. 497, 11 S. W. 1001, 4 L. R. A. 594, 14 Am. St. Rep. 651; *Fremont, etc., R. R. Co. v. Marley*, 25 Neb. 138, 40 N. W. 948, 13 Am. St. Rep. 482; *Chalkley v. City of Richmond*, 88 Va. 48, 14 S. E. 339, 29 Am. St. Rep. 730; 2 *Dillon on Municipal Corporations*, § 1051; *Gould on Waterways*, § 271. Another exception to the right, which is practically converse to the foregoing exception, is that the owner of the land cannot interfere with the flow of surface water in a natural channel. Where the water has been accustomed to gather and flow along a well-defined channel, where, by frequent running it has worn or cut into the soil, it may not be obstructed to the injury of the dominant tenement. *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *L. R. & F. S. R. Co. v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280; *Rowe v. St. P. Ry. Co.*, 41 Minn. 384, 43 N. W. 76, 16 Am. St. Rep. 706; *Sinai v. L. N. O. & T. R. R. Co.*, 71 Miss. 552, 14 South. 87; *Jungblum v. M. N. U. & S. W. R. R. Co.*, 70 Minn. 156, 72 N. W. 971; *Boyd v. Conklin*, 54 Mich. 590, 20 N. W. 595, 52 Am. Rep. 831; *N. & W. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517.

In *Norfolk & Western R. R. Co. v. Carter*, supra, the surface water on the land of the plaintiff prior to the building of the road escaped from it over what is now the right of way of the defendant railway company by natural channels into Clinch river, and the flow was obstructed by the failure of said defendant to construct the necessary channels under its roadbed, and consequently the plaintiff was damaged by the accumulation of water. In the case of *Jungblum v. M. N. U. & S. W. R. R. Co.*, 70 Minn. 157, 72 N. W. 972, the depression was the usual and natural course of channel along which the surface water was accustomed to flow before the roadbed was constructed for a mile or two east of the roadbed, and the channel bears marks of water having flowed through it. Whether this channel is a natural water-course within the strict definition of the term we need not determine, for the evidence justifies the finding that it was the natural and usual channel for surface water, and afforded a reasonable way for the defendant to construct a culvert for the escape of the surface water without injury to any landowner. In the case of *Boyd v. Conklin*, 54 Mich. 583, 20 N. W. 595, 52 Am. Rep. 831, it is said: "The narrow definition of water courses as natural living streams, which appears in a few cases in the United States, is not an ancient or universal definition. On the contrary, water running in a natural or artificial bed is very frequently, if not generally, so regarded. But names are of small importance, inasmuch as the only considera-

tion that need be looked at is the character and surroundings of the flowage. The following authorities recognize valuable rights in water, and some of them are spoken of expressly as water courses which are entirely distinct from natural living streams. 3 *Woolrych on Waters*, 146, 147; *Wright v. Williams*, 1 M. & W. 77; *Rawstron v. Taylor*, 11 Exch. 369; *Broadbent v. Ramsbotham*, 11 Exch. 602; *Beeston v. Weale*, 5 El. & Bl. 986; *Ivimey v. Stocker*, L. R. 1 Ch. App. 396; *Watts v. Kelson*, L. R. 6 Ch. App. 166; *Nuttall v. Bracewell*, L. R. 2 Exch. 1; *Holker v. Poritt*, L. R. 8 Exch. 107; *Taylor v. Corp. of St. Helen's*, L. R. 6 Ch. Div. 264; *Magor v. Chadwick*, 11 Ad. & E. 571; *Chadwick v. Marsden*, L. R. Exch. 284. * * * Whatever may be the rights of adjoining proprietors as to the use and diversion of waters, there is no right in any one, by raising artificial obstructions, to flood his neighbor's lands by stopping the escape of water that cannot escape otherwise."

In the case of *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395, a water course is defined to be a channel or canal for the conveyance of water, particularly in draining lands. It may be natural, as where it is made by the natural flow of the water, caused by the general superficies of the surrounding land from which the water is collected into one channel, or it may be artificial, as in the case of a ditch or other artificial means used to divert the water from its natural channel, to carry it from lowlands from which it will not flow from the consequence of the surface of the surrounding land; and if such water is regularly discharged through a well-defined channel, and is the accustomed channel through which it flows and has flowed from time immemorial, it is an ancient natural water course. In the case of *Sinai v. L. N. O. & T. Ry. Co.*, 71 Miss. 552, 14 South. 88, it is said: "At the ancient common law every landowner fought and fenced against surface water as suited his necessities. It was a common enemy, with which the landowner dealt according to his own pleasure, for his own protection; but this strict rule had its origin when the soil was used for agricultural purposes, in that primeval day of the law's birth and growth, and a railroad corporation as a landowner was undreamed of. Now, with a network of railway lands spread all over the face of the country, we are called to deal, in the application of legal principles, with a condition of affairs not thought of. When every man fought surface water to suit his own fancy, still then, as now, the rule was that each must so use his own property as not to do unnecessary harm to another. Each proprietor has the right to the use and possession of his own soil; each has equality of proprietary rights, and upon each is imposed in organized society, regulated by law resting on mutual concession, reciprocal duties and correlative obligations. No one, natural or artificial, has

the absolute dominion and unlimited control of his own lands. Blending these harmonious rules of the common law, and adopting them in their flexibility to the new order of society, we shall do no violence to either while we apply both to the case in hand." In the case of *Town v. Mo. Pac. Ry. Co.*, 50 Neb. 771, 70 N. W. 403, the facts were as follows: "A body of land—the plaintiff says about a section (640 acres), one witness says a half section, and others fix it at 200 or 300 acres—within the corporate limits of the city of Lincoln, including some of the improved portions of the city, and all platted or laid out in lots and blocks, etc., on a lot on which was the plaintiff's place of business, has such a surface conformation or is sloped so that, in time of rains or melting of snows, any waters caused thereby flow toward and come together in a body at a place in what witnesses called a 'draw,' others a 'depression in the prairie,' and others a 'channel' or 'waterway,' having its course near the store of plaintiff, and in or directly across which an embankment was made by or for the railway company, and which stopped the flowage of waters in the channel. The company made a culvert by placing at the base of the embankment, in the course of which the surface waters had apparently taken their flow, a tile of the required length, and of an internal diameter of 24 inches." The jury found from the foregoing state of facts that the "depression" in the land complained of was a water course or natural channel, with banks clearly defined; and the undisputed proof was that the water was surface water, and the verdict of the jury was sustained.

If the water, whether surface water or not, had been accustomed to gather and flow along a well-defined channel, although said channel may have been cut or worn into the soil by the frequent running or flowing of such surface water, yet the same could not be obstructed by the railway company; but it was the duty of said railway company, in the construction of its said road, to reasonably provide sufficient drainage and an outlet to carry off such water as might be reasonably expected to flow along said channel and through such drainage outlet, but, however, in such a manner to do no wrong to the servient tenement—in other words, to provide the outlet as near as reasonably practicable, so as to force the water off the servient tenement in like manner and in the same channel or place as it flowed prior to the construction of said embankment. From the foregoing it is evident that neither was the verdict contrary to the law nor was the defendant below entitled to a peremptory instruction of its favor.

This brings us to the third assignment of error, to the effect that the court erred in its instructions defining a water course. Said instruction was in words and figures as follows: "The jury are instructed that the word 'water course,' as used in the statute

quoted in instruction No. 3, means such a course as that where the natural conformation of the surrounding country necessarily collects therein so large a quantity of water, after heavy rain or after the melting of large bodies of snow, as to require an outlet to some common reservoir, and when such water is regularly discharged through a well-defined channel which the force of the water has made for itself and which is the accustomed channel through which it flows and has ever flowed." The plaintiff in error has no ground to complain of the same. It was sufficiently favorable to it. *Town v. Mo. Pac. Ry. Co.*, 50 Neb. 771, 70 N. W. 402; *Boyd v. Conklin*, 54 Mich. 583, 20 N. W. 595, 52 Am. Rep. 831, and authorities therein cited; *Jungblum v. M. N. U. & S. W. R. R. Co.*, 70 Minn. 157, 72 N. W. 971; *N. & W. R. R. Co. v. Carter*, 91 Va. 583, 22 S. E. 517; *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *Sinal v. L. N. O. & T. Ry. Co.*, 71 Miss. 552, 14 South. 87.

In the same assignment of error plaintiff complains of the following instruction: "The jury are instructed that, if they find from the evidence that the waterway through which plaintiff's land drains a large area of the surrounding country, about 3 to 3½ miles long, and 1 to 2 miles in width, and carries off, after heavy rains in its channel, large volumes of water, and that the drainage of the surrounding country is such as to cause rain falling thereon to run off very rapidly and accumulate in the waterway across plaintiff's land, which waterway is well defined and the accustomed channel through which such water flows, and so marked as to present on casual glance to every one the unmistakable evidence of the frequent action of running water, such waterway is a water course within the meaning of the statute quoted in paragraph 3 of these instructions." For the same reason, and under the same authorities, the plaintiff in error has no just ground for complaint.

The fourth assignment of error is unsupported by the record.

It is further contended in the fifth assignment of error that the court erred in directing the consideration of the jury to overflow subsequent to the alleged overflow of September, 1902. There is nothing in the charge of the court submitting any issue as to any overflow subsequent to the date alleged in the petition. There was testimony, however, introduced on the part of the plaintiff as to subsequent overflows, that was competent. Just as it was competent to introduce testimony as to whether or not there had been overflows of such land prior to the date of the construction of the embankment, in order that the jury might determine whether or not the overflow was the primary cause of the construction of the embankment, so it is in like manner competent to make proof as to subsequent overflows, in order that the jury might determine as to whether or not the de-

fendant had exercised reasonable care in providing outlets to carry off water that might accumulate in said water course.

The seventh, eighth, and ninth assignments of error are without merit.

Let the cause be affirmed. All the Justices concurring.

(14 N.M. 352)

DE BERGERE et al. v. CHAVES et al.
(Supreme Court of New Mexico. Jan. 14, 1908.)

1. TENANCY IN COMMON—ACTION BY CO-TENANT.

Tenants in common need not join in a suit in ejectment to recover possession of lands, although they may do so if they so desire.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, §§ 143–150.]

2. SAME—RECOVERY IN EJECTMENT.

A tenant in common may sue separately in ejectment, and, if the defendant shows no title, he is entitled to recover possession of the entire estate, in subordination, however, to the rights of his co-tenants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, §§ 143–150.]

3. SAME.

The case of Neher v. Armijo, 9 N. M. 325, 54 Pac. 236, is reversed so far as it holds that, if a tenant in common sues alone in ejectment, he can recover only his own interest in the estate.

4. DEEDS—WHAT CONSTITUTE—EXECUTORY CONTRACTS.

In the case at bar the paper relied on is not a deed, but is an executory contract, for the giving of a deed to the Galisteo ranch, by Manuel A. Otero, to Jesus M. Sena y Baca, upon the approval of the Bartolome Baca grant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 6.]

5. ADVERSE POSSESSION—WHEN LIMITATIONS RUN.

The instrument in writing under which Jesus M. Sena y Baca took possession of the Galisteo ranch, being an executory contract, the statute of limitations, under which title by adverse possession might be gained, would not begin to run until Sena y Baca, or those claiming under him, distinctly and unequivocally repudiated the title of Manuel A. Otero to the Galisteo ranch.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 343, 344.]

(Syllabus by the Court.)

Appeal from District Court, Santa Fé County; before Justice Edward A. Mann.

Action by Eloisa Luna de Bergere and others against Luciano Chaves and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

This is a suit in ejectment, brought by the plaintiffs, to recover the possession of a certain tract of land situated in Santa Fé county, N. M., and known as the "Galisteo Ranch." A jury was waived and the evidence in the case was taken by Hon. John R. McFie, judge of the First judicial district court of the territory of New Mexico, but on March 3, A. D. 1900, the said judge disqualified himself, and by consent of all the parties the cause was referred to the honorable Edward A. Mann, associate justice of the Supreme

Court of this territory, who heard the arguments and rendered a judgment in the case. It will be unnecessary to trace the title to the Galisteo ranch back of June 22, 1878, at which time the title to the ranch was in Manuel Antonio Otero, as all of the parties to this controversy trace their claims to him as the common source. On June 22, 1878, Manuel A. Otero and one Jesus M. Sena y Baca entered into a contract or agreement, written in Spanish, a translation of which reads as follows, to wit: "Know all men by these presents, that I, the undersigned, Manuel Antonio Otero, resident of the county of Valencia, in the Territory of New Mexico, for consideration, have sold and transferred in favor of Jesus M. Sena y Baca and Agapita Ortiz, his wife, a ranch known as the ranch of Galisteo, which is situated in the county of Santa Fé and territory aforesaid, known as the ranch which was formerly of the deceased Don Miguel E. Pino, and that I will give and execute the documents of conveyance of the said ranch in favor of Jesus M. Sena y Baca and Agapita Ortiz, as soon as there shall be adjudicated and approved by the Surveyor General the grant of Bartolome Baca of a tract which was ceded to him by the Governor Melgarez in the year 1819, and the which is situate in the county of Valencia in the territory of New Mexico, and, furthermore, they will take possession of the aforesaid ranch and will have and enjoy all the products of the same until the proper documents may be executed, and in conformity with the above stated; and the said Jesus M. Sena y Baca so agrees and has signed here jointly with me. In witness whereof, we sign the present in La Constancia, county of Valencia, this 22d day of June, A. D. 1878. Manuel A. Otero. Jesus M. Sena y Baca." Under this contract or agreement Sena y Baca went into possession of the lands in controversy, and so remained until his death in the year 1885, when his rights descended to his widow, who continued in possession until July 10, 1888, when she quitclaimed her rights in it to one Jesse D. Rumberg, and at the same time delivered to him the original contract or agreement between her husband and Otero, both of which instruments Rumberg had placed of record. Rumberg continued in possession of the property until July 18, 1889, when he quitclaimed the same to Jose de la Cruz Chaves, and from Jose de la Cruz Chaves the property came into the possession of his heirs at law, the defendants herein. The contract or agreement between Sena y Baca and Otero, and which is set out above, was handed over to the several occupants of the property, and was introduced in evidence on the trial of this case. Indeed, the contract or agreement seems to have been executed in duplicate, as both the plaintiffs and defendants have one, which are identical, except that the one held by the defendants has certain interlineations in it

setting out a consideration of \$1,000 for the alleged sale. During all of the time that the property was in the possession of Sena y Baca and his privies their possession was continuous. They farmed the land, made certain improvements on it by building fences and acequias, have received rentals for parts of it which was farmed on shares, and have exercised all of the control over the property which its owner might do. The evidence discloses that Manuel Antonio Otero attempted to get the Bartolome Baca grant, approved by the Surveyor General of New Mexico, but that official made an unfavorable report on the validity of the grant, and recommended that it be rejected, but before Congress took any action on this report of the Surveyor General the Court of Private Land Claims was created, and empowered to adjudicate and determine the validity of land grants made by the governments of Spain and Mexico in New Mexico and other territories. The Oteros prosecuted their claim for the confirmation of the Bartolome Baca grant before the Court of Private Land Claims, and secured a favorable decision from that court, for a part of the grant, but on appeal the Supreme Court of the United States in 1897 finally rejected the grant. After the creation of the Court of Private Land Claims the successors of Sena y Baca brought a proceeding in such court for the confirmation of the Gallisteo grant, and succeeded in getting that part of it known as the "Gallisteo Ranch," the property in controversy, confirmed. On April 3, 1901, after the final rejection of the Bartolome Baca grant, the plaintiffs herein, as heirs of Manuel Antonio Otero, brought this suit to recover the possession of the Gallisteo ranch. Judgment was finally entered by the learned judge below in favor of the plaintiffs, and, from such judgment, the defendants appealed to this court.

A. B. Renehan, for appellants. T. B. Catron and Robert C. Gortner, for appellees.

MILLS, C. J. (after stating the facts as above). It is evident from an examination of the record that this case was ably contested by the attorneys for both the plaintiffs and the defendants, and that every effort was used to secure and present to the trial court all of the evidence which minds trained in the subtlety of legal procedure by many years of active practice before the courts believed would be useful to the respective sides which they represented in the controversy now before us.

The questions discussed by counsel in their briefs are numerous and involve complicated points of law, but in our opinion the real questions on which this case must finally be decided can be compressed into a small compass, by brushing to one side what under our opinion of this case are collateral and comparatively unimportant matters, many of

which are elaborately argued in the briefs submitted to us by counsel. We will endeavor to dispose of this case along these lines.

1. We do not consider as well taken the contention of the appellants that the plaintiffs below could not maintain this suit without joining their tenants in common as parties. No provision of our laws, so far as we are aware, requires that all of the tenants in common should join in a suit to recover possession of real property. In fact, this court has held in *Neher v. Armijo*, 9 N. M. 325, 54 Pac. 236: "Defendant insists that these plaintiffs as tenants in common could not be joined as parties plaintiff, and their having so joined is fatal to their case. We do not interpret the law to be as defendant contends, but believe the better rule to be that tenants in common may join in ejectment and recover the whole property demanded as held by them in common, or they may sue separately and recover each one only his whole interest." The opinion in the *Neher v. Armijo* Case, that tenants in common may join in an ejectment case and "recover the whole property demanded so held by them in common or they may sue separately and recover," is we think correct, but we think that that case is incorrect in limiting such recovery in case a suit is brought by one of several tenants in common to "each one only his whole interest," and to that extent the case of *Neher v. Armijo* is reversed. We think the true rule to be that a tenant in common may sue separately in ejectment, and that, if the defendant shows no title, he is entitled to recover possession of the entire estate, "in subordination, however, to the rights of his co-tenants." As is well said in *Hardy v. Johnson*, 1 Wall. (U. S.) 371, 17 L. Ed. 502: "The action of ejectment determines no rights but those of present possession; and that one tenant in common has such right as against all parties but his co-tenants, or persons holding under them, is not questioned." That a tenant in common may sue without joining the other tenants in common is also held as late as 1898, when the Supreme Court of the United States quotes approvingly from *Davis v. Coblenz*, 12 D. C. App. 51, 61, as follows, to wit: "The original rule at common law was that tenants in common could only sue separately, because they were separately seized, and there was no privity of estate between them. *Mobley v. Bruner*, 59 Pa. 481, 98 Am. Dec. 360; *Corbin v. Cannon*, 31 Miss. 570, 572; *May v. Slade*, 24 Tex. 205, 207; 4 Kent Com. 368. * * * The practice soon became general, however, in the United States to permit them to sue either jointly or severally as they might elect. 7 Ency. P. & P. 316, and cases cited. This seems to have been the practice in the District of Columbia, and, so far as we are advised, has never been questioned. Tenants in common may join in an

action if they prefer to do so, but it is with the risk of the failure of all if one of them fail to make out a title or right to possession." And the Supreme Court adds to this quotation the words: "These remarks express the rule correctly." *Davis v. Coblenz*, 174 U. S. 719, 19 Sup. Ct. 832, 43 L. Ed. 1147. The law is also laid down in 15 Cyc. 8 to be that it is not necessary that all the tenants in common should unite in the action, although they may join in it for their common estate.

2. We will now consider the agreement in writing signed by Otero and Sena y Baca, on which this controversy is largely based, to determine whether it is a deed or an agreement to convey, for the decision of this point is of vital importance to the parties to this case. From the standpoint of performance contracts have been divided into two classes—executed and executory. "A contract is executed where everything that was to be done is done, and nothing remains to be done. A grant actually made is within this category. Such a contract requires no consideration to support it. A gift consummated is as valid in law as anything else. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629. An executory contract is one where it is stipulated by the agreement of minds upon a sufficient consideration that something is to be done or not to be done by one or both of the parties. Only a slight consideration is necessary. *Pillans v. Van Mierop*, 3 Burr, 1063; *Forth v. Stanton*, 1 Saund. 210, note 2, and the cases there cited." *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558. An examination of the contract or agreement entered into between Otero and Sena y Baca, and which is set out in full in the statement of facts preceding this opinion, convinces us that it was an executory contract (although it contains words of present purchase and sale), for the conveyance of the Galisteo ranch by Otero to Sena y Baca depends upon the happening of a certain contingency, viz., the adjudication and approval of the Bartolome Baca grant. The wording of the contract provided that Sena y Baca could take possession of the Galisteo ranch and enjoy the products of the same until the proper documents were executed to convey the title to him, which documents were to be executed on the favorable adjudication and approval (confirmation) of the Bartolome Baca grant. The wording of the agreement is unequivocal and plain that the deed of conveyance to the Galisteo ranch was to be made when the Bartolome Baca grant was favorably adjudicated and approved. Nor can it be contended that the contract of June 22, 1878, was a deed, for it is signed by both Otero and Sena y Baca, and not alone by Otero, the then owner of the Galisteo ranch. If the instrument in question had been signed by Otero alone, there would have been more force than now exists in the contention of the appellants that it was a deed transferring

the title to real estate, rather than a mere agreement to execute deeds to convey on the happening of certain events. Another thing which leads us to conclude that the writing was an executory contract, and not a deed, is that it is not acknowledged before any officer having the power to take acknowledgments to deeds, nor before any one, and as long ago as 1852 our Legislature passed an act which was approved on January 12th of that year which provided in section 5 that "every instrument in writing by which real estate is transferred or affected, in law or equity, shall be acknowledged and certified to in the manner hereinafter prescribed." Laws 1851-52, p. 374. Section 6 of the same act sets out the officers before whom such acknowledgments might be taken. This law was in force at the time of the signing of the agreement or contract on June 22, 1878, and must have been known to the parties who signed it, for the evidence discloses that one of them at least was a man of affairs, and one who was familiar with the working of the legislative bodies of the territory. In arriving at a conclusion as to whether or not the writing which is the basis of this controversy is a deed or contract, we must consider it as an entirety. We cannot pick out a few words or a line here and there, and determine from them what it is. As the Supreme Court of the United States says: "We agree generally that although there are words of conveyance in present in a contract for the purchase and sale of lands, still, if from the whole instrument it is manifest that further conveyances were contemplated by the parties, it will be considered an agreement to convey, and not a conveyance. The whole question is one of intention to be gathered from the instrument itself. *Jackson v. Moncrief*, 5 Wend. (N. Y.) 26; *Ogden v. Brown*, 33 Pa. 247; *Phillips v. Swank*, 120 Pa. 76, 13 Atl. 712, 6 Am. St. Rep. 691; *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658." We have gone over the written instrument dated June 22, 1878, very carefully, and have come to the conclusion that it is not and was not intended to be a deed for the conveyance of the Galisteo ranch, but that it was an executory contract, by the terms of which a deed for its conveyance was to be delivered by Manuel Antonio Otero to Jesus Sena y Baca, on the favorable adjudication and confirmation of the Bartolome Baca grant. As the Bartolome Baca grant was finally rejected by the Supreme Court of the United States, no necessity arose for Otero or his heirs to give deeds of conveyance for the Galisteo ranch.

3. Holding that the instrument in writing under which Sena y Baca took possession of the Galisteo ranch and held the same was an executory contract, we must determine the nature of the possession of the said ranch by Sena y Baca and his successors in title, with the view of determining whether or not title has been acquired by adverse possession,

The evidence in this case discloses that Sena y Baca in obtaining the confirmation of the Galisteo grant derelinqed his title through Manuel Antonio Otero by virtue of the executory contract, and thus recognized the title of his vendor to the premises. No claim was made by the defendants that their title arose from any other source. Sena y Baca then entered into the possession of the lands in controversy by virtue of the contract, and with the permission of Manuel Antonio Otero, and it is generally held that a possession by permission or license from the owner is not adverse and cannot ripen into title, no matter how long continued or however exclusive it may be. 1 Cyc. 1030, and cases cited in note 66, from 27 states, and from England, Canada, and the Supreme Court of the United States. The possession of the occupant under such circumstances is considered as the possession of him upon whose pleasure it continues. *Pulaski County v. State*, 42 Ark. 118, and again in 1 Cyc. 1044, the rule is stated to be, and many cases are cited in its support, that, "where one enters into and holds possession of lands under an executory contract of purchase or bond for title, the entry and possession are in subordination to the title of the vendor until payment or performance of all the conditions by the vendee, or until the vendee has distinctly and unequivocally repudiated the title of his vendor, which repudiation is brought expressly or by legal implication to the vendor's knowledge." The reason for this rule forbidding a person who has gone into possession under a contract to purchase is the injustice of allowing a person who has obtained possession by admitting title of another, to enjoy that title, and, in case of failure of proof of it, hold the premises himself. *Howard v. McKenzie*, 54 Tex. 171; *Kirk v. Taylor*, 8 B. Mon. (Ky.) 262; *McKelvain v. Allen*, 58 Tex. 383; *Clouse v. Elliott*, 71 Ind. 302. The evidence in this case nowhere discloses that Sena y Baca, or his assigns, ever distinctly and unequivocally repudiated the title of Manuel Antonio Otero. When Sena y Baca disposed of whatever title he had in the Galisteo ranch to Rumberg, he did so by a quitclaim deed, and handed Rumberg the executory contract which he had in his possession, and this contract appears to have always been given to the occupants of the real estate in controversy down to the present day, for we find it in the possession of the defendants when this suit is brought, and it is introduced by them in evidence to support their claim that they own the property in fee.

We are aware that many points are raised in the briefs of both appellants and the appellees which we have not discussed; but, as before stated, under the view which we have taken of this case, we do not think that it is necessary for us to discuss or determine them, and we therefore refrain from so doing, although we have read and considered them with much care.

Finding no reversible error in the judgment of the court below, the same is therefore affirmed; and it is so ordered.

POPE, PARKER, and ABBOTT, JJ., concur. McFIE, J., having heard a part of this case below, and MANN, J., having decided the case below, took no part in this decision.

(13 Idaho, 662)

VALLEY LUMBER & MFG. CO. v. DRIESSEL et al.

(Supreme Court of Idaho. Dec. 7, 1907. On Rehearing, Jan. 22, 1908.)

1. MECHANICS' LIENS—TIME FOR FILING—SEPARATE CONTRACTS—KNOWLEDGE BY SUB-CONTRACTOR.

D. contracted with M. to construct a dwelling house, and M. contracted with the V. L. Company to furnish the material, which it did, and M. completed the dwelling on the 16th day of January, 1905. Thereafter, on the 13th day of March, 1905, D. contracted with M. to erect a porch to said dwelling, and M. on that day ordered lumber for said porch from the V. L. Company, which was furnished by them, the last of it being furnished on the 15th of March, 1905. Thereafter, on the 11th day of May, 1905, the V. L. Company filed its materialman's lien on said premises. *Held*, that the erection of the dwelling and the porch was done under separate contracts, but it is not shown by the evidence that the V. L. Company had notice or knowledge that said dwelling and porch were erected under separate contracts, and for that reason *held* that the V. L. Company's lien was filed in time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, *Mechanics' Liens*, § 203.]

2. SAME.

A materialman who furnishes material for the erection of a building under two separate contracts, and has knowledge of such contracts, cannot tack one contract to the other by filing his claim of lien within the required time from the date of furnishing material pursuant to one of the contracts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, *Mechanics' Liens*, §§ 202, 203.]

3. SAME.

The time for filing a lien cannot be extended by furnishing on a new contract or request additional articles, and adding them to a completed account and statement of material furnished.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, *Mechanics' Liens*, §§ 202, 203.]

4. SAME.

Where materials are furnished for the same building or improvement in installments and at intervals, and the parties intend them to be included in one account and settlement, the entire account will be treated as a continuous and connected transaction, and the time in which to file the lien begins to run from the date of the last item of the account.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, *Mechanics' Liens*, §§ 200-203.]

5. CORPORATIONS—ACTIONS—PLEADING—FOREIGN CORPORATION—COMPLIANCE WITH LAW—WAIVER OF OBJECTION.

Under the laws of this state, a foreign corporation, in order to maintain an action in the courts of this state, must allege a compliance with the Constitution and statutes in regard to designating an agent upon whom service of process may be had, and in filing its articles of incorporation as required by law, and a complaint by such corporation that fails to allege

such facts is subject to demurrer. However, the defendant will waive the question of noncompliance if he fails to raise the same by demurrer or answer, and cannot raise it for the first time in the appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2647.]

6. SAME.

The case of *Katz v. Herrick*, 12 Idaho, 1, 86 Pac. 873, cited and approved.

7. PLEADING — DEMURRER — GROUNDS OF — STATEMENT.

Section 4174, Rev. St. 1887, provides that a defendant may demur to the complaint on seven separate and distinct grounds, the second being "that plaintiff has no legal capacity to sue"; and the sixth is "that the complaint does not state facts sufficient to constitute a cause of action." The clear intent of the provisions of that section is, if one desires to demur to a complaint on the ground that the plaintiff has no legal capacity to sue, he must so state in his demurrer, and cannot raise the question of the legal capacity of the plaintiff to sue on the ground that the complaint does not state a cause of action.

8. SAME.

A cause of action may exist in favor of a corporation or person who has not the capacity to sue, and an action brought by such person or corporation on a complaint alleging a good cause of action would not be obnoxious to a demurrer on the ground that it does not state a cause of action.

9. SAME—DEFECTS IN COMPLAINT—WAIVER—STATUTORY PROVISIONS.

If, as in the case at bar, a foreign corporation fails to allege its compliance with the domestic law, the complaint is demurrable on the ground that it fails to allege the capacity of the plaintiff to sue. The objection on that ground may also be taken by answer under the provisions of section 4177, Rev. St. 1887. Under the provisions of section 4178, Rev. St. 1887, if no objection to the complaint is taken either by demurrer or answer, the defendant is deemed to have waived the same, excepting only the objection to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action.

10. SAME.

Where the complaint on its face shows the want of capacity of the plaintiff to sue, the question of want of capacity cannot be raised by demurrer on the ground that the complaint fails to state a cause of action.

11. SAME.

A corporation or individual may have a good cause of action and still have no capacity to sue, and may have a capacity to sue, and no cause of action.

12. SAME.

The demurrer must be confined to the specific grounds stated therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 482-485.]

13. SAME.

Held, that the question of the capacity of the respondent to sue was not raised in the court below by demurrer or answer, and for that reason was waived.

On Petition for Rehearing.

14. MECHANICS' LIENS—ENFORCEMENT—BURDEN OF PROOF.

Where a defendant seeks to defeat the plaintiff's right of recovery in an action to foreclose a mechanic's lien by showing that the material was furnished on two separate and distinct contracts, and that the lien was therefore not filed in time to secure the claim for the material furnished on the first contract, the burden of proof is on the defendant to show either that the plaintiff had actual notice that

the material was furnished and used on two separate contracts or else show such circumstances as would impute to plaintiff constructive notice, and put him on his inquiry to ascertain that two or more contracts did in fact exist.

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action to foreclose a mechanic's lien by the Valley Lumber & Manufacturing Company against John Driessel, administrator, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Chas. L. McDonald, for appellants. C. H. Lingenfelter, for respondent.

SULLIVAN, J. This is an action brought to foreclose a materialman's lien under the provisions of the mechanic's lien law of this state. One Driessel was the owner of the premises, and contracted with one Morrison for the construction of a dwelling house on the premises described in the complaint. It is alleged in the amended complaint that the plaintiff, who is respondent here, is a corporation organized under the laws of the state of Washington, and doing business in the town of Lewiston, Idaho; that said Driessel is the owner of the premises described in the complaint, and that the defendant Morrison was the contractor and agent of Driessel, and as such agent entered into a contract with the respondent, whereby it was to furnish the material for the construction of a certain dwelling house; that the respondent furnished the material between the 23d day of November, 1904, and the 15th day of March, 1905, which material was actually used in the construction of said building of the agreed value of \$552.47; that there was thereafter paid on said account \$300.98, leaving a balance due of \$251.49, together with interest thereon, and that the plaintiff within 60 days from March 15, 1905, the date of furnishing the last item of said lumber, duly filed its claim of lien on the 11th day of May, 1905, in the office of the recorder of Nez Perce county. The defendants filed a general demurrer to the complaint, which was overruled by the court. They thereafter filed a joint answer, denying the material allegations of the complaint, except the corporate existence of the plaintiff, and admitted that Driessel was the owner of the premises described in the complaint. The cause was tried by the court without a jury, and judgment was rendered in favor of the respondent. This appeal is from the judgment and order denying a new trial.

It appears from the testimony in the case that there were two contracts entered into between Morrison and Driessel. The first was for the building and construction of a dwelling house, which was completed on January 16, 1905, and the respondent rendered him a bill or a statement on the 20th of January for all the lumber that he had used in the construction of said dwelling house. It also

appears from the record that Driessel rented the house before or about the time it was completed, and the tenants took possession thereof. Thereafter they desired a porch built on to said house, and it would appear that they expressed their desire to Driessel and he consented to have a porch built, and on the 13th of March, 1905, 59 days after the delivery of the last item of material under the first contract, he entered into another contract with Morrison for the construction of said porch, and on that date Morrison ordered the lumber for its construction from the respondent, to the amount of about \$25, and the respondent furnished the lumber for said porch on the 13th and 15th days of March. The respondent filed its materialman's lien on the 11th day of May, 1905, 57 days after furnishing the last material for the porch.

It is first contended by counsel for appellant that as there were two separate contracts, one for the construction of the house and the other for the construction of the porch, that said contracts had no connection with each other and were entirely separate and severable, and that the last one cannot be tacked on to the first and thus keep alive the materialman's lien for the material furnished for the construction of the house for more than 60 days after its completion under the first contract. The evidence shows beyond a doubt that the house was constructed under one contract and the porch under another and separate contract. It also shows that the house was completed about the 16th day of January, 1905, and that the owner leased the house about the time of its completion and the tenants took possession. It also appears that the owner lived in Genessee, Latah county; that he went to Lewiston on the 13th of March, and his tenants persuaded him to have said porch constructed, and on that date he made a contract with the appellant Morrison to erect said porch. The contract for the porch was not made until about 59 days after the respondent had furnished the last material for the construction of the house. The court in its findings of fact virtually finds that the house and porch were constructed under one contract, but that finding is not supported by the evidence. The secretary of the respondent company testified that he did not know the house was completed on or about the 16th day of January, but his testimony is not very clear on that point. He testified, further, that Morrison told him that he put the lumber furnished on the 13th and 15th of March into the porch; while Morrison swears positively that the house was built under one contract and the porch under another and separate contract. The fact that the respondent furnished Morrison with an itemized statement of all the lumber furnished for the construction of the house on the 20th of January, 1905, is very suggestive of the fact that the respondent was informed that the building was completed, as

Morrison testified on the completion of a building the company furnished him an itemized statement of the material furnished, and that he checked it over to ascertain whether or not it was correct, but does not testify that he informed respondent that the contract was completed, or that it had knowledge of that fact. There is no positive testimony in the record showing that the respondent had information that the house and the porch were constructed under separate contracts. The circumstance of respondent's furnishing an itemized statement of the lumber used in the construction of the house, to say the least, is suggestive and significant. If the record showed that the respondent had such information, the rule laid down in *Central Loan & Trust Co. v. O'Sullivan*, 44 Neb. 834, 63 N. W. 5, would apply. In that opinion the court said: "A materialman cannot tack one contract to another so as to procure a lien for all the materials furnished under separate contracts by filing his claim within the required time from the date of furnishing material pursuant to one contract." And in *Schulenburg v. Vrooman*, 7 Mo. App. 133, the court said: "Where all the items of an account except the last few were supplied under one contract and that contract was executed and the transaction closed, held, that the time for filing a lien could not be extended by furnishing on a new request additional articles and adding them to the completed account." On this point, see, also, *Fay v. Muhliker*, 1 Misc. Rep. 321, 20 N. Y. Supp. 671; *Scott v. Cook*, 8 Mo. App. 193; *Sanford v. Frost*, 41 Conn. 617; *Frankoviz v. Smith*, 34 Minn. 403, 26 N. W. 225.

It is contended by counsel for respondent that it had no knowledge that Morrison and Driessel had one contract for the house and one for the porch, and that the contract, so far as it was concerned, was continuous and entire, and the time within which to file a lien dated from the date of the last item of material furnished. That, no doubt, was the theory upon which the trial court rendered its decision. Among other authorities cited by respondent is the case of *Darlington Lumber Co. v. Harris*, 107 Mo. App. 148, 80 S. W. 688. In that case the company and one Taylor agreed to the estimate of the lumber to be used in the Harris building. Considerable extra lumber was furnished all along during the continuance of the original contract, and the undisputed testimony showed that the lumber was ordered for the extra work for which Taylor had a separate bid; that the respondent company had no fresh arrangement with him, and knew nothing about there being another contract between Taylor and Harris, or that they were furnishing material for a job to be done under a separate contract. The court said: "The interval between October 25th, when the last item was furnished for the completion of the original plan, and December 10th, when the

lumber for the extras was sold, was too short a time to affect respondent with constructive notice of Taylor's new arrangement with Harris." That decision, no doubt, would have been different had the court found that Taylor had entered into a separate contract with Harris for doing a part of the work in the construction of said building, and the materialman had notice of that fact. Where materials are furnished for the same building or improvement in installments and at intervals, and the parties intend them to be included in one account in settlement, the entire account will be treated as a continuous and connected transaction, and the lien limitation begins to run from the last item of the account. *Jones & Magee Lumber Co. v. Murphy*, 64 Iowa, 165, 19 N. W. 898; *Darlington Lumber Co. v. Harris*, supra; *Lumber v. Myers*, 87 Mo. App. 671. But, where there are two separate and distinct contracts for the erection of a building and the materialman knows that there are two contracts, he cannot tack the last contract to the first so as to procure a lien for all the materials furnished under the separate contracts where the time had expired for filing a lien for the material furnished under the first contract. While there are some facts and circumstances tending to show that the respondent had notice of the two contracts referred to in this case, the evidence is not such as to warrant the reversal of the judgment on the ground that the respondent knew or had notice of those two contracts. The fact as to whether the respondent had information that the porch was built under a separate contract was within the possession and knowledge of the appellants, and they should have proved that fact by a preponderance of the evidence if they relied upon it, which they failed to do.

The question whether the plaintiff is entitled to maintain this action, it being a foreign corporation, is raised by the record. The paragraph of the complaint alleging the corporate existence of the respondent is as follows: "That the plaintiff is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the state of Washington, with its principal place of business at Clarkston, Wash., and doing business at Lewiston, Idaho." It will be observed that it is not alleged that the plaintiff had complied with the provisions of section 10 of article 11, of the state Constitution in designating an agent upon whom process may be served; and with the provisions of section 2853 of the Revised Statutes of 1887, as amended by the Laws of 1903 (Laws 1903, p. 49), which provides that a foreign corporation shall file with the county recorder of the county in this state, in which is designated its principal place of business in the state, a copy of the articles of incorporation of said corporation, duly certified by the Secretary of State of the state in which said corporation was organized, and

a copy of such articles of incorporation duly certified by the county recorder with the Secretary of State. It is contended that the allegations of said complaint places the respondent in the status of an individual whose contracts and dealings in this state are absolutely void, unless it affirmatively appears that it has complied with the above-mentioned provisions of our statute and Constitution. The question presented may be stated as follows: When it appears from the complaint that the plaintiff is a foreign corporation, whether the fact of its not having complied with the laws of this state in reference to designating an agent and filing its articles of incorporation is a matter of defense to be pleaded affirmatively in the answer and proven by the defendant, or whether the plaintiff has affirmatively placed itself in a position so that it is incumbent upon it to allege and prove that it has complied with the laws of this state, and is entitled to do business in the state or maintain an action in its courts.

Counsel for the respondent contends that the right of the plaintiff to do business in this state is not disputed by the pleadings; that the defendant, neither by demurrer nor answer, questioned the authority of the company to do business in this state nor to maintain this action, and that that question could only be raised by demurrer or answer, and, if not so raised, it is waived, and cites in support of that contention *Ontario State Bank v. Tibbits*, 80 Cal. 63, 22 Pac. 86; *Phillips v. Goldtree*, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; *Southern Pac. R. Co. v. Purcell*, 77 Cal. 69, 18 Pac. 886-889; *Dahl v. Montana Copper Co.*, 132 U. S. 264, 10 Sup. Ct. 97, 33 L. Ed. 325; *Wetzel & T. R. Co. v. Tennis Bros. Co.*, 145 Fed. 453, 75 C. C. A. 266. The first case above cited, the *Ontario Bank v. Tibbits*, involved the foreclosure of a mortgage by a corporation, and the court there held that the complaint did not show that the plaintiff had complied with the provisions of section 299, Civ. Code Cal., requiring foreign corporations to file their articles of incorporation and designate an agent upon whom process could be served, and could not maintain an action or proceeding in relation to property owned by it in such county "until such articles of incorporation shall be filed in the place directed by the general law and by the provisions of that section." The court there said, in considering that section of the statute: "The failure of the plaintiff to file a copy of its articles of incorporation in the office of the county clerk, being mere matter of abatement, should be specially pleaded by the defendants; otherwise, it was waived." Said section 299 is different from the provisions of our own statute, in that it does not make it unlawful for a foreign corporation to acquire property in the counties of that state, but it provides that they must file their articles of incorporation within 50 days after the purchase, and it also further differs from

our provisions of the statute, in that it provides that such corporation shall not maintain any action or proceeding until their articles of incorporation have been filed as provided by law. Under the provisions of that section, a corporation that had failed to comply with the law in regard to filing its articles of incorporation could begin an action, and the day before the action was tried might file its articles of incorporation, and thereby have the right to maintain said action. Under the provisions of our Constitution and law, it was held in the case of *Katz v. Herrick*, 12 Idaho, 1, 86 Pac. 873, that foreign corporations which had failed to comply with the Constitution and law in regard to designating an agent upon whom process may be served, and filing its articles of incorporation with the county recorder and Secretary of State, cannot maintain an action on a contract made prior to their compliance with the law, and for that reason the California citations are not in point, as a compliance with the law, after an action is commenced, would not remove the disability in this state as it does under the California statute. The case of *Phillips v. Goldtree*, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451, involves the failure of a partnership to file a certificate of partnership as provided by sections 2466 and 2468 of the Civil Code of California, which sections attach a legal incapacity to maintain an action upon a contract made or a transaction had in the partnership name on a failure to file such certificate, and the court there held that the objection that no such certificate had been filed must be taken by answer; otherwise, under the provisions of Code Civ. Proc. § 434, it was waived. In the case of *Southern Pac. Ry. Co. v. Purcell*, supra, which was a case under section 299 of the Civil Code of California, above referred to, the court held that the noncompliance of the railway corporation to file its articles of incorporation should be raised by answer, and, unless specifically set up therein, want of proof of noncompliance with that law was not fatal to the verdict. In the case of *Wetzel & T. R. Co. v. Tennis Bros. Co.*, supra, decided by the Supreme Court of West Virginia, it was there held under the provisions of the Code of that state, providing that a foreign corporation not having complied with the laws of the state shall not be entitled to maintain any action in the courts of that state, that the failure of a foreign corporation, plaintiff, to so qualify, may be pleaded in abatement in any action, suit, or proceeding. The court held that such failure was a matter which the defendant was entitled to raise or waive at its election. In *Dahl v. Montana Copper Co.*, 132 U. S. 264, 10 Sup. Ct. 97, 33 L. Ed. 325, which is a case from the Supreme Court of Montana, taken by writ of error to the Supreme Court of the United States, the plaintiff alleged in its complaint that it was a corporation created under the laws of the

state of New York, doing business in Silver Bow county, in the territory of Montana. It will be observed that that allegation is very much like the allegation of the complaint in this case in regard to the corporate capacity of the plaintiff. In that case the answer of the defendant did not deny the incorporation of the plaintiff or its right to do business in Silver Bow county, but only its ownership of the mining claim involved. Justice Field in the opinion in that case stated, among other things, as follows: "No question is therefore raised on the pleadings as to its competency to do business within the territory for want of compliance with the provisions of the territorial law. The question at issue on the pleadings and on the trial in the court below was confined to the ownership of the mining ground. Without, therefore, considering the validity and force of the provisions of that law * * * or whether, if they are valid, any parties except the government of the territory can allege a disregard of them to defeat the title of the corporation to its property (*Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317), it is sufficient in this case to say that such incompetency cannot be considered unless set up in the pleadings in the court below. A failure to comply with the provisions of the law will not be presumed in the absence of any allegation on the subject. The objection cannot be urged for the first time in this court." As we understand that decision, the Supreme Court of the United States holds the question of noncompliance by a foreign corporation with the laws of the domestic state must be raised by demurrer or answer in the trial court, and cannot be raised for the first time in the appellate court. In *Welsbach Co. v. Norwich Gas & Electric Co.*, 96 App. Div. 52, 89 N. Y. Supp. 284, the court holds under the general corporation laws of the state of New York, providing that no foreign corporation shall maintain an action in the state on any contract made by it in the state, unless it has procured a certificate from the Secretary of State entitling it to do business in the state, that the procuring of the certificate is a condition precedent which must be averred in the complaint. In that case it appeared from the complaint that the plaintiff was within the category of those parties who must procure the certificate before they make the contract in order to sustain an action thereon. The court said: "The intent that the procurement of such certificate before the contract was made shall be a condition precedent to the maintaining an action thereon is as plain as any language could make it—certainly as plain as is the language in the Buffalo charter above referred to—and hence, being a condition precedent, it is a fact necessary to be proven, and therefore necessary to be alleged, within the authority of the above case." The court quoted from the *Reining Case* as follows: "It is competent for them [the Legislature] to attach a condi-

tion to the maintenance of a common-law action, as well as one created by statute; and, when they have done so, its averment and proof cannot safely be omitted." It further said: "It is to be noticed that by the amendment of 1901 the enforcement of a contract made by a foreign corporation before it has obtained the required certificate is entirely abrogated. It is made incapable of enforcement because of the omission to procure the certificate before the contract was made." The demurrer in that case was sustained, and the decision was based upon the theory that the complaint should have contained an averment that such certificate had been procured before the making of the contracts which were the basis of the action. That decision was by the appellate division of the Supreme Court of the state of New York, and on appeal the case was taken to the Court of Appeals. See 72 N. E. 1152. It appears from the short opinion by the Appellate Court that there were two questions certified to it for decision, to wit: (1) "Was the complaint demurrable on the ground that it appeared upon the face thereof that the plaintiff did not have the legal capacity to sue? (2) Was the complaint demurrable on the ground that facts are not therein stated sufficient to constitute a cause of action?" Both of said questions were answered in the affirmative by the Court of Appeals. There the question of the corporation's capacity to sue was directly raised by the demurrer upon the ground that it appeared upon the face of the complaint that the plaintiff did not have legal capacity to sue. In the case of *Cumberland Land Co. v. Canter Lumber Co.* (Tenn. Ch. App.) 35 S. W. 886, the court held that a bill by a foreign corporation doing business in the state of Tennessee should be dismissed; it not being alleged that it had complied with the statute as to filing charter and registering abstract of the same. In that case the court said: "With respect to the first error assigned by the defendants, it is proper to state that in our opinion it should be sustained. It is true the point was not made in the court below, nor does it appear in the evidence, that the complainant had failed to file its charter, and have an abstract thereof registered, as required by our statutes. But it does appear that it is a foreign corporation, and that it was doing business in this state. This being so, in order to obtain any relief in any of the courts of this state, it was incumbent on complainant to show affirmatively that it had complied with our statutes, on a compliance with which it was alone authorized to do business here."

Thus it will be observed that one line of the above-cited authorities hold that noncompliance with the law of the domestic state is a matter of defense to be pleaded affirmatively by the defendant in his answer. The statutes upon which that line of decisions rest are construed by those courts to mean that a failure of a corporation to comply with the

statutory conditions upon which it may enter a state and do business does not operate to render its contracts wholly void, but merely operates to suspend the remedy of such corporation in the courts of the state where such contracts are made until it shall have complied with the statutory conditions. Such are the decisions of California. The second line of decisions requires the foreign corporation to affirmatively allege and prove its compliance with the statutory requirements of the domestic state, and is based upon a construction of their statutes that makes compliance with the terms thereof a condition precedent to the right to maintain the action in the courts of the domestic state. Other authorities hold, as did the Supreme Court of the United States in *Dahl v. Montana Copper Co.*, supra, that the incompetency of a foreign corporation to sue cannot be considered unless set up in the pleadings in the court below, and that a failure to comply with the provisions of the law will not be presumed in the absence of any allegation on the subject, and that objection cannot be first urged in the appellate court. It therefore remains for this state to adopt one or the other line of those authorities as the rule governing such actions in this state.

It is contended by counsel for appellant that this court held in the case of *Katz v. Herrick*, 12 Idaho, 1, 88 Pac. 873, that contracts of a noncomplying foreign corporation were illegal and void. Counsel evidently misapprehended the effect of that decision. The court there held that the noncomplying foreign corporation had no legal existence in this state, and, under the law, was without a remedy for the enforcement of any contracts made by it within the state, but did not hold that its contracts were absolutely void. In the course of that opinion the court said: "Courts of equity are always able to protect innocent and honest persons in legitimate transactions, and we are satisfied that the courts of this state can and will protect all persons who have had honest dealings with noncomplying foreign corporations where they deserve protection." The court did not hold in that case that such contracts were absolutely void, but held that such contracts were not enforceable in the courts of this state by a noncomplying corporation. If a foreign corporation fails or neglects to allege in its complaint that it has complied with the laws of this state, in regard to designating an agent upon whom service may be had, and filing its articles of incorporation, it is demurrable on the ground that it fails to allege its legal capacity to sue; for, after alleging that it is a foreign corporation, it then places itself in the category of a plaintiff, who cannot maintain a suit in this state without alleging that it has complied with the law that must be complied with before such corporation can maintain an action. The failure of a foreign corporation to comply with the law of the state before it may maintain an

action goes to its capacity to sue; that is, unless it complies with the law, it has no capacity to sue. A corporation or an individual may have a good cause of action and still have not the capacity to sue; and may have capacity to sue and no cause of action. *Pratt v. N. P. Ry. Co* (Idaho) 90 Pac. 341, 10 L. R. A. (N. S.) 499. If it merely alleges that it is a foreign corporation, and fails to allege its capacity to sue by alleging that it has complied with the law of the state, the complaint is demurrable on the ground of want of legal capacity to sue. Section 4174 of the Revised Statutes of 1887 provides seven grounds of demurrer, and the second ground is "that the plaintiff has not legal capacity to sue." It was evidently intended by the Legislature that the specific grounds of demurrer to a complaint must be stated in the demurrer. The only ground of demurrer stated in the demurrer to this complaint is the failure to allege facts sufficient to constitute a cause of action, which is the sixth ground of demurrer provided in said section 4174. Under that ground of demurrer, neither of the other specific grounds of demurrer can be considered. Suffice it to say in this case that neither the demurrer nor the answer raised the question of the want of the respondent's capacity to sue. That question might have been raised by either demurrer or answer. Section 4175 declares that the demurrer must distinctly specify the grounds on which any of the objections to the complaint are taken, and that unless it does so, the demurrer must be disregarded. Section 4177 provides that, whenever any of the matters enumerated in section 4174 do not appear on the face of the complaint, the objection may be taken by answer. Thus, under the law of this state, the question of the want of capacity of the respondent to sue could have been raised by demurrer or answer. That being true, and the appellants having failed to raise the question, we think that they have waived it. Section 4178 provides that, if no objection is taken either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action. We are therefore of the opinion that, where objections may be taken to allegations of the complaint by either demurrer or answer, if they are not so taken, they are waived as provided in said section 4178. We therefore hold with that line of authorities which holds that, unless the fact of the compliance of a foreign corporation with our state law is put in issue by a demurrer to the complaint or by answer, it is waived. In the case at bar the only ground stated in the demurrer was that the complaint did not state facts sufficient to constitute a cause of action. It therefore did not raise the question of the capacity of the respondent to sue, and that question was not raised by the answer, and was therefore waived. We

therefore hold that the question of the capacity of the respondent to sue was waived on the trial; and that it is too late to raise it on appeal.

From the foregoing we conclude that the judgment of the lower court must be sustained; and it is so ordered, with costs in favor of the respondent.

AILSHIE, C. J., concurs.

On Petition for Rehearing.

AILSHIE, C. J. Appellants have filed a petition for rehearing, and insist that, since the court in the original opinion held that there was no evidence in the record to support the finding made by the trial court to the effect that the house and porch were constructed under one and the same contract, the findings are therefore necessarily rendered insufficient to support the judgment. In order for the plaintiff to recover, it was necessary for it to establish that it furnished the material to the contractor under one continuous contract with him, and that the lien was filed within the statutory time after furnishing the material. It is possible for this to be true, and still two or more contracts to have been made and to have existed between the owner of the building and the contractor or builder. Now, in so far as this finding has reference to the contract or contracts between the owner of the premises and the contractor, it is not supported by the evidence for the reason that the evidence clearly shows that there was one contract for the main building and another and separate contract for the porch. On the other hand, in so far as the finding had reference to the contract between the builder and the company furnishing the material, we hold that the finding is supported by the evidence. In this view of the case, the findings are still sufficient to support the judgment.

But the appellants insist that, as soon as they succeeded in establishing the fact that the material furnished was used by the contractor upon two separate and distinct contracts which he had with the owner of the building and premises, they then shifted the burden of showing want of knowledge that two separate contracts existed onto the materialman, the respondent in this case. We do not think that would be a correct view to take of the law or the proper practice to adopt. When the plaintiff, who is seeking to foreclose his lien, establishes the fact that he furnished the material to the contractor under one arrangement and contract with him, and has presented sufficient evidence to make his case on that theory, then, if the defendant seeks to defeat the right of recovery on the ground that there were two separate and distinct contracts, after showing their existence, he should be required to either show that the materialman had actual knowledge that two contracts existed, or else prove such facts and circumstances either

by way of lapse of time, cessation of work, occupation of the building and premises by the owner, settlement of accounts, or other circumstances that would amount to constructive notice to the materialman, and put him on his inquiry to ascertain that two contracts did in fact exist. In this case, as said in the original opinion, there are a number of circumstances which tend to show that the plaintiff had notice of the completion of the original contract, and that another contract had been entered into between the owner and the builder; but the court found, in substance, against the appellants' contention and in favor of the respondent, and we would not be justified under the evidence as disclosed in interfering with that finding.

Appellants urge that they ought to be granted a new trial in order to enable them to establish the fact that the lumber company had actual notice of the completion of the contract and the making of the second contract. We are unable, however, to find anything in the record that would justify us in doing so. The court seems to have admitted all the evidence that appellants offered tending to establish the fact that the company had notice. There is nothing in the record which indicates or tends to indicate that the appellants could make any stronger case on that issue than they have already made. We do not find anything in the petition which changes our view of the case, or that would justify us in granting a rehearing.

The petition is denied.

SULLIVAN, J., concurs.

YOUNG v. EXTENSION DITCH CO.

(Supreme Court of Idaho. Jan. 21, 1908.)

1. COSTS—ON APPEAL—PREVAILING OR SUCCESSFUL PARTY—REPORTER'S FEE.

Under the rules of this court and the provisions of section 5 of an act providing for the appointment of stenographic reporters of the district court, approved February 9, 1899 (Sess. Laws 1899, p. 163), the statutory fee paid by a party to an action to the reporter for a transcript of the evidence to be used on motion for a new trial and appeal may be taxed as costs against the party finally defeated on appeal.

2. SAME.

The general theory of our law and the rules of the court in regard to costs is that the losing party shall pay them; and the prevailing party, on appeal, is entitled to recover the amount paid by him to the reporter for a copy of the evidence whenever that is needed on appeal. *McDonald v. Burke*, 3 Idaho (Habb.) 266, 28 Pac. 440, 35 Am. St. Rep. 276, cited and approved.

3. SAME.

In the passage of said act, approved February 9, 1899 (Sess. Laws 1899, p. 163), the legislative intent was not to amend either of the several provisions of the Revised Statutes in regard to the losing party paying the costs necessarily incurred in the proceedings in which such costs are made.

4. SAME.

Only necessary costs and disbursements can be recovered. The general rule is that the party who wins on appeal is entitled to recover his

necessary costs and disbursements on such appeal, although the case finally goes against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 869-876.]

5. SAME—PRINTING BRIEF.

Under the provisions of rule 6 of the rules of this court (32 Pac. vi), 40 pages of printed brief may be allowed and taxed as costs on appeal, and under paragraph 3 of rule 8 (32 Pac. viii), the expense of printing the transcript on appeal in civil cases must be allowed as costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 978-982.]

6. SAME—MAPS.

Under paragraph 6 of rule 27 (32 Pac. xi), maps used on the hearing and necessary to be examined on the appeal form a part of the transcript, and copies thereof must be attached thereto, and the necessary expense of making the same may be taxed as costs on the appeal.

7. SAME.

Under the provisions of rule 19 (32 Pac. ix), the judge may order the transmission of maps and other original papers to the Supreme Court for its inspection, and that method of presenting maps ought to be pursued whenever practicable, and thus save costs.

(Syllabus by the Court.)

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by Lee Young against the Extension Ditch Company. A judgment for plaintiff having been reduced on appeal (89 Pac. 296) by defendant, on the filing of a remittitur, plaintiff moved to strike out certain items of the cost bill filed by defendant, and from an order refusing to strike those items plaintiff appeals. Affirmed.

Stone & McLane, for appellant. Richards & Haga, for respondent.

SULLIVAN, J. This action was before this court at its February term, 1907, on an appeal from the judgment and an order denying a new trial. 13 Idaho, 174, 89 Pac. 296. The judgment appealed from was for \$1,750. This court reduced that judgment \$750, leaving the judgment \$1,000. When the remittitur was filed in the lower court, the respondent here, who was appellant on the first appeal, filed a memorandum of costs of appeal that included, among other items, one of \$130 paid the stenographic court reporter for a transcript of the evidence used in preparing his statement on motion for a new trial and on appeal, and an item of \$20 paid for prints of exhibits of maps for use on appeal. This appellant, who was respondent on the former appeal, moved to tax the costs by striking out those two items and certain others from the cost bill. The motion was denied as to said two items. This appeal is from the order of the court refusing to strike out those two items.

We will first consider the item of \$130 paid the court reporter for the transcript of the evidence. Under the provisions of section 5 of an act entitled, "An act to provide for the appointment, duties and compensation of stenographic reporters of the district

courts," approved February 9, 1899 (Sess. Laws 1899, p. 163), it is made the duty of such reporters to furnish, on the application of the Attorney General, district attorney, or any party to a suit in which a stenographic record has been made, a typewritten copy of the record, or any part thereof, for which he shall be entitled to receive, in addition to his salary, a fee of 15 cents per hundred words, to be paid by the party requesting the same, and to be taxed as costs in the case against the party finally defeated in the action. The act of 1899 was again amended in 1907. Sess. Laws 1907, p. 542. However, the amendment of 1907 does not apply to this case.

It is most earnestly contended that, although the respondent won on the former appeal and succeeded in having the judgment reduced nearly one-half, he must nevertheless pay the stenographer for a transcript of the evidence that was used in the preparation of the transcript on appeal, because he was finally defeated in the action. He was compelled to take the appeal to protect his rights, and succeeded in reducing the judgment \$750. It was necessary for him to have a transcript of the reporter's notes in order to prepare his transcript on appeal. As he was successful in that proceeding, at least to a certain extent, he is entitled to recover his costs on such appeal, and a part of those costs were \$130 paid for a transcript of the reporter's notes. We think the provision of said section 5 of the act referred to contemplates that the cost of the reporter's notes shall be taxed against the defeated party in the proceeding in which they are used. To illustrate: If a plaintiff procure judgment for \$5,000 against a defendant, and the defendant appeals, and in order to prepare his transcript on appeal it is necessary for him to procure a copy of the reporter's notes, and he pays therefor, and on the appeal reduces the judgment to \$500, that is a final determination of that action on that appeal, and appellant is entitled to recover of the respondent the amount paid for the reporter's notes. The general theory of our law in regard to costs is that the losing party shall pay the costs, and it would be most unjust to compel the winning party on an appeal, especially where there is any considerable change in the judgment appealed from, to pay the costs of the appeal. And we do not think that the Legislature intended in this class or kind of costs or fees to compel the successful party on the appeal to pay them. The determination of the appeal is a final determination of the action on appeal, and the costs made thereon are separate and distinct from costs made in the trial court.

We have not overlooked the fact that the payment of costs in certain cases is left discretionary with the judge or court. In the case of Raft River Land & Cattle Co. v. Langford, 6 Idaho, 30, 51 Pac. 1027, the right of the prevailing party to recover the amount

paid by him for a copy of the evidence from the court reporter was considered. The fees paid for the procuring of a transcript of the evidence from the court reporter to be used on motion for a new trial, in case an appeal is taken, are costs incurred on the appeal and are taxable as such. In McDonald v. Burke, 3 Idaho (Hasb.) 266, 28 Pac. 440, 35 Am. St. Rep. 276, where a question similar to the one under consideration was passed upon and the fees of the stenographer were there disallowed because the services charged for were not rendered by the court stenographer, the party employed a private stenographer, and charged as fees such stenographer's compensation for work done as a private stenographer. We do not think in the passage of said act the Legislature intended to amend the various provisions of the Revised Statutes regarding taxation of costs. If it did do so, the title of the act is clearly insufficient for that purpose. The provisions of said act in regard to the taxation of costs should be construed harmoniously with the other provisions of the statute. It is only necessary costs and disbursements that can be recovered either under the statute or rules of the court; and, when a plaintiff has recovered a much larger judgment in the trial court than he is entitled to, and the defendant is required to appeal to protect his rights and wins on the appeal, he is entitled to the necessary costs incurred by him on the appeal, although the case ultimately goes against him.

It is contended by counsel that the item of \$20 for the prints of maps for use on appeal should not be allowed. Under rule 6 of the rules of this court (32 Pac. vi), the cost of printing, not to exceed 40 pages of brief, must be allowed taxed as costs, and under paragraph 3 of rule 8 (32 Pac. viii) the expense of printing the transcript on appeal in civil cases and the pleadings, affidavits, or other papers constituting the record in original proceedings in this court must be allowed as costs. Paragraph 6 of rule 27 (32 Pac. xi) provides that, whenever a map forms a part of the transcript, the appellant must furnish six copies thereof, one to be attached to each of the six copies of the transcript filed with the clerk. That provision was complied with in this case by furnishing blue prints of maps and attaching them to the transcript, and it is a necessary cost on appeal, and we think should be allowed as such; it being considered a part of the printed transcript. Maps introduced in evidence on the trial need not be printed, if the parties will take advantage of the provisions of rule 19 (32 Pac. ix), by getting an order from the trial judge for the transmission of such maps to the Supreme Court for inspection there, or by stipulation of counsel that the originals may be used on the appeal. In order to avoid costs, this procedure should be adopted whenever it is practicable. We think the court did not err

in allowing the item of \$20 for prints of maps.

The order taxing costs must be affirmed; and it is so ordered. Costs of this appeal are awarded to the respondent.

AILSHIE, C. J., and STEWART, J., concur.

BOARD OF COUNTY COM'RS v. BASSETT.

(Supreme Court of Idaho. Feb. 18, 1908.)

1. DISTRICT AND PROSECUTING ATTORNEYS — DUTIES.

Under the provisions of an act entitled "An act fixing the qualifications, and prescribing the powers and duties of county attorneys," approved February 2, 1899 (Laws 1899, p. 25), it is made the duty of the prosecuting attorney to defend all actions, applications, or motions, civil or criminal, in the district court of his county, in which the people of the state or the county is interested or a party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, District and Prosecuting Attorneys, §§ 34-37.]

2. COUNTIES — COUNTY COMMISSIONERS — DUTIES.

Under the provisions of subdivision 13, § 1759, Rev. St. 1887, the board of commissioners is given the power to direct and control the prosecution and defense of all suits to which the county is a party in interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, District and Prosecuting Attorneys, §§ 34-37.]

3. DISTRICT AND PROSECUTING ATTORNEYS — POWERS—RIGHT TO APPEAL.

The foregoing provisions of the law in regard to the duties of the county attorney and the powers of the board must be read together, and under those provisions the prosecuting attorney must look after and defend any and all litigation instituted against the county, and has the power to take an appeal in any such cases from the district court to the Supreme Court, and it does not require an order of the board of commissioners to authorize him to do that.

4. APPEAL — DISMISSAL — ACTION AGAINST COUNTY.

Under the powers given to the board of commissioners, it may settle a case pending against the county, on appeal, and where they do settle such case, and it appears from the record that no beneficial results can accrue to the county from a determination of the appeal, the appeal will be dismissed on motion.

(Syllabus by the Court.)

Appeal from District Court, Twin Falls County; Edward A. Walters, Judge.

Application of George Bassett to the board of county commissioners for a liquor license. From a judgment reversing an order of the board, and directing that a license be issued, the board appeals. Dismissed.

F. A. Hutto, Pros. Atty., for appellant. Sweeley & Sweeley, for respondent.

SULLIVAN, J. This is an appeal from a judgment of the district court reversing an order of the board of county commissioners of Twin Falls county, and directing that a liquor license be issued to the respondent. It is an appeal on behalf of the board of county commissioners. A motion has been made to dismiss the appeal on three several grounds,

the first of which is that the appeal was not taken upon the authority or order of the board of county commissioners, but upon the volunteer action of the county attorney; second, that the appeal was not legally taken for the reason that it was not taken by the Attorney General of the state; and, third, that the judgment and order have been fully executed and complied with and satisfied by the said board of county commissioners.

There is nothing whatever in the first two contentions, for the reason that it is made the duty of the prosecuting attorney, under Laws 1899, p. 25, to prosecute or defend all actions, applications, or motions, civil or criminal, in the district court of the county in which the people of the state or the county is interested or a party. The prosecuting attorney is the legal adviser of the board of county commissioners. Under the provisions of subdivision 13, § 1759, Rev. St. 1887, as amended, the board of commissioners is given the power to direct and control the prosecution and defense of all suits to which the county is a party in interest, and employ counsel to conduct the same, with or without the prosecuting attorney, as they may direct. Those provisions must be read in connection with the provisions of the statute, which prescribe the duties of the county attorney. Under the law it is made his duty to look after and defend any and all litigation instituted against the county, and, if it becomes necessary to take an appeal, he has full authority to take it, and it is unnecessary for him to wait for the action of the board of county commissioners to give him directions and orders in regard to the same. The statute gives the board of commissioners the right to direct the litigation, and, if that board sees fit to compromise or settle the case pending against the county, they have the right to settle or direct the case to be dismissed, and it appears from the record in this case that the board of county commissioners complied with the order and judgment of the district court without consulting the county attorney, which they had the legal right to do. As the case has been fully settled, no beneficial results can come from a determination of the issues made on this appeal.

It is true, as appears from the record presented on this motion, that the board acted without knowledge of an appeal having been taken, and, under the facts, this court might proceed and determine the case under the authority of Warner Bros. Co. v. Freud, 131 Cal. 639, 63 Pac. 1017, 82 Am. St. Rep. 400, and 2 Cyc. 647, but under all the facts of this case, and considering that the time for which the license was issued is about to expire, we have concluded to sustain the motion and dismiss the appeal.

The appeal is therefore dismissed, with costs in favor of the respondent.

AILSHIE, C. J., and STEWART, J., concur.

ARMSTRONG v. SLICK et al.

(Supreme Court of Idaho. Feb. 1, 1908.)

ATTACHMENT—WHEN ALLOWED — "DIRECT PAYMENT OF MONEY."

The contract of an indorser of a promissory note or guarantor of a bill of exchange is a contract "for the direct payment of money," and an attachment may issue against the property of such indorser or guarantor when action is brought to enforce payment of the debt the same as against the acceptor or maker, under the provisions of section 4302, Rev. St. 1887.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2073; vol. 8, p. 7638.]

(Syllabus by the Court.)

Appeal from District Court, Bannock County; Alfred Budge, Judge.

Action by W. W. Armstrong against W. B. Slick and others. From an order denying the dissolution of an attachment, defendants appeal. Affirmed.

Gray & Boyd and E. C. Lackner, for appellants. Clark & Budge, for respondent.

SULLIVAN, J. This action was brought to recover upon four bills of exchange and two promissory notes for a sum aggregating approximately \$54,000, including interest and attorneys' fees. Said bills of exchange were dated February 20, 1906, and were executed by the appellants to the order of themselves and drawn on the Glenn's Ferry Land & Irrigation Company, and were indorsed on that date by the appellants under the name of Slick Bros., as follows, to wit: "For value received, we hereby guarantee payment of the within note, waiving demand of payment, protest, and notice of nonpayment. [Signed] Slick Bros., by W. B. Slick." On the same day said bills were accepted by the Glenn's Ferry Land & Irrigation Company by the following indorsement upon their face: "Accepted this 20th day of February, 1906, payable at the Bannock National Bank, Pocatello, Idaho. [Signed] Glenn's Ferry Land & Irrigation Co., by Ernest Pierson, Pres., by E. L. Rigg, Secy." Promissory notes were executed by the Glenn's Ferry Land & Irrigation Company, payable to the order of Slick Bros., and were indorsed by Slick Bros. in the same manner as were the bills of exchange. One of said notes bore date of July 19th, and one July 20, 1905, the indorsement thereon bearing date of July 20th. The complaint states six causes of action—four on bills of exchange, and two on said promissory notes. At the time of filing the complaint the plaintiff secured several writs of attachment directed to the sheriff of several different counties in Idaho and against all of the defendants jointly; the plaintiff averring in the affidavit for attachment that the causes of action set forth in the complaint were founded upon certain express contracts for the direct payment of money. The property of the defendants Slick Bros. was attached in several different counties. Thereafter

Slick Bros. moved to vacate and discharge said writs of attachment, the principal ground of which was that the alleged negotiable instruments set forth in the complaint were not, as to the liability of the appellants, contracts express or implied for the direct payment of money, but that, on the contrary, the liability for the payment thereof was wholly contingent, indirect, secondary, and conditional to the liability of their codefendant the Glenn's Ferry Land & Irrigation Company. The Irrigation Company did not appear in the action, and did not join in the motion to dissolve the attachment, and has not joined in this appeal. After a hearing the court denied the motion to dissolve the attachments, and this appeal is from that order.

The contention of appellants is that their liability upon the instruments sued upon is conditional, contingent, indirect, and collateral, and therefore as to them the said contracts are not for the "direct payment of money," within the meaning of the phrase "for the direct payment of money," as used in section 4302, Rev. St. 1887, which section has reference to the issuance of writs of attachment. There is nothing in that contention, as the contract of an indorser or guarantor of a bill of exchange or promissory note is a contract for the direct payment of money. There is no distinction between the contract of a maker of a promissory note and the acceptor of a bill of exchange as to their being contracts for the direct payment of money. After the obligation becomes due, and suit is brought to collect the same, attachment may issue under the laws of this state against the indorser and guarantor of such paper the same as against the acceptor or maker. *Elbring v. Mullen*, 4 Idaho, 199, 38 Pac. 404.

The order of the trial judge refusing to dissolve the attachment must therefore be affirmed, and it is so ordered, with costs in favor of the respondent.

AILSHIE, C. J., and STEWART, J., concur.

PIERSON v. STATE BOARD OF LAND COM'RS.

(Supreme Court of Idaho. Jan. 27, 1908.)

PUBLIC LANDS—CONTESTS—APPEAL FROM DECISION OF LAND BOARD.

The statutes of this state do not authorize an appeal from the decision of the State Board of Land Commissioners in a land contest case heard and determined by such board.

(Syllabus by the Court.)

Appeal from District Court, Twin Falls County; Edward A. Walters, Judge.

Application by J. H. Pierson for writ of mandamus to the State Board of Land Commissioners. From an order denying the writ, plaintiff appeals. Affirmed.

The plaintiff herein brought a contest before the State Board of Land Commissioners against the entry of Charles S. Loveland, made under the Carey act, on the Twin Falls segregation. After notice of contest was issued by the board and service thereof, it seems that the contest was dismissed by the board without a hearing. The contestant thereupon attempted to take an appeal from the action of the State Board of Land Commissioners to the district court in and for Twin Falls county, that being the county in which the land was situated. The board refused to send up any transcript or furnish any record of proceedings, and the contestant and appellant applied to the district court for a writ of mandate to compel the board to send up a transcript of the record. Notice of the application for a writ was served on the board, and the Attorney General appeared on behalf of the board and contested the application. After the hearing the court made an order denying the writ on the ground that an appeal does not lie from the action of the State Board of Land Commissioners in such case. Plaintiff appealed from the order.

Shields & Ashton, for appellant. J. J. Guheen, Atty. Gen., and Edwin Snow, for respondent.

AILSHIE, C. J. (after stating the facts as above). The only question presented for our determination in this case is whether an appeal will lie from the decision of the State Board of Land Commissioners on a land contest had before them. The State Board of Land Commissioners is a constitutional body, organized and existing under and by virtue of the provisions of section 7 of article 9 of the Constitution, which is as follows: "The Governor, Superintendent of Public Instruction, Secretary of State and Attorney General shall constitute the State Board of Land Commissioners, who shall have the direction, control and disposition of the public lands of the state, under such regulations as may be prescribed by law." To this board the Constitution has assigned the "direction, control and disposition of the public lands of the state." In furtherance of the powers conferred by the Constitution, the state Legislature, by section 2 of the act of March 2, 1899 (Sess. Laws 1899, p. 284), conferred upon the same board "the selection, management, and disposal" of all lands received by the state under the grant from the general government, commonly known as the "Carey act." The statute of the state prior to 1905 contained no provision for hearing contests over the right to purchase or enter state lands; but by the act of March 2, 1905 (Sess. Laws 1905, p. 131), the Legislature created the office of register of the State Board of Land Commissioners, and provided for hearing contests, and by section 5 of the act re-

quires the register to set a time for hearing evidence and taking testimony, and requires that after the hearing the register shall furnish "a full transcript of the proceedings to the State Board of Land Commissioners, who shall render a decision in accordance therewith." Section 24 of the same act is as follows: "The State Board of Land Commissioners may hear and determine the claims of all persons who may claim to be entitled, in whole or in part, to any lands owned by this state, and the decision of said board shall be final until set aside by a court of competent jurisdiction, and the board shall have power to establish such rules and regulations as in their opinion may be proper or necessary to prevent fraudulent applications." Appellant rests his contention for the right of appeal upon the grounds: (1) That it is the duty of the board to hear and determine the contest upon the evidence submitted; and (2) that "the decision of said board shall be final until set aside by a court of competent jurisdiction."

It must be conceded in the outset that "the right of appeal is statutory and unknown to the common law. It cannot be extended to cases not within the statute." *General Custer Min. Co. v. Van Camp*, 2 Idaho (Hasb.) 40, 3 Pac. 22. In the case at bar, if any right of appeal exists, it must be found in the statute. This latter proposition, we think, narrows itself down to the question as to whether that authority is to be found in section 24 of the act of March 2, 1905 (Sess. Laws 1905, p. 142). Section 5 of the act provides that the practice and procedure in contest cases shall be the same as that established by the United States in the district land office, and the whole tenor of the act indicates that the Legislature intended to provide a similar mode and method for contests over state land and for state purposes to that established by the general government for contests over government lands. Under similar legislation in other states a like view has been entertained by the courts. *Corpe v. Brooks*, 8 Or. 222; *Routt v. Greenwood Cemetery Land Co.*, 18 Colo. 132, 31 Pac. 858. The United States Supreme Court has repeatedly held that the decisions of the land department of the government are final and conclusive as to all facts found in a case, and that they would only be reviewed as to errors of law or on account of fraud. *Johnson v. Towsley*, 13 Wall. (U. S.) 72; 20 L. Ed. 485; *Burfenning v. Chicago, St. P., M. & O. R. Co.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; *Gonzales v. French*, 164 U. S. 342, 17 Sup. Ct. 102, 41 L. Ed. 460; 7 Notes on U. S. Reports, 618. In other words, that, where the land department had misapplied the law to the facts found, or in cases of fraud, the court would furnish relief. We think the Legislature had a similar purpose in view when they said: "The decision of said board shall be final until set aside by a court of

competent jurisdiction." This language indicates the idea of a review of questions of law rather than questions of fact. If the board should refuse to act, a contestant has an adequate remedy to compel them to act. If they should act in a matter without jurisdiction, there is a remedy; if they misapply the law to the facts found, or in case of fraud, there is a remedy; but those remedies are not by appeal. The fact that the Legislature never provided any procedure to be followed or designated any court to which the appeal could be taken is further indicative of an absence of intention to grant the right of appeal. Of course, if the Legislature had in direct terms authorized an appeal, and designated the court to which such appeal might be taken, the court would assume jurisdiction, and prescribe the procedure to be followed. Such, however, is not the case here.

We are satisfied that the order and judgment of the trial court was correct, and it is hereby affirmed, costs awarded in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

BOOTH MERCANTILE CO. v. MURPHY et al. (GRIFFIN et al., Interveners).

(Supreme Court of Idaho. Feb. 4, 1908. On Rehearing, Feb. 18, 1908.)

1. HUSBAND AND WIFE—CONTRACTS OF WIFE—SEPARATE ESTATE.

Where a married woman purchases hotel furniture, furnishings, and fixtures for conducting a hotel business, and executes her promissory note therefor, and at the same time executes a mortgage on her separate real property to secure the payment of such promissory note, the contract is one for her own use and benefit, and the mortgage constitutes a contract with reference to her separate property, and the debt and obligation thus incurred is enforceable against her and against her separate estate so mortgaged.

2. ACKNOWLEDGMENT—DEFECTIVE CERTIFICATE—CORRECTION.

Where a certificate of acknowledgment was not made in compliance with the provisions of section 2060, Rev. St. 1887, prior to the amendment thereof, and it appears that the acknowledgment was, in fact, taken in conformity with the substantial requirements of that provision of the statute, and the facts actually existed which would have enabled the notary to have attached the proper certificate of acknowledgment, the court should decree the correction of such certificate so as to comply with the statute.

3. SAME.

The facts in this case considered, and held sufficient to authorize and require a decree reforming the certificate of acknowledgment so as to make it conform with the requirements of the statute.

4. DESCENT AND DISTRIBUTION—RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

Where a deceased husband's estate is found upon return of the inventory to be of less value than \$1,500, and the probate court thereafter duly and regularly makes an order and decree setting the entire estate aside for the use and support of the family of the deceased, in compliance with section 5445, Rev. St. 1887, and

the widow thereafter mortgages all her interest in and to such estate, held, that the mortgage so executed covers whatever right, title, or interest she has in or to the estate by right of succession as an heir of her deceased husband, and that the interest so granted and incumbered is commensurate only with her rights of succession, and that a purchaser under a foreclosure sale can only acquire such rights and privileges as she has by reason of being an heir to such estate.

(Syllabus by the Court.)

Appeal from District Court, Bannock County; Alfred Budge, Judge.

Action by the Booth Mercantile Company against Julia Murphy and others, and Mary Griffin and others intervene. Judgment for defendant, and plaintiff appeals. Reversed.

D. Worth Clark, for appellant. J. R. S. Budge, for respondents.

AILSHIE, C. J. This action was instituted to foreclose a mortgage on certain real estate situated at Pocatello, Idaho. The note and mortgage were executed on the 29th day of May, 1903, at West Jordan, Salt Lake county, Utah, by the defendant Mrs. Julia Murphy. The defendant Mrs. Murphy, who was then residing in Utah, purchased from the plaintiff some furniture, fixtures, and supplies for the purpose of running and conducting a hotel business, and executed the note and mortgage in question in payment of the purchase price. At the time of entering into this contract, Mrs. Murphy was the wife of Timothy Murphy. She had, however, previously been married to Michael D. Griffin. At the time of the death of Griffin, her first husband, they were living at Pocatello, in this state. An administration was thereafter had on the Griffin estate, and, upon the return of the inventory, it appeared that the estate was of less value than \$1,500, and the court, after due notice, in pursuance of section 5445, Rev. St. 1887, proceeded to and did make an order in due and regular form setting aside the entire estate, including the real property covered by the mortgage in question, for the use and benefit of the widow and minor children. At that time the family consisted of the widow, Mrs. Griffin, and her seven minor children. The proceedings in setting aside this estate appear to have been regular and in conformity with the statute, and are not questioned in this case. The Widow Griffin thereafter married Murphy, and early in the year of 1903 they moved to Utah, where Murphy engaged in railroad work, while Mrs. Murphy conducted the hotel business. Mrs. Murphy and the minor children contested the foreclosure of this mortgage upon sundry grounds, and obtained a judgment in their favor, refusing the plaintiff any relief whatever either upon the promissory note or the mortgage executed as security therefor. The plaintiff has appealed and assigns numerous errors which are argued in the brief under five general heads. In the first place, it is contended

that the contract was a Utah contract, and that under the statutes of that state (section 1190, Rev. St. 1898) a married woman may contract in all respects as if she were a feme sole. Second. It is insisted that the findings of the court that the residence of Mrs. Murphy was in Idaho, instead of in Utah, is erroneous, and contrary to the evidence. Third. That the evidence in the case shows clearly and without contradiction that the debt was contracted for the use and benefit of Mrs. Murphy and concerning her separate estate, and that the finding of the court that it was in fact not for her use or benefit or with reference to her separate estate is wholly unsupported by the evidence. Fourth. That the evidence shows that the mortgage was duly and properly acknowledged, and was entitled to be so certified, and that the finding of the court that it was not duly and properly acknowledged was contrary to the evidence and erroneous. Fifth. That Mrs. Murphy had a mortgagable interest in the property covered by the mortgage, and that the court erred in holding otherwise.

As we view this case, it is immaterial for the purpose of this decision whether the contract was a Utah or an Idaho contract, and it is likewise immaterial whether Mrs. Murphy was as a matter of law at the time of entering into the contract domiciled in Utah or Idaho. The contract was her own debt, incurred for her use and benefit. She received the consideration therefor—the goods and merchandise for which the note and mortgage were executed. Not only that, but the purchase price was secured by a contract with direct reference to her separate estate, namely, a mortgage executed by her on her separate property. *Bank of Commerce v. Baldwin* (Idaho) 93 Pac. 504. It has been uniformly held by this court that a married woman could bind her separate estate by a contract executed in this manner. *Dernham v. Rowley*, 4 Idaho, 753, 44 Pac. 643; *Jaeckel v. Pease*, 6 Idaho, 131, 53 Pac. 399; *Strode v. Miller*, 7 Idaho, 16, 59 Pac. 893; *Holt v. Gridley*, 7 Idaho, 416, 63 Pac. 188; *Bank of Commerce v. Baldwin*, 12 Idaho, 202, 85 Pac. 497; *Bank of Commerce v. Baldwin*, *supra*. The fact that the property purchased may have inured to the benefit of the whole family, or, rather, of the community, does not make it any less her own individual contract, nor does it do away with the fact that she received the goods for which the contract was made. In a sense, it would be difficult to name a contract a married woman might make that would not in some respects inure to the benefit of the community, but that fact alone does not lessen her obligation thereon. *Edmilston v. Smith* (Idaho) 92 Pac. 842. The acknowledgment to the mortgage is as follows: "State of Utah, County of Salt Lake—ss.: On the fourth day of June, A. D. Nineteen Hundred and three, personally appeared before me, Mrs. Julia Murphy and the Booth Mercantile Co. (R.

L. Booth, Gen. Manager.) The signers of the above instrument, who duly acknowledged to me that she executed the same. Eugene P. Wheelon, Notary Public. My commission expires April 27, 1903." This acknowledgment was taken prior to the amendment of section 2960, Rev. St. 1887, and is not in conformity with the requirements of that section, in that it does not show that the acknowledgment was taken without the hearing of the husband, and that the woman was made acquainted with the contents of the instrument. The plaintiff in its complaint alleged that the acknowledgment was duly and regularly taken, but that the certificate was imperfect, and not in proper form, and prayed that the same be corrected and amended so as to comply with the statute. There is no substantial conflict in the evidence as to what occurred at the time of the execution of this mortgage. In substance it is as follows: After the deal had been made, the papers were drawn, and were taken by one of the employés of the plaintiff company to Mrs. Murphy at her place of business, and she read them over and signed the note there, and either signed the mortgage at that time or later on in the office of the company. On this latter fact there is some uncertainty. At any rate, the notary went into the office where there were two or three persons present, and read the mortgage to Mrs. Murphy, and asked her if the signature was hers. She told him it was, that she knew the contents of the instruments, and that it was a mortgage on some property she had in Pocatello, and that it was given as security for the note she had just executed. She testifies that she knew its contents and all about it, and that she executed it. The husband was not present during any of these transactions, and was not present at the time the mortgage was executed and the acknowledgment taken. Now, it is true that the notary was not aware of the requirements of the Idaho statute with reference to acknowledgments of married women, and did not take this acknowledgment with any view to a compliance with the Idaho statute; and that evidently accounts for the certificate being in the form as above set out. It would be immaterial, however, whether he actually knew what the Idaho statute was or not, if the acknowledgment had been properly taken and he had attached a proper certificate. He failed, however, to attach a proper certificate, for the reason that he was not aware of the provisions of our statute. It does quite clearly appear to us, on the other hand, that the acknowledgment was taken in substantial compliance with our statute. The woman was made acquainted with the contents of the instrument. She already, in fact, knew its contents and the nature of the transaction. It was her transaction. It was taken in the absence of her husband, and without any coercion or compulsion on his part. *First Nat. Bank of Hailey v. Glenn*, 10 Idaho, 224,

77 Pac. 623, 109 Am. St. Rep. 204. It satisfactorily appears to us that the facts existed upon which the notary could have attached a proper certificate of acknowledgment. Where such facts already exist, and it is shown that the acknowledgment was proper, the certificate should be so reformed as to conform with the statute, and it was error to refuse a reformation of the acknowledgment so as to entitle the mortgage to be foreclosed in this case. Section 2971, Rev. St. 1887; *Bunnell & Eno L. Co. v. Curtis*, 5 Idaho, 652, 51 Pac. 767.

This brings us to the last question presented. Did Mrs. Murphy have a mortgagable interest in the property covered by the mortgage? As previously stated, this property had been set aside by a decree of the probate court for the use of the widow and her minor children. The interest the wife acquired under this decree is a separate and distinct interest from that which she had as an heir to the estate. By such a decree the property was set aside as an entirety for the use of the family of the deceased as a whole. The wife could do no act that would relieve this property of its burden, or free it from the obligation and purposes to which it was set aside until the children had reached their majority. This proposition is very clearly set forth in *Estate of Moore*, 57 Cal. 437, and in *Phelan v. Smith*, 100 Cal. 158, 34 Pac. 667. On the other hand, Mrs. Murphy had a vested interest in this estate which will or may at some time become available to her under the laws of succession, and by reason of her being an heir to her deceased husband's estate. There can be no question as to her right to alienate or incur a burden that interest. Such alienation or incumbrance is subject, however, to the superior and paramount right conferred by the decree of the probate court, and will confer no rights and grant no privileges that she did not possess herself by reason of being an heir to the estate as distinguished from her duties as the widow and member of the family of her deceased husband, and head of such family after the death of her husband. *Phelan v. Smith*, *supra*.

We are not called upon in this case to determine what rights the mortgagee may acquire in the mortgaged property by a foreclosure sale, or when, in the course of time, the purchaser at such sale may be able to realize or enjoy any of the fruits of, or benefits from, his purchase. We content ourselves by simply holding that Mrs. Murphy, as the heir of her deceased husband, acquired such a right in this property, under the law of succession, as she could alienate or incumber.

For the foregoing reasons, the judgment must be reversed, and it is so ordered and a new trial granted. The cause is remanded, with costs in favor of the appellant.

SULLIVAN and STEWART, JJ., concur.

On Petition for Rehearing.

STEWART, J. The respondent files a petition for a rehearing, and contends, first, that the note sued on was not a contract for the use and benefit of Julia Murphy; second, that the mortgage was not a contract with reference to her separate estate. This court fully considered these questions in the principal opinion. We now add that a contract made by a married woman, by which she secures property for which the contract is executed, is for her own use and benefit, and that such use and benefit is a fact resulting from the contract itself. Where it appears, as it does in this case, that a married woman purchases property and receives such property, and executes a promissory note therefor, she is liable upon such note, and the contract is made for her own use and benefit, because she receives the consideration for which such note was made. It is not necessary that a party selling property to a married woman shall pursue the property after it is delivered to her, and ascertain whether or not the same ultimately results in a benefit to her personally, or proves a profitable investment. The fact of making the contract and receiving the consideration therefor is sufficient to create a liability on the part of a married woman, and she may be held personally liable on such contract. Second. The mortgage was executed by her, on property which it is admitted was her separate estate. That she may make such a contract and bind her separate estate would seem to be no longer in doubt in this state. Authorities cited in principal opinion.

Counsel for respondent in his petition for rehearing relies with much confidence upon the case of *Jaeckel v. Pease*, 6 Idaho, 181, 53 Pac. 899. In that case Pease and wife jointly executed a promissory note for the debt of the husband, and executed a mortgage upon community property as security therefor. Suit was brought upon said note, and for a foreclosure of the mortgage. The trial court held the mortgage void because of a defective acknowledgment, but rendered a personal judgment against Pease and wife. Mary A. Pease, the wife, appealed, and this court held that a personal judgment could not be sustained against her, for the reason that the debt was a debt of the husband. In that case the debt was not contracted by the wife, nor for her use or benefit, nor did she receive the consideration, nor with reference to her separate estate. In the case at bar it clearly appears that the contract was made for the use and benefit of the wife, and with reference to her own separate estate. It would seem that the case of *Jaeckel v. Pease* would be clearly distinguishable from the case at bar. In the principal opinion this court does not depart from the well-recognized rule which has been adopted in this state, that, in order to charge the separate property of the wife, or render it liable to levy and sale, it must

be alleged in the complaint and proven on the trial that the debt was incurred for the use and benefit of her separate property, or was a contract by her for her own use and benefit. It is specifically alleged in the complaint in this case "that the note was given and the indebtedness of said Mrs. Julia Murphy evidenced thereby, was incurred for the use and benefit of the separate property of said Mrs. Julia Murphy, and was contracted by her for her own use and benefit." The facts as proven upon the trial clearly show that this allegation was proven by the evidence. She made the contract personally, and received the goods for which the note was given; and executed the mortgage upon her own personal estate as security therefor. The note was executed for her own use and benefit, and was clearly such a contract as she had authority to make. The mortgage was upon her own separate property and with reference thereto, and she had power and authority to make and execute the same.

Counsel argues next that the mortgage was invalid, for the reason that it covered the separate property of a married woman, and required that she and her husband both join in its execution, as provided in section 2921 of the Revised Statutes of 1887. The estate Mrs. Murphy had in the property mortgaged was not a homestead as contemplated in section 2921, *supra*. The estate was one set aside for the benefit of the family and bestowed by the beneficence of the law. The interest, however, which Mrs. Murphy mortgaged, was such interest as might come to her under the law of succession by reason of being an heir to her deceased husband. This interest, whatever it might be, is not a homestead, and the law does not require that her husband join her in the execution of the mortgage of the same. The mortgage cannot in any way interfere with the rights of the family to occupy said property as a home. This is very clearly set forth in the principal opinion.

No reason appearing for granting a rehearing, the same is denied.

AILSHIE, C. J., and SULLIVAN, J., concur.

(14 Idaho, 133)

MESERVEY, Road Overseer, v. GULLIFORD.

(Supreme Court of Idaho. Jan. 25, 1908.)

1. HIGHWAYS — OBSTRUCTIONS — ABATEMENT — STATUTORY PROVISIONS.

Held, that this action was brought concerning a road that has become a highway by user as defined by the provisions of section 851, Rev. St. 1887, as amended by the act of 1893 (Sess. Laws 1893, p. 12).

2. SAME.

The provisions of section 960, Rev. St. 1887, apply to encroachments upon highways "duly laid out or erected," and the penalty prescribed in section 963, Rev. St. 1887, for making encroachments upon public highways, applies to such highways, and does not apply to highways established by prescription or user

before such highways have been recorded as provided by law.

3. SAME — ESTABLISHMENT — STATUTORY PROVISIONS.

Roads are defined by section 851, Rev. St. 1887, as amended by Sess. Laws 1893, p. 12, as "roads laid out and recorded as highways by order of the board"; and also all roads "used as such for a period of five years," provided the latter shall have been worked and kept up at the expense of the public, or located and recorded by order of the board of county commissioners, are declared to be highways.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 23.]

4. SAME.

Roads used as such for a period of five years, that have been worked and kept up at public expense, are public highways, whether they are recorded or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 23.]

5. SAME — PERSONS ENTITLED TO REMOVE OBSTRUCTION — ROAD OVERSEER.

The road overseer is the proper party, under our statute, to bring an action to abate a nuisance when such nuisance consists of an obstruction to a public highway within his district.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 431.]

6. SAME — COMPLAINT — ALLEGATION OF ADVERSE POSSESSION.

It is not necessary, in an action to remove an obstruction from a highway established by user, to allege title to a highway by adverse possession, under the provisions of section 4039, Rev. St. 1887, as the only right acquired by the public is an easement in the land, consisting of a right to pass over the same and keep the highway in repair. The legal title to the land remains in the owner of the abutting land.

7. SAME — PRESCRIPTION.

The public use of a highway for the statutory period and the keeping of it in repair at public expense is all that is necessary to establish a highway by prescription. The consent of the owner of the land, or his dissent, makes no difference.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 1-10.]

8. SAME — APPOINTMENT AS ROAD OVERSEER — EVIDENCE.

Either the "Minute Book" or the "Road Book" required to be kept by the board of county commissioners, under the provisions of sections 853, 1754, Rev. St. 1887, is competent evidence to show the appointment of a road overseer, and his testimony may be received upon that question.

9. EVIDENCE — OFFICERS — PRESUMPTION OF PERFORMANCE OF DUTY.

There is no presumption of official irregularity, and the one asserting such official irregularity has the burden of proving it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 105.]

10. HIGHWAYS — OFFICERS — APPOINTMENT.

The road overseer is an elective officer, and the board of county commissioners has the appointing power in case of a vacancy in that office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 304, 305.]

11. SAME — PRESCRIPTION — WIDTH.

Under the provisions of section 932, Rev. St. 1887, all highways, except alleys and bridges, must be at least 50 feet wide, excepting those existing prior to the enactment of that section of a less width, and the width of roads or highways established by prescription or public use must be determined from a consideration of the

facts and circumstances peculiar to the case, and is presumed to be 50 feet in width, unless the facts and circumstances of the case clearly indicate that the owner, over whose land the road runs, has limited the width of said road to a less width than 50 feet prior to the time said road became a highway by user.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 21, 24.]

12. SAME — OBSTRUCTION — ABATEMENT — EVIDENCE — ADMISSIBILITY.

Where it is alleged in the complaint that for more than 10 years immediately preceding the commencement of the action the road had been traveled by the public generally, it is error for the court to admit evidence that such road was established by public user for more than 19 years prior to the commencement of the action, and find that a highway had there been established by user under a law that did not require such highway to be kept up at public expense, which law had been amended more than 13 years prior to the commencement of this action, and under which amendment this action was brought.

13. SAME — FINDING.

As this action was brought under the provisions of the law requiring roads to be used by the general public and kept up at public expense for five years, it was error for the court not to find whether said road had been kept up at public expense for that period.

14. SAME.

It was error to hold that said road had been established under a law which did not require it to be kept up at public expense, and had been repealed more than 13 years prior to the commencement of this action.

15. SAME.

The allegation that a road has been used as a public highway for more than 10 years prior to the commencement of an action cannot be treated as definitely describing a longer period than 10 years and 1 day.

Stewart, J., dissenting in part.

(Syllabus by the Court.)

16. WORDS AND PHRASES — "ENCROACHMENT."

An "encroachment" is a gradual entering on and taking possession by one of what is not his own; an unlawful gaining upon the rights of possession of another—citing 3 Words & Phrases, 2385.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2385-2386.]

17. SAME — "OBSTRUCTION."

An "obstruction" is a blocking up, filling with obstacles or impediments, impeding, embarrassing, or opposing the passage along and over a street—citing 6 Words & Phrases, 4891.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 4890-4894.]

Appeal from District Court, Fremont County; J. M. Stevens, Judge.

Action by O. K. Meservey, road overseer, to remove an obstruction in a public highway, against S. K. Gulliford. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Caleb Jones, for appellant. Soule & Soule, for respondent.

SULLIVAN, J. This action was commenced by the plaintiff as road overseer against the defendant, who is appellant here, to compel him to remove certain fences and gate which it is alleged constitute an obstruction to a highway. This action was commenced on the 23d day of May, 1906, and

it is alleged that for more than 10 years immediately preceding the commencement of this action, "continuously and uninterruptedly, except when interfered with during the past two years by the defendant," the public generally have enjoyed and used a public highway over, across, and through certain lands, describing them, and that with the exception of the past two years, when interfered with by the defendant, said road has been used and worked and kept up at the expense of the public as a highway for the convenience of the public under the direction and supervision of the board of county commissioners of Fremont county. It is also alleged that more than 10 days prior to the commencement of this action plaintiff served personally upon the defendant written notice requiring him to remove said obstruction from said highway within 10 days from the service of notice, and prays that the defendant be restrained from maintaining such obstructions to said highway, and that they be abated as a public nuisance, and that he have judgment against the defendant for \$10 per day as damages for every day that such obstructions remain upon said public highway after the service of said notice. Those allegations were denied by the answer. The answer also denies on information or belief that the plaintiff is road overseer of road district No. 20 in Fremont county, as alleged in the complaint, and denies that said gate and fences are obstructions to any highway or encroachments thereon. The cause was tried by the court without a jury, and the court found that the plaintiff was the duly qualified and acting road overseer of Road District No. 20 in Fremont county; that said district was created by order of the board of county commissioners on April 24, 1902; that the defendant was the owner of a certain tract of land in said road district, describing it, and that from 1887 to the spring of 1905 the road described in the complaint was continuously and uninterruptedly used and traveled by the public as a public road, and that the same was necessary for the convenience and use of public travel; that some time during the spring of 1905 the defendant erected fences and other obstructions across the north end of said highway, and also maintains various structures, fences, and obstructions in and across said highway, and thereby shuts off and segregates the same from the public highway extending on either end of the same, and thereby shuts out and prevents the public from using such highway for public travel; that written notice was properly served on the defendant, requiring him to remove such obstructions more than 10 days prior to the commencement of this action. As conclusions of law the court finds that the fence and obstructions placed upon said highway are a nuisance and should be abated, and the defendant be enjoined from further obstructing said highway; that the strip

of land described in the findings has been used and traveled by the public for such length of time that the same has become a highway by user; and that said strip of land is a public highway. Judgment was entered in accordance with said findings and conclusions of fact in favor of the plaintiff. The appeal is from the judgment.

Counsel for appellant assigns a great many errors going to the action of the court in overruling a demurrer to the amended complaint, the admission and rejection of evidence, and that the findings of fact are not sufficient to support the judgment; that such findings are not supported by the evidence, and are in direct opposition thereto and are not responsive to the issues in the case. At the outset, it is contended by counsel for appellants that this action is brought under the provisions of sections 960, 963, Rev. St. 1887, which sections are as follows:

"Sec. 960. If any highway duly laid out or erected is encroached upon by fences, buildings, or otherwise, the Road Overseer of the district may, orally or in writing, require the encroachment to be removed from the highway."

"Sec. 963. If the encroachment is denied, and the owner, occupant, or person controlling the matter or thing charged with being an encroachment, refuses to remove or to permit the removal thereof, the Road Overseer must commence in the proper Court an action to abate the same as a nuisance; and if he recovers judgment, he may, in addition to having the same abated, recover ten dollars for every day such nuisance remained after notice, as also his costs in such action."

This action was brought concerning a road that had been established under the provisions of section 851, Rev. St. 1887, as amended by Laws 1893, p. 12, by user and by being kept up at public expense, and not in regard to a road that had been duly laid out, erected, or recorded by order of the board of county commissioners. The provisions of said section 960 apply to encroachments upon highways "duly laid out or erected," and it is not alleged in the complaint that the highway referred to therein had been duly laid out or erected, but that it had been used, worked, and kept up at the expense of the public as a public highway for a period of more than 10 years prior to the commencement of this suit. There is nothing in this contention; for, under the allegations of the complaint, the highway referred to was one established by user, and not one that had been "duly laid out or erected" by the board of county commissioners. Said section 963 provides for a penalty against one who has made encroachments upon a public highway, and refuses to remove them after notice has been served upon him for the removal thereof. There is a distinction between an encroachment and an obstruction. A penalty was asked for in the prayer of the complaint; but the court, no doubt, taking the view that

the penalty there prescribed applied only to highways that had been duly laid out or erected by the board of county commissioners, or recorded as provided by law, and not to highways that had been established by prescription or user, did not enter any judgment against the defendant for the penalty. However, the court failed to give the road overseer judgment for any penalty whatever, and the defendant has no cause of complaint because of the court's refusal to enter judgment against him for the penalty. Under a statute like our sections 960 and 963, the Supreme Court of California in *Freshour v. Hihn*, 99 Cal. 443, 34 Pac. 87, held that the right of a road overseer to recover the penalty of \$10 per day for obstructing a highway does not extend to a case where the highway is established by user or abandonment to the public, and has not been recorded as a highway, and we think that is the correct view of that matter under our statute. *Parker v. People*, 22 Mich. 93; *State v. Babcock*, 42 Wis. 138. Under the provisions of subdivision 2, § 870, Rev. St. 1887, as amended by Laws 1890, p. 127, the board of county commissioners are required to cause to be surveyed, viewed, laid out, recorded, opened, and worked such highways as are necessary for public convenience. There is no allegation in the complaint showing that the highway referred to therein has been duly recorded as provided by said section. Roads are defined by section 851, Rev. St. 1887, as amended by Sess. Laws 1893, p. 12, as follows: "Roads laid out and recorded as highways by order of the board of county commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public, or located and recorded by order of the board of county commissioners, are highways." It will be observed from those provisions that, in order to establish a road as a highway, it does not necessarily need to be recorded; that is, that class of roads used as such for a period of five years that have been worked and kept up at the expense of the public are highways, whether they are recorded or not.

It is next contended by counsel for appellant that the road overseer has no authority to bring an action to remove obstructions from a highway. Under the provisions of section 873, Rev. St. 1887, as amended by Sess. Laws 1890, p. 128, the road overseer, under the direction, supervision, and pursuant to the order of the board of county commissioners, must take charge of the public highways within their respective districts, and keep them clear from obstructions and in good repair. The highways established by user or prescription are thereby placed under the control of the road overseer subject to the order of the board, and it is made his duty to keep such highways clear from obstructions and in good repair. Under the provisions of said section, the road overseer is authorized to

remove obstructions from highways established by user, and we think he has full authority, under the orders of the board, to maintain an action to remove obstructions placed therein. At the date of the passage of said amendatory act, the road overseers were appointed by the board of county commissioners, but an act was thereafter passed which provided for their election, thereby making them public officers. Sess. Laws 1899, p. 306. In the case of Freshour, Road Overseer, v. Hihn, supra, a road overseer was the plaintiff, and his right to maintain that action was not questioned. Section 3634, Rev. St. 1887, provides that "a public nuisance may be abated by any public body or officer authorized thereto by law." Under the provisions of section 873, Rev. St. 1887, supra, it is provided that the road overseer must take charge of the public highways in his district, and keep them clear from obstructions and in good repair, and under the provisions of the laws of 1899 (Sess. Laws, p. 360) road overseers are elected by the electors of the road district, and are made public officers. The road overseer thus becomes a public officer, and the law makes it his duty to keep the highways clear from obstructions, and, as he is a public officer, he is authorized by the provisions of section 3634, supra, to bring an action to abate a public nuisance when such nuisance consists of an obstruction placed upon a highway within his road district. In *San Benito Co. v. Whitesides*, 51 Cal. 416, the court held that "an action to abate a nuisance caused by an obstruction to the public highway cannot be brought in the name of the county as plaintiff, and must be brought in the name of the road overseer." The road overseer is the proper party under our statute to bring an action to abate a nuisance when such nuisance consists of an obstruction to a public highway within his district. If the road overseer has no such authority, it certainly would place the county at a great disadvantage, as the boards of county commissioners in this state only have quarterly sessions, and are in session but a few days at a time. Highways might be obstructed weeks before the board could order an action to be brought to remove them. I conclude under our law that the road overseer has authority to bring actions to remove obstructions from highways either laid out or recorded as highways, or such as have been established by user or prescription. Section 963, Rev. St. 1887, provides that, if one who has made encroachments on the highway refuses either to remove or to permit the removal thereof, the road overseer must commence an action to abate the same as a nuisance and for the penalty; but the California courts have held under a similar statute that the provisions of that section, at least so far as it applies to the penalty, only applies to roads or highways duly laid out or erected and recorded.

It is next contended by counsel for appel-

lant that, since it is alleged in the complaint that the appellant is the owner of the land over which such highway extended, the complaint should have alleged a claim of title to the highway by adverse possession, under the provisions of section 4039, Rev. St. 1887. That section of the statute has no application whatever to public highways, since under the law the public never acquires the legal title to land over which a highway extends. All the right acquired by the public is an easement in the land consisting of a right to pass over the same and keep the road in repair. The legal title to said land remains in the owner of the adjoining land or the land over which the road runs. It is not necessary to allege adverse possession in an action like the one at bar. The public use of a highway for the statutory period and the keeping of it in repair at public expense is all that is necessary to establish it as a highway. The consent of the owner of the land or his dissent makes no difference. *Gross v. McNutt*, 4 Idaho, 300, 38 Pac. 935.

It is next contended that the court admitted secondary evidence as to the appointment of the road overseer. It appears from the record that the minutes of the board of county commissioners contained a record of the appointment of the respondent road overseer, and that record was introduced in evidence, supplementing the testimony of the road overseer himself to the effect that he had been duly appointed road overseer. It is contended that under our law (section 1754, Rev. St. 1887) that the board is required to have kept a book known as the "Road Book," which must contain all proceedings and adjudications relating to the establishment, maintenance, change, and discontinuance of roads and road districts and overseers thereof, their reports and acts, and that that book was the best evidence of the appointment of said road overseer, and under the provisions of section 853, Rev. St., the clerk of the board of county commissioners is required to keep a book in which he must record separately all proceedings of the board relative to each road district, including orders, laying out, altering, and opening roads, etc., and it is contended that such books are the primary and best evidence of the appointment of a road overseer. Under the provisions of section 1754, Rev. St. 1887, the board is required to keep a minute book in which must be recorded all orders and decisions made by them, and the daily proceedings had at all regular and special sessions; and under the Laws 1899, p. 248, the board of county commissioners, at the adjournment of each session of the board, is required to publish a statement such as will clearly give notice to the public of all acts and proceedings of the board. Said "Minute Book," if it contains all orders and decisions made by the board, certainly is the book of original entry as to the appointment of road overseers, al-

though a "Road Book" is required to show that fact also. If all the original orders and proceedings are first entered in the "Minute Book," that certainly would be the best evidence, or equal evidence, of the appointment of a road overseer to that of the "Road Book." We do not think the court erred in admitting said "Minute Book" showing the appointment of said road overseer. In *Barry v. Smith*, 191 Mass. 78, 77 N. E. 1099, 5 L. R. A. (N. S.) 1028, it was held that in proving the fact that a man is a public officer his own testimony that he is such officer is competent evidence. The court did not err in permitting the road overseer to testify that he was road overseer of said district, and did not err in admitting said "Minute Book" to show that fact.

It is contended that as respondent was appointed road overseer by the board, that the order making the appointment must contain a recital that there was a vacancy in that office, and that, without this recital, the commissioners would have no authority to make the appointment. There is nothing in this contention, as the presumption is that public officers act within their authority until the contrary is shown, and the making of the appointment raises the presumption that there was a vacancy. 16 Cyc. 1076. *Mercer Co. Traction Co. v. United N. J. R. Co.*, 64 N. J. Eq. 588, 54 Atl. 819, is in point, and it is there said: "It is, moreover, a rule of procedure that the burden of proving unlawful or irregular conduct rests upon him who asserts it, since there is no presumption of official irregularity." 16 Cyc. 1078. In *Valley Township v. King Iron B. & M. Co.*, 4 Kan. App. 622, 45 Pac. 660, it is said: "In the absence of an affirmative showing, it will be presumed that the officers were in the rightful performance of duty, and that the conditions existed which authorized them to act as they did." See, also *Harper v. City*, 9 Kan. App. 609, 58 Pac. 488. Under our statute, the board of county commissioners could legally act in making an appointment if a vacancy existed; and, since the record is silent on that question, the presumption is that the board acted within the law and that the vacancy did exist. In the case of the *County of Canyon v. Toole*, 8 Idaho, 501, 69 Pac. 320, this court held that a substantial compliance with the statute by the board of commissioners was all that was necessary. Technical objections are not viewed with favor.

It is contended by counsel for appellant that the court erred in finding the width of the highway described in the complaint to be a strip of land 25 feet wide on each side of the southwest boundary line of the southwest quarter of section 15, township 7 north, of range 41 east B. M., and that the same had continuously and uninterruptedly been used and traveled by the public as a road from 1887 to the spring of 1905. It is urged

that the trial court in this finding added 25 feet to the width of the road more than the evidence shows was used as a highway. At least one witness testified that said road was 25 feet wide on each side of said section line; that it was approximately 25 feet each side of the line. He further testified that the road was 50 feet wide approximately; that the strip of land traversed there was approximately 50 feet wide. Under the provisions of section 932, Rev. St. 1887, all highways, except alleys and bridges, must be at least 50 feet wide, excepting those consisting of a less width at the date of the enactment of said section. This statute evidently provides the width of a road that is considered reasonably necessary for the convenience of the public generally. In *Whitesides v. Green*, 13 Utah, 341, 44 Pac. 1032, 57 Am. St. Rep. 740, which involved the width of a public highway established by prescription, the court held that the width must be determined from a consideration of the facts and circumstances peculiar to the case, because in such event the court cannot say that any highway is of a certain width "in the absence of statutory provisions." In *Angell on the Law of Highways*, § 153, the author says: "Where there is no other evidence of dedication than mere user by the public, the presumption is not necessarily limited to the traveled path, but may be inferred to extend to the ordinary width of highways; or, if the road be inclosed with fences, to include the entire space so inclosed." The court in *Burrows v. Guest*, 5 Utah, 91, 12 Pac. 847, said: "When a highway is established by user merely over a tract of land of the usual width of a highway, or over a tract of land where, by a survey and plat, which has been recognized and adopted by the owner, a street or highway of a certain width is laid out, the right of the public is not limited to the traveled part, but such user is evidence of a right in the public to use the whole tract as a highway, by widening the traveled part or otherwise, as the increased travel and the exigencies of the public may require. * * *

In determining the extent of the dedication, all the circumstances may be considered—the width of the highways in the vicinity of the land in question, the width of highways in a system of which the one in controversy forms a part, any circumstances of recognition by the owner of the fee and the public of definite and fixed limits." In *Elliott on Roads and Streets*, § 174, the author states: "If the right to the way depends solely upon user, then the width of the way and the extent of the servitude is measured by the character of the user, for the easement cannot be broader than the user; but, if there were defective proceedings, and the use was under color of the claim supplied by them, then the extent of the easement should generally be measured by the claim exhibited by the proceedings, and by them

intended to be established. This is in strict accordance with the elementary principle of the law of real property, which declares that where there is color of title, and possession of part is taken under the claim of title, it will cover the whole, but that, where there is no color of title, the right will not extend beyond the actual possession, the *pedis possessio*. But it may be doubted if that rule applies in all its strictness to highways acquired by user and prescription. While it is true that the extent of the servitude is measured by the character of the user, and that, in a general sense, the easement cannot be broader than the user, yet the right of the public is not necessarily limited strictly to the main traveled path in all instances, and it has even been held in some jurisdictions that the user may evidence a right to a way of the statutory or usual width in the neighborhood." It would seem that the right acquired by prescription and user carries with it such width as is reasonably necessary for the reasonable convenience of the travelling public, and, where the public have acquired the easement, the land subject to it has passed under the jurisdiction of the public authorities for the purpose of keeping the same in proper condition for the enjoyment thereof by the public. See *Whitesides v. Green*, *supra*. And, where the right is so acquired, such width must be determined from a consideration of the facts and circumstances peculiar to each case. However, it must be borne in mind that the statute fixes the width of highways at not less than 50 feet, and common experience shows that width no more than sufficient for the proper keeping up and repair of roads generally.

It is further contended that it was error for the court to find, under the issues made by the pleadings and the proof, that said highway had existed since June, 1887. On this point the complaint alleges as follows: "That for more than 10 years immediately preceding the commencement of this action, continuously and uninterruptedly, except when interfered with during the past 2 years by the defendant, the public generally have enjoyed and used a public highway over, across, and through the said described lands." It is contended that, as this suit was commenced on May 10, 1906, it was error for the court to admit evidence tending to show that said road was first traveled in June, 1887. It is contended that the allegation, to wit, "that for more than 10 years immediately preceding the commencement of this action," etc., did not extend back further than 10 years and 1 day, and that it was error for the court to admit evidence to show that the road was first traveled as early as June, 1887; that being about 19 years before the commencement of the action. On this point appellant cites *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316. In the complaint in that action

it was alleged that the debtor before his death was absent from the state "for more than five years." The court held that that allegation could not be treated as definitely describing a longer period than five years and one day. Going back to June, 1887, the court held that the road in question had been traveled continuously up to the spring of 1905. The court fails to find that said road had been worked and kept up at the expense of the public, or that it had been located and recorded by order of the board of county commissioners as a highway, as provided by said section 851, as amended by the Sess. Laws 1893, p. 12. But it is contended by counsel for respondent that said road was established as a highway under the provisions of said section 851 before its amendment, which did not require the road to be kept up at the expense of the public. The difficulty arises from the fact that it is alleged in the complaint that said road had been used by the public and kept up at public expense for more than 10 years prior to the commencement of the action, and the issues made by the pleadings clearly show that this action was commenced and the issues framed upon the theory that said road had become a highway by user and by reason of the expenditure of public money thereon under the provisions of said section 851 after its amendment in 1893. For that reason, it was error for the court to admit evidence of the establishment of this road from 1887 to 1893. As the court failed to find that said road was worked at public expense for a period of five years, the findings are not sufficient on which to base a judgment in favor of the plaintiff without a finding to that effect. It was error, under the issues, to enter judgment on the theory that said road had become a highway by prescription prior to 1893.

Several errors were assigned in regard to the admission and rejection of evidence. It will not be necessary for us to pass upon each of them separately. Assignment No. 11 is on the ground that the court permitted the plaintiff to state in what road district certain lands were situated. There was no error in that, as a plat of the road district was introduced in evidence showing the lands included within said district. Objection was raised to the introduction of said plat on the ground of its insufficiency, but we think the plat sufficient and that it was properly admitted.

The question was asked one witness whether or not there was a well-established road there at that time, and he was permitted to answer over the objection of counsel for the defendant. While that calls for a conclusion, we do not think it reversible error. The witness ought to have stated the condition of the road, rather than whether he considered it a well-established road or not. The court rejected certain evidence offered to show that there were numerous roads running in

all directions across the school section involved in this controversy, and there were several questions asked which, if answered, would tend to illuminate the issues made by the pleadings, and it is sufficient for us to say here that, in case this action is tried again, the court should admit all evidence showing or tending to show that there was no well-defined and established road along the section line referred to.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views expressed in this opinion. Costs are awarded to the appellant.

AILSHIE, C. J. (concurring). The only serious question in this case over which there is any doubt or diversity of opinion among the members of the court is as to whether or not under the statute the road overseer can maintain an action for the removal of an obstruction on a highway that has not been "duly laid out or erected." Upon the first consideration of this case, I was inclined to the opinion that he could not, but on more deliberate reflection and examination of the various provisions of the statute in reference to highways, and the duties of overseers in relation thereto, I am convinced that he may properly maintain such action. Article 8, c. 2, tit. 6, Pol. Code 1887 (Rev. St. 1887, §§ 960-976), is entitled, "Obstructions and injuries to highways." The first five sections of that article deal with "encroachments" upon highways "duly laid out and recorded," and of the duty of the road overseer to give notice to the person maintaining such encroachment, and provide for the prosecution of an action to abate the same in case the encroachment is denied. It will be seen from an examination of section 962 of that article that the person who maintains an encroachment upon such a highway is liable to a fine of \$10 for each day it is maintained after receiving notice to remove the same. The same section also provides that, "If the encroachment is such as to effectually obstruct and prevent the use of the road for vehicles, the overseer must forthwith remove the same." In other words, where the encroachment grows into an obstruction, then it ceases to be incumbent upon the road overseer to prosecute an action for its abatement, but he may summarily abate it, and is vested with all the authority of a public officer to forthwith remove the obstruction or abate the nuisance.

After dealing with the matter of encroachments and the method of abating the same, and the subject of forfeitures and penalties for maintaining them, the Legislature passes to the consideration of the subject of "obstructions" to highways, and in section 967 it is provided that "whoever obstructs or injures any highway, or obstructs or diverts any water course thereon, is liable to a penalty of \$5.00 for each day such obstruction or injury remains, and must be punished as

provided in the Penal Code." The remaining sections of that entire article deal exclusively with what are termed by the Legislature "obstructions" to highways. Nothing is therein said about the road overseer maintaining an action for the abatement of "obstructions," but section 975 provides that "all penalties or forfeitures given in this chapter, and not otherwise provided for, must be recovered by the road overseers of the respective road districts." This latter section was amended by act of February 7, 1899 (Sess. Laws 1899, p. 131), but the amendment only deals with the use of the fines so collected. An examination of the several sections from 967 to 975 discloses that numerous fines and penalties of different grades and character are prescribed for the different kinds and classes of injuries to highways and obstructions thereon. I take it that the Legislature had in mind a clear distinction between an encroachment and an obstruction on a public highway. By encroachment they evidently meant and had reference to some intrusion into or trespass upon a highway which would tend to lessen and diminish the width and extent of the public easement, but which would not amount to a complete blocking up of the highway and a substantial delay to passengers and travelers thereon. This view is borne out by the latter part of section 962, wherein it recognizes that an encroachment may grow into an obstruction such as to "prevent the use of the road for vehicles" in which case the overseer is given the right to summarily remove the obstruction. By "obstruction" they evidently meant something that would prevent, hinder, or substantially delay travel over the highway. The moving of a fence over into the road, the construction of a wall out onto a portion of the right of way, the digging of a ditch along the highway, and various other acts of this kind and character might constitute an encroachment upon the highway and easement, and yet not amount to an obstruction so as to materially delay or hinder travel. On the other hand, a fence, building, or wall constructed across the entire road would amount to an obstruction that the road overseer is clearly authorized and entitled to summarily remove. In *Chase v. City of Oshkosh*, 81 Wis. 313, 51 N. W. 560, 15 L. R. A. 553, 29 Am. St. Rep. 898, the Supreme Court of Wisconsin defined "encroachment" and "obstruction" as used in the road laws of that state as follows: "An 'encroachment' is a gradual entering on and taking possession by one of what is not his own; an unlawful gaining upon the rights of possession of another. An 'obstruction' is a blocking up; filling with obstacles or impediments; impeding; embarrassing, or opposing the passage along and over the street." To the same effect see 3 Words & Phrases, 2385, and 6 Words & Phrases, 4891.

It is also worthy of note that all those sections of article 8, supra, providing penalties

for placing obstructions in roads, uniformly use the word "highway." Now, a highway includes not only roads duly laid out and erected, but also roads that have been used and worked as such for a period of five years. In other words, it is as much a violation of the law to obstruct a highway that has become such by user, even though it has never been recorded, as it is to obstruct a highway that has been duly laid out and recorded. The Legislature has as fully authorized the overseer to maintain an action for the collection of a penalty where the obstruction is on an unrecorded road as where it is on a recorded road. In such case the board of commissioners clearly have no control over him in the sense that they can prevent his maintaining an action. It would seem to be the height of inconsistency to hold that he may maintain an action to recover a penalty for obstructing an unrecorded highway, and at the same time hold that he cannot maintain an action for the abatement of the same nuisance for which he has collected a penalty. It requires exactly the same evidence in each case. It is a primary and fundamental rule of statutory construction that, where the power and authority is granted to do a certain thing, the act necessarily carries with it the implied power to employ the means necessary to accomplish the result. Section 873, Rev. St., as amended by act of February 7, 1890 (Sess. Laws 1890, p. 128), provides that "road overseers, under the direction and supervision and pursuant to orders of the board of commissioners appointing them must: First. Take charge of the public highways within their respective districts; Second. Keep them clear from obstructions and in good repair." This section contains seven other subdivisions, among which are the provisions providing for notice to inhabitants liable to do road work and for the collection of commutation fee where work is not performed, making semiannual reports, etc. I do not think the Legislature by this provision meant to limit or subject the right of the overseer to remove obstructions and keep roads clear of impediments to free passage to the orders and directions of the board of commissioners. Such a construction would be inconsistent with the duties of the road overseer, and the general purpose and object of the road laws. I think the Legislature meant to authorize the road overseer to summarily remove obstructions to highways. On the other hand, it seems to me that, if the obstruction is of such a character that the overseer does not feel justified in assuming the responsibility of a summary abatement, he may pursue his remedy in court, and abate the nuisance and remove the obstruction by an action and consequent decree of the court. A man might in some instances move a house or other building onto the highway and completely block the same, and he might have his family in the building. On attempting to summarily remove the obstruction, it might

appear to the overseer that a breach of the peace would be occasioned and violence be the result. In such a case he would undoubtedly prefer to resort to an action, and, in my opinion, he is granted all the implied power and authority necessary to enable him to prosecute such an action.

I concur in the reversal of the judgment.

STEWART, J. (concurring specially). I concur with the majority opinion that this case should be reversed. I am unable, however, to agree with the majority opinion, holding that the plaintiff, as road overseer, can maintain this action. Justice SULLIVAN in the principal opinion seems to hold that the plaintiff has a right to maintain this action by reason of the fact that, under the provisions of section 873 of the Revised Statutes of 1887 (as amended by Sess. Laws 1890, p. 128), the road overseer, under the direction of the board of commissioners, takes charge of all public highways of his district, and under the provisions of the act of February 18, 1890 (Sess. Laws 1890, p. 306), he is made an elective officer, and as section 3634, Rev. St. 1887, provides "a public nuisance may be abated by any public body, or officer authorized thereto by law," that, therefore, the road overseer, being a public officer, has a right to maintain an action to abate as a nuisance any encroachment upon a public highway, as provided by section 903 of the Revised Statutes of 1887. Chief Justice AILSHIE, however, in his concurring opinion seems to think there is a difference between an encroachment and an obstruction of a public highway, and that, while the road overseer might not maintain an action to remove an encroachment upon a public highway "unless the same be duly laid out or erected," yet, inasmuch as the different sections in article 8 of the Political Code provide that a road overseer may maintain an action to recover the penalties for placing obstructions upon a public highway whether "duly laid out or erected" or not, that, therefore, there is an implied power that the road overseer may also bring an action to remove such obstruction. It will thus be observed that my associates take a contradictory position in the outset; Justice SULLIVAN holding that a road overseer may maintain an action to remove an encroachment upon a highway because it is a nuisance, whether the highway be "duly laid out or erected" or not, while Chief Justice AILSHIE holds that the word "encroachment" only applies to roads "duly laid out or erected," as defined by Rev. St. 1887, § 900, and that the road overseer's authority to maintain the action to remove an obstruction to a public highway whether "duly laid out or erected" is an implied authority by reason of the authority of the road overseer to bring an action to recover the penalty for obstructing a public highway.

It is a general proposition of law that the limit of the power of a public officer is the

statute conferring the power, and what further power is necessarily implied, in order to effectuate that which is expressly conferred. The principle stated in the concurring opinion of Chief Justice AILSHIE that, "It is a primary and fundamental rule of statutory construction that where the power and authority is granted to do a certain thing, the act necessarily carries with it the implied power to employ the means necessary to accomplish the result," as applied to the plaintiff, means that, while he is authorized under article 8, supra, to bring an action to recover the penalty therein named, he is also impliedly authorized to employ whatever means may be necessary to recover such penalty; but the principle cannot be extended so as to authorize a suit entirely different and brought for a different purpose. In the performance of a ministerial duty enjoined by statute when the mode of performance is prescribed by the statute, no further power is implied, nor has the officer any discretion. He must strictly pursue the statute. His authority is the command of the statute, and it is the limit of his power. *Throop on Public Officers*, § 556; *Ex parte Farrell* (Mont.) 92 Pac. 785.

Section 960 of the Revised Statutes of 1887 provides that, if any highway "duly laid out or erected" is encroached upon by fences, buildings, or otherwise, the road overseer of the district may, orally or in writing, require the encroachment to be removed from the highway. And section 963 provides that if the encroachment is denied, and the owner refuses to remove the same, the road overseer must commence an action to abate the same as a nuisance. This section only authorizes the road overseer to commence an action to remove a nuisance by reason of an encroachment upon a highway "duly laid out or erected." The words "duly laid out or erected," as used in section 960, have reference to roads which have been laid out or erected by the proper officers in the manner prescribed by law. They have reference to formal or official action which the law enjoins upon those charged with the duty of establishing public highways. *Freshour v. Hihn*, 99 Cal. 443, 34 Pac. 87. It is admitted in this case that the road was not "duly laid out or erected." As section 3634 only authorizes the abatement of a nuisance by "an officer authorized thereto by law," and the law only authorizes the road overseer to bring an action for an encroachment upon a highway "duly laid out or erected," it follows that the road overseer has no authority found in the statute authorizing him to bring an action to remove an encroachment or obstruction upon any other kind of road. Section 967, Rev. St. 1887, upon which the Chief Justice bases his conclusion that the plaintiff has authority to bring this action, provides: "Whoever obstructs or injures any highway, or obstructs or diverts any water course thereon, is liable to a penalty of five

dollars for each day such obstruction or injury remains, and must be punished as provided in the Penal Code." It says nothing about the authority of the road overseer to bring an action to remove an obstruction to a public highway. The authority to bring an action to recover a penalty for placing an obstruction in a highway is not authority to bring an action to remove an obstruction to a highway. The majority opinion, however holds that this action is not brought under section 960, supra, but is brought under section 851 of the Revised Statutes of 1887, as amended. This latter section provides that "roads laid out and recorded as highways by order of the board of commissioners, and all roads used as such, for a period of five years, provided the latter shall have been worked and kept up at the expense of the public, or located and recorded by order of the board of commissioners, are highways." Paragraph 3 of the complaint alleges that for more than 10 years immediately preceding the commencement of this action, continuously and uninterruptedly, except when interfered with during the past two years by the defendant, said road has been used, worked, and kept up at the expense of the public as a public highway. It will thus be seen that this allegation does not bring this case within that class of cases which the statute authorizes the road overseer to maintain, for the purpose of abating as a nuisance any encroachment upon a public highway. Had the Legislature intended to authorize a road overseer to bring an action to abate as a nuisance an obstruction upon a public highway before the same has been "duly laid out or erected," they certainly would have said so.

Rev. St. 1887, § 873, as amended by Laws 1899, p. 128, provides that "road overseers, under the direction and supervision, and pursuant to orders of the board of commissioners appointing them, must: First. Take charge of the public highways within their respective districts. Second. Keep them clear from obstructions and in good repair." It is not alleged in the complaint nor proved upon the trial that the board of commissioners ever authorized the plaintiff to take charge of the highway in controversy in this case, nor to keep the same free from obstructions or in good repair. In fact, there is nothing alleged in the complaint or proved upon the trial which shows that the highway in controversy was ever "laid out or erected" as such, or that it was ever recognized in any way by the commissioners of Fremont county as a public highway, or that its course or width was ever fixed or established in any way. Before the plaintiff, as road overseer, has any authority to declare the same a public highway, and bring an action to remove obstructions placed thereon, his authority must clearly appear in the statutes. Section 870, subd. 3, Rev. St. 1887, authorizes the board of commissioners to cause to be

recorded as highways such roads as have become such by usage or abandonment by the public. These various sections of the statutes of this state are almost identical with the statutes of California bearing upon the same subject. In the case of *Smith v. Talbot*, 77 Cal. 16, 18 Pac. 795, the court held that no action lies under section 2734 of the Political Code at the suit of a road overseer to abate an encroachment of a highway as a nuisance, and for the penalty therein provided, unless the encroachment came into existence after the highway is "laid out and completed." If placed there by the owner of the land before the highway is laid out, the remedy of the road overseer is to pursue the course prescribed by section 2695 of the Political Code. Section 2734 of the California Code, referred to in the above opinion, is identical with section 963 of the Revised Statutes of 1887 of this state, and referred to in the opinion of Justice SULLIVAN, and section 2695 of the Political Code of California referred to in the above opinion is the same as section 936 of the Revised Statutes of 1887 of this state.

There is another remedy clearly provided for by the statutes of this state. Subdivision 4, § 1759, Rev. St. 1887, authorizes the board of county commissioners "to lay out, maintain, control, and manage public roads, turnpikes, ferries, and bridges, within the county and levy such taxes therefor as authorized by law." And subdivision 13 of the same section provides: "To direct and control the prosecution and defense of all suits to which the county is a party in interest, employ counsel to conduct the same, with or without the district attorney, as they may direct." This statute clearly provides a remedy for a case like that alleged in the complaint, and the county commissioners are clearly authorized under section 3634 of the Revised Statutes of 1887 to bring an action to abate a public nuisance.

I am unable to find in the statutes any authority giving to the plaintiff the right to maintain this action. For these reasons, I dissent from that part of the opinion of the majority which holds that the plaintiff can maintain this action.

NELSON BENNETT CO. et al. v. TWIN FALLS LAND & WATER CO.

(Supreme Court of Idaho. Jan. 4, 1908. On Rehearing, Jan. 30, 1908.)

1. MECHANICS' LIENS—RIGHT TO LIEN—SUB-CONTRACTORS.

Under Act Cong. June 11, 1896, c. 420, 29 Stat. 434, 6 Fed. St. Ann. p. 398 [U. S. Comp. St. 1901, p. 1556] which is supplementary to Carey Act Aug. 4, 1894, c. 208, 28 Stat. 226, 6 Fed. St. Ann. pp. 396-398 [U. S. Comp. St. 1901, p. 1552], Act Aug. 18, 1894 c. 301, 28 Stat. 422 [U. S. Comp. St. 1901, p. 1554], and the act of the Legislature of the state of Idaho

of March 2, 1899 (Sess. Laws 1899, p. 282), accepting the provisions of the Carey act, and providing for the reclamation, occupation, and disposal of lands thereunder, a lien is granted in favor of the person, company, or association contracting for the construction of canals and reclamation works for the irrigation of arid lands thereunder, and such lien extends to all lands in the segregation that can be irrigated by such system, to the full extent of the price per acre for which such person, company, or association contracts and agrees to sell water rights, and the contractor or subcontractor performing work under such person, company, or association is entitled to the benefit of the lien laws to secure the payment to him for such work to the full extent of the title, interests, rights, and claims of the company having the contract from the state, and to the full extent of, and commensurate with, the lien rights of such company.

2. SAME.

The rights of the lien claimant who is a contractor or subcontractor under the person, company, or association which has the contract from the state will extend to all the rights, interests, claim, and title of such company in and to the works and irrigation system and lands thereunder; but the lien claimant cannot by foreclosure of his lien acquire any greater right than that possessed by such company or association.

3. SAME—ENFORCEMENT—PLEADING—AMBIGUITY.

Where a complaint states in ordinary and concise language the nature of the cause of action, and states the number of cubic yards of earth removed for which the plaintiff claims compensation, and the classification to which the same belongs, and the specific contract or piece of work on which the same was performed, it is not open to demurrer on the ground of uncertainty or ambiguity in that particular; and it is not error for the trial court to deny a motion for a "bill of particulars" in such case, requiring the plaintiff to state the particular amount claimed for every given number of feet in distance or at any given station upon the works.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 507.]

4. PLEADING—BILL OF PARTICULARS—STATUTORY PROVISIONS—EQUITY.

Section 4209, Rev. St. 1887, provides the method for an adverse party securing an itemized statement of an account, and, in addition to that provision of the statute, the court in an equity case has the inherent power to so regulate and control its proceedings as to require the party to furnish a bill of particulars in a proper case.

5. CONTRACTS—CONSIDERATION—MUTUALITY.

A stipulation in a contract, requiring the submission of differences and controversies arising thereunder to the chief engineer of one of the contracting parties as umpire, and leaving the measurements, estimates, and classification of the work to him, and providing that his measurements and classifications shall not estop the party employing the engineer from disputing or questioning them, will not be enforced by the courts as a binding obligation against the other party thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 21.]

6. SAME—AGREEMENT FOR UMPIRE—SETTING ASIDE UMPIRE'S FINDINGS.

Where the issue tendered is that the chief engineer of the defendant company, selected as umpire to determine all questions of controversy, acted fraudulently and arbitrarily in making estimates, measurements, and classifications, and without previously making any proper in-

spection on which to found an honest judgment, and with intent to injure and defraud the plaintiff and deprive it of its just compensation, and did arbitrarily and in violation of good faith make and cause to be made false and untrue estimates, measurements, and classifications, such issue, if supported by the evidence, will authorize and justify a court in setting aside such final estimates, measurements, and classifications, and in hearing the evidence as to the true measurements and classifications that should have been made and determined the same as though no estimates, measurements, or classifications had been made by an engineer and no submission had ever been made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1343.]

7. MECHANICS' LIENS—ENFORCEMENT—FINDING—SUFFICIENCY.

A finding by the trial court on the foregoing issue "that the chief engineer wrongfully, arbitrarily, and without having made proper observations, and without sufficient knowledge upon which to found a just judgment in respect to the kind, quality, and classification of materials, and in violation of good faith and duty, did make, cause to be made and permit untrue and grossly erroneous estimates and classifications of the kind, character, and amount of materials removed and placed, and work done," is sufficient to support a judgment in favor of the plaintiff for the true measurements and amount of work done, and the proper and just classifications as found from the evidence in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Mechanics' Liens, § 593.]

8. CONTRACTS—AGREEMENT FOR UMPIRE—SETTING ASIDE UMPIRE'S ESTIMATES.

Where the chief engineer of a defendant company, who has been selected as umpire for the purpose of making a final determination of controversies and differences in reference to the work, material, measurements, and classifications, retains in his service an assistant engineer who is manifestly prejudiced and biased against the contractor, and where, after such chief engineer has been advised of the animus, bias, and prejudice of his assistant against the contractor, causes such assistant engineer to make the measurements, estimates, and classifications of the work done by such contractor, and it manifestly appears that such estimates and classifications have been unfair and unjust, and discriminating against the contractor, the court, when appealed to, will set the same aside, and ascertain from the evidence submitted the true amount of work done or material furnished, and the proper measurements and classifications thereof, and order judgment accordingly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1343.]

9. SAME.

Evidence in this case examined, and held sufficient to support findings and judgment entered and rendered thereon, except as to total number of cubic yards of earth moved; and judgment modified as to excess.

10. MECHANICS' LIENS—ENFORCEMENT—ATTORNEY'S FEES—CONSTITUTIONALITY.

That portion of the lien laws of this state (section 12, p. 150, Lien Laws 1899), which provides that upon the foreclosure of a mechanic's lien the court may allow reasonable attorney's fees in favor of the plaintiff, is constitutional and valid. *Thompson v. Wise Boy Min. & Milling Co.*, 9 Idaho, 363, 74 Pac. 958, followed and approved. Held further, that under the facts and circumstances of this case and in view of the amount involved and the questions raised, an allowance of \$10,000 as attorney's fees is not excessive.

11. SAME—COSTS.

Order, made on motion to tax costs, examined and sustained. *Anderson v. Ferguson-Hach Sheep Company*, 12 Idaho, 418, 86 Pac. 41, followed and approved.

(Syllabus by the Court.)

Appeal from District Court, Cassia County; Lyttleton Price, Judge.

Action by the Nelson Bennett Company and another against the Twin Falls Land & Water Company to foreclose a mechanic's lien. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Modified and affirmed.

See 92 Pac. 980.

Henderson, Pierce, Critchlow & Barrette and S. H. Hays, for appellants. Marshall K. Snell, Bertha M. Snell, and H. H. Henderson, for respondents.

AILSHIE, C. J. This is an appeal from the judgment and an order denying a motion for a new trial. The Nelson Bennett Company, a Washington corporation, in the month of March, 1903, entered into a contract with the Twin Falls Land & Water Company, a Utah corporation, whereby the former agreed to construct about 38 miles of canal for the appellants in the counties of Lincoln and Cassia on the south side of the Snake river, and which is now commonly called the "Twin Falls Canal." After the work was completed, the Nelson Bennett Company filed a lien against the canal and all the property connected therewith belonging to the Twin Falls Company, to secure its claim for the balance due in the sum of \$185,705.62. About the same time liens were filed by subcontractors; one by Alexander Toponce, and one by Ryberg & Carleson. The Nelson Bennett Company commenced an action to foreclose the lien, as did also Toponce; but it seems that Ryberg & Carleson have never prosecuted any action for the foreclosure of their lien—at least they never sought to do so in this action. At the time of the trial, an order was made for the consolidation of the Nelson Bennett Case and the Toponce Case, and the action was thereafter prosecuted in the name of the two plaintiffs. The defendant and appellant answered, denying the material allegations of the complaint, and also pleading special matters in defense. The case went to trial, and resulted in a judgment in favor of plaintiffs for the sum of \$162,211.26.

The questions presented on this appeal have involved the examination of a voluminous record and exhaustive briefs. In order to a proper understanding of the questions that must be determined on this appeal, it is necessary to recite the relation of the respective parties to the property on which the lien is sought, and some of the transactions which led up to the status they occupied at the time of entering into this contract, and of the rendition of judgment thereon. On

the 2d day of January, 1903, the appellant corporation entered into an agreement and contract with the state of Idaho, the latter acting through and by the authority of its State Board of Land Commissioners, whereby the company undertook to build a dam across Snake river and construct a system of main and lateral canals in the counties of Lincoln and Cassia, sufficient in capacity for carrying water enough to irrigate a tract of about 270,000 acres of land lying under such system of canals. The contract was entered into by the State Board of Land Commissioners, under authority of the act of the Legislature approved March 2, 1899 (Sess. Laws 1899, p. 282), entitled "An act to provide for a state engineer, defining his duties and regulating his compensation, and to provide for the acceptance by the state of Idaho from the United States of certain lands, and to provide for the reclamation, occupation and disposal of the same." By the provisions of the foregoing act, the Legislature provided for an acceptance of the terms of the act of Congress commonly known as the "Carey Act" (Act Aug. 4, 1894, c. 208, 28 Stat. 226 [U. S. Comp. St. 1901, p. 1552], and Act Aug. 18, 1894, c. 301, 28 Stat. 422 [U. S. Comp. St. 1901, p. 1554], found in 6 Fed. St. Ann. pp. 396-398, and prescribed the means, manner, and method by which the state might avail itself of any part of the million-acre grant made by the Carey act, and acts of Congress supplemental thereto. It will be seen that the Legislature of this state did not authorize the state, or any board of commissioners under the state, to construct and erect these works; but it rather authorized the state to contract with individuals, associations, or corporations for doing such work. An examination into the character and extent of the appellants' interest in this property and these works is at once suggested, by reason of the contention that it makes to the effect that a mechanic's lien cannot be maintained against this property. The land and water company has argued with much force and earnestness that it has no lienable interest in this property; that the entire property belongs to the state of Idaho and to the United States; that the canal system, and the water and the entire works, belong to the state of Idaho; and that the lands to be irrigated principally belong to the United States. Appellants contend that the only interest they have is that they may do this work and receive their pay, and that the law does not permit a lien either against the state or the general government.

By section 20 of the act of the Legislature of 1899, the person, company, or association which secures the contract for the construction of a canal system and for the reclamation of arid lands under the Carey act is given a "prior lien on said water right and land upon which said water is used for all

deferred payments for said water right." This provision of the legislative act, granting to the contractors or construction company a lien, is authorized by and is in harmony with section 1 of the sundry civil appropriation act of Congress of June 11, 1896 (29 Stat. 434, c. 420 [U. S. Comp. St. 1901, p. 1556]), found in 6 Fed. St. Ann. p. 398, which authorizes the state to create a lien "for the actual cost and necessary expense of reclamation," etc., under the Carey act. By the provisions of the statute and the contract entered into thereunder, the appellant herein acquired the right to construct the system of canals and ditches covering this tract of land, and the right to divert the necessary amount of water from the Snake river for the irrigation of such lands. It likewise acquired a right to charge and collect from each and every settler the sum of \$25 per acre for a water right, and to have the same become an immediate and continuing lien upon the lands to be irrigated. It acquired a right of way for the ditches and canals, and also an additional strip of land, not exceeding 50 feet in width along the main canal and 30 feet along the laterals, as a right of way for working, inspection, and improvement purposes, and the right to increase or enlarge the canal at any time it might see fit or proper to do so, for the purpose of carrying any additional waters either for its own use or purposes or for that of rental and distribution, and the right to the use of any surplus water that might be carried in the canal and not needed for the purpose of irrigating the lands in this segregation. Under its contract and the statute (section 7 of amendatory act approved March 18, 1901; Sess. Laws 1901, p. 198), it secured the additional right to acquire title absolute from the state of Idaho to any and all lands contained in the segregation not applied for or taken by settlers within two years after the final completion of the ditch and irrigation works. It also acquired a right of indefinite possession and control of the system, and authority to charge and collect additional rates from the water consumers not to exceed 80 cents per acre per annum, and to become a stockholder in the settlers' and consumers' company that was to be formed for the purpose of eventually taking over the management of the canals.

The foregoing are some of the numerous rights and interests we find provided and stipulated for in the contract entered into between the appellant corporation and the state. As to the legal effect of these various stipulations and provisions, and the extent of the rights, title, and interest acquired by the appellant corporation under them, we express no opinion; nor are we required in this case to determine their extent or character beyond that of ascertaining whether they are sufficient on which to found or rest a mechanic's lien. That the Twin Falls Land

& Water Company had and still has an interest in this canal system, and the lands thereunder and the waters appropriated for their irrigation and reclamation, and that under the statutes and decisions of this state such property rights are real estate, there can be no doubt. Section 2825, Rev. St. 1887; *Welch v. Garrett*, 5 Idaho, 639, 51 Pac. 405; *Ada Co., etc., v. Farmers', etc., Co.*, 5 Idaho, 793, 51 Pac. 990; *Hard v. Boise City Irrigation & Land Co.*, 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407. Under section 1 of the mechanic's lien law of this state (Sess. Laws 1899, p. 147), "Every person performing labor upon or furnishing materials to be used in the construction, alteration or repair of any * * * ditch, dyke, flume * * * has a lien upon the same for the work or labor done or materials furnished," etc. The statute further provides that the contractor, subcontractor, architect, builder, or any person having charge of the construction, alteration, or repair shall be deemed the agent of the owner for the purposes of this chapter. In this case there is no contention made that the lien claimant can acquire any greater right or interest under its lien than that owned and possessed by the Twin Falls Land & Water Company. It should be borne in mind, however, that under the act of Congress and the state statute above cited both the general government and the state Legislature have granted the right of lien upon the lands to be irrigated to any person, association, or corporation taking a contract from the state to the extent of "the actual cost and necessary expenses of reclamation." The act of the Legislature, in conformity with the act of Congress, has granted a lien to "any person, company or association furnishing water for any tract of land," for the expense of the construction of the works, or rather to the extent of the price allowed to be charged for the water right for each acre of land. Under this enactment of the state Legislature, it is clear to us that the contractors and subcontractors, under a construction company like the appellant, would be entitled to avail themselves of the benefit of the lien laws of the state; and that in case of foreclosure and sale under the lien they would be entitled to sell all the right, interest, and claim of the construction company; and that the purchaser at such foreclosure sale would be subrogated to all the rights, interests, and privileges of the construction company therein. If it be conceded by appellant that it has no interest in or title to any of this property, and no right of possession thereto, then we grant that the respondent can sell nothing at a foreclosure sale. This lien extends only to the interest, claim, and right of the Twin Falls Land & Water Company. If it has no interest therein, it cannot suffer by a foreclosure sale under this lien. If it has an in-

terest therein, that interest may be sold at foreclosure sale. The appellant is not the representative of either the state of Idaho or the general government, and is in no position to present the interests of either here, and cannot complain for or on account of any pretended claim that may be preferred against either. In fact, however, the claim here made is only commensurate with the interests and rights of the appellant company. To that extent the action may be prosecuted, and no further. Section 4, Lien Law; Sess. Laws 1899, p. 148. Miners, by discovery and location, acquire only a possessory right to mining claims, while the fee remains in the government; yet they may go ahead and expend thousands of dollars in running tunnels, sinking shafts, and making other improvements thereon, and the contractor, laborers, and materialmen who have engaged in such work are entitled to a lien on the mine or mining claim for such labor or material, and we know of no court that has refused to allow the lien because the fee was in the general government or that the miner had nothing but a possessory title. On the contrary, the courts have uniformly allowed the lien claimant to foreclose his lien and sell the property, and the purchaser has been recognized as having acquired all the interest that the locator and possessor of the claim had at the time of preferring the lien and foreclosing the same. Many cases may be found where the courts have held that liens preferred against property, where the party who employed the laborers, or made the contract, or purchased the material had only a right of possession or a leasehold interest, would extend to all the rights, interest, and claim the employer or purchaser had in or to the property. In *Badger Lumber Co. v. Malone*, 8 Kan. App. 692, 54 Pac. 692, the Court of Appeals of Kansas, in discussing this question, said: "We conclude the law to be that a mechanic's lien affects whatever estate or interest in the land upon which the building is erected is owned and possessed by the person who causes the erection of the building, at the time when the contract is made for the material. And, if the person contracting to have the building erected has any estate or interest in the land upon which it stands, the lien of the materialman who furnishes the material extends to the whole of that estate or interest, whatever it may be. The word 'owner' is not limited in its meaning to an 'owner in fee,' but includes also an owner of a leasehold or other estate. It therefore follows that the estate possessed by the builder, whatever its extent may be, in the land, is subject to a mechanic's lien, and may be sold." To the same effect, see *Farnham on Water and Water Rights*, vol. 3, p. 1995; *Garland v. Bear Lake Co.*, 9 Utah, 35, 34 Pac. 368; s. c. 164 U. S. 1, 17 Sup. Ct. 7, 41 L. Ed. 327; *Jar-*

rell v. Block (Okla.) 92 Pac. 167; A. & E. Ency. (2d Ed.) 297.

Having determined that the plaintiffs were entitled to liens, and were pursuing the proper remedy, we now pass to the consideration of the further questions that were raised and are presented here. The defendant filed a special demurrer to the complaint on the grounds of ambiguity and uncertainty, and pointed out specifically numerous instances in which it claimed the complaint was too indefinite and uncertain to enable it to properly answer or go to trial. At the same time, defendant filed a motion based on the grounds designated in the demurrer, and moved the court to require the plaintiff to furnish it with a bill of particulars. The demurrer and motion came on for hearing, and the demurrer was overruled and the motion denied. The defendant thereafter answered. It now assigns the action of the court in overruling the demurrer and denying the motion as error. The chief ground relied upon by the appellant is that, since the measurements of the amount of work done and the estimates and classifications thereof were by the contract to be left to the appellant's chief engineer, and in pursuance thereof the engineer had made the measurements, estimates, and classifications, and the respondent claimed that they were unfair, fraudulent, and incorrect, and that in truth and in fact the classifications should be very different from those made, the court should have required the respondent to point out the particular place or places along the line of the works, and the particular stations, sections, or subdivisions where these errors and mistakes and fraudulent estimates had been committed, and the particulars on which it relied for a recovery, so as to enable appellant to properly answer, and to prepare its case for trial. The respondent constructed about 22 miles of the main canal. This canal was 80 feet wide at the bottom and 120 feet wide at the top. In its construction the contract contemplated that it would be necessary to remove all kinds of material, from that of loose earth to solid rock, and accordingly it enumerated a number of classifications, such as solid rock, loose rock, common material (earth that could be plowed with six horses), and earth or other material that could not be plowed with that number of horses. The allegations of the complaint involved in this consideration are paragraphs 6 and 9 thereof, which are as follows:

"(6) That plaintiff proceeded under said contract and employment, and in good faith completed and fulfilled said contract on its part; and did between the dates of March 9, 1903, and the 6th day of August, 1904, perform and furnish work, labor, and material in the construction of said canal, ditch, dams, adjuncts, and irrigation system and works, as follows:

482.85 acres cleared at \$10 per acre	\$ 4,828 50
70,732 cubic yards solid rock at 90 cts.	63,658 80
455,569 cubic yards loose rock and hard pan at 45 cts. per cubic yard	205,006 05
1,632,568 cubic yards common material at 13 cts. per cubic yard..	212,233 84
499,172 cubic yards overhaul at 2 cts. per cubic yard, per 100 feet	9,983 44
28,256 feet bridge timber at \$42 per M.	1,186 75
336 acres bond-plowing at \$3.00 per acre	1,008 00
2 Pettelo cars furnished at \$50 each	100 00
184,551 cubic yards of embankment at 27 cts. per cubic yard..	49,828 77
9,789 yards of riprap at \$1.25 per yard	12,236 25
167 days' pumping at \$5 per day..	835 00

Amount to the sum of..... \$560,905 40

"(9) That, according to the terms of the contract between plaintiff and defendant canal company—the amount and classification of the work done under said contract—said plaintiff was to be governed by the rules, regulations and restrictions, and specifications of the engineers in charge of said work, which said engineers were in the employ of said defendant canal company. That the said defendant canal company and its said engineers fraudulently and arbitrarily, and without having made actual or correct measurements, and without having made proper inspection of the same, and without sufficient knowledge upon which to found an honest judgment in respect either to the proper measurements or the amount of cubic yards excavated, or the classifications of the same as to earth, loose rock, solid rock, hard pan, and of the other work done, and with intent to injure and defraud this plaintiff, and to deprive it of the just amount of compensation due for said work and material as aforesaid, the said defendant canal company and its engineers arbitrarily, and in violation of good faith and duty, did make, or cause to be made, false and untrue final estimates, so called, or calculations and certificates of the amount or kind of work done by the plaintiff. That said estimates and calculations and certificates of the kind of work done by said plaintiff, as made by the defendant canal company and its engineers, were false and untrue in this, to wit: That, according to the estimates made by said defendant canal company and its engineers, they allowed and furnished estimates to plaintiff for solid rock in the amount of 33,214 cubic yards, at the rate of 90 cents per cubic yard, when in truth and in fact there were 70,732 cubic yards of solid rock at the same price. That, according to the estimates and classifications made by said defendant canal company and its engineers, they allowed for loose rock and hard pan in the amount of 101,394.3 cubic yards, at the rate of 45 cents per cubic yard,

when in truth and in fact there were 455,569 cubic yards of loose rock and hard pan at the same price. That, according to the estimates and classifications made by the said defendant canal company and its engineers, and as furnished defendant canal company, they allowed for overhaul 249,585.5 cubic yards, at the rate of 2 cents per cubic yard, while in truth and in fact there were 499,172 cubic yards at the same price. That the said defendant canal company did knowingly, intentionally, and with an intent to cheat and defraud plaintiff, order and direct in the performance of its said contract that it perform and plow 336 acres of bond plowing, for which plaintiff was to receive, and should have been allowed and received, the sum of \$3 per acre. That said defendant canal company neglected and refused to allow said plaintiff anything whatsoever for said bond plowing, and have never made any allowance therefor. That the defendant canal company did take, and appropriate and use for its own use and benefit in the construction of said canal, two Pettelo grading cars of the value and price of \$50 each, which cars were reasonably worth, and were worth at said time, the sum of \$50 each, or \$100. That said defendant canal company neglected and refused, and have always and still do neglect and refuse, to pay or allow plaintiff for said cars, although demand has been made for the payment of same. That the said defendant canal company, although ordering and directing that the plaintiff perform and furnish for its use and benefit in the puddling of its said dam, while under construction, 167 days' pumping of water, at the sum of \$5 per day, that said services performed by plaintiff for said canal company in pumping of said water were reasonably worth, and were worth, the sum of \$5 per day, which said defendant canal company promised and agreed to pay, but that they have neglected and refused, and do still neglect and refuse, to pay said pumping as heretofore set forth, or any part thereof. That, according to the estimates and specifications made by the said defendant canal company and its engineers, which were furnished to plaintiff, they allowed for 8,873 yards of riprap at the rate of \$1.25 a yard, when in truth and in fact there were 9,789 yards at the same price. That, according to the estimates and specifications made by the said defendant canal company and its engineers, which were furnished to plaintiff, they allowed for 160,273 cubic yards for embankment and construction of its dam and canal at the price of 27 cents per cubic yard, when in truth and in fact there were 184,551 cubic yards at the same price. That, in respect to the above-enumerated items and estimates, calculations, and computations, as made by said defendant canal company and its engineers, they were false and untrue and grossly incorrect, and were arbitrarily made for the purpose of cheating and defrauding

and depriving this plaintiff of the amount justly due to it for work performed under and in pursuance of said contract."

It will be seen from these allegations that the plaintiff in every instance gave the classification and number of cubic yards thereunder that had been allowed by the appellant's engineer, and also gave the number of cubic yards and classifications it contended was correct and that it should have received. The controversy and difficulty is therefore reduced to this: Was it necessary for the plaintiff, where it claimed 70,000 cubic yards of solid rock, when in fact the engineer's estimate had only given it 33,000 cubic yards, to state in its pleading or bill of particulars the particular point or points, station or stations, along the line of work at which it should have received increased estimates or different classifications; or, for instance, where it had only received an estimate of 100 cubic yards when it should have had 125 cubic yards in any given distance of the canal? It should be borne in mind, too, that the appellant company had on file all the figures, estimates, classifications, and records of its engineers showing the amount of excavation and work done along the entire length of this canal, and the number of cubic yards removed for every 100 feet thereof. It is further worthy of note that there was no material difference between the plaintiff and respondent as to the total number of cubic yards of material handled in the construction of this canal, with the exception of one piece of work known as the "Dry Creek Dam." The principal controversy arose over the classifications given the respondent by the appellant's engineer. For example, the appellant only allowed respondent for 101,394.3 cubic yards of loose rock and hard pan, while the respondent claimed that it should have had an estimate of 455,569 cubic yards of loose rock and hard pan. On the other hand, the engineer's estimate of common material was much larger than respondent claims it was entitled to; this difference arising out of the fact that he had not given large enough estimates of the more expensive classifications, and too large an estimate on the cheaper classifications. When the defendant company came to answer, it relied upon its engineer's estimates and classifications, and denied that any error, mistake, or fraud had been committed by him, and asserted the correctness of his estimates and classifications, and relied thereon. It is therefore difficult to see just how or wherein the appellant has been injured or prejudiced by the ruling of the court in overruling its demurrer and denying its motion. *Dennis v. Crocker-Huffman Land & Water Co.* (Cal. App.) 91 Pac. 427. We do not think the complaint was open to demurrer on the grounds of ambiguity or uncertainty. Under section 4209, Rev. St. 1887, in dealing with "general rules of pleading," a plaintiff is relieved from the neces-

sity of pleading its items of an account, but must deliver to the adverse party a copy of the account within 10 days after written demand therefor, or be precluded from introducing evidence thereon. That section might be held to cover a case of this kind; but, if it does, it may then be said that the complaint in this case contained a statement of each item, or rather of the number of cubic yards under each classification, and the compensation claimed therefor. On the other hand, we have no statute providing for the ordering of "bills of particulars." The appellant does not appear to have relied upon the provisions of the foregoing statute, or pursued the remedy there pointed out; but rather applied to the court for an order requiring respondent to furnish a "bill of particulars," and, for the relief sought, relied upon the general and inherent powers of courts of justice to control their proceedings and regulate the conduct of trials, and to require the information that may be obtained by means of such statements or bills of particulars. *United States v. Clawson*, 4 Utah. 34, 5 Pac. 689; *s. c.* 114 U. S. 477, 5 Sup. Ct. 949, 29 L. Ed. 179; *Commonwealth v. Snelling*, 15 Pick. (Mass.) 330. We have no doubt of the power of the court, in the exercise of a sound discretion, to order bills of particulars in proper cases. 3 *Ency. P. & P.* 523; *Tilton v. Beecher*, 59 N. Y. 176, 17 Am. Rep. 342. We are satisfied, however, that there was no abuse of discretion in denying the motion in this case.

It is next urged by appellant that the court erred in refusing to give effect to the "contract provision giving engineer of defendant right to decide upon disputed questions"; and, further, that "the controversies have been decided by the chief engineer pursuant to the provisions of the contract." The provision of the contract involved in these assignments is as follows: "Engineer as Umpire.—(1) To prevent all disputes and misunderstanding in relation to any of the stipulations contained in this agreement, or their performance by either of said parties, the said engineer shall be and hereby is made umpire to decide all controversies arising or growing out of this contract, and his decision on any point or matter touching this agreement shall be final and conclusive between the parties. And it is further agreed between said parties that, wherever the word 'engineer' is used, it shall be taken and construed to mean chief engineer employed by said second party." Respondent in the first place urges that there are two reasons why this provision of the contract was ineffectual: (1) That it is so general and sweeping that it amounts to an attempt by contract to oust the courts of jurisdiction, and in support thereof cites *Wait, Eng. & Arch. Juris.* § 406, p. 340; 2 *A. & E. Ency.* (2d Ed.) 570; *Louisville Ry. v. Donevan*, 111 Ind. 179, 12 N. E. 153; *Wood v. Chicago Ry. Co.*, 39 Fed. 52. See, also, *B., O. & C. Co. v. Scholes*, 14 Ind. App. 524,

43 N. E. 156, 56 Am. St. Rep. 307, and note. The second objection is that the contract under consideration reserved to the land and water company the right to question the estimates of the engineer both as to "amount and character of the work," etc. That provision of the contract is embodied in paragraph 3 thereof, and is as follows: "True Estimates.—Said second party shall not be estopped by any estimate by its engineer from showing at any time the true and correct amount and character of the work which shall have been done and materials which shall have been furnished by said first party, or by any person under this agreement." In the first place, it would seem that the stipulation constituting the chief engineer as umpire could not, and perhaps would not, receive a construction by the courts that would give to the engineer "the determination of questions relating to the meaning and interpretation of the contract itself," and would rather limit his determinations to "estimates, classifications, character of work," etc., provided by the contract to be done and performed. *Wait, Eng. & Arch. Juris.* § 408, p. 342. It is clear to us, on the other hand, that a stipulation in a contract, requiring the submission of any given questions or controversies to an engineer as umpire, in order to be binding upon one party, must be made obligatory on the other, and, in so far as it is made inoperative by the contract against one party, it will be held inoperative by the courts as against the other. If this point, however, were conceded in favor of appellant, there is another and equally serious reason why the courts will go back of the findings of the engineer in this case, and that reason we will consider presently.

As will be seen from an examination of paragraph 9 of the complaint above quoted, the issue tendered was that the "canal company and its said engineers fraudulently and arbitrarily, and without having made actual and correct measurements, and without having made proper inspection of the same, and without sufficient knowledge upon which to found an honest judgment in respect either to the proper measurements or the amount of cubic yards excavated, or the classifications of the same, * * * and with intent to injure and defraud this plaintiff, and to deprive it of the just amount of compensation due * * * its engineers arbitrarily, and in violation of good faith and duty, did make, or cause to be made, false and untrue final estimates," etc. In contracts for this character of work, stipulations for the submission of questions of difference and controversies to the decision of the chief engineer on the works have been generally sustained and enforced. *Wait, Eng. & Arch. Juris.* § 433; *Chicago, etc., R. R. Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917; *Davis v. King*, 50 Am. St. Rep. 114, and note; *McCoy v. Able*, 131 Ind. 423, 30 N. E. 528, 31 N. E. 453; *Baltimore, etc., Ry. Co. v. Scholes*,

14 Ind. App. 524, 43 N. E. 156, 56 Am. St. Rep. 310. But where it has been shown that the engineer was biased against one of the parties to the contract, and declined to make honest estimates and decisions, or refused to make inquiries, or inform himself as to the facts in dispute, or as to the condition of the matters or works he was to determine upon, or the nature of the work or classification to which it belonged; or where he was utterly incompetent and unfit for the discharge of the duty, or acted fraudulently, or acted wholly on information received from other parties—the courts have furnished relief to the injured party. *Spaulding v. Coeur d'Alene Ry. Co.*, 5 Idaho, 528, 51 Pac. 408; *Davis v. King*, 66 Conn. 465, 34 Atl. 107, 50 Am. St. Rep. 104; *Edwards v. Hartshorn*, 72 Kan. 19, 82 Pac. 520, 1 L. R. A. (N. S.) 1050; *Martinsburg & Potomac R. R. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; *Williams v. Chicago, etc., Ry. Co.*, 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403; *Mundy v. L. & N. R. Co.*, 67 Fed. 633, 14 C. C. A. 583; *Baltimore, etc., Ry. Co. v. Scholes*, 14 Ind. App. 524, 43 N. E. 156, 56 Am. St. Rep. 307, and notes. Upon the issues made on this point the court found: "That the said chief engineer wrongfully, arbitrarily, and without having made proper examination, inspections, and tests, and without having made proper observations, and without sufficient knowledge upon which to found a just judgment in respect to the kind, quality, and classification of materials, and in violation of good faith and duty, did make, cause to be made, and permit untrue and grossly erroneous estimates and classifications of the kind, character, and amount of materials removed and placed, and work done, by said plaintiff. The said chief engineer, in arriving at his conclusion, based his judgment almost entirely upon reports made to him by his subordinates, and without any due or proper examination made by him to verify these reports. That the reports of the subordinates were grossly incorrect and untrue." It is argued by appellant that this finding is not sufficient to justify or support a judgment against the land and water company, setting aside the final estimates and classifications made by the engineer and going back of such estimates and classifications; that it is insufficient for the reason that it does not directly find the engineer or the company guilty of fraud or dishonesty in the matter of the estimates and classification. It has been established in this state that "the appellate court will give to the findings of the trial court the most liberal construction the language used will permit, in order to sustain a judgment founded thereon." *Eastwood v. Standard Mines & Milling Co.*, 11 Idaho, 195, 81 Pac. 382. It is also well settled that findings of fact made by the trial court are not required to conform to all the niceties and rules governing the pleadings,

which go to form the issues under which the findings are made. Here the court finds that the engineer made and caused to be made estimates and classifications "wrongfully" and "arbitrarily," and that he did so in "violation of good faith and duty," and that he caused and permitted "untrue and grossly erroneous" estimates and classifications, and that he based his judgment upon "grossly incorrect and untrue" reports made to him by his subordinates, and without due or proper effort to verify their correctness. It seems to us that there can be but little room for doubt that the findings of the court on these issues were sufficient to support the judgment entered thereon.

Pursuing this contention, however, appellant contends that the facts before the court were not sufficient to justify these findings and warrant the court in going back of the estimates and classifications made by the engineer. As stated by appellant in its brief, "The great controversy in the case, as to which the greater amount of testimony was given, was over that part of the specifications, Exhibit A, which classified loose rock and hard pan." The chief engineer had allowed the Nelson Bennett Company for 101,394.3 cubic yards of "loose rock and hard pan" at 45 cents per cubic yard, while the plaintiff contended that it was entitled to an allowance of 455,569 cubic yards of "loose rock and hard pan" at the price above stated. It seems to have been conceded by counsel, and assented to by the court, that there is a sheet of hard pan extending throughout that entire section of country, varying in depth below the surface. The parties to the contract had this fact in view, and stipulated therein for the classification of "hard pan" as common excavation where it "can be plowed with a 10-inch grading plow, behind a team of six good horses properly handled," and for its classification as loose rock where it "cannot be plowed with a 10-inch grading plow behind a team of six good horses properly handled." The controversy and evidence necessarily revolved about the issue as to whether this stratum of "hard pan" could be plowed with a 10-inch grading plow drawn by a team of six good horses properly handled. The record contains some hundreds of pages of evidence on this point. To review it in this opinion would be out of the question and useless. It is sufficient to say that the great preponderance of evidence on this point goes to sustain the contention made by the plaintiff and the finding of the court. It was shown that most of this work was done with 8 and 10 horses, and in some instances with smaller plows than that prescribed in the contract and specifications. In a few instances the appellant succeeded in showing that subcontractors had plowed with four and six horses; but in those cases the plows were much smaller than that mentioned in the contract, and in those cases the plaintiff

showed that the plowing was not successful, and not up to the standard of ordinary plowing.

Appellant also urges that the evidence was not sufficient to warrant a finding and conclusion that the engineer acted either fraudulently, arbitrarily, or dishonestly, or without honest inquiry and investigation, or without sufficient information to enable him to make honest and true estimates. The appellant's chief engineer was a Mr. Bickel, under whose charge were a number of assistant engineers. It is conceded that the larger part of the Nelson Bennett contract was examined and superintended by an assistant engineer named Shobert. It is also apparent from the record that Bickel received practically all his information, reports, estimates, and classifications from Shobert. Differences arose between the Nelson Bennett Company and the land and water company at an early stage in the progress of this work over the treatment the contractor and subcontractors were receiving from the employés of the land and water company, and especially from the engineers. Mr. Bennett complained of the conduct of the assistant engineer, Shobert, charging him with being prejudiced against him and with wanting to "do him." As an illustration of the feeling of animosity existing, we quote the following from the testimony of Mr. Bennett: "I called Shobert over and talked quite a while with him. I said: 'Shobert, why do you want to do me? What is the matter with you?' He says, 'Well, you ought to know why I want to do you.' He says, 'You got me discharged off the Northern Pacific Railway.' I said, 'Bill'—I called him 'Bill' because that was his nickname. I believe that is his name. We so call him. I says: 'Bill, you are entirely mistaken. I cannot see how you arrived at any such conclusion.' He told me what his authority was; that it was the chief engineer of the Northern Pacific Railroad told him—Mr. Darling. I told him, if Darling said anything of that kind, he was mistaken; and there was a good deal of feeling in the matter. He says: 'I don't believe a word of it. I don't believe Darling would say that unless it was true.' He says, 'You got me fired off there, and I don't see why you should expect anything from me.' I told him I didn't expect anything from him except justice, and I was going to try to get that; and I told him again that there was absolutely and unqualifiedly no reason for any statement that I got him fired from the Northern Pacific. 'On the contrary, I was always your friend.' I found there was no use talking to him about it. He had got it firmly fixed, and was going to do me injury. I went back to Milner, and saw the chief engineer, and called his attention to this matter. I saw Bickel in regard to this conversation with Shobert—the animosity he had expressed toward me. I explained to Bickel the conversation I had had with Shobert, and Shobert's answer to

me. I said, 'Now, Mr. Bickel, it seems to me there should be something done in these premises; that it is not fair to myself, nor fair to these subcontractors who have to be punished if I am to keep a man over my work that expresses himself as having a desire to do me or to injure me; and he having such an opportunity to do it as to classify and return my estimates.' He asked me what I wanted him to do with him. I said: 'I don't want you to discharge him. You have plenty of work off my work. There is work below, location of that immense ditch and laterals. You could easily change him for one of the engineers of Faris-Kesl, or you could put him below.' He got up and said: 'The very fact that you want me to discharge him is evidence that you did get him discharged off the Northern Pacific. I will tell you right now that I will not discharge him for you.' I said, 'All right, Mr. Bickel, I cannot help it. It is wrong.' In the fall, later on, I had another conversation with Mr. Shobert in regard to his feeling toward me." Later on, Bennett had another conversation with Shobert in which there appears to have been considerable feeling manifested, and wherein Shobert informed Bennett that he intended to make him and his subs hew to the line, and that he was going to do him up if he could. There seems to be no question about this conversation taking place, and, indeed, about this feeling existing. For a chief engineer and a corporation for which he was working to retain the services of a man under such circumstances, and with knowledge of the feeling existing, and permit him to fraudulently act as umpire in the settlement of differences and disputes and the making of estimates and classifications, is in itself sufficient evidence of fraud and injustice to warrant any court in going back of his estimates and classifications and see that honesty and fair dealing is enforced. It was specifically stipulated in this contract that the word "engineer" should mean the "chief engineer" employed by the land and water company. It is true that in extensive works such engineer cannot measure every yard of earth and material moved, and classify the same personally, and that he must in some measure rely upon information derived from other sources. *Sweet v. Morrison*, 116 N. Y. 31, 22 N. E. 276, 15 Am. St. Rep. 376; *Palmer v. Clark*, 106 Mass. 373. On the other hand, "the decision, to be conclusive, must be a result of the deliberate and fair judgment of the engineer." *Walt, Eng. & Arch. Juris.* §§ 433, 503. The decision of the questions which arise and require the exercise of judgment of a quasi judicial character cannot be delegated by the chief engineer or umpire to any one. The parties in this case have agreed to abide the deliberate and fair judgment of the "chief engineer." In order for him to fairly, honestly, and justly exercise that judgment, it was necessary for him to hear the facts, and to take such steps as would enable him to come into possession

of the facts in controversy, or on which his judgment and decision depended. Such was not done.

The contract provided for any additional work, changes, or alterations that might be ordered by the land and water company or its chief engineer, and for the classification thereof and payment therefor in the same manner and under the same rules and regulations as set out in the contract and specifications for the main work. In the course of the construction of this canal, the company decided to have a dam built across what is called "Dry Creek," and which dam is referred to throughout the case as "Dry Creek Dam." No special contract, nor plans nor specifications, were drawn for this piece of work. The dam was about one mile long at the top. A difference arose between the Nelson Bennett Company and the engineer over the measurements of this work. The engineer allowed 100,273 cubic yards as his measurement. The court, after hearing the evidence, allowed 184,551 cubic yards. Small differences and disputes arose over other pieces of work, and extras and additional work. Among those items was that of "riprapping" and "bond plowing." Without going into a consideration of the evidence on these items and charges, we are content to dispose of them by saying that there is sufficient evidence in the record to justify the findings and conclusion of the court on each of them.

Appellant assigns as error that the court made excessive allowances, and that the total allowances made by the court under the various classifications amounted to some 38,000 cubic yards more than was contained in the works and was actually moved. It seems that respondent originally proceeded on the theory that the measurements made by the land and water company were in the aggregate correct, except as to those on the Dry Creek dam, and that the chief error was in the classification of the different material contained in the grand total. After the court had heard the evidence and made up its findings, he concluded, among other things, that, as a matter of fact, 78,948 cubic yards of solid rock had been removed; but, since a lien had only been claimed for 70,732 cubic yards, the plaintiffs were only allowed to recover for the latter amount. On the Dry Creek dam embankment he found that there had actually been removed 208,902 cubic yards, while the lien filed only claimed for 184,551; and the plaintiff was allowed to recover only to that extent. At the trial the Twin Falls Land & Water Company presented the measurements, estimates, and classifications made by their chief engineer, and relied upon them. They showed a total of 2,178,142.9 cubic yards of material as having been removed. The plaintiffs, in order to establish their case, had secured the services of an engineer named Bostaph, who went over the whole works and made tests and measurements; and he produced his measurements and computations in

court and testified concerning the whole works covered by the transaction. His figures disclosed a total of 2,236,757.9 cubic yards of material as having been handled. The difference between the totals furnished by the two engineers was some 58,000 cubic yards. There was a difference of over 48,000 on the Dry Creek dam alone, on which it was never admitted that the chief engineer's figures were correct. In the course of the trial the company admitted, apparently, several items of discrepancies, something over 1,000 yards on the Dry Creek dam, and some 1,680 yards removed on the first 40 feet of the plaintiff's contract. After all the allowances are made for corrections, it seems that the difference in the figures is upward of 3,000 cubic yards. Respondents admit in their brief that, after making all the additions and corrections to the figures made by the engineer of the appellant company, as admitted by the pleadings or upon the trial, the total number of cubic yards as allowed by the court in its findings exceeds the total measurements made by the company as shown by its figures in the sum of 3,162.2 cubic yards. The Nelson Bennett Company's engineer, Bostaph, who made the tests, measurements, and computations for the plaintiff, testified that his total estimates were within seventeen-hundredths of 1 per cent. of the total estimates made by the company, and that, on a work of the magnitude of this, it would be very difficult to make a closer calculation than that. He also testified that his total estimates were substantially the same as those made by the company's engineer, and that in some instances he had relied upon their figures as to total yards of earth removed, and in fact had consulted their maps and measurements in arriving at some of them. We think, in view of the proceedings had upon the trial and the conduct of the plaintiffs and their engineer, that the appellant was justified in relying on its total estimates as made by its engineers, and in combating only the attempt of the plaintiff to have a reclassification of the material that the company's figures showed had been removed. In view of this situation, we think the judgment ought to be modified to the extent of the excess shown in these total estimates over those shown by the appellant's engineer. The question, therefore, arises as to the classifications from which this deduction shall be made. As the principal contest was made over the change in classification of "hard pan" from that of common material to loose rock, and since the principal change made by the court was in this classification, we think the most favorable presumption that could be indulged in favor of the appellant would be that the mistake had been made in increasing the total number of yards of the classification designated as "loose rock," for which the appellant was required to pay at the higher rate, namely, 45 cents per cubic yard. We have therefore concluded to modify this judgment

to the extent of the overcharge in total number of cubic yards, admitted by respondent to be 3,162.2 yards, which, computed at 45 cents per cubic yard, will entitle the appellant to a reduction and modification of the judgment in the sum of \$1,423.

The sixth assignment of error is that so much of the mechanic's lien law of this state as allows attorney's fees to a lien claimant is unconstitutional, for the reason that it does not provide for an allowance to the adverse party in case he shall be successful. We had occasion to consider the validity and constitutionality of this statute in *Thompson v. Wise Boy Min. & Milling Company*, 9 Idaho, 363, 74 Pac. 958, and there decided adversely to appellant's contention here. We are still satisfied with the conclusion reached in that case as to the validity of this portion of the law and the right to recover attorney's fees in case of a successful prosecution of a lien, and for that reason will not pursue that assignment of error further. In this case, however, the court allowed both the Nelson Bennett Company and Toponce a total sum of \$10,000 for attorney's fees; and appellant contends that this sum is excessive. The evidence submitted to the trial court, upon which he found that this was a reasonable sum to be allowed, was sufficient in our judgment to authorize and justify the court in such a finding and conclusion. We are not prepared to say that, in a case of the magnitude of this, and of the peculiar character of the contract under which the plaintiff was operating, and the nature of the work and the obstacles with which he met in attempting to recover under the contract, and the obstinacy with which this case has been contested, \$10,000 is an excessive sum to be allowed as attorney's fees.

Numerous errors have been assigned against the rulings of the court in the admission and rejection of evidence. The particular objection to the ruling in each instance has not been pointed out by brief, nor have they been separately considered therein. Upon an examination of them, however, we are satisfied that the rulings of the court have generally been correct—in some instances, perhaps, erroneous; but it is clear to us that the appellant has not been injured or prejudiced thereby. This was an equity case, and no question of fact was submitted to a jury, and in such cases the rule as to the admission of evidence is much more liberal; and the appellate court will hesitate to reverse a judgment on account of an erroneous ruling in the admission of evidence, unless it appears that the court was proceeding on a wrong theory of the case, or that the admission or rejection of the evidence offered misled the losing party or surprised him, and in some way deprived him of some right, or embarrassed him in the presentation of some substantial part of his cause of action or grounds of defense.

After the entry of judgment, the plaintiffs

filed a cost bill, in which they claimed costs to the amount of \$2,488.60. The defendant Twin Falls Land & Water Company made a motion to retax costs, and supported the same by affidavit; and the two principal objections appear to have been, first, that mileage and per diem had been allowed to a number of subcontractors, who, while not parties to the action, were really interested in the outcome of the case, and were therefore such interested parties as were not entitled to per diem and mileage for attendance as witnesses; and, second, that mileage had been claimed for attendance of witnesses a distance of more than 30 miles. The court denied the motion, and the appellant assigns the same as error. The action of the court in denying the motion was clearly within the purview of the law as announced by this court in *Anderson v. Ferguson-Bach Sheep Company*, 12 Idaho, 418, 86 Pac. 41.

We are satisfied that there is no error in this record that has been called to our attention that would justify us in a reversal of the judgment herein. It is the order of this court that the judgment be modified and reduced in the sum of \$1,423, and that, as so modified and reduced, it be and is hereby in all other respects affirmed. Each party will pay its own costs incurred on this appeal.

The case is remanded, with direction that the judgment be modified as above indicated.

SULLIVAN and STEWART, JJ., concur.

On Rehearing.

PER CURIAM. A petition for a rehearing has been filed in this case; and, upon an examination of it, the court was at first disposed to strike it from the files on account of the disrespectful and discourteous language in which it was couched. However, since it was filed the resident attorney has withdrawn from the petition, and the court is satisfied that he took no part in the preparation of the same. On further consideration, the court concluded to and has made a careful examination of the questions raised by the petition, and we will proceed *seriatim* to consider them.

Counsel for petitioner raises six questions in his petition, all of which have been considered in the former hearing of this case, except one, and that is the first question suggested by the petition, to the effect that the respondent, the Nelson Bennett Company, showed no legal right to recover in this action, and that it affirmatively appears that it has no right to recover by reason of the fact that it had not complied with the requirements of the statutes of Idaho as to foreign corporations. The trial court in its first finding of fact found that the Nelson Bennett Company was an incorporation duly organized and existing under and by virtue of the laws of the state of Washington, and, during all of the times mentioned in the complaint, had carried on business as a contract-

or, in its corporate name, in Cassia county, state of Idaho, and at all of said times had accepted the provisions of the Constitution and complied with the laws of the state of Idaho relative to nonresident corporations doing business within this state. In support of this contention, counsel calls our attention to folio 707 of the transcript, wherein it is made to appear, on the trial of the case, the respondent's counsel offered in evidence a certificate, executed by the Secretary of State, dated December 1, 1904, reciting the fact that the articles of the incorporation of the Nelson Bennett Company were filed August 1, 1904, and marked "Plaintiff's Exhibit 11," which was received in evidence. It also appears in the transcript that counsel for respondent offered in evidence a certified copy of the written designation of agent by the Nelson Bennett Company from the county recorder of Cassia county, which certificate was marked "Plaintiff's Exhibit 21" and received in evidence. Those exhibits, with others introduced on the trial of the case, were brought to this court by stipulation of counsel for inspection, and many of them are not printed in the transcript. On an examination of said Exhibit 11, we find that the Secretary of State of the state of Idaho certifies that the Nelson Bennett Company filed, in his office on the 1st day of August, 1903 (not 1904, as stated in the transcript), a properly authenticated copy of its articles of incorporation. It also appears from plaintiff's Exhibit 21 that the Nelson Bennett Company had filed its written designation of agent upon whom process could be served with the county recorder of Cassia county as early as the 22d day of June, 1903. This evidence was amply sufficient to sustain the finding of the trial court to the effect that said respondent corporation had complied with the Constitution and laws of this state in regard to foreign corporations doing business in this state. Said Exhibit 11 shows that a mistake was made in the transcript at folio 707, where it recites that the certificate of the Secretary of State shows that the articles of incorporation of the Nelson Bennett Company were filed in the office of the Secretary of State on August 1, 1904, when, as a matter of fact, said certificate shows that said articles were filed August 1, 1903.

Another complete answer to this contention is that the court, by its first finding of fact, found that the Nelson Bennett Company was a foreign corporation, "and at all said times had accepted the provisions of the Constitution and complied with the laws of the state of Idaho relative to nonresident corporations doing business within this state." That finding was not excepted to, and there is no assignment of error in the record specifying in any manner that said finding is not supported by the evidence. Under the practice of this court, it will review no decision or ruling of the trial court unless the same is

assigned as error. And, under the rules of this court, the brief of appellant must contain a distinct enumeration of all errors relied upon by the appellant. The record contains no exception to said finding of the court, and appellant's brief contains no suggestion that that finding of the court is not supported by the evidence. It is too late to assign that finding of fact as an error and present it for the first time on a petition for a rehearing.

Another answer to this contention of petitioner is that the Nelson Bennett Corporation alleged in its complaint that it had complied with the requirements of the Constitution and statutes of this state in regard to filing its articles of incorporation and designating an agent upon whom service of process could be made; and the appellant in its answer denied that allegation on information and belief. That denial, on information and belief, is no denial of the allegations of the complaint above referred to; hence that allegation is admitted. The fact whether the respondent corporation had complied with the Constitution and laws of this state in regard to filing its articles of incorporation and designating an agent upon whom process could be served could have been ascertained by the appellant from the records of the office of Secretary of State, and of the auditor of the county where the principal business of the corporation was carried on, as the law requires them to be made matters of record there; and its denial of that fact upon information and belief is not sufficient and is no denial whatever. Under the provisions of section 4183, Rev. St. 1887, if a defendant has no information and belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in the answer, and place his denial on that ground; but this does not authorize a defendant to make a denial on information and belief when the truth of the fact alleged is a matter of public record and within his reach. This court has held in *Simpson v. Remington*, 6 Idaho, 681, 59 Pac. 360, that a denial on information and belief is not permitted "where by a mere inspection of a public record the defendant may have obtained the knowledge as to whether an execution had been issued and returned." This court again said, in *Work Bros. v. Kinney*, 7 Idaho, 460, 63 Pac. 596, when considering such denials, that, "This is not good pleading, and such denials of matters of record, within reach of the defendants, are insufficient."

We shall consider the second and third contentions as one, as they refer to the same stipulation in the contract on which this action was brought. It is contended that this court has erroneously construed the provisions of the written contract, which provide that the estimates of the engineer should not estop the company from annulling the other provision, making his decision final and conclusive between the parties. This court, in

effect, held that a stipulation in a contract, requiring the submission of differences and controversies arising thereunder to the chief engineer of one of the contracting parties as umpire, and leaving the measures, estimates, and classification of the work to him, and providing that his measurements and classifications shall not estop the party employing the engineer from disputing or questioning them, will not be enforced by the courts as a binding obligation against the other party to the contract. We still adhere to that rule. The contract provides as follows: "Said second party shall not be estopped by any estimate made by its engineer from showing at any time the true and correct amount and character of the work which shall have been done and materials which shall have been furnished by said first party, or by any person under this agreement." There the contract expressly provides that the second party shall not be bound by the estimates of its engineer of the amount and character of the work. We take it that that applies to all estimates of the several varieties of material required to be excavated and removed, and classification of the same. So far as the umpire is concerned, his decision is made binding upon the first party, and not binding upon the second, and, for that reason, the courts of this state will not enforce such a one-sided provision. Counsel cites in support of his contention the case of *Mundy v. Louisville, etc., R. R.*, 67 Fed. 635, 14 C. C. A. 583. That case involved a contract for the construction of a railroad, and contained a provision to the effect that, in computing the final estimate and giving his final certificate, the engineer should not be bound by any preceding estimates and certificates, but that such preceding estimates and certificates should be held to be only approximate to the final estimate. That is a very different provision from the one under consideration. That authorizes the engineer to correct his first estimates in his final estimate; but it did not relieve the second party from the decision of the engineer as made by his final estimates, as does the contract under consideration. The estimate of the chief engineer, under the provisions of the contract involved in this case, does not bind, and was not intended to bind, the second party, and for that reason the contract in the case at bar is not similar in that regard to the one in the *Mundy Case* above cited.

It is also contended that this court has expressly found that the lower court was authorized to go behind the stipulation of the contract as to the finality of the chief engineer's decision, and thus sets aside the contract for constructive fraud of the chief engineer, and contends that the court lays down a new rule of law in that regard. Counsel seems to misapprehend, or does not desire to understand, the decision in that regard. In support of this contention, coun-

sel quotes as follows from the opinion: "The decision of the questions which arise and require the exercise of a judgment of a quasi judicial character cannot be delegated by the chief engineer or umpire to any one. The parties in this case have agreed to abide by the deliberate and fair judgment of the 'chief engineer.' In order for him to fairly, honestly, and justly exercise that judgment, it was necessary for him to hear the facts, and to take such steps as would enable him to come into possession of the facts in controversy, or on which his judgment and decision depended. Such was not done." Counsel says that he does not propose that the implications which arise therefrom shall go unchallenged. The quoted portion of the opinion fairly expresses the views of this court upon the point there under consideration. The record clearly shows that the chief engineer took the estimates and classifications from his subordinates. He knew that his subordinate, Shobert, was very much prejudiced against Mr. Bennett, and threatened to "do him." Mr. Bennett informed Mr. Bickel of this fact, and requested him to place some other engineer who was not prejudiced against him in charge of his work. Mr. Bickel's reply indicated that Mr. Shobert was just the kind of a man he wanted as a subordinate; and Mr. Bickel exhibited, as we gather from the record, such arbitrary and wanton disregard of the Nelson Bennett Company's rights as to be equivalent to fraud. This court has held that, in order for the chief engineer to honestly and justly exercise his judgment in regard to the matter in controversy, it was necessary for him to hear the facts and to take such steps as would enable him to come into possession of the facts in controversy, and that he had not done so. We think the record fully justifies the conclusion the court reached on that point.

In this connection it is contended in the third specification that this "court has abrogated the stipulation of the contract, making the decision of the engineer final, not because of any actual or positive fraud or dishonesty, bias or prejudice, but for mistakes of policy, or constructive fraud, thereby declaring a new rule of law, heretofore unheard of." The court has done nothing of the kind, and no such construction can reasonably be drawn from the opinion. The trial court found as follows: "That the said chief engineer wrongfully, arbitrarily, and without having made proper examinations, inspections, and tests, and without having made proper observations, and without sufficient knowledge upon which to found a just judgment in respect to the kind, quality, and classification of materials, and in violation of good faith and duty, did make, cause to be made, and permit untrue and grossly erroneous estimates and classifications of the kind, character, and amount of materials removed and placed and work done by said

plaintiff. The said chief engineer in arriving at his conclusions based his judgment almost entirely upon reports made to him by his subordinates, and without any due or proper examination made by him to verify these reports. That the reports of the subordinates were grossly incorrect and untrue." If that finding of the trial court is not sufficiently strong to satisfy counsel that the court found the chief engineer exhibited such an arbitrary and wanton disregard of respondent's plain rights under the contract as to be equivalent to fraud, or had committed errors and mistakes to the respondent's prejudice so gross and palpable as to leave no doubt in the mind of the court that grave injustice had been done to the respondent, it must require very strong language to satisfy him. In effect, the trial court found that said engineer was guilty of fraud, although the word "fraud" was not used in that finding. The words "wrongfully," "arbitrarily," "without sufficient knowledge," "in violation of good faith," "grossly erroneous," "grossly incorrect," and "untrue" are used in said finding. If that finding only finds that said engineer was moved by "mistakes of policy" only, and not by fraud, as suggested by counsel, then we do not understand the language used therein. The contract considered in *Mundy v. Louisville R. R. Co.*, supra, expressly stipulated that the decision of the engineer should not be conclusive in case of "fraud or mistake." But the court there held that the stipulation in the contract, to wit, that the engineer's decision should not be conclusive in cases of fraud or mistake, did not vary the construction of the contract; that in such a contract the exception therefrom of fraud or mistake would be implied, if they were not expressed in the contract; that that exception in such contract is always implied, whether it is written in the contract or not. We think that the correct rule. That provision is not contained in the contract under consideration, but it is clearly implied therein, and the contract will be construed the same as though it were written in the contract.

The court has not desired to reflect on the integrity of any person, as insinuated by counsel for the petitioner, but is controlled solely by the facts as they appear in the records before us. Counsel, with some asperity, has deemed it wise to suggest in his petition for a rehearing that the standing of the engineers referred to, for fairness and honesty, will continue to be of the best, regardless of the decision of this court. So far as this decision is concerned, it is immaterial to us what their standing ever has been or continues to be. We have been called upon to decide this case upon the record, regardless of the standing of any of the persons named therein, and, if their candor and fairness is impeached by evidence in the record, we are not responsible for that.

It is next contended that the court misap-

prehended the proof in respect to certain items of work in the "hard pan," and for that reason failed to reduce the judgment as it ought to have been. We have gone through the evidence and carefully considered the extensive quotations therefrom contained in the petition, and we are fully convinced that the conclusion reached by the court is correct and should be sustained. The controversy arises mostly from the classification of the hard pan. While it is true the evidence shows that much of said hard pan was plowed with a 10-inch plow and 6 horses, it is also true that the evidence shows that, in plowing with 6 horses and a 10-inch plow, the plow was so set as to cut but 6 or 8 inches in width; and under the contract all hard pan, or all earth that could not be successfully plowed with a 10-inch plow and 6 horses, was to be classified as "loose rock"; and, simply because many of the contractors did, as they testified, "wear the hard pan out" with a 10-inch plow and 6 horses, the record does not show that they could successfully plow it with 6 horses and a 10-inch plow. There is nothing in this contention.

It is next contended that the court is mistaken as to the state of the proof as to the total quantity of material removed, and upon the uncontested facts the judgment should be further reduced. It was alleged in the complaint that there had been placed 184,551 cubic yards of embankment in the Dry Creek dam, and the answer admitted that there had been placed there 176,073 yards. It was contended that respondent should be paid for only 160,273 cubic yards thereof, that being "within the lines of the stakes and directions given by defendant's engineer"; and it is averred that respondent was to put a two-foot excess on the sides and top of the dam without pay. It was admitted that there was more material actually placed on the Dry Creek dam than was included in the measurements of the company's engineer, and it appears that said excess amounted to something over 20,000 yards. It is clear from the record that there was a dispute in regard to the quantity of material placed in the Dry Creek dam, and the court found that there were 208,992 cubic yards placed therein, and that the appellant allowed respondent for only 160,273 cubic yards placed therein. Counsel for appellant admits, on page 106 of his brief, that respondent never admitted that the total measurements of the chief engineer of the Dry Creek dam were correct. The transcript and the briefs of counsel clearly show that there was a contest over the amount of material placed in said dam. After again going over the matter, we are satisfied that our former decision herein is correct. So far as the classification of the material is concerned, we are satisfied with the conclusion reached in our original decision.

The next question raised by the petition is an allowance of \$1,008 for "bond plowing"

on the main canal. There is nothing whatever in the contract or specifications requiring "bond plowing." In the specifications for the Dry Creek dam, which were handed the respondent some time after he had commenced work on his contract, was a specification for "bond plowing," and it is as follows: "The surface will then be thoroughly plowed, first, in a direction parallel with the stream bed, and the second time, parallel with the axis of the dam, throwing up ridges and making deep furrows between." There is no requirement in the contract or specifications for "bond plowing" anywhere on said canal, except as above set forth, and that applies only to the Dry Creek dam.

It is contended that, as respondent agreed to construct the banks of the canal in a good, workmanlike manner, out of materials excavated out of the prism of the canal, making the embankment as near water-tight as possible, of suitable materials, to be judged by the engineer, and in accordance with his instructions, respondent was required to do certain "bond plowing," and that, in order to do said work in a workmanlike manner, "bond plowing" must be done. It was held by the trial court that, under those provisions of the contract, "bond plowing" was not required to be done, or, if done under the orders of the engineer, a reasonable compensation should be paid therefor. We think that ruling of the court is correct, and that, under the terms of said contract, whenever the respondent did "bond plowing" under the orders of the chief engineer, he was entitled to receive compensation therefor.

We find no merit in the petition. A rehearing is denied.

(77 Kan. 179)

EBLE v. STATE ex rel. LEAVENWORTH COUNTY ATTORNEY.

(Supreme Court of Kansas. Jan. 11, 1908. Rehearing Denied Feb. 14, 1908.)

1. HIGHWAYS—OBSTRUCTIONS—PERSONS ENTITLED TO ENJOIN—COUNTY ATTORNEY.

The county attorney has power to bring a suit in the name of the state to enjoin obstructions to travel upon a public highway without authority from the board of county commissioners, and notwithstanding the disinclination or refusal of the local highway officers to move in the matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 431.]

2. SAME—ESTABLISHMENT—BOND—SUFFICIENCY.

A bond given at the institution of proceedings to open a road under the law of 1868 (Gen. St. 1868, c. 89, § 1) is not void because signed by one petitioner as principal and by a single surety who is also a petitioner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 217.]

3. SAME—LIMITATION OF TIME TO OPEN.

The statute vacating roads and barring authority for opening roads which have remained unopened for seven years after orders have been made or authority has been granted for opening them does not apply to a discontinuance of use after a road has been opened.

4. ADVERSE POSSESSION—PROPERTY SUBJECT TO PRESCRIPTION—PUBLIC HIGHWAY.

A private individual cannot obtain title to a public highway by adverse possession. Lapse of time will not bar the remedies of the state against encroachments upon a highway. An obstruction to the public use of a highway is a continuing nuisance, and no equities in favor of a person committing such a nuisance can be founded upon the acquiescence of the highway or other officials, or upon their laches in taking steps to punish or abate it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 43-57; vol. 25, Highways, §§ 417-422.]

5. WRIT OF ERROR—HARMLESS ERROR—SUBSTANTIAL PREJUDICE.

It must appear that the denial of a request upon the trial court to state findings of fact and conclusions of law separately has prejudiced the substantial rights of the party making the request before a judgment will be reversed because of such denial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4047-4051.]

(Syllabus by the Court.)

Error from District Court, Leavenworth County; J. H. Gillpatrick, Judge.

Action by the state, on relation of the county attorney of Leavenworth county, against Joseph Eble. Judgment for plaintiff, and defendant brings error. Affirmed.

F. S. Jackson, Atty. Gen., and Lee Bond, Dawes & Rutherford, for plaintiff in error. Jno. T. O'Keefe, for defendant in error.

BURCH, J. The state of Kansas, on the relation of the county attorney, brought an action to enjoin the defendant from the commission of a nuisance by the obstruction of a public highway. The action was instituted without consulting the board of county commissioners, and without authority obtained from them. Private parties applied to the county attorney for the relief asked, and indemnified the state against costs. Private counsel prepared the papers and conducted the trial of the case; but the county attorney signed and verified the petition, appeared at the trial, and participated in the conduct of the proceedings. On May 31, 1906, at the conclusion of the trial, the court announced orally what its judgment would be. The defendant then proposed to dedicate and open a road through his premises satisfactory to all parties in lieu of the highway obstructed, and the court for the purpose of giving him an opportunity to do so stated that it would take the case under advisement. On June 19, 1906, a regular motion day under the rules of the court, the defendant for the first time made a request for separate findings of fact and conclusions of law. The request was denied as coming too late, the court calling attention to the fact that the judgment had already been indicated, and that the proceedings were kept open merely on the proposal of the defendant referred to. On the next motion day a week later the request for separate findings of fact and conclusions of law was renewed and denied. On July 7th the court made findings, and rendered judg-

ment as follows: "Now on this 7th day of July, 1906, this case came on for further consideration, and the court having heretofore heard the evidence and the arguments of counsel, and being well advised in the premises, finds that the road described in the petition in this case, and known as the 'Lynn Road,' was duly and legally established and opened for travel in 1871, and ever since such time has been a public highway; and the court further finds that for more than 15 years prior to the commencement of this action the defendant maintained fences, cattle sheds, and other obstructions in and across said public highway, and continued to maintain said obstructions up to the trial of this case. It is therefore now here by the court considered, ordered, and adjudged that said defendant, Joseph Eble, is guilty of maintaining a public nuisance. It is further considered, ordered, and adjudged and commanded that said defendant, Joseph Eble, abate said nuisance within 60 days from this date by removing all of said obstructions, except his barn, from said highway, and he is hereby perpetually enjoined from obstructing the same or any part thereof in any manner whatsoever except as the same is now obstructed by said barn." The defendant prosecutes error.

It is claimed the county attorney had no authority to bring the suit. The statutes making it the duty of the township trustee to prosecute violations of the road law and giving him authority to remove obstructions, and the statutes prescribing the powers and duties of boards of highway commissioners and road overseers, are cited. The decisions of this court to the effect that the board of county commissioners has control of the business and financial affairs of the county, and has charge of all litigation in which the interests of the county are involved, are also cited. These statutes and decisions do not govern the controversy. The state at large has an interest in keeping the highways in every county free from obstruction to public travel, no matter what the attitude of the local authorities upon the question may be. The willful obstruction of a highway is a public offense, which the state may prosecute, even though the township trustee be disinclined or refuse to do so. Such an obstruction may be enjoined and abated as a common nuisance by the state, even though the board of county commissioners should be opposed to the suit; and the Legislature has made it the duty of the county attorney to prosecute on behalf of the people all suits, civil or criminal, arising under the laws of the state in which the state is a party or is interested. Gen. St. 1901, § 1777. It is claimed the county attorney delegated the authority of his office to the private counsel, who did the work in the case. Manifestly this is not true. It was the county attorney's law suit all the time, and it is not very important in this proceeding in error who drew the papers or led in the trial.

The meritorious question is if the judgment is correct?

It is said no highway was ever established, because the security of the bond given when application was made to lay out the road was insufficient. The statute of 1868 under which the road was established provides that one or more of the signers of the petition shall enter into a bond with sufficient security, payable to the state of Kansas, conditioned for the payment into the treasury of the county of all costs and expenses in case the prayer of the petitioner shall not be granted. Gen. St. 1868, c. 80, § 1. The bond was signed by one of the petitioners as principal, and by another petitioner as surety. Section 6 of the act referred to seems to contemplate that there may be a single obligor in the bond, indicating that perhaps the words "with sufficient security" might mean "in a sufficient sum." However this may be, the bond of one petitioner with one surety complies with the law, and the fact that the surety is also a petitioner does not render the bond void on its face and make the proceeding open to collateral attack. The statute is cited vacating roads and barring authority for opening roads which have remained unopened for seven years after orders have been made, or authority has been granted for opening them. Gen. St. 1901, § 6058. This statute does not apply to a discontinuance of use after a road has been opened. The regular procedure for vacating roads must then be followed. The court found specifically that this road had been opened.

Certain evidence was tendered which the court declined to consider. It showed that in November, 1903, a petition was presented asking the board of county commissioners to submit to the electors a proposition to build a bridge at a ford on the road in controversy. Remonstrances were filed. The county surveyor recommended a change in the road "by reason of improvements obstructing the original location of road as shown on plat." The commissioners refused to submit the bridge proposition, and ordered "that the road at the place in question be not ordered open, but be and remain vacated." It is not pointed out how this evidence could have inclined the court in the defendant's favor. The proceeding did not start as one to vacate a road, but as one to build a bridge. No single step essential to the vacation of a road was taken, and it is difficult to see how the proceeding could terminate in a valid judgment of vacation. Considered as the recorded opinion of the board of county commissioners upon the status of the road, the order was neither binding nor enlightening. In no other light does the evidence appear to have been relevant, and no error was committed in excluding it. The court likewise rightfully declined to hear evidence of the value of the barricading improvements. The wrong to

the public could not be palliated, because of the amount of money expended by the wrongdoer in its perpetration. Perhaps the evidence might have appealed to the court's discretion; but the court took into consideration the character and location of the offending property in exercising his discretion over the allowance of the equitable remedy sought, as the judgment clearly shows, and this was sufficient.

It was admitted upon the trial that the obstruction to travel upon the road had been maintained for more than 15 years. The defendant claims the statute of limitations has run against the state, that he has acquired title to the road by adverse possession, and that the state is at least estopped to clear the road of obstructions. The weight of authority, supported by the better reasoning, is opposed to this view of the law. The courts of several states have changed their earlier rulings and adopted the modern doctrine. The question is discussed in an elaborate note in 87 Am. St. 775, where authorities are collated, and in Elliott on Roads and Streets, § 882 et seq. See, also, 26 L. R. A. 449, n. This court is already committed to the doctrine that a private individual cannot obtain title to a public highway by adverse possession, that lapse of time will not bar the remedy of the state against encroachments upon a highway, that an obstruction to the public use of a highway is a continuing nuisance, and that no equities in favor of a person committing such a nuisance can be founded upon the acquiescence of the highway or other officials, or upon their laches in taking steps to punish or abate it. *McAlpine v. Railway Co.*, 68 Kan. 207, 75 Pac. 73, 64 L. R. A. 85; *Webb v. Commissioners*, 52 Kan. 375, 34 Pac. 973; and cases cited in those opinions.

Error is assigned because the court denied the request for separate findings of fact and conclusions of law. The request came too late. The trial was ended, and the character of the judgment indicated when the request was made. The case was, in fact, decided; but it was held open to enable the defendant to avoid the consequences of the decision which only needed formal promulgation to make it conclusive. Even if this were not true, another principle applies. The issues were few and simple. The findings embodied in the journal entry cover substantially all questions of fact essential to a decision. The court's views of the law are so plain they cannot be mistaken. The defendant does not even suggest that he has been unable satisfactorily to present his case to this court because findings of fact and conclusions of law were not separately stated. He makes no claim of prejudice. A rule of procedure has been violated without injurious consequences. Section 140 of the Civil Code reads as follows: "The court in every stage of action must disregard any error or defect in the pleadings or proceedings which

does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." It must appear that the denial of a request upon the trial court to state findings of fact and conclusions of law separately has prejudiced the substantial rights of the party making the request before a judgment will be reversed because of such denial. See *Caldwell v. Bigger* (Kan.) 90 Pac. 1095.

The judgment of the district court is affirmed.

KROEGER v. PASSMORE.

(Supreme Court of Montana. Feb. 10, 1908.)

1. FALSE IMPRISONMENT—DEFINITION—INTENT AND MALICE—PROBABLE CAUSE.

Under Pen. Code, § 420, defining false imprisonment as the unlawful violation of the personal liberty of another, neither malice, nor, ordinarily, want of probable cause, is an element of the right to recover for false imprisonment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Imprisonment, §§ 1-16.]

2. SAME — ACTIONS — SUFFICIENCY OF EVIDENCE.

In an action for false imprisonment, evidence held sufficient to support a verdict for plaintiff.

3. SAME—DAMAGES—EXCESSIVE DAMAGES.

Where, in an action for false imprisonment, there was evidence that plaintiff went to defendant's office to sign a deed conveying property to a third person, that defendant handed the deed to plaintiff, who, after reading it, refused to return it to defendant, who thereupon told plaintiff that she could not leave without surrendering the deed, and requested his brother to call the sheriff; that plaintiff was detained about three-quarters of an hour, during which time there were many people in the office, and others about the building, and plaintiff testified that as a result of the detention she became very nervous and sick from the shock of it, and, feeling that she was disgraced, did not leave her house for nearly a week thereafter—a verdict for plaintiff for \$250 would not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Imprisonment, §§ 109-115.]

4. SAME—DEFENSES.

Treating false imprisonment as a tort, as distinguished from a crime, the only defenses which may be interposed are a denial of the imprisonment and a justification thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Imprisonment, §§ 74-79.]

5. APPEAL — REVIEW—VERDICT ON CONFLICTING EVIDENCE.

Where the evidence, though conflicting, is sufficient to justify a finding for either party, the verdict will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

6. FALSE IMPRISONMENT—JUSTIFICATION.

When a private person seeks to justify his imprisonment of another, it must appear that he has complied with the law warranting such imprisonment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Imprisonment, §§ 74-79.]

7. SAME — DEFENSES — ARREST BY PRIVATE PERSON—INSTRUCTIONS.

Pen. Code, § 1633, provides that a private person may arrest another (1) for a public offense committed or attempted in his presence; (2) when the person has committed a felony, al-

though not in his presence; (3) when a felony has, in fact, been committed, and he has reasonable cause for believing the person arrested to have committed it. Section 1643 provides that a private person who has arrested another for the commission of a public offense must without unnecessary delay take the person arrested before a magistrate or deliver him to a peace officer. Held that, in an action for false imprisonment, an instruction requested by defendant that the law gives a private person the right to arrest another when the party arrested has committed, or is about to commit, a public offense in the presence of the party arresting, and that if the jury believed that plaintiff had taken from defendant property of defendant, and that defendant was attempting to recover it from plaintiff at the time plaintiff alleged she was restrained, they should find for defendant, was properly refused, as not calling the jury's attention to all the facts which must be shown under said sections 1633 and 1643 in order to constitute a justification.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

Action by Lavina Kroeger against Charles S. Passmore. From a judgment for plaintiff, and from an order denying defendant's motion for new trial, he appeals. Affirmed.

C. M. Parr, for appellant. Mackel & Meyer, for respondent.

HOLLOWAY, J. This is an action for damages for false imprisonment. The plaintiff had judgment. The defendant moved for a new trial, which motion was denied by the trial court upon condition that the plaintiff remit \$250 of the amount of the verdict, which was done. Defendant thereupon appealed from the judgment and from the order denying him a new trial.

The errors assigned by the appellant are insufficiency of the evidence to justify the verdict, the refusal of the trial court to grant a motion for a nonsuit, refusal to direct a verdict for defendant, and refusal of the court to give the following instruction: "The court instructs the jury that the law of this state gives a private person the right to arrest another when the party arrested has committed or is about to commit a public offense in the presence of the party arresting; and in this case, if you believe from the evidence that plaintiff had taken from defendant property of defendant, and that defendant was attempting to recover his property from plaintiff at the time plaintiff alleges she was restrained, then your verdict must be for the defendant." In 1905 Henry Kroeger and Lavina Kroeger owned and occupied certain real estate in Butte, at 811 West Galena street. In November of that year Henry Kroeger listed the property for sale with the defendant, a real estate agent; the selling price agreed upon at that time being \$6,000. In March, 1906, Passmore had an offer for the property at \$5,750, made by Mrs. Cora L. Lindsay. He thereupon made what he understood to be satisfactory arrangements with the Kroegers for a sale of the property at that price, \$2,000 of which was to be paid in cash. On March 27, 1906,

Henry Kroeger executed a deed conveying the property, and he and Mrs. Lindsay put the deed in escrow with Passmore as depository, under an agreement that upon the further payment by Mrs. Lindsay of the sum of \$3,750 within 60 days, with interest at 8 per cent. per annum, the deed was to be delivered to her. The parties apparently all understood that Mrs. Kroeger was to sign the deed and escrow agreement, and on March 28th Passmore took the deed and agreement to Mrs. Kroeger for the purpose of having her execute them. Some misunderstanding arose as to the amount of money to be paid at that time, and consideration of the matter went over until the following day. On the afternoon of March 29th Mr. and Mrs. Kroeger went to Passmore's office by appointment with him. As to what occurred there at that time the evidence is very conflicting.

The jurors were the exclusive judges of the credibility of the witnesses; and, by the general verdict in plaintiff's favor, they indicated that they believed the version presented by her and her witnesses, which was to the effect: That she and her husband went into Passmore's office, which was in the front of a building occupied by him; the entrance to the office being through a narrow passageway between the end of a high desk and the wall of the building. That Mr. and Mrs. Kroeger sat down in the office. That Passmore then asked Mrs. Kroeger if she would sign the deed, to which she replied, "Yes; if you have the check for me," meaning a check for the remaining \$3,750, which amount Mrs. Kroeger contends was to be paid at that time. That Passmore handed Mrs. Kroeger the deed. That she read it and kept it. That Passmore requested her three or four times to return the deed to him, and that she refused to do so. That, after reading the deed, she told Passmore that she knew it was hers, and that Passmore then said, "You cannot leave this office until you give me that," and turned to his brother, saying, "John, call the sheriff." That Passmore closed the door, and stood in the passageway leading into the office. That Mrs. Kroeger got up to leave the office, and that it was then that Passmore made the remark that she could not leave the office with the deed. That she was detained there about three-quarters of an hour from the time she got the deed until her attorney arrived, soon after which she was permitted to leave. That during the time she was detained there there were many persons in the office and others about the building. With respect to the effect of the detention upon the plaintiff, she testified: "The effect of all this was to make me very nervous. I was sick from the shock of it. You might know what effect it had on me. I was never in that position before. As to what effect it had on me when he threatened to call the sheriff, I said, 'If you call the sheriff, you must call a carriage,' because I could not have such a disgrace.

I made the remark, and he was there, and I was very nervous. I was very much humiliated and disgraced. I felt that I was disgraced. After that I did not leave the house for nearly a week." In view of the evidence introduced on behalf of the plaintiff, the court was clearly correct in denying the motion for a nonsuit, and also the motion for an instructed verdict; for "the defendant's evidence, though contradictory in some particulars of that put in by the plaintiff, did not make out a case so clear and indisputable as would have justified the court in giving the peremptory instruction requested." *Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; *Stephens v. Elliott*, 36 Mont. —, 92 Pac. 45.

False imprisonment is treated as a tort, and also as a crime. The definition is the same in either case. In our Code it is defined as "the unlawful violation of the personal liberty of another." Pen. Code, § 420. It has been held that the liability of the wrongdoer does not depend primarily upon his mental attitude. 19 Cyc. 319. Neither malice nor, ordinarily, want of probable cause, is an element of the right to recover. 19 Cyc. 320. "All of the authorities declare that neither malice nor, ordinarily, want of probable cause is an essential element of the right of action. If the imprisonment is lawful, it does not become unlawful because done with malicious intent. If the conduct is unlawful, neither good faith, nor provocation, nor ignorance of the law is a defense to the person committing the wrong, in a civil, as distinguished from a criminal, proceeding. The normal effect of malice or absence of malice is respectively to aggravate or mitigate the damages." And, again, it is said: "False imprisonment may be committed by words alone, or by acts alone, or by both. It is not necessary that the individual be actually confined or assaulted or even that he should be touched. But there must be personal coercion of some sort exercised by defendant over plaintiff in order to subject the former to liability." 19 Cyc. 323. In *Comer v. Knowles*, 17 Kan. 440, it is said: "False imprisonment is necessarily a wrongful interference with the personal liberty of an individual. The wrong may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or by both. It is not necessary that the individual be confined within a prison, or within walls; or that he be assaulted, or even touched. It is not necessary that there should be any injury done to the individual's person, or to his character or reputation. Nor is it necessary that the wrongful act be committed with malice, or ill will, or even with the slightest wrongful intention. Nor is it necessary that the act be under color of any legal or judicial proceeding. All that is necessary is that the individual be restrained of his liberty without any sufficient legal

cause therefor, and by words or acts which he fears to disregard." Under these authorities it is apparent that the evidence is sufficient to support a verdict in favor of the plaintiff. See, also, 12 Am. & Eng. Ency. Law (2d Ed.) 736, and cases cited.

But it is said that the evidence is not sufficient to sustain a verdict or judgment for \$250. The trial court properly called the attention of the jury to the provisions of section 4330 of the Civil Code as to the measure of damages in a case of this character, and after a careful consideration of the entire case as made, and upon a review of it on motion for new trial, that court reduced the amount of the verdict from \$500 to \$250, and with its determination as to the fairness of the amount of the reduced verdict we do not feel inclined to interfere.

Treating false imprisonment as a tort, as distinguished from a crime, the only defenses which may be interposed will at once be suggested: (1) A denial of the imprisonment; and (2) a justification of the imprisonment. Apparently defendant relied upon both of these defenses. So far as the question of plaintiff's imprisonment is concerned, the answer is a general denial of the allegations of the complaint; and the evidence offered on behalf of the defendant is ample, if believed by the jury, to make out this first defense completely. But by the general verdict the jury manifested its determination not to accept as the facts the defendant's version of what occurred in his office on March 29th; and, since the evidence is conflicting, we cannot interfere, as it is sufficient to have justified a finding for either party with respect to that particular matter. By offering the instruction set forth above, the defendant evidenced his intention to rely upon the second defense as well as the first. But the instruction is erroneous, and was properly refused. It falls far short of stating the rule applicable to that defense. Under our system of government we do not recognize the right of a private individual to take the law into his own hands to redress his grievances. The law itself furnishes him an ample remedy. When a private person, then, seeks to justify his imprisonment of another, it must appear that he has complied with the law which warrants such imprisonment. The particular provisions of the law which defendant invokes are found in section 1633 of the Penal Code, which section reads as follows: "A private person may arrest another: (1) For a public offense committed or attempted in his presence. (2) When the person arrested has committed a felony, although not in his presence. (3) When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it." But in connection with this section there must also be read section 1643, which is a part of the same chapter of the Code, relates to the same subject-matter, and may rightly be

said to be a limitation upon the provisions of section 1633 above. The latter section reads as follows: "A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer." Assuming, then, for the sake of this argument, everything in favor of the defendant as claimed by his counsel with respect to this defense, it appears at once that the offered instruction does not cover the ground, in that it does not call the attention of the jury to all of the facts which must be made to appear under sections 1633 and 1643 above in order to constitute a justification of the defendant.

We find no error in the record. The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

MANUEL v. TURNER et al.

(Supreme Court of Montana. Feb. 13, 1908)

1. JUDGMENT—DEFAULT—EXTENT OF RELIEF.

Under Code Civ. Proc. § 1003, declaring that the relief granted to plaintiff, if there be no answer, cannot exceed that demanded in the complaint, and also under the stipulation with plaintiff of defendants T. that the allegations of the complaint were true, that said defendants had no defense and would file no answer, and that their demurrer to the complaint might be overruled, their default might be entered, and judgment might be entered against them in accordance with the prayer of the complaint, it is error, where the complaint merely sets out mortgages and prays their foreclosure against said defendants, for the decree, after providing for sale of the property and application of the proceeds to satisfaction of the mortgages, to provide for application of the surplus to satisfaction of judgments against one of said defendants, set up in plaintiff's replication to the subsequent answer of another defendant, and alleged to be owned by plaintiff and to be a lien on the property.

2. SAME—PLEADINGS TO SUSTAIN.

A judgment for plaintiff for affirmative relief cannot be supported on allegations which appear in the replication only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 232-235.]

3. DOWER — JUDGMENT AGAINST HUSBAND — EXTENT OF.

The lien on property of a judgment against a husband is subject to the interest of his wife, whether arising from a tenancy in common with her husband or out of her right of dower.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dower, §§ 78, 79.]

4. JUDGMENT—DEFAULT.

Where the complaint to foreclose a mortgage against T. states that the other defendants have or claim interests in or liens on the premises, as judgment or attaching creditors, but that their interests or liens are subordinate to plaintiff's mortgage, and demands that the priority of the mortgage lien be fixed and established, and that the liens of such other defendants be declared inferior to them, the decree, on default of T., may adjust the rights as between plaintiff and such other defendants.

Appeal from District Court, Jefferson County; Lew L. Callaway, Judge.

Action by Josephine Manuel, administratrix of Moses Manuel, deceased, against Dima S. A. Turner individually and as administratrix of Davis C. Turner, deceased, and others. From the decree, defendant Turner appeals. Modified and affirmed.

Galen & Mettler, for appellant. Word & Word, for respondent.

BRANTLY, C. J. This action was brought to obtain a decree foreclosing three several mortgages upon lands situate in Jefferson county and described in the complaint, which were executed by Davis C. Turner and his wife, Dima S. A. Turner, to various persons to secure the payment of as many promissory notes, each one bearing the same date as the one of the mortgages intended to secure it. At the time of his death the plaintiff's intestate was the owner of all of these notes and mortgages. The second and third of the mortgages cover the lands described in the first, as well as others, but the record is silent as to what were the several interests of these defendants in any of them. The date of the third, and the junior, mortgage, was January 21, 1903. The other two were executed some years prior to that date. The complaint contains three separate counts, each one setting forth the allegations necessary to warrant foreclosure. George M. Bourquin and the T. C. Power Company were made defendants; it being alleged that they each claimed some interest in or lien upon the mortgaged property as judgment or attachment creditors or otherwise, but that their interests were subject and subsequent to the liens of plaintiff's mortgages. The prayer demands the usual decree of foreclosure as against the Turners, husband and wife, that the priority of plaintiff's mortgage liens over those of George M. Bourquin and the T. C. Power Company be fixed and established, that the property be sold to satisfy plaintiff's mortgages, and that the plaintiff have such other and further relief as to the court may seem just and equitable. The action was brought on March 6, 1906. After being served with summons, the Turners filed a general demurrer. This was on March 21st. On April 24th they entered into a stipulation with plaintiff, in which it was agreed that all the allegations of the complaint were true; that the Turners had no defense and would file no answer; that their demurrer might be overruled; that their default might be entered on or after July 11, 1906; and that at any time after that date judgment might be entered against them in accordance with the prayer of the complaint, unless the amounts due on the several promissory notes had been paid. Default was entered against them on July 13th; no payment having been made. In the meantime, on March 14th, the

defendant Bourquin filed his answer, admitting the truth of the allegations of the complaint, and alleging that he was the owner of a judgment against Davis C. Turner which had been recovered on February 2, 1904, and was a lien upon the property described in the complaint. He asked that the surplus remaining after the satisfaction of plaintiff's mortgages be applied to the satisfaction of his judgment. The defendant T. C. Power Company filed its answer on April 18th. It is alleged that on October 16, 1902, it brought its action against Davis C. Turner in the district court of Lewis and Clark county; that it caused an attachment to be issued therein, directed to the sheriff of Jefferson county, and to be levied upon all the lands described in the complaint; that thereafter a judgment was given and made in said action in its favor for \$103.85; and that thereafter a transcript of said judgment was filed in the office of the clerk of the district court of Jefferson county, and thus became a lien upon all of said lands from the date of the levy of the attachment paramount to plaintiff's lien under said mortgages. The prayer demanded that upon final decree its lien be adjudged paramount to that of plaintiff, and that its judgment be first paid out of the proceeds of the sale of the property.

The allegations of Bourquin's answer were not controverted by any one. To the answer of the T. C. Power Company the plaintiff filed a replication, in which, after putting in issue many of the material allegations thereof, it is alleged, "as separate defenses, cross-complaints, and counterclaims," (1) that on February 6, 1901, a judgment was duly given and made by the district court of Lewis and Clark county in favor of the Thomas Cruse Savings Bank, a corporation, against the defendant Davis C. Turner for \$610.05; that thereafter a transcript of this judgment was filed and docketed in the office of the clerk of the district court of Jefferson county; that said judgment thus became a lien upon the property described in the complaint; that thereafter Moses Manuel, plaintiff's intestate, became the owner thereof by assignment; that the same came into the hands of the plaintiff as his administratrix, and that it remains wholly unpaid, and (2) that on September 22, 1902, one Arthur J. Craven brought an action in the district court of Lewis and Clark county against Davis C. Turner and Dima S. A. Turner; that he caused an attachment to issue therein, directed to the sheriff of Jefferson county, and to be levied upon the interests of said defendants in the lands described in the complaint; that thereafter such proceedings were had in the cause that on November 8, 1902, judgment was duly given and made therein in favor of said Craven and against Davis C. Turner for \$302.50; that on November 10, 1902, a transcript of the judgment was duly filed and docketed in the office of the clerk of the district court of

Jefferson county; that thereafter Moses Manuel, plaintiff's intestate, became the owner thereof by assignment by said Craven; that it came into the hands of plaintiff, as the administratrix of said Manuel; that it was wholly unsatisfied; and that both judgments are liens upon the property described in the complaint paramount to the judgment lien of the T. C. Power Company. The prayer demands judgment in accordance with the prayer of the complaint.

The court found (1), that the mortgage set forth in the first count of the complaint was a first lien upon all the lands described therein; (2) that the one set forth in the second count was a second lien upon the same lands and a first lien upon the other lands described therein; (3) that the liens of the Cruse Savings Bank and the Craven judgments, and also of the T. C. Power Company judgment, followed next in the order in which they are here enumerated; (4) that plaintiff was entitled to have satisfaction of her third mortgage after the satisfaction of these judgments; and (5) that the lien of the Bourquin judgment should be satisfied out of any surplus thereafter remaining. A decree was entered directing the property to be sold, and the proceeds, after the payment of costs including attorney's fees for foreclosure, be applied to the satisfaction of the different liens in the order mentioned. Pending the action, Davis C. Turner died intestate, and Dima S. A. Turner, having qualified as his administratrix, was substituted as defendant in his stead. She has appealed from the decree both as administratrix and in her own right.

As heretofore stated, it does not appear what the respective interests of Davis C. Turner and Dima S. A. Turner were at the time the various mortgages were executed by them and the judgments against Turner were obtained. It is a matter of no importance, however, so far as it has to do with the contention made by the appellant. If it be assumed that she has only a dower interest, the decree is open to attack on some of the grounds which are urged against it by the appellant. As to the Turners, the decree was entered by default. Under the stipulation between the plaintiff and the Turners, it should have been entered in accordance with the prayer of the complaint. This should have been done in any event, for the statute applicable (Code Civ. Proc. § 1003) declares: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." Now, the complaint neither in its allegations nor in the prayer contains any reference to plaintiff's two judgments. For this reason the court could grant no relief with reference to them, and, so far as it did undertake to do so, the decree is beyond the purview of the demand made in the com-

plaint, and is, to this extent, erroneous. Nor is it aided in the least by the fact that the Turners stipulated for its entry. Plaintiff was bound by the stipulation, and could not demand anything further than was contemplated by its terms. Indeed, judging from the terms in which it is couched, the parties seem to have had in mind the provisions of the statute. In any event, the decree could go no further, in the extent of the relief granted, than the stipulation provided. Again, these judgments make their appearance in the case in plaintiff's replication to the answer of the defendant T. C. Power Company. This being so, they could not be made the basis of relief against the Turners; for the replication cannot be looked to to broaden the scope of the complaint or aid it in any way. Nor can a judgment for plaintiff for affirmative relief be supported upon allegations which appear in the reply only. *Thornton v. Kaufman*, 35 Mont. 181, 88 Pac. 796; 6 Ency. Pl. & Pr. 461. Further, the defendants could not anticipate that any issue would arise in the case between the plaintiff and the T. C. Power Company as to these judgments, which would in any way affect their rights, or that they would be brought into the case at all. Much less could they have anticipated that their validity as liens against the interest of Dima S. A. Turner would be declared in the decree. If she had the title to the land, they were not liens at all. If her interest was only her right of dower, still they could not be declared valid liens against the property so as to defeat this right; for, though so far as the mortgages were concerned she had waived her right of dower, the lien of any judgment against her husband was subject to her claim in the surplus remaining after the mortgages had been satisfied. *Dahlman v. Dahlman*, 28 Mont. 373, 72 Pac. 748; Civ. Code, § 228. In its consideration of the case the court should have eliminated those judgments altogether.

The decree is erroneous, also, in directing the satisfaction of the T. C. Power Company judgment out of the proceeds of the sale, without regard to the interest of the wife. While the decree correctly declared the lien of this judgment superior to the lien of the third mortgage, it could in no event attach as such except to the interest of the husband. It did not attach to the interest of the wife, whether such interest arose out of the ownership of the whole property by her or a tenancy in common with her husband, or out of her right of dower. The same may be said of the lien of the Bourquin judgment upon the surplus remaining after all the other liens were satisfied. His judgment being against Davis C. Turner alone, he had a lien upon his interest only.

It is said by counsel for appellant that since these latter judgments appear in the case, not from allegations in the complaint, but in the answers of Bourquin and the T. C. Power Company, the decree is erroneous in

declaring their status. In this contention, however, we think there is no merit. The complaint states in terms that these defendants have or claim interests in or liens upon the premises described in the mortgages or some part thereof, as judgment or attachment creditors, but that their respective interests or liens are subsequent and subordinate to the liens of plaintiff's mortgages. The prayer demands that the priority of the plaintiff's mortgage liens be fixed and established, and that the liens of these defendants be declared inferior to them. It is apparent, therefore, that under the statute and the stipulation of the defendants for judgment it was fairly within the contemplation of the parties that the rights as between the plaintiff and these defendants should be adjusted in the decree. The court was therefore authorized to adjust these equities and decree accordingly. In this respect the decree is not open to attack.

For the reasons heretofore stated, however, the cause is remanded to the district court with directions to amend the decree by eliminating therefrom any mention of the judgments belonging to the plaintiff, and, further, to so modify it as to make the T. C. Power Company and the Bourquin judgments liens upon the interest of Davis C. Turner only, whatever that interest may be. When so amended and modified, the decree will stand affirmed.

Modified and affirmed.

HOLLOWAY and SMITH, JJ., concur.

STEVENS v. TRAFTON.

(Supreme Court of Montana. Feb. 13, 1908.)

1. SPECIFIC PERFORMANCE—(GROUNDS OF REMEDY)—DISCRETION OF COURT.

Whether a contract will be specifically enforced is a matter of judicial discretion, but it must be a sound, legal discretion, and, where the testimony furnishes no reasonable grounds for different conclusions, there is no ground for the exercise of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 17, 18.]

2. SAME—CONTRACTS ENFORCEABLE—STATUTORY PROVISIONS—PART PERFORMANCE OF ORAL SALE OF REAL ESTATE.

Under Civ. Code, § 2342, providing that failure to embody an agreement for the sale of real property in writing does not abridge the power of a court to compel the specific performance of any agreement for the sale of real property, in case of part performance thereof, where it appeared that the terms of an oral agreement for the sale of real property were fully performed on plaintiff's part, and that defendant had put him in actual possession of the premises upon which he had erected substantial improvements, the court had the power to decree specific performance of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 123-133.]

3. SAME—EVIDENCE—SUFFICIENCY.

In an action for the specific performance of an oral agreement to sell real estate, plaintiff testified that by the terms of the agreement he

agreed to buy a certain lot of defendant for \$100, and also to buy from defendant the lumber for the erection of a house thereon; that he was to pay defendant \$50 cash, \$50 in three months, and the balance whatever it might be in six months, which included the price of the lumber to be purchased; and that defendant agreed that when these payments were made he would make a warranty deed of the lot to plaintiff. He further testified that he offered to make the \$50 payments to defendant, but defendant told him to pay it to S., and that S. gave him receipts for the two \$50 payments, the first of which recited that another \$50 was to be paid in three months and the balance in six months, at which time a warranty deed was to be given plaintiff, and the second receipt recited that the \$50 was "part payment on lot." He also testified to the subsequent payment for the lumber some 15 months after the date of the contract and original payment. *Held*, that plaintiff was entitled to a decree for specific performance.

4. SAME—PROCEEDINGS—EFFECT OF GENERAL DENIAL—TIME AS ESSENCE OF CONTRACT—STATUTORY PROVISIONS.

In view of Civ. Code, § 2220, providing that time is not of the essence of a contract unless expressly so provided, and section 2027, providing that, where delay in performance is capable of exact and entire compensation, and time is not expressly declared to be the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, time was not the essence of the contract, and plaintiff was not without equitable rights. Hence a mere general denial by defendant unsupported by any proofs in opposition to plaintiff's testimony did not entitle defendant to judgment, for in any event the court was entitled to know defendant's version of the contract to determine the facts necessary to a full performance by plaintiff before refusing the relief to which his showing entitled him.

5. EQUITY—HEARING—NONSUIT.

Strictly speaking, there is no such thing as a motion for a nonsuit in equitable proceedings under our present practice.

6. APPEAL—REVERSAL—NONSUIT—EFFECT IN LAW ACTIONS—RESULT IN CASE OF ERROR.

The effect of granting a nonsuit in an action at law is to declare that the evidence is insufficient to warrant a verdict for plaintiff under any circumstances. Hence the judgment would be reversed on appeal, if there was any evidence justifying a verdict for plaintiff.

7. SAME—REVIEW—DISCRETION OF COURT—NONSUIT.

In an action for specific performance of a contract, if plaintiff is not entitled to relief as of right, then upon a motion for nonsuit at the close of plaintiff's testimony it is the trial court's duty to adjudicate the issues between the parties, and the court may exercise a legal discretion in giving or withholding relief. Hence the effect of nonsuit would not be to determine that plaintiff was not entitled to relief in any view of the evidence, but that the court in the exercise of its discretion withheld relief in that particular case, and its action would not be disturbed unless there was an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3846.]

8. COURTS—PROCEDURE—RIGHT OF LEGISLATURE TO FIX.

The Legislature has power to establish by regulations the procedure in civil and criminal cases so far as it does not amount to a denial of justice, and it has power to declare by law what shall be the practice on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 274-281.]

9. APPEAL—DISPOSITION OF CAUSE—NONJURY QUESTIONS—STATUTORY PROVISIONS.

Laws 1903 (2d Ex. Sess.) p. 7, provides that the Supreme Court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had; that in equity cases, and in matters and proceedings of an equitable nature, the Supreme Court shall review and determine all questions of fact arising upon the evidence in the record as well as questions of law, unless for good cause a new trial or the taking of further evidence in the court below is ordered. *Held*, that the purpose of the Legislature was to expedite final judgment in cases where the parties were not entitled to trial by jury, and to put an end to litigation and avoid the necessity of new trials.

10. SAME—REVIEW—SCOPE—RULING ON MOTION FOR JUDGMENT ON PLAINTIFF'S TESTIMONY.

The object of the law in providing that the court on appeal should determine equity cases on the merits, unless for good cause a new trial or the taking of further evidence is ordered, was that the Supreme Court might enter final judgment. Hence it is the duty of parties to an action in equity to introduce all of their testimony in order that the Supreme Court may carry out the intent of the Legislature; and, if a defendant moves for judgment at the conclusion of plaintiff's testimony, it will be construed as a declaration that, if his motion is granted, he elects to stand upon the case presented by the plaintiff.

11. SAME—EQUITY CASES—REVERSAL—NEW TRIALS—GROUNDS.

In view of Laws 1903 (2d Ex. Sess.) p. 7, requiring the Supreme Court to determine all questions of fact arising upon the evidence in the record in equity cases, unless for good cause a new trial or the taking of further evidence in the court below is ordered, a new trial will not be granted in equity cases except for good cause appearing in the record; and hence, where an equity case is reviewed on a judgment of nonsuit, the mere failure of defendant to introduce testimony will not entitle him to a new trial.

Appeal from District Court, Valley County; Jno. W. Tattan, Judge.

Action by C. H. Stevens against R. M. Trafton for specific performance of an agreement to convey land. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

T. E. Crutcher, for appellant. Hurd & Lewis, for respondent.

SMITH, J. In the district court of Valley county the plaintiff filed his complaint, wherein he alleged: "(1) That on the 21st day of July, 1903, he made a certain agreement with defendant whereby defendant agreed to sell, and plaintiff agreed to buy of defendant, the east half of lot 3 in block 6 of the Trafton addition to Malta, in the county of Valley, state of Montana, for which he agreed to pay defendant the sum of \$100, and at the same time plaintiff agreed to buy from defendant certain lumber which he would need for building a house on said lot. By the terms of said agreement plaintiff was to pay defendant \$50 cash, \$50 in three months, and the balance, whatever it might be, in six months, which included the price of the lumber to be purchased, and when these payments were made

defendant agreed to make to plaintiff a warranty deed to said east half of said lot. (2) That in pursuance of said agreement plaintiff paid defendant \$50 cash on said 21st day of July, 1903, and was placed in possession of said east half of said lot by defendant, and proceeded to and did buy lumber from defendant and erected a house on said east half of said lot. That on the 20th day of October, 1903, he paid defendant the sum of \$50 in accordance with the terms of said agreement, and on the 31st day of October, 1904, he paid defendant the sum of \$101.78, the balance due under the terms of said agreement, and thus complied fully with his part of the agreement. (3) That on the 31st day of October, 1904, plaintiff made a written demand on said defendant to make and execute to him a warranty deed to said east half of said lot, which said deed defendant refused and still refuses to make, execute, and deliver to this plaintiff, notwithstanding plaintiff has performed all his part of said agreement. Wherefore he prays judgment that said defendant be decreed and compelled to make, execute, and deliver to this plaintiff in a reasonable time, to be fixed by the court, a warranty deed to the east half of lot 3 in block 6 of Trafton's addition to Malta, and that this honorable court appoint a commissioner to make such conveyance in default of one being made by defendant in the time fixed by the court, and for his costs herein." Defendant filed a general demurrer to the complaint, but afterwards withdrew the same and filed an answer, wherein he denied each and every allegation thereof. Plaintiff was the only witness in his own behalf. After testifying to the contract for the sale of the lot, as alleged in his complaint, he continued as follows: "Mr. Trafton paced the lot off, indicating the northeast and northwest corners, scratching in the dirt, and said: 'This is the parcel.' We then went to the bank, and I paid him \$50 cash. He called in Mr. Smith from another part of the bank, and said, 'Smith, Stevens has purchased the east half of this lot,' putting his finger down on the plat which he held in his hand. 'Mark it sold. He is to pay \$100. The conditions are that he is to pay \$50 down, and \$50 in three months. You take the money and give him a receipt.' Mr. Trafton then withdrew, and Mr. Smith went into another part of the bank, and came back and gave me a receipt, reading as follows: 'Malta, Montana, July 21, 1903. Received of C. H. Stevens the sum of fifty dollars (\$50.00) being part payment on the east half of lot 3, block 6, of Trafton's addition to Malta, Montana; another fifty dollars (\$50.00) to be paid in three months, and the balance in six months, at which time a warranty deed is to be given the said Stevens. R. M. Trafton, per Smith.' I paid the second \$50 on October 20, 1903. I have the receipt signed by E. Smith, as follows: '\$50.00. October 20, 1903. Received of C. H. Smith fifty dollars, part payment on lot. E.

Smith.' I offered to pay the money to Mr. Trafton, but he sent me to Smith. I made this payment to Mr. Smith by direction of Mr. Trafton. Mr. Trafton told me to go and pay Smith. * * * He said to pay it to Smith, which I did, and took a receipt. * * * After having paid everything, I made a demand on Mr. Trafton for a deed in person, and by registered letter. I was at his store, and I told him I wanted a deed to this lot that I had contracted for, the east half of lot 3, block 6. He said: 'You will get your deed when you pay for it.' I said: 'Everything is paid for.' Then he said: 'Who did you pay?' I said I paid Smith. He said: 'Go to Smith for your deed.' I went to Smith and he sent me back to Trafton, and then I served written notice, through the post office, on Mr. Trafton, demanding a warranty deed for the property. I never received any reply to that written notice. Smith is out of the country, and has been for a long time. I paid for the lot in full according to Mr. Trafton's directions. I put a frame building, 12x18 feet, 10 feet high, on the lot. I have remained in possession ever since I purchased the lot, and I am in possession now. The contract I had with Mr. Trafton was a verbal contract. * * * I have no written agreement concerning this lot. * * * My recollection is clear as to the terms of this oral agreement. * * * As Mr. Trafton went out of the bank he said: 'So far as the lumber is concerned, you can pay that at the bank.' * * * I handed the \$50 to Trafton, and he passed it on to Smith. * * * The next conversation I had as to title on payment was on the 20th of October, 1903, when I started from the office which I had built on the lot down to his store to pay him the remaining \$50, and I met him on the street and told him I was going down to pay him the other \$50 on my lot. He said: 'I am busy. Go in and pay Smith.' He went on, and I went in and paid it to Smith. * * * Then it ran along until the day I paid my lumber bill, which was the 31st day of October, 1904. The reason why I didn't demand a deed when I paid the \$50 in 1903 was because I had a lumber bill for about \$90 on that lot, due to Trafton, and I hadn't any idea that he would give me a deed until I had paid it. I did not ask him at that time, or make any demand. I waited for about a year before I made a demand. I saw Trafton off and on about every day during that time. On the 31st day of October, 1904, I did make a demand on Mr. Trafton, and he told me to go to Smith for the deed. I went to Smith, and I did not get my deed. Mr. Smith simply grinned and said: 'You better go back to Trafton.' I did not go back to Trafton, but wrote out a demand on him and sent it by registered letter. That demand reads as follows: 'Malta, Montana, October 31, 1904. R. M. Trafton, City—Sir: I hereby demand of you a warranty deed to the east half of lot 3, block 6, Trafton's ad-

dition to Malta, as per our agreement of July 21, 1903, and if the same is not delivered within six days from date, I shall begin proceedings against you to recover the same, and such damages as the law allows. C. H. Stevens." The record recites that at the conclusion of this testimony "the defendant moved for a nonsuit, upon the ground that, under the proof, no decree for specific performance could be awarded." The district court granted the motion, entered a judgment for the defendant, and plaintiff appeals therefrom.

Appellant contends that the court erred in granting the so-called motion for a nonsuit, for the reason that the testimony tended to prove all the material allegations of the complaint. The respondent, on the other hand, argues that specific performance of a contract is never demandable as a matter of right, but relief should be granted or withheld in the discretion of the trial court, and in this case the court below having withheld relief to plaintiff on his own showing, and the evidence furnishing grounds for different inferences, the finding of the lower court thereon should not be disturbed. It is well settled that whether or not a contract will be specifically enforced is a matter of judicial discretion. 26 Am. & Eng. Ency. Law (2d Ed.) 62. But it must be a sound, legal discretion. *Dewey v. Spring Valley Land Co.*, 98 Wis. 83, 73 N. W. 565. And, assuming that the respondent is correct in his conclusion, we think he is wrong in his premises. As we read the testimony, it furnishes no reasonable grounds for different conclusions, and therefore no grounds for the exercise of discretion. Plaintiff testified that the purchase price of the lot was \$100, all of which had been paid. Had no written receipts been received in evidence, plaintiff's case would have embodied no uncertainty whatever. The parties, the subject-matter, and the terms of and circumstances surrounding the making of the contract were all clearly and definitely stated. According to the evidence given by the plaintiff, the terms of the agreement were not merely partly but fully performed on his part, and, in addition to that, the defendant had put the plaintiff into actual possession of the premises, upon which he had erected substantial improvements. Under these circumstances the court had the power to decree specific performance of the contract, by virtue of section 2342 of the Civil Code, which reads as follows: "Sec. 2342. No agreement for the sale of real property, or of any interest therein, is valid unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or his agent, thereunto authorized, in writing; but this does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof." See, also, *Wolke v. Fleming*, 103 Ind. 105, 2 N. E. 325, 53 Am. Rep. 495.

But it is argued that because the two receipts produced by the plaintiff recite, respectively, "and the balance in six months, at which time a warranty deed is to be given," and "part payment on lot," an element of uncertainty was injected into the case that authorized the court in disregarding the positive oral testimony of the plaintiff. But let us remember that the plaintiff testified that there was also a lumber bill between the parties, that the sale of the lot and agreement to purchase lumber were parts of one transaction, and that defendant had instructed him to pay the lumber money into the bank, as well as the \$50 remaining due on the lot. It is true that plaintiff did not attempt to explain the reason for this phraseology of the receipts, or to account for the employment of the words quoted. Singularly enough he was not asked to do so by counsel for either party. But we do not think that this fact alone would warrant a court of equity in disregarding his positive testimony as to the terms of the sale. We feel that in equity and good conscience he was entitled to a decree as prayed for upon the showing made by him.

The general denial made by the defendant gave the court no intimation of the nature of the defense. It is true that defendant was entitled to file such a pleading, but whether it concealed a valid defense or an absolutely unconscionable one the court had no way of knowing. The receipts were written by the defendant's agent. We think the court should have taken these matters into consideration in passing upon defendant's motion, especially in view of the fact that, unless the defendant can be compelled in this action to disclose his version of the agreement, the plaintiff may never be able to perform his part, although there may be but a small sum between them. We cannot say that time was of the essence of this agreement. Civ. Code, §§ 2223, 2027.

The difficulty we encounter in this case relates to the disposition we shall make of it upon reversal of the judgment. Strictly speaking, there is, in our present practice, no such thing as a motion for a nonsuit in an equitable proceeding. The effect of granting a nonsuit in an action at law is to declare, on the part of the court, that the evidence is not sufficient in law to warrant the jury in finding, under any circumstances, a verdict for the plaintiff. If it be true that in an action to enforce specific performance of a contract the plaintiff is not entitled to relief as of right, then upon a motion for a nonsuit, such as was interposed in this case, it becomes the duty of the trial court to adjudicate the issues between the parties, and in so doing the court may exercise a legal discretion in giving or withholding relief. Such being the case, the effect of the nonsuit would not be to determine that the plaintiff was not entitled to relief in any view of the evidence, but that the court in the exercise of its discretion had withheld relief in the

particular case. In the one case the action of the trial court would be reversed if there was any evidence justifying a verdict for the plaintiff, and in the other the action of the court would not be disturbed unless there was an abuse of discretion.

The Legislature of 1903 (Laws 1903 [2d Ex. Sess.] p. 7) enacted into law the following practice provision: "The Supreme Court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. * * * In equity cases, and in matters and proceedings of an equitable nature, the Supreme Court shall review all questions of fact arising upon the evidence presented in the record, whether the same be presented by specifications of particulars in which the evidence is alleged to be insufficient or not, and determine the same, as well as questions of law, unless, for good cause, a new trial or the taking of further evidence in the court below be ordered." The Legislature has power by regulations to establish the procedure in civil and criminal cases, so far as such procedure does not amount to a denial of justice, and has power to declare by law what shall be the practice on appeal. *Jordan v. Andrus*, 26 Mont. 37, 69 Pac. 118. The evident purpose of the Legislature in passing the law above quoted was undoubtedly to expedite the entry of final judgment in cases where the parties were not entitled to trial by jury; to put an end to litigation and avoid the necessity of new trials involving expense and the contingencies incident to delay. These regulations seem reasonable and salutary. To the end, therefore, that this court might enter final judgment in these equity causes, it is provided that the court shall, on appeal, determine the same on the merits, unless for good cause a new trial or the taking of further evidence is ordered.

It is the duty of parties to an action in equity to introduce all of their testimony so that this court may carry out the intent of the Legislature. If the defendant moves for judgment, at the conclusion of plaintiff's testimony, it will be construed hereafter as a declaration on his part that, if his motion be granted, he elects to stand upon the case presented by the plaintiff. In this case the defendant may perhaps have been misled by the practice heretofore pursued into thinking that in the event of reversal he would get a new trial as of right. We feel, therefore, that in this particular case that may be sufficient cause for ordering a new trial. But in future we shall not grant new trials in equity cases, except for good cause appearing in the record.

The judgment of the court below is reversed, and the cause remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

STATE v. DE LEA.

(Supreme Court of Montana. Feb. 13, 1908.)

1. CRIMINAL LAW—PRELIMINARY PROCEEDINGS—WAIVER OF ERRORS—LIST OF WITNESSES.

In a criminal prosecution, failure to cause defendant to be served at arraignment with a copy of the indorsements upon the information including the list of witnesses is waived where defendant by counsel asked for and obtained time to plead, and afterwards, without objection, pleaded to the information.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 2116, 2117.]

2. SAME—REVIEW—ERRORS AFFECTING SUBSTANTIAL RIGHTS.

In a criminal prosecution, minutes of the trial court which, after showing that the jury were present while the case was being tried, recite that the jury retired in charge of a bailiff, and later returned into open court and submitted their verdict, which verdict was filed and read in open court and in the presence of the jury, who, being asked, state that such is their verdict, while defective in not showing that the names of the jury were called by the clerk when brought into court as required by section 2142 of the Penal Code, cannot be construed not to show the presence of the entire jury at the rendition of the verdict, and, if they were so present, the failure to call their names is not prejudicial error under sections 2320 and 2600, providing that the appellate court will not notice errors not affecting the substantial rights of the parties.

3. WORDS AND PHRASES—"THEREUPON."

"Thereupon," as defined by Webster, means "upon that or this; immediately; at once; without delay."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6953-6955.]

4. CRIMINAL LAW—JUDGMENT—RECORDS—PRESENCE.

In a criminal prosecution, minutes of the trial court, which show the presence of defendant during the trial up to the time the jury retired, and then recite, "Defendant thereupon waived the polling of the jury * * * defendant thereupon waives time for sentence and elects to be sentenced at this time," sufficiently show the presence of defendant when the verdict was rendered under section 2141 of the Penal Code requiring such fact to be affirmatively shown.

5. SAME—REVIEW—INSTRUCTIONS.

Where, in a criminal prosecution, the record shows that an instruction upon the presumption of innocence was not requested, and no error was assigned upon the failure to give such instruction, the appellate court in considering an instruction upon reasonable doubt will be uninfluenced by the failure to give the instruction.

6. SAME—INSTRUCTIONS—REASONABLE DOUBT.

In a criminal prosecution, an instruction defining a reasonable doubt as "not a mere imaginary or possible doubt, but a substantial doubt, based upon reason and common sense, and induced by the facts and circumstances attending the particular case and growing out of the testimony. It is such a doubt as will leave one's mind, after a careful examination of all the evidence, in such condition that he cannot say that he has an abiding conviction to a moral certainty of the defendant's guilt as charged"—is not subject to the objection that by it the jury were confined to a consideration of the evidence, whereas a reasonable doubt may arise from the lack of evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1904-1922.]

7. SAME—CREDIBILITY OF ACCUSED.

In a criminal prosecution, an instruction in the words of section 2442, Pen. Code, that a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself, but may be sworn and may testify in his own behalf, and that the jury, in judging his credibility and the weight to be given to his testimony, may take into consideration the fact that he is defendant, and the nature and enormity of the crime of which he is accused, is proper, as the statute creates an exception to the general rule that the court ought not to single out a particular witness, and direct the attention of the jury to his testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1895-1901.]

8. SAME—CURE OF ERRONEOUS INSTRUCTION.

An erroneous instruction as to larceny is cured by the giving of an instruction not subject to any objection urged against it, which is supplementary to the erroneous instruction, since instructions must be considered as a whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1900-1905.]

Smith, J., dissenting in part.

Appeal from District Court, Silver Bow County.; Michael Donlan, Judge.

Frank De Lea was convicted of larceny, and appeals. Affirmed.

The following instruction as to reasonable doubt was given: "A reasonable doubt is not a mere imaginary or possible doubt, but a substantial doubt, based upon reason and common sense, and induced by the facts and circumstances attending the particular case and growing out of the testimony. It is such doubt as will leave one's mind after a careful examination of all the evidence, in such condition that he cannot say that he has an abiding conviction to a moral certainty of the defendant's guilt as charged."

The first sentence of Pen. Code, § 2442, used as an instruction, is as follows: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself but may be sworn and may testify in his own behalf and the jury in judging his credibility and the weight to be given to his testimony, may take into consideration the fact that he is defendant and the nature and enormity of the crime of which he is accused."

Maury, Tempelman & Hogevoil, for appellant. Albert J. Galen, Atty. Gen., and W. H. Poorman, Asst. Atty. Gen., for the State.

HOLLOWAY, J. Frank De Lea was convicted of the crime of grand larceny and appeals from the judgment.

1. Objections are made to the proceedings in the case. It is said the court erred: "(a) In not causing a copy of the indorsements upon the information, including the list of witnesses, to be delivered to the defendant at the time of his arraignment. (b) In permitting the verdict to be filed without having the names of the jurors first called by the clerk. (c) In receiving the verdict in the ab-

sence of the defendant." These objections must be answered, if at all, by the record.

(a) The minutes of the trial court show: "This day, September 22d, defendant being present in person and by counsel, Mr. J. G. Brown, whose name is by the court ordered entered as counsel for defendant, and the county attorney being present on the part of the state, being then asked, defendant states that his true name is Frank De Lea as charged in the information. Defendant waives reading of the information and accepted a copy thereof, on application of Mr. J. G. Brown. Saturday, September 29th, 1906, at 10 o'clock a. m. is by the court fixed as date for the entry of a plea herein. * * * September 29th. This day defendant being present in person and by counsel Mr. J. G. Brown, and the county attorney being present on the part of the state, thereupon defendant pleads not guilty to the offense charged in the information, which plea is by the court ordered entered." It is not contended that the original information does not contain the names of the witnesses for the state; but it is contended that the minutes fail to show that the copy delivered to the defendant contained the necessary indorsements. It would appear from section 1893, Pen. Code, that the indorsements on the information are not considered part of the information; but, however this may be, by asking for and obtaining time to plead, and afterwards, without objecting, pleading to the information, the defendant waived these defects in the arraignment. 12 Cyc. 348; *People v. Lightner*, 49 Cal. 226.

(b) The next contention is that the minutes fail to show that the names of the jurors were called before the verdict was delivered, as required by section 2142, Pen. Code. The minutes do show the presence of the 12 men constituting the jury while the case was being tried. With respect to what occurred after the case was submitted the minutes recite: "The jury retired in charge of a sworn bailiff to consider of their verdict and later returned into open court and submitted their verdict which is in words and figures as follows, to wit: [Title of Court and Cause.] 'We, the jury in the above entitled action, find the defendant Frank De Lea guilty of the crime of grand larceny and leave his punishment to be fixed by the court. M. L. Mustard, Foreman.' Which verdict was filed and read in open court and in the presence of the jury who on being asked state that such is their verdict." While these minutes do not meet the requirements of the Code, we hardly think any other fair inference can be drawn than that the jurors were, in fact, all present. Certainly there is not anything here to suggest that the jurors were not all present; and the evident purpose of the provision of section 2142 above for calling the names of the jurors is to insure their presence before the verdict

is delivered. A case presenting precisely this same question, and under a similar statute, is *Norton v. State*, 106 Ind. 163, 6 N. E. 126. In the opinion in that case it is said: "Under the alleged error of the court in overruling appellant's motion for a venire de novo, the only point made by his counsel is based upon their construction of the provisions of section 1829, Rev. St. 1881, and the alleged noncompliance of the trial court therewith. This section provides as follows: 'When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and, if all appear, their verdict must be rendered in open court. If all do not appear, the rest must be discharged without giving a verdict, and the cause must be tried again at the same or next term. The defendant shall have the right, in all criminal cases, to have the jury polled.' It is not claimed by appellant that the jury had not all appeared when their verdict herein was rendered in open court; but it is claimed that their names were not called prior to such rendition of their verdict. Although the statutory provision requiring that the names of the jury must be called is mandatory in form, and although we think that such provisions ought always to be strictly complied with, yet we can hardly regard the omission to call the names of the jury as a material or fatal error, unless it further appears that the jury did not, in fact, all appear at the time their verdict was rendered in open court. To such an error, conceding it to be such, as the one here complained of, section 1891, Rev. St. 1881, seems to us peculiarly applicable, so far as our consideration of the error is concerned. In that section it is thus provided: 'In the consideration of the questions which are presented upon an appeal, the Supreme Court shall not regard technical errors or defects, or exceptions to any decision or action of the court below, which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant.' In the case at bar, if the jury all appeared at the time their verdict was returned into open court, as we must assume they did, in the absence of any showing to the contrary, then we are of opinion that the omission of the court to have the names of the jury called, even if erroneous, did not prejudice the substantial rights of the appellant." Another case identical in its facts is *People v. Rodundo*, 44 Cal. 538, in which it is said: "It is now claimed that the court erred in receiving the verdict without first calling the names of the jurors. The statute provides that, when the jury have agreed upon a verdict, they shall be conducted into court. 'Their names must then be called, and, if all do not appear, the rest shall be discharged without giving a verdict.' *Crim. Prac. Act*, § 414. Undoubtedly it was an irregularity to receive the verdict without first calling the names of the

jurors; but, if all were in fact present and declared the verdict, it was an irregularity which in no way prejudiced the defendant. Section 601 of the Criminal Practice Act provides: 'Neither a departure from the form or mode prescribed by this act in respect to any pleadings or proceedings, nor an error or mistake therein shall render the same invalid unless it have actually prejudiced the defendant or tended to his prejudice in respect to a substantial right.' The record shows that the 'jury' returned into court and reported the verdict, and it is not even suggested by counsel that the jurors were not all present and agreed. * * * On the whole, we see no error in the case which prejudiced the defendant in respect to any substantial right, and the judgment is therefore affirmed." Our Penal Code contains provisions similar to those referred to by the Indiana and California courts. See sections 2320, 2600, Pen. Code.

(c) The third contention is that the minutes do not show that the defendant was present when the verdict was returned. The minutes do show the presence of the defendant during the trial up to the time the jury retired to consider of their verdict. Then, after the recital last above set forth, the minutes proceed: "Defendant thereupon waived the polling of the jury. * * * Defendant thereupon waives time for sentence and elects to be sentenced at this time." The word "thereupon" first used in this quotation is significant in this connection. Webster defines it to mean: "Upon that or this; immediately; at once; without delay." Substituting in the minutes, then, the meaning of the word "thereupon" for the word itself, and the minutes would say that the jury returned into open court and submitted their verdict, which verdict was filed and read in open court and in the presence of the jury, who, on being asked, stated that such was their verdict. Upon this happening, the defendant immediately waived the polling of the jury and asked to be sentenced at this time. Pen. Code, § 2141, provides that the defendant, if charged with a felony, must be present when the verdict is received; and it is generally held, and we think correctly, that this fact must affirmatively appear; but it must be conceded that by every fair intendment this record is a sufficient showing of the defendant's presence when the verdict was received. Just criticism may be made of the manner in which the minutes of this trial were kept. A studied effort to ignore the law could hardly have been productive of a more defective record.

2. Exception is taken to the giving of instruction No. 7, which defines a reasonable doubt in the language employed for that purpose in *Territory v. McAndrews*, 3 Mont. 158. The particular objection is that the jury was confined to a consideration of the evidence; whereas, it is said, a reasonable doubt may arise from the lack of evidence, and *State v.*

Harrison, 23 Mont. 79, 57 Pac. 647, Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481, Brown v. State, 105 Ind. 385, 5 N. E. 900, State v. Gosnell (C. C.) 74 Fed. 734, Smith v. State, 9 Tex. App. 150, Densmore v. State, 67 Ind. 306, 33 Am. Rep. 96, and Knight v. State, 74 Miss. 140, 20 South. 860, are cited in support of this contention. But most of these cases are not in point. In the Harrison Case this particular instruction now under consideration was approved. The case was reversed for the refusal of the trial court to give an instruction upon the subject of the presumption of innocence. While in the case now before us there does not appear to have been any instruction given upon the presumption of innocence, as there ought to have been, there is not any error assigned upon the failure of the court in this respect. Indeed, the record shows that an instruction upon that subject was not requested; but in the Harrison Case it was and was refused. So that our consideration of instruction No. 7 is uninfluenced by the failure of the court to give an instruction upon that very important branch of the case. In the Coffin Case there was a reversal for the same reason as in the Harrison Case. In the Gosnell Case the subject is not treated at all. In Brown v. State a somewhat similar instruction is criticized, but the judgment of conviction was affirmed. The same thing occurred in Mackey v. People, 2 Colo. 13. In Smith v. State the instruction given was held erroneous, but upon entirely different grounds from that suggested by counsel for appellant in this case. In each of the other two cases cited an instruction of this general character was held erroneous, for the reason now urged here. But, so far as we are able to ascertain, Indiana and Mississippi are the only states in which the giving of an instruction of this general character is held to be error. It is the accepted rule that, before any one can be convicted of a criminal offense, his guilt must be established beyond a reasonable doubt; but every attempt to define the apparently simple phrase "a reasonable doubt" has been attended with the greatest difficulty, and it may fairly be said that in a great majority of instances the definitions do not convey any more accurate idea than the phrase itself. So great is the difficulty, that some courts hold that it is not error for the trial court to decline any attempt at a definition. 12 Cyc. 623. In United States v. Hopkins (D. C.) 26 Fed. 443, Judge Dick said: "The inherent imperfection of language renders it impossible to define in exact express terms the nature of a reasonable doubt. It arises from a mental operation, and exists in the mind when the judgment is not fully satisfied as to the truth of a criminal charge, or the occurrence of a particular event, or the existence of a thing." However in 1850 Chief Justice Shaw, of the Supreme Court of Massachusetts, in the celebrated case of Commonwealth v. Webster, 5

Cush. 295, 52 Am. Dec. 711, formulated a definition which for more than half a century has withstood most of the criticism, and has been adopted and followed in a very large number of courts. In substance, if not in form literally, that definition was adopted and approved by this court in Territory v. McAndrews, above, and for more than 30 years the instruction approved in that case has been generally accepted and approved by the courts of this jurisdiction, and repeatedly approved by this court. See State v. Martin, 29 Mont. 273, 74 Pac. 725. So far as we are aware, the present is the first instance in which the instruction has been attacked upon the ground now urged. We think, however, that the criticism made of this instruction by the courts above is altogether captious, and must have had its origin in the misconception of the function of the presumption of innocence. By some of the courts it is held that this presumption is evidence introduced by the law in favor of the accused. But in State v. Martin, above, this court in a very able opinion by Mr. Commissioner Poorman said: "This presumption may have the effect of evidence, in that it must be overcome by evidence; but, strictly speaking, it cannot be evidence, nor can it be introduced in the case, for it is in the case from its inception. It needs no introduction. It is the safeguard which the law casts around all persons accused of crime, and the defendant cannot be reached by a verdict of guilty until this safeguard is entirely removed. This removal can only be accomplished by evidence which satisfies the minds of the jurors beyond a reasonable doubt. The presumption of innocence is in effect the very thing against which the prosecution is directed."

This presumption of innocence surrounds every person accused of crime. And to say that this presumption is evidence introduced at the trial in behalf of the accused implies, at least, that such person does not have that same presumption attending him prior to the trial; for instance, from the time of his arrest until the trial. The expression, "the presumption of innocence is evidence introduced by the law in favor of the accused," is inaccurate and an unfortunate one. If, however, this presumption be treated merely as safeguard with which the law surrounds every person accused of crime, the supposed defects in the definition of a reasonable doubt will at once appear more fanciful than real. It is inaccurate to say, in the language of the Supreme Court of Mississippi: "Such a doubt may arise from a want of evidence." It always does, and of necessity must, arise from a want of evidence, by which we mean a want of sufficient evidence; for in every criminal case where there is a plea of not guilty, if the state does not introduce any evidence, the question of a reasonable doubt never arises, for there is not a court in the land but what under those circumstances

would peremptorily direct a verdict of not guilty. But, if the state does offer evidence sufficient in the judgment of the trial court to the jury, then the jurors under their oaths must consider such evidence and such evidence alone in determining whether the safeguard erected by the presumption of innocence has been completely destroyed. It is completely destroyed when, and only when, the jurors can say from the evidence introduced that they feel an abiding conviction to a moral certainty of the truth of the charge against the accused. If the evidence leads to a conclusion which satisfies the judgment of the jurors, and leaves upon their minds a settled conviction of the truth of the charge, it is then their duty to so declare by their verdict. But in every such contested case their consideration is directed to the evidence introduced, and from that evidence they must say whether they still retain a reasonable doubt of the guilt of the accused. It is in this sense that it is said that a reasonable doubt is not a doubt suggested or surmised without foundation in the facts or testimony. In other words, the jurors may not predicate a doubt upon street rumor, or facts not in evidence, nor upon theories outside of the record, which may be suggested by the ingenuity of counsel, or, upon a merciful inclination to permit the accused to escape, prompted by sympathy for him in his apparently unequal contest with the state. The definition now under consideration, which is in substance that of Chief Justice Shaw, has met with widespread approval. Hughes, *Criminal Law & Procedure*, §§ 2488, 3263; Hochheimer on *Criminal Law*, § 157; 12 Cyc. 491. Speaking of this definition, the Supreme Court of California, in *People v. Strong*, 30 Cal. 151, said: "And in the general charge of the court the jury were instructed in relation to the subject of reasonable doubt substantially in the language of Mr. Chief Justice Shaw, in the case of *Commonwealth v. Webster*, 5 Cush. (Mass.) 320, 52 Am. Dec. 711, which is probably the most satisfactory definition ever given to the words 'reasonable doubt' in any case known to criminal jurisprudence." And in this conclusion we agree. We do not think that the other objections to the instruction are well founded.

3. Exception is likewise taken to the giving of instruction No. 9, which is a literal copy of the first sentence of section 2442 of the Penal Code. But it is said that a court ought not to single out a particular witness and direct the attention of the jury to his testimony; and that this is the general rule is well settled and has been recognized by this court. *Mahoney v. Dixon*, 34 Mont. 454, 87 Pac. 452. But the Code, in section 2442 above, has made an exception to this general rule. That section particularly states by what standard the jury shall judge of the defendant's credibility; and, in order that they may have this standard which the law

has fixed, it is necessary that it be given in a proper instruction. In support of their contention counsel for appellant cite *People v. Maughs*, 149 Cal. 253, 86 Pac. 187; but, as this court said in *State v. Farnham*, 35 Mont. 375, 89 Pac. 728, the instruction criticized in the *Maughs* Case is not the one given here. And, furthermore, California does not have a provision of the Criminal Code similar at all to section 2442 above. See *Pen. Code*, Cal., tit. 10, c. 2. The instruction has received the approval of this court, and we are satisfied that it was properly given in this case. *State v. Dotson*, 26 Mont. 305, 67 Pac. 938; *State v. Farnham*, above.

4. Instruction No. 10 is also criticized. But this instruction, while not approved, is held in *State v. Penna*, 35 Mont. 535, 90 Pac. 787, not to be prejudicially erroneous, under circumstances similar to those we have here.

5. Instruction No. 12 attempts to define larceny; but, standing alone, is insufficient for that purpose. *State v. Peterson*, 36 Mont. —, 92 Pac. 302. But this defect in the instruction is fully cured by instruction No. 17, which, though not technically correct, is not open to any objection urged against it here by counsel for appellant. It is not in any sense contradictory of No. 12, but supplementary of it. The instructions must be considered as a whole.

We find no prejudicial error in the record. The judgment is affirmed.

Affirmed.

BRANTLY, C. J., concurs.

SMITH, J. (concurring specially). I agree with the result reached by Mr. Justice HOLLOWAY in the foregoing opinion. But I am inclined to think, despite the fact that the definition of "reasonable doubt" therein discussed has been employed by the courts of this and other states for so many years, and has been approved, that it is not too late to discourage the practice of giving it to juries in criminal cases. It seems that the English language is inadequate to satisfactorily define the phrase "reasonable doubt." Some courts are not satisfied with the definition approved by this court. How, then, shall a jury of laymen be guided or aided by it? Perhaps the reason why the words are difficult of explanation is because they are so ordinary and simple. At any rate, the definition, although the best that has ever been given and perhaps the best that can be framed, is so complicated and involved that it is more difficult to understand than are the words, the meaning of which are courts have attempted to explain. I do not think the words "reasonable doubt" require explanation. I believe that any juror who has not the mental capacity to understand the words themselves could not possibly comprehend the definition given to them by the courts. How can it be said that a juror could not understand what

is meant by a "reasonable doubt" but would know the meaning of the words "an abiding conviction to a moral certainty," used in the definition? I think any intelligent juror will appreciate the scope of his duty when told that, before he is justified in arriving at a verdict of guilty, he must be satisfied of the guilt of the defendant from the evidence, beyond a reasonable doubt; and that no other or further charge should be given on this subject.

An experience of over 20 years at the bar and on the trial bench enables me confidently to assert that, in criminal causes, more confusion in the minds of jurors, and more illogical verdicts, result from attempts by the court to define a reasonable doubt than from all other causes, save alone the conflict of testimony. Added to this, it is matter of common knowledge in the profession that this definition is seized upon by unscrupulous counsel, representing defendants oftentimes palpably guilty upon the evidence, and industriously repented and reiterated, to impress upon the jurors that the words have some deeply occult meaning, known only to those engaged in the trial of criminal cases, which they, as jurors, are bound, on their oaths, to apply, or find the defendant not guilty; and that, having solemnly sworn, both generally and in answer to numerous questions touching their competency to sit as jurors, to give the defendant the benefit of every reasonable doubt, as defined by the court, there attaches to their deliberations some new and wonderful quality, pertaining more to deity than to mortals, prohibiting them from arriving at a conclusion by any mental process ever before exercised by them; that they must, as jurors, discard their everyday habits of thought and judgment, and use their minds in an entirely different manner from that which, as men, they would employ in their own important affairs. I believe the system of paternalism practiced toward jurors to-day, upon the theory apparently that they are as incapable of forming an intelligent judgment as were the yokels of 400 years ago, should be abandoned, lest in trying to explain the meaning of the most common words and terms we convey to jurors the idea that the law, instead of being founded in common sense, deals in nothing but technicalities.

We hold in this state, in common with many other states in the Union, that it is error for the trial court, usually presided over by a lawyer of experience and ability, to comment in any manner upon the weight of the evidence; and the application of the doctrine has been carried, in my judgment, to the extent of absurdity. But we give instructions to juries that would puzzle a scholastic logician to analyze; and then crit-

icize the jury system. I have talked with highly intelligent jurors—men who were successful in their private affairs—who seemed to feel that a juror must discard all human attributes, and change all his usual mental habits in order to arrive at a verdict in a criminal case according to law. I have heard jurors say, in defense of a verdict of acquittal, in a case where every unsworn person who heard all of the evidence had no doubt whatsoever of the guilt of the defendant: "It was the only thing we could do under the charge of the court." And this after the court had laboriously instructed the jury that they were the sole and exclusive judges of the facts in the case, and that the instructions were merely a guide to the law. This is one of the principal reasons why we have mistrials and wrong verdicts in plain cases involving enormous expense, and why the popular defense of insanity can be successfully interposed in so many murder trials. After all, a reasonable doubt is not a thing to be described. It is a state of mind, not, ordinarily, to be accounted for by pointing out any particular testimony in the record. Doubts come and go, and reappear during the progress of the trial. The jurors are admonished by the court not to make up their minds concerning the guilt or innocence of the accused until the case is finally submitted to them. (An admonition admirable in theory, but ridiculous in practice, because usually impossible of obedience.) More paternalism. And, while the jury knows nothing of it, the trial judge is, in fact, almost powerless. He is a mere puppet in the trial, an umpire whose authority is limited to passing upon questions of admissibility of evidence. If he gives to the jury anything more than abstract propositions of law (and the appellate courts say he should not give those), he is accused, and generally convicted, on appeal, of commenting upon the weight of the evidence. A juror cannot tell when the reasonable doubt first lodged in his mind. Certainly it was not, in most instances, after the case was finally submitted to him. I undertake to say that every honest juror who, upon the whole evidence, has in his heart a reasonable doubt of the defendant's guilt, will act upon it, without analysis or application of definition. He will unconsciously heed it without seeking to explain it. When his mind harbors a doubt that prevents his conscientiously voting guilty, that doubt will be expressed in a vote for acquittal.

I maintain, therefore, that we should give our trial judges credit for the integrity, learning, discretion, and consideration for their oaths of office that they in reality possess, and that our jurors should be treated as men of intelligence, and not as children.

CRAWFORD'S ESTATE v. CRAWFORD
et al.

(Supreme Court of Oregon. Feb. 11, 1908.)

1. APPEAL—NOTICE IN OPEN COURT—SUFFICIENCY.

Under B. & C. Comp. § 549, providing, as amended by Laws 1901, p. 77, that a party may appeal by notice in open court, or before the judge, if the decree is rendered at chambers, and that such notice shall thereupon by order of the court or judge be entered in the journal, an oral notice of appeal in such a case is all that is required, and service thereof on the adverse party is not necessary; section 538, providing that notices shall be in writing, having no application to matters transpiring in the progress of the cause and relating to the issues.

2. SAME.

Under B. & C. Comp. § 549, as amended by Laws 1901, p. 77, the notice need not be contained in the decree; it sufficing if it be taken in open court and entered by the clerk.

3. SAME—DESCRIPTION OF DECREE.

Under B. & C. Comp. § 549, as amended by Laws 1901, p. 77, and where it appeared that the notice of appeal was given when the decree was rendered, and the entry of the notice apparently immediately followed the entry of the decree in the journal and referred to it as "the above order and decree," the decree was sufficiently identified without further description.

4. SAME.

Under B. & C. Comp. § 549, as amended by Laws 1901, p. 77, where notice of appeal from a final decree of distribution denying the widow any portion of the estate was given in open court, all the heirs affected by the decree were bound to take notice thereof, including those who were not parties to the objections filed in the probate court to the apportionment of any of the property to the widow; they being parties to the settlement of the administrator's final account and to the distribution of the estate.

Appeal from Circuit Court, Tillamook County; Geo. H. Burnett, Judge.

Final accounting of John R. Harter, administrator of the estate of Robert Crawford, deceased. John J. Crawford and others filed objections to the apportionment of any part of decedent's property to his widow, Rebecca Crawford. From a decree denying her any portion of the estate, said Rebecca Crawford appealed to the circuit court, and, from an order of that court dismissing her appeal, she appeals to the Supreme Court. Reversed.

See *In re Crawford's Estate*, 90 Pac. 147.

John Harter, administrator of the estate of Robert Crawford, deceased, on January 4, 1906, filed in the county court of Tillamook county his final account of the administration of said estate, in which he reported that Rebecca (Bessie) Crawford is the widow, and seven children of decedent, naming them, are the heirs, of said decedent. Thereafter four of said heirs filed objections in the county court to the apportionment of any part of the property to the widow. An answer to such objections was filed by the widow, and, after a trial of the issues so raised, the county court on the 17th day of April, 1906, filed and entered in its journal findings of fact and conclusions of law, together with a final decree of distribution, denying her any portion of said estate. Following said de-

cree, and on the same day, the court made the following order in said matter: "Comes now on this 17th day of April, 1906, being the same day on which the above order and decree relating to the distribution of the proceeds of the estate of the deceased above named was made, Rebecca Crawford, the widow of Robert Crawford, deceased, by her attorney, W. H. Cooper, and gives notice in open court and before the judge of the above-entitled court that she, the said Rebecca Crawford, does now and at this time appeal from the order, judgment, and decree of this court to the circuit court of the state of Oregon for Tillamook county. It is therefore ordered that the said notice of appeal be entered on the record of this county court. W. H. Conder, County Judge." Appellant thereafter, on April 26th, filed and served an undertaking on appeal, and upon the perfecting of said appeal the said heirs moved that the circuit court dismiss the appeal for the reasons that no notice thereof had been given or served herein; that the pretended notice was given to the judge of the county court in vacation after the April term, and was not served upon the adverse parties; and that said notice does not describe the judgment or order appealed from. This motion is supported by the affidavit of the clerk of the county court to the effect that the findings and decree and the entry of the said notice of appeal were made in vacation after the April term of the county court, and that at the November term, 1906, of the circuit court, the said motion to dismiss the appeal was allowed; and Rebecca Crawford, the widow, appeals to this court from said order.

W. H. Cooper and H. T. Botts, for appellant. G. W. Talmage, for respondents.

EAKIN, J. (after stating the facts as above). The question of the sufficiency of said notice of appeal is the only matter for consideration. In 1901 (Laws 1901, p. 77) the Legislature amended section 549, B. & C. Comp., by adding thereto a provision to the effect that a party may take an appeal by giving notice in open court, or, if the decree is rendered in vacation before the judge, that he appeals from such decision; and such notice shall thereupon, by order of the court or judge thereof, be entered in the journal. It was clearly the purpose of the Legislature that this notice should dispense with the necessity of a formal notice of appeal or service thereof on the adverse party. Similar statutes have been so construed in other states. The statute of the state of Washington (Ballinger's Ann. Codes & St. § 6303), in so far as relates to the notice in open court, is identical with ours, and in *Town of Elma v. Carney*, 4 Wash. 418, 30 Pac. 732, it is held that oral notice is sufficient. This is also held in *Northern, etc., Trust v. Hender*, 12 Wash. 559, 41 Pac. 913, that the effect of

this statute is not confined to a judgment rendered in term, but applies equally to vacation orders. To the same effect is *Torres et al. v. Falgoust*, 33 La. Ann. 560. The Texas statute, in so far as relates to giving notice in open court or to the judge, in case of vacation orders, and the entry thereof in the journal, is also similar to our own; and it is held that service on the respondent is not necessary in such cases. *Estado Land & Cattle Co. v. Ansley*, 6 Tex. Civ. App. 185, 24 S. W. 933; *Forrest v. Rawlings*, 40 Tex. 502. The United States courts also hold that in case the appeal is taken in open court no citation is necessary. *Brockett v. Brockett*, 2 How. (U. S.) 233, 11 L. Ed. 251; *United States v. Gomez*, 1 Wall. (U. S.) 690, 17 L. Ed. 677; *Hewitt v. Filbert*, 116 U. S. 142, 6 Sup. Ct. 319, 29 L. Ed. 581; *Brown v. McConnell*, 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495. In this latter case it is said that no citation is necessary, because, both parties being constructively in court during the entire term, they are charged by law with notice of all that is done in the case affecting their interests. To the same effect is *New York Hosp. v. Knox*, 57 Miss. 600. On a motion to dismiss the appeal to this court the notice was oral in open court; and, in deciding that motion, it is held that such notice is sufficient and affects all interested parties without service. In *re Crawford's Estate* (Or.) 90 Pac. 147.

We are cited to section 538, B. & C. Comp., which requires notices to be in writing; but the notice referred to there relates to such warning as is necessary to bring the adverse party before the court or to advise him of some matter or proceeding not occurring in the progress of the trial, but can have no application to matters transpiring in the progress of the cause and relating to the issues. The notice in open court provided for in B. & C. Comp. § 549, is for the purpose of bringing the appeal to the attention of the court that a record thereof may be made, rather than information or a warning to respondent that an appeal is taken. In *Rev. St. Mo. 1899*, §§ 807, 811 [Ann. St. 1906, pp. 775, 780], the appeal in open court is taken by motion to the court requesting that a record of the appeal be made. It is recognized as an application to the court also in the opinions in *Hewitt v. Filbert*, 116 U. S. 142, 6 Sup. Ct. 319, 29 L. Ed. 581; *Brockett v. Brockett*, 2 How. (U. S.) 233, 11 L. Ed. 251; *United States v. Gomez*, 1 Wall. (U. S.) 690, 17 L. Ed. 677. Even a rule or statute requiring motions to be in writing does not apply to motions made in the progress of a cause with relation to matters presented by the pleadings or record, to which it is said that general rules cannot apply. 14 Ency. Pl. & Pr. 115; *Johnson v. Adleman*, 35 Ill. 235; *Lake's Appeal from Probate*, 32 Conn. 331; *Palmer v. Jones*, 49 Iowa, 405. *Ballinger's Ann. Codes & St. Wash.* § 4888, also

provides that all notices shall be in writing, but, as we have seen, oral notice under Id. § 6503, is sufficient. Therefore we conclude that an oral notice of appeal given in open court or before the judge, if the decree is rendered at chambers, is all that is required by the statute, and service thereof on the adverse party is not necessary, but all interested parties must take notice of it.

It is objected that the notice was not given at the time of the rendition of the decree. The only thing from which this inference can be drawn is that the entry of the notice of appeal is not embodied in the decree; but that fact does not justify such conclusion. It does show that it was entered on the same day, and it is not necessary that it be contained in the decree. In the case of *In re Estate of Askins*, 20 D. C. 10, it is held that it is not necessary to have the notice embraced in the decree. It is sufficient if it be taken in open court, and entered by the clerk. It sufficiently appears that such notice of appeal was given at the time of the rendition of the decree, and the entry of the notice apparently immediately followed the entry of the decree in the journal, and refers to it as "the above order and decree," which sufficiently identifies it without further description.

It is further urged that the notice was not served upon the heirs who were not parties to the objections filed in the probate court; but this is untenable. They were parties to the settlement of the final account of the administrator and to the distribution of the estate, being the only matters under consideration and adjudicated by the decree, and, whether actually appearing or not, they are constructively in court; and, when the notice is given in open court, no service being necessary, all parties affected by the decree are bound to take notice of the appeal. *Brown v. McConnell*, 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495; *New York Hosp. v. Knox*, 57 Miss. 600. If some of the heirs were not parties to the proceeding, then they were not affected by the decree, and have no interest in the appeal. If they were parties and bound by the decree, then they are, without service thereof, also included with the parties affected by the notice.

Therefore, the court below erred in sustaining the motion to dismiss the appeal; and the order dismissing the appeal is reversed, and the cause remanded to the lower court for such further proceedings as may be proper, not inconsistent with this opinion.

(51 Or. 83)

MULTNOMAH COUNTY v. DEKUM et al. (Supreme Court of Oregon. Feb. 11, 1908.)

1. COMPROMISE AND SETTLEMENT—FRAUD—INFORMATION—DUTY TO DISCLOSE.

Where there is no relation of trust or confidence existing between the parties to a compromise which would impose on one an obligation to give full information, and no artifice or

fraud is employed to lull the other to repose, he cannot omit all investigation, and then complain that the former did not volunteer information he possessed, which, if disclosed, would have prevented the settlement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Compromise and Settlement, § 19.]

2. SAME.

Where a county was a party to a suit to remove certain tax titles as a cloud on title, it was bound by the record, and charged with notice that a decree dismissing the suit had been affirmed on appeal prior to the execution of a compromise.

3. COUNTIES — TAXATION — SALES — DELINQUENT TAXES—COMPROMISE BY COUNTY.

Where property charged with delinquent taxes was sold on foreclosure of the tax lien to the county, the county officers had power to effect a valid compromise and settlement with the taxpayers by which a portion of the taxes were remitted.

4. COMPROMISE AND SETTLEMENT—VACATION—FRAUD.

Certain property belonging to a trustee was sold to the county for unpaid taxes. The trustee and the heirs sued the county to cancel the tax certificates as a cloud on title. This suit was dismissed and the decree affirmed on appeal, after which the trustee filed a petition in the county court, alleging that the taxes were invalid and offering a compromise, which the county court accepted. The county thereafter filed a complaint to set aside such compromise, alleging that the trustee did not inform the county court that the decree in the prior suit had been affirmed, and that the assessments were valid, that the taxes were legally imposed, and that the order setting aside the tax sales was void. *Held* that, as the trustee was under no obligation to impart to the county court information that the decree had been affirmed and the complaint failed to allege any fraud in the settlement, it did not state a cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Compromise and Settlement, § 19.]

Appeal from Circuit Court, Multnomah County; John J. Cleland, Judge.

Suit by Multnomah county against Adolph A. Dekum, as trustee of the estate of Frank Dekum, deceased, and others. A decree was rendered for plaintiff, and defendants appeal. Reversed and remanded, with directions.

This is a suit by Multnomah county against Adolph A. Dekum, as trustee under the last will and testament of Frank Dekum, deceased, and others, to set aside a compromise and settlement, whereby certain tax certificates were, upon the payment of a part of the money due thereon, canceled of record and surrendered. The facts are that the heirs at law of the deceased are the owners in fee of lots 1 and 2 in block 48, lots 3 and 4 in block 38, and lot 5 in block 18 of the city of Portland, and also lot 1 and the south half of lot 4, in block 10, in Couch's addition to that city. This property was mortgaged, and the incumbrances were assessed in 1892 to the defendants, as follows: The Hartford Fire Insurance Company, lot 1, and the south half of lot 4, in block 10, in such addition, and lot 5, in block 18, in the city, and taxed to the amount of \$975; "German Savings and Loan Society, mtge. lot 1, 2, block 48, lot 34, block 38, Dekum, Frank, total tax, \$2,921.65." These tax-

es not having been paid, the property assessed therefor was sold May 13, 1899, to the county, which received from the sheriff tax certificates therefor. The trustee and the heirs, asserting that such sales clouded the title to lots 1 and 2 in block 48 in Portland, commenced a suit against the county to remove the outstanding claim, alleging that the tax imposed on the incumbrance on the premises was invalid, because the debt had been paid, the lien discharged, and the statute authorizing the taxation of mortgages repealed. Such proceedings were had that the suit was dismissed and the decree affirmed on appeal. *Dekum v. Multnomah County*, 38 Or. 253, 63 Pac. 496. A mandate having been sent down, entry was made of it in the lower court in March, 1901; and the decree remains in full force. The trustee thereafter filed in the county court of that county a petition, which set forth the real property first hereinbefore described, the assessment and taxation of the mortgages, as stated, and the assertion that he believed these taxes were invalid because the mortgages were not assessed to the holders thereof, and that there was no tract of land in block 38 of the city of Portland designated as lot number "34"; but that it should have been described as lots 3 and 4 in that block; that in 1895 the county recognized such infirmities by not attempting the collection of the taxes, but in 1899, when an alias writ was issued, the description of the premises was amended without legal authority; that, as a compromise and settlement, and to avoid the expense of litigation, the trustee offered to pay the sum of \$975 in full satisfaction of the entire taxes claimed, provided the tax certificates, issued for the property, were canceled of record and surrendered to him. The county court, sitting for the transaction of county business, July 16, 1901, accepted the offer thus made, and upon the payment of the money proposed complied with the terms of the petition; but on May 27, 1903, that court made another order intending to annul such cancellation and surrender, and to effectuate the latter determination this suit was instituted. The complaint sets forth the facts, in substance, as hereinbefore stated, and avers that lots 1 and 2, in block 48, in the city of Portland, constitute the identical property, and the mortgage tax imposed thereon to the German Savings & Loan Society is the same incumbrance described in the suit to remove the alleged cloud from the title; that the trustee did not inform the county court that the decree in that suit had been affirmed; that it is not true that the assessments of either of the mortgages is invalid; that the plaintiff elects to apply the payment of \$975 on account of the taxes mentioned; that in 1892 the mortgages were severally owned and held by the defendant corporations, and the taxes specified were duly imposed; that the order of the county court setting aside the tax sales is void and the entries of such sales in the records thereof remains in full force and

effect, but, by reason of the apparent release, the plaintiff is precluded from realizing anything upon such securities; and that the county had no plain, speedy, or adequate remedy at law. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of suit, having been overruled and the defendants declining further to plead, the relief prayed for by the plaintiff was granted, from which decree the defendants appeal.

P. L. Willis, for appellants. Harrison Allen, for respondent.

MOORE, J. (after stating the facts as above). The complaint herein does not allege any fraud or misrepresentation as a basis for setting aside the compromise and settlement. Neither does it aver that such agreement was not made in good faith, unless concealment can be inferred from the statement that the trustee did not inform the county court that the decree rendered in the case of Dekum v. Multnomah County, 38 Or. 253, 63 Pac. 496, had been affirmed.

The doctrine once prevailed that the failure of a party to a contract to disclose every material fact of which he knew the adverse party was ignorant, although such actuality was equally within the observation or reach of both parties, would afford sufficient equitable grounds for rescinding an agreement that was consummated by means of the concealment. Pom. Eq. § 850. This precept is modified to some extent by a text-writer who, discussing the question, says: "As a general rule, each party is bound to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation." 2 Kent, Com. *482. In a note to this excerpt, appearing in Lacy's edition to the works of this noted author, it is stated: "The rule here laid down, though one undoubtedly of moral obligation, is perhaps too broadly stated to be sustained by the practical doctrine of the courts. The qualification of the rule is that the party in possession of the facts must be under some special obligation, by confidence reposed or otherwise to communicate them truly and fairly." The more modern rule is that when there is no relation of trust or confidence existing between the parties to a compromise and settlement, which would impose upon one an obligation to give full information, and no artifice for a fraudulent purpose is employed which would lull the other to repose, he cannot proceed blindly, omitting all inquiry and investigation, and then complain that the former did not volunteer to give the information which he possessed. 8 Cyc. 525; Dambmann v. Schulting, 75 N. Y. 55; Graham v. Meyer, 99 N. Y. 611, 1 N. E. 143; Cleveland v. Richardson, 132 U. S. 318, 10 Sup. Ct. 100, 33 L. Ed. 384. Tested by this rule, the complaint in the case at bar does not show that any fiduciary relation existed between the parties

hereto at the time the compromise and settlement were reached, nor does that pleading negative in any manner a want of knowledge on the part of the county court that the decree rendered in the case of Dekum v. Multnomah County, supra, had been affirmed. The county, however, was a party to that suit; and hence it knew what decree had been rendered therein, and was bound by the record. The complaint was undoubtedly framed on the assumption that the officers of a municipal corporation were powerless to effect a valid compromise and settlement whereby any part of a burden, represented by certificates issued to a county on account of the sale of property for delinquent taxes, could be remitted. This question having been settled adversely to such theory (Multnomah County v. Title Guarantee & Trust Co., 46 Or. 523, 80 Pac. 409), the only ground, therefore, on which a decree for the plaintiff could be based, is the alleged failure of the trustee to impart the information which he possessed, and that is insufficient.

It is unnecessary, in view of the conclusion reached, to consider whether or not the plaintiff can retain the money paid, which affords a valuable consideration for the compromise and settlement, and seek a rescission.

An error having been committed by the trial court, the decree is reversed, and the cause remanded, with directions to sustain the demurrer.

MATLOCK v. SCHEUERMAN.

(Supreme Court of Oregon. Feb. 4, 1908.)

1. BILLS AND NOTES—CHECKS—ACTIONS—DEFENSES—ILLEGALITY—BURDEN OF PROOF.

Under B. & C. Comp. § 1945, providing that all notes, bills, etc., the consideration for which is money won at gaming with cards, etc., shall be void as between the parties thereto and all other persons, except holders in good faith, without notice of the illegality of the contract, where, in an action on a check by the indorsee thereof, it was admitted by the pleadings that the check was given for a gambling debt, plaintiff had the burden of establishing all the elements necessary to constitute him a holder in good faith for value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1675-1686.]

2. SAME.

Under B. & C. Comp. § 4454, providing that one is a holder in due course of a negotiable instrument who has taken the instrument under the following conditions: "That it is complete and regular on its face," etc.—the fact that at the time a check was transferred the payee stated that the drawer had asked him to wait two or three days for presentation of the check did not charge the indorsee with notice of any infirmity in the contract, such a request not being binding on the payee, and not varying the terms of the writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 849-852.]

3. SAME—PRESENTATION—TIME.

As between the drawer and payee of a check the rule is that, when the payee to whom the check is delivered receives it in the same place where the bank on which it is drawn is located, he may preserve recourse against the drawer by presenting it for payment at any

time before the close of banking hours on the next day.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1091-1103.]

4. SAME.

Under B. & C. Comp. § 4455, providing that, where an instrument, payable on demand, is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course, a check issued on a certain date, and bearing that date and negotiated at noon of the following day, was not overdue so as to carry to the indorsee notice of its illegality or previous dishonor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 830-841.]

5. SAME—RECEIPT IN USUAL COURSE OF BUSINESS.

Commercial paper may be said to be received in the usual course of business when it is indorsed and delivered for value under such circumstances that a business man of ordinary intelligence and capacity would give his money, goods, or credit for it, when offered for the purpose for which it is transferred; and it would not be in due course, if he should at once suspect the integrity of the paper itself, or the credit and standing of the party offering it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 819, 820.]

6. SAME—QUESTIONS FOR JURY.

A purchaser for valuable consideration before maturity of negotiable paper is not as a matter of law affected by notice of facts calculated to arouse suspicion as to the transaction in which the paper originated, the single question being whether he acted in good faith; and in determining that question his knowledge of suspicious circumstances may be shown, and it is for the jury to determine the ultimate facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1879.]

7. SAME—NOTICE OF INFIRMITY—SUFFICIENCY OF EVIDENCE.

Under B. & C. Comp. § 4458, providing that to constitute notice of infirmity in a negotiable instrument or defect in the title of the person negotiating it the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith, evidence that the transfer of a check for \$400 by S., the payee thereof, to plaintiff, his brother-in-law, took place near the bank on which the check was drawn and of which plaintiff was vice president; that no inquiry was made at the bank before purchase; and that plaintiff, after getting his lunch, went to a hotel, got a blank check, and filled it out to the order of S. for \$400, and gave it to another party for delivery to S.—did not show actual knowledge on plaintiff's part of an infirmity in the check.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1832-1839.]

8. SAME—QUESTIONS FOR JURY.

Where, in an action on a check by the indorsee thereof, an inference may be drawn from the surrounding circumstances that on the one hand tends to discredit plaintiff's testimony as to his lack of knowledge of the infirmity of the check and his good faith in taking it, and on the other hand tends to establish lack of good faith, the question is for the jury.

9. PAYMENT—CHECK OF DEBTOR—PRESUMPTION.

When a debtor gives his check for the amount of his indebtedness, the prima facie presumption arises that the check was taken merely as conditional, not as absolute, payment, though to make the rule applicable there must be a debt either precedent or contemporaneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Payment, §§ 189-194.]

10. BILLS AND NOTES—CONSIDERATION—EXCHANGE OF COMMERCIAL PAPER—PAYMENT AS CONDITION.

Where there is an exchange of commercial paper, each instrument forms a sufficient consideration for the other, and such exchange is an independent obligation not conditioned on the payment of the other, unless such condition is expressed in it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 174.]

11. SAME.

B. & C. Comp. § 4454, relating to negotiable instruments, provides that one is a holder in due course "who has taken the instrument under the following conditions: * * * That he took it in good faith and for value." Section 4427 provides that value is any consideration sufficient to support a simple contract. One S., the payee of a check drawn by defendant, told plaintiff that defendant had asked him to wait two or three days before presenting it, and that he (S.) might need some money. Plaintiff agreed to take the check, which was thereupon indorsed to him, he giving S. his own check for a like amount. This latter check was afterwards paid. *Held*, that plaintiff gave value for the check indorsed to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 893-908.]

12. SAME—RIGHTS OF INDORSEE—INVALIDITY OF CHECK.

A bona fide indorsee for value of a check given for a gambling debt is not bound on discovering the original invalidity of the check to sue the indorser rather than the maker.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 971-981.]

13. SAME—ACTIONS—INSTRUCTIONS.

Defendant gave his check to one S. in payment of a gambling debt. S. indorsed the check to plaintiff, who took it without notice of its illegality, and gave his own check for a like amount, and on the same bank, in exchange therefor. *Held*, that an instruction that plaintiff was not bound to make inquiry at the bank, or ascertain whether or not his check had been presented or paid at the time he presented defendant's check for payment, nor was it necessary for him to stop payment on his own check, if, at the time he presented defendant's check for payment, he was a bona fide holder thereof, and that the fact that his own check had not yet been cashed would make no difference, was proper.

Appeal from Circuit Court, Umatilla County; H. J. Bean, Judge.

Action by W. F. Matlock against Jacob Scheuerman. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant appeals from a judgment entered against him for the amount of a check issued by him under date of December 12, 1906, on the First National Bank of Pendleton, for the sum of \$400, in favor of Lester Swaggart, his order, or bearer, who about noon of the following day indorsed and delivered it to plaintiff, receiving in exchange therefor plaintiff's check for the same amount, on the same bank, payable to his order. It is averred in the complaint that plaintiff paid Swaggart value for the check, and on the 14th presented it to the bank for payment, which was refused on the order and direction of defendant, given to the bank without plaintiff's knowledge, and after he became the owner of it. The answer admits the issuance of the check, but denies

the other averments of the complaint, and affirmatively alleges that the only consideration for the check was a gambling debt which Swaggart claimed from defendant; that Swaggart on the morning of the 13th, before he indorsed it to plaintiff, had presented the check for payment, which was refused; that plaintiff had knowledge of its illegality when he received the check, and of its previous dishonor; that plaintiff paid no consideration or value for the transfer; and that at the time of the transfer the check was past due. By the reply all of the new matter of the answer is denied excepting that the check was given for a gambling debt. Error is assigned on account of the overruling of defendant's motion for a nonsuit, the admission of testimony over his objection, and the giving and refusing of instructions by the court.

Douglas W. Bailey, for appellant. J. H. Raley, for respondent.

SLATER, C. (after stating the facts as above). All the errors assigned are included in two principal propositions, which alone are necessary to be considered, viz.: (1) Is the plaintiff a holder in course? and (2) was he under any legal duty to stop payment on his own check after having been denied payment of the check held by him? The statute declares that one is a holder in due course "who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." B. & C. Comp. § 4454. But a check, the consideration for which is money won by playing at a game of cards, is void and of no effect as between the parties to the same and all other persons, except holders in good faith, without notice of the illegality of such contract. B. & C. Comp. § 1945.

It having been admitted by the pleadings that the check was given in consideration of a gambling debt, the burden of proof is with the plaintiff to establish all of the elements necessary to constitute him a holder in good faith for value. *Owens v. Snell*, 29 Or. 483, 44 Pac. 827; *Kenny v. Walker*, 29 Or. 41, 44 Pac. 501; *Brown v. Feldwert*, 46 Or. 363, 80 Pac. 414. The check sued on was offered in evidence, and is in the following form:

Pendleton, Oregon, Dec. 12, 1906. No. —.	
The First National Bank	\$400.—
	order
Pay to L. Swaggart	or bearer
four hundred dollars	
	J. Scheuerman.

Plaintiff testified that he had lived in Pendleton for 30 years and had been acquainted with Scheuerman for 20 years; that he was a man who did a great deal of business about town, of which plaintiff had more or less knowledge; that he had frequently seen defendant's checks in circulation in the community, and now held one of them, and that he, plaintiff, was the present owner and holder of the check sued on; that he bought the check from Swaggart, who at the time indorsed the same to him; that no part of the check had been paid, and that he, plaintiff, gave his check for \$400 for it, and that his check, so given to Swaggart, was cashed at the First National Bank, and the amount charged to his account by the bank; that within two or three days after he got Scheuerman's check he demanded payment thereof of the First National Bank, but was told by the cashier that Scheuerman had stopped its payment; that at the time he paid Swaggart for the check he had no knowledge as to what the consideration of the Scheuerman check was, nor that it was given for a gambling debt, nor that the maker and payee thereof had been engaged in gambling. On cross-examination the witness also testified that he bought the check on December 13, 1906, about noon. In answer to the question, "Tell the jury the circumstances under which you bought it?" plaintiff testified as follows: "That day about 12 o'clock I was going home to my lunch, and I met Mr. Swaggart on the corner of the Boston store, and he stopped me and said, 'I have a check of Scheuerman's which he asked me to wait two or three days for, and I may need the money,' and I said: 'All right. Give me the check, and I will give you my check for it, and you can go to the bank and get the money.' And he signed the check, and I went to my lunch and came back from lunch, and went to the hotel and got a blank check and gave it to John Endicott." Knowing that Endicott was well acquainted with Swaggart, he asked him to hand the check to the latter, which he did. Endicott, it appears, had been interested with Swaggart in the results of the gambling game; but plaintiff swears he knew nothing of that. The plaintiff's evidence further shows that he is vice president of the First National Bank, and was in the bank on the morning of the 13th, but he did not then learn that Scheuerman had ordered payment of his check stopped; that he presented the check at the bank for payment on the morning of the 14th, which was refused; that he made no inquiry at the bank to ascertain whether the check he had issued to Swaggart in exchange therefor had been paid or not, nor did he notify Swaggart of the nonpayment of the Scheuerman check, but he immediately gave it to his attorney for collection; that on the 15th Swaggart cashed at the bank the check received by him from plaintiff. Upon this state of the record, has plaintiff made out a prima facie

case of a holder in due course? We shall discuss in the order of their statement in section 4454, *supra*, the several elements of fact, the existence of which is necessary to constitute one a holder in due course.

1. It is necessary that the instrument be complete and regular on its face, and it is argued by the defendant that Swaggart's remark at the time of the negotiation that Scheuerman had asked him to wait two or three days for presentation of the check disclosed to plaintiff that the instrument did not represent on its face all of the contract between the parties and rendered it indefinite as to time of payment. Such a request, however, was not binding on the payee. It did not vary the terms of the writing. It added nothing to it and took nothing from it that was essential to its character as a negotiable instrument. From such a request one would usually and rightly infer that the maker had not funds on deposit to meet the check when issued, but would deposit sufficient funds within the time, and, by the use of such language, notice of that fact might be given; but it is not calculated to carry notice of any infirmity in the contract.

2. It is urged that the check was overdue when negotiated. It is payable on demand, and when such paper is negotiated an unreasonable length of time after issue the holder is not deemed a holder in due course. B. & C. Comp. § 4455. What is a reasonable time has been fixed by judicial decisions. As between the drawer and payee the rule is that, when the payee to whom the check is delivered receives it in the same place where the bank on which it is drawn is located, he may preserve recourse against the drawer by presenting it for payment at any time before the close of banking hours on the next day. 2 Daniel, Neg. Inst. (5th Ed.) § 1590. The presumption raised by the statute is that if the instrument is presented within a reasonable time it would be paid, if a valid instrument on its face; but, when such reasonable time has passed and the instrument is still in circulation, it carries with it the inference of dishonor, and is notice to any one taking it of any latent inherent infirmity that may exist. The check having been issued on the 12th, and bearing that date, and negotiated at the noon hour on the 13th, was not overdue, so as to carry notice to plaintiff of its illegality or of its previous dishonor.

3. It is next urged that the check was not received in the usual course of business, but in a very unusual manner, not in the course of a business transaction, or a transaction free from suspicion. As to what transactions are included "in the usual course of business" it is not easy to determine. That depends largely upon the circumstances of each particular case. 7 Cyc. 925. As applied to the indorsement of commercial paper, it may be said generally to include the concurrent indorsement and delivery for value under

such circumstances that a business man of ordinary intelligence and capacity would give his money, goods, or credit for it when offered for the purpose for which this was transferred, and it would not be in due course if such a person would at once suspect the integrity of the paper itself, or the credit and standing of the party offering it. 2 Randolph on Com. Paper, § 988; Roberts v. Hall, 37 Conn. 205, 9 Am. Rep. 308; Kimbro v. Lytle, 10 Yerg. (Tenn.) 417, 31 Am. Dec. 585. This necessarily involves the question of good faith. But a purchaser for a valuable consideration before maturity of negotiable paper is not as a matter of law affected by notice of facts calculated to arouse suspicion as to the transaction in which the paper originated. The single question is whether he acted in good faith, and to aid in determining that question his knowledge of suspicious circumstances may be shown, and it is for the jury to determine the ultimate facts. Bowman v. Metzger, 27 Or. 23, 39 Pac. 3, 44 Pac. 1090. Since the decision of that case the Legislature has prescribed a rule upon what shall constitute notice in such cases: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." B. & C. Comp. § 4458. The lack of good faith arises, it is asserted, from the facts shown that the transfer took place in the near vicinity of the bank on which the check was drawn, and of which Matlock was vice president; that he and Swaggart were brothers-in-law; that no inquiry was made at the bank before purchase; that Matlock after getting his lunch went to the hotel, and there procured a blank check in which he wrote the amount of \$400, payable to Swaggart, and signed and delivered it to Endicott for delivery to Swaggart. But none of these facts amount to proof of actual knowledge. As to making the inquiry "he does not owe to the party who puts such paper in circulation the duty of active inquiry to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by mere speculation as to his probable diligence or negligence." Belmont Branch Bank v. Hoge, 35 N. Y. 65-68; Bowman v. Metzger, *supra*. Plaintiff testified to his lack of knowledge of the infirmity of the paper and to his good faith in taking it; but if an inference may be drawn from the surrounding circumstances that on the one hand tends to detract from the credibility of plaintiff's statements, and on the other hand tends to establish the lack of good faith, it is for the jury and not the court to determine the fact.

4. Did the plaintiff take the instrument for value? Value is any consideration sufficient to support a simple contract. Section 4427,

B. & C. Comp. It is a well-settled and universally recognized rule that, when a debtor has given his check for the amount of his indebtedness, the prima facie presumption arises that the check was taken merely as conditional, not absolute, payment (22 Am. & Eng. Ency. Law [2d Ed.] 569), and "the acceptance of the instrument by the creditor is considered as accompanied by the condition of payment. Thus it was said, in the time of Lord Holt: 'A bill shall never go in discharge of a precedent debt, except it be a part of the contract that it shall be so.'" 2 Daniel, Neg. Inst. (5th Ed.) 283. And this rule has been applied to the liquidation of a contemporaneous debt. Id. 281.

There must, however, be a debt, either precedent or contemporaneous, to make the rule applicable. Where, however, there is an exchange of commercial paper, each instrument forms a sufficient consideration for the other (2 Randolph on Com. Paper, §§ 479-480; Rice v. Grange, 131 N. Y. 149, 30 N. E. 46; Rankin v. Knight, 1 Cin. R. [Ohio] 515; Shannon v. Harley, 32 Misc. Rep. 623, 66 N. Y. Supp. 471), and each is an independent obligation not conditional on the payment of the other (7 Cyc. 710). In this case the language of the parties used at the time imports nothing more than an exchange of checks. They met upon the street, when Swaggart says to plaintiff: "I have a check of Scheuerman's which he asked me to wait two or three days for, and I may need the money." Plaintiff replies: "All right. Give me the check, and I will give you my check for it, and you can go to the bank and get the money." That is the contract between the parties. It appears from other evidence that the Scheuerman check which was then indorsed and delivered to plaintiff was for the sum of \$400, and that Matlock gave to Swaggart his check for a like amount. The transaction does not amount to an offer to pay \$400 and its acceptance, thereby creating a debt of that amount, which was afterwards liquidated by the delivery of another check. If, however, that construction should follow, the check would have the effect of conditional payment, and it is a part of the plaintiff's case that the check he gave was paid on the 15th. That not only established its value, but is a performance of the condition. The original obligation is paid and extinguished by relation as of the date of the giving of the check. Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Getchell v. Chase, 124 Mass. 366; Cushman v. Libbey, 15 Gray (Mass.) 358. As sustaining the contention that the check was not payment, we are cited to the case of Heartt v. Rhodes, 66 Ill. 351-356. There one Dickinson gave his check to pay a precedent debt existing in the form of a note signed by Heartt for his accommodation, and on which the action was brought. At the time of giving the check Dickinson had only \$23.40 in the bank, and the check was dishonored for want of funds. Because of

the pre-existing debt, the rule of conditional payment was applicable, and the court very properly say: "Drawing the check without having funds to meet it, and having no right to expect payment of it, was a fraud and imposition on the payee." For the same purpose the case of Harrington v. Johnson, 7 Colo. App. 483, 44 Pac. 368, is cited. There one Hoblit, who was the cashier of a bank, purchased of the mortgagee a note and mortgage which had been fraudulently given and gave a check on his bank for the price. A suit in equity was brought to set aside the conveyance for fraud, and the defense of bona fide purchaser for value was set up. Fraud was found; but the lower court held that Hoblit purchased without notice, and that by giving his check he had paid value. On appeal the case was reversed upon the ground that Hoblit was entirely silent as to what became of the check; whether it was ultimately paid, or whether, in point of fact, Mrs. Johnson, the assignor, ever received the money which it represented. He neither produced the check or proved its payment, and hence there was no evidence of value. Thompson v. Sioux Falls National Bank, 150 U. S. 231, 14 Sup. Ct. 94, 37 L. Ed. 1063, is another case upon which defendant relied. It was there held that the crediting upon the books of the bank to a depositor of the amount of a check fraudulently issued without consideration and to whom it was assigned does not make the bank a bona fide purchaser for value, and that if, after such credit and before payment for value upon the faith of the check, the holder received notice of the invalidity of the check, he cannot become a bona fide holder by subsequent payment. This is undoubtedly correct, because by such credit only the relation of debtor and creditor is created, and it is the right of the apparent debtor at any time upon receipt of knowledge of the invalidity of the check to cancel the credit, but if it pays, having such knowledge, it is a voluntary payment. We conclude, therefore, that there was no error in denying defendant's motion for a nonsuit.

The theory of the defense is that the giving of a check by Matlock to Swaggart was not payment and did not amount to payment until Matlock's check was paid at the bank on which it was drawn, or it had passed out of Swaggart's hands and into the hands of an innocent purchaser. An instruction to that effect was asked, but was denied; and the court instructed the jury: "That the plaintiff was not bound to make inquiry at the bank, or ascertain whether or not his check had been presented or paid at the time he presented the Scheuerman check for payment. Neither was it necessary for plaintiff to stop payment on his check, if at the time he presented the check to the bank for payment he was a bona fide holder thereof. The fact that his own check had not yet been cashed would make no difference." And error is also assigned for the refusal to give

and the giving of these instructions. If defendant's theory is correct as to what constitutes payment and when it took place, then Matlock received notice of an infirmity in the instrument before he paid value, and he would be bound at his own peril to stop payment of his own check. But we have already held that, where there is an exchange of commercial paper, as there was in this case, each instrument is a sufficient consideration for the other, and such exchange is an independent obligation, not conditioned on the payment of the other, unless such condition is expressed in it. It necessarily follows that the nonpayment of the Scheuerman check would not be a defense to Matlock in an action against him on his own check brought by Swaggart. "It is true," as stated in *Wooster v. Jenkins*, 8 Denio (N. Y.) 187, "that so long as the securities are in the hands of the original parties they will balance each other. But it is by way of set-off, and not on the ground that they are invalid." Even the defense of set-off would be lost by assignment of the check. As between Matlock and the bank he could doubtless have stopped payment of his own check when denied payment of the Scheuerman check, but that would not have relieved him of liability on his own check either in the hands of Swaggart or of a third party as assignee. While Matlock may have had a cause of action against Swaggart as indorser upon due notice to him of nonpayment, he is also entitled to his action against Scheuerman, and he was not bound to pursue the former for the protection of the latter to whom he was under no legal duty on account of the original invalidity of the check. In *Duncan v. Gilbert*, 29 N. J. Law, 521, action was brought on a note made for the accommodation of one Rowland, and which, it was alleged as a defense, had been fraudulently misappropriated by him, and a letter of credit on London obtained from plaintiff in his favor as the consideration for its assignment. The suggestion was made to the court that plaintiff might revoke the letters of credit and thus protect themselves, to which Brown, J., at page 540 of opinion, replies, in substance, that, if it be said that Rowland has not drawn, the plaintiffs may protect themselves from future drafts by revoking the credit, the answer is, the plaintiffs cannot be called upon by defendant to adopt that remedy. There was no error in refusing the requested instruction, or in the one given.

The court permitted the jury to consider all of the surrounding circumstances given in evidence, which included plaintiff's failure to notify Swaggart of the nonpayment of the defendant's check, and his failure to demand and enforce payment against Swaggart, to ascertain plaintiff's good faith in taking the check. We think that is all that defendant was entitled to, and there was no error in refusing the other requested instructions, not specifically considered herein.

These considerations, we think, dispose of the errors assigned, and result in an affirmation of the judgment.

(33 Utah, 289)

**BRUMMITT et al. v. OGDEN WATER-
WORKS CO. et al.**

(Supreme Court of Utah. Feb. 2, 1908.)

1. MUNICIPAL CORPORATIONS—FISCAL MANAGEMENT—REMEDIES OF TAXPAYERS.

Where a city enacts an ordinance regulating its relations with a water company which provides for excessive rates for the use of water for municipal purposes, a taxpayer may sue to enjoin the waste of public funds, though the taxes of others are proportionally raised.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 2159, 2163.]

2. SAME—ULTRA VIRES ACTS.

A taxpayer may sue for relief against the waste of public funds by unauthorized or ultra vires acts of the municipality, in the absence of a special statute requiring a particular officer to sue for the benefit of all taxpayers. Hence, if a city enacts an invalid ordinance regulating its relations with a water company so as to bind itself to pay unreasonable rates or to require the payment of unjust charges by the public, taxpayers affected directly as users of water or indirectly as taxpayers may sue to enjoin the enforcement of the ordinance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 2158, 2159, 2163.]

3. SAME—DISCRETIONARY ACTS.

Where a city is acting within its authorized powers, a taxpayer cannot arrest its acts merely because they would be unwise or extravagant, nor in any matter that is purely legislative or discretionary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 2157.]

4. WATERS—PUBLIC WATER SUPPLY—RATES—REASONABLENESS—PRESUMPTION.

In the absence of a showing to the contrary, it will be presumed that water rates agreed upon between a city and a water company are fair and reasonable.

5. APPEAL—SCOPE OF REVIEW—QUESTIONS CONSIDERED—CITY ORDINANCE—GROUNDS OF INVALIDITY.

In an action by taxpayers to enjoin the enforcement of an ordinance regulating the relations between a city and a water company, where the ordinance is pleaded and made a part of the complaint, whether a particular provision is legal or illegal, in connection with the other provisions and the allegations of the complaint, may present a mere question of law, and, if it does, the grounds of illegality of the particular provision need not be specially pleaded to authorize its consideration on appeal, if the rights of plaintiffs are affected thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3316-3323.]

6. MUNICIPAL CORPORATIONS—VALIDITY OF ORDINANCES—REMEDY OF TAXPAYER.

A taxpayer cannot sue to enjoin the enforcement of an ordinance, even though it is invalid, unless his rights are affected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 2157.]

7. MONOPOLIES—GRANT—CONSTRUCTION—EXCLUSIVENESS.

Unless a grant is expressly made exclusive, it will not be so construed except by unavoidable implication arising from the terms used in the grant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 1.]

8. MUNICIPAL CORPORATIONS—FISCAL MANAGEMENT—REMEDIES OF TAXPAYER—INJUNCTION—ENFORCEMENT OF ILLEGAL ORDINANCE.

Where an ordinance granting rights to a water company for 50 years is not prohibited by statute, and does not prevent others from receiving the right to supply inhabitants with water, and at most grants a monopoly of the right to furnish water to the city for that time, its enforcement cannot be enjoined in an action by taxpayers who have no direct or personal interest therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 2138.]

9. SAME—INVALIDITY OF PART OF ORDINANCE—EFFECT.

Though a part of an ordinance fixing the relations between a city and a water company is invalid, if it does not affect the interests of the taxpayers who are suing to restrain its enforcement, the effect of the invalid portion upon other provisions need not necessarily be considered in an action by the taxpayers to enjoin the enforcement of the ordinance.

10. WATERS—PUBLIC WATER SUPPLY—RATES—AUTHORITY OF MUNICIPALITY TO FIX—RIGHT—WAIVER.

The fixing and regulation of water rates is a governmental function which cannot be surrendered or suspended by the city council.

11. MUNICIPAL CORPORATIONS—REGULATION OF RATES OF PUBLIC SERVICE.

Municipalities in this state cannot enter into binding contracts regarding rates for services rendered to the public, for the right to regulate and fix such rates cannot be surrendered, in the absence of a constitutional or statutory authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 154.]

12. SAME—ORDINANCES—EFFECT OF PARTIAL INVALIDITY.

The fact that a city ordinance is invalid in part because it attempts to suspend its right to regulate water rates will not render the rest of the ordinance invalid, since, on account of its invalidity, that portion could have no effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 248-251.]

13. SAME—REMEDIES OF TAXPAYER—CONTESTING VALIDITY OF ORDINANCES.

A taxpayer cannot sue to declare invalid or restrain the enforcement of an ordinance regulating relations with a water company, even though it contains invalid provisions which would affect his rights, if they could be enforced for, if they are illegal, they cannot be enforced by the water company, and would be no defense to the enforcement of the taxpayer's right against the company.

14. WATERS—PUBLIC WATER SUPPLY—WATER RATES.

The fact that an ordinance regulating the relations of the city with a water company authorizes the company to fix reasonable rates to be paid by the public in certain instances does not invalidate the ordinance, since, if the rates are reasonable, it is immaterial who fixes them.

15. MUNICIPAL CORPORATIONS—REMEDIES OF TAXPAYERS—ENJOINING ENFORCEMENT OF ORDINANCES.

A taxpayer cannot sue to enjoin the enforcement of an ordinance relinquishing the city's right to purchase a water plant, since the question of purchase is discretionary with the council, and is not a proper subject of judicial review.

16. SAME—ALTERATION OF FORMER CONTRACT.

An ordinance readjusting water rates and regulating relations with water company, which

requires payment for water used on school lawns during a certain season, is not invalid merely because the company was required to furnish free water for the public schools and grounds under a former agreement, and a taxpayer cannot sue to enjoin the enforcement of the ordinance on that ground, for the wisdom of the ordinance is not a matter for judicial review.

17. WATERS—PUBLIC WATER SUPPLY—RIGHT OF CITY TO DISPOSE OF WATER RIGHTS—CONSTITUTIONAL PROVISION.

Const. art. 11, § 6, provides that no municipal corporation shall directly or indirectly lease any water rights or sources of water supply controlled by it, but all such rights, etc., shall be preserved, maintained, and operated by it for supplying its inhabitants with water at reasonable charges; provided that nothing herein contained shall be construed to prevent an exchange of water rights or sources of water supply for others of equal value, and to be devoted in like manner to the public supply of its inhabitants. Prior to the time the Constitution went into effect a city had made a contract purporting to lease certain water rights to one who agreed to construct and operate a system of waterworks to supply the city, etc., under which the lessee was to furnish certain free water to the city. After the Constitution was adopted the city passed an ordinance regulating its relations with the company which succeeded to the rights of the lessee in which some changes in rates, etc., were made, and this ordinance granted to the company the use of the water rights for a term of 50 years as a part of the arrangement; but the city was still to receive considerable water for public purposes free of charge. *Held*, that the ordinance was in effect a mere continuance of the former contract, and the disposition of the city's water right was valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 274.]

18. SAME.

Even if the ordinance were to be construed as a new contract, it would not be invalid merely because it is called a lease, since the water belonging to the city was devoted to its use under the contract.*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 274.]

19. CONSTITUTIONAL LAW—CONSTRUCTION—MEANING OF LANGUAGE.

In determining whether an act is unconstitutional within the meaning of a certain provision, it must fall within the spirit of the constitutional inhibition, and not merely within the technical language used, for Constitutions like other laws are not to be interpreted alone by their words abstractly considered, but the language should be read in the light of the conditions which are to be met and the objects to be attained.†

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 10, 11.]

20. WATERS—PUBLIC WATER SUPPLY—RATES.

Where an ordinance regulating relations with a water company and granting the company a right to use the streets, etc., fixes the rates for the entire period of the contract, that provision cannot be upheld, but the city council may fix temporary rates. Both the city and its taxpayers may sue to enforce reasonable rates, and the water company may sue to prevent the enforcement of confiscatory rates. Hence the entire ordinance is not vitiated by an agreement of the council that a certain rate for hydrants should be maintained during the 50-year period covered by the ordinance.

*Ogden City v. Waterworks Irrigation Co., 28 Utah, 25, 76 Pac. 1069.

†State v. City Council, 26 Utah, 13, 64 Pac. 460.

Appeal from District Court, Second District; J. A. Howell, Judge.

Action by James J. Brummitt and others against the Ogden Waterworks Company and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

J. D. Skeen, James N. Kimball, Dey & Hopppaugh, and O. S. Varian, for appellants. Van Cott, Allison & Riter, and Howat & Macmillan, for respondents.

FRICK, J. This action was commenced December 12, 1906, by the plaintiffs, as taxpayers and water users, for equitable relief by injunction. In 1889 the defendant Ogden City entered into a contract with one J. R. Bothwell whereby he agreed to construct and operate a system of waterworks to supply Ogden City and its inhabitants with water for all purposes. Ogden City, on its part, granted Bothwell the right to lay the pipes to be used in the water system in the streets, alleys, and public places of the city. The contract was for no definite time, and in connection therewith the city leased to said Bothwell its water right amounting to 0.98 of a second foot of water "for the full time that said Bothwell or assigns furnishes water through its system" of waterworks. The defendant waterworks company (hereinafter called "company") succeeded to all the rights of Bothwell under said contract, and for a long time prior to and at the commencement of this action owned and operated the system of waterworks constructed by Bothwell as aforesaid. A further history leading up to the making of the contract and the conditions under which it was entered into and executed are all set forth in the case of *Ogden City v. Waterworks & Irrigation Co.*, 28 Utah, 25, 76 Pac. 1069, to which we refer for a more complete statement. We shall only refer to such parts here as are deemed essential to an understanding of the points passed upon in this opinion. In the Bothwell contract the rates agreed upon were as follows: For the first 100 hydrants, \$75 a year each; for any number above 100, \$60 a year each; for "city buildings, public schools, and grounds, public fountains and water troughs, parks, city squares, and lawns, street sprinkling, and all other municipal uses of water, free." The rates were to be reduced 10 per cent. after three years, and another 10 per cent. after six years. Extensions were to be made as fast as the consumption of water by users should produce a revenue of 8 per cent. on the cost of extensions. The city also reserved the option to purchase the system of waterworks by paying therefor the original cost of construction, to be paid for either in cash or in 6 per cent. city bonds. This option did not include a certain conduit which was part of and connected with the waterworks system. In addition to the waterworks the city was also to purchase the water rights owned by Bothwell, the value of which was to be

ascertained by appraisers chosen by the parties. Before the city could exercise its option to purchase it was required to pay Bothwell the sum of \$150,000, payment thereof to be made in three annual installments, which was to be for the perpetual right to use the conduit above mentioned. Much litigation ensued, a part of which culminated in the case referred to in 28 Utah, supra. In 1906 it seems a full adjustment and settlement of all differences between the parties was had, and, in pursuance of which, the terms and conditions of the Bothwell contract, under which the company was operating the waterworks system, were modified in certain respects by an ordinance passed by the city on September 24, 1906, and duly accepted by the company on October 1st of the same year. It is this ordinance that is called in question in this proceeding by the water users and taxpayers. The purpose of the action is to declare the ordinance illegal and void, and to enjoin its further enforcement by the city and the company. In the ordinance the rates for fire hydrants were fixed at \$35 each. The city was also to receive free water for the following purposes: For all public buildings and grounds used for city purposes; for flushing public sewers; for washing paved streets and gutters; for five public drinking fountains, and an additional one for every 5,000 increase in population; for five watering troughs, and an additional one for each 5,000 increase in population over 20,000; for sprinkling city streets; for public school buildings and grounds, except for the water used on lawns from June 1st to September 15th; for sprinkling all the city parks, city hall square, city hospital grounds, and lawns at the library building, and for parking the centers of all streets. In addition to this the company agreed to pay the city an annual license or occupation tax of \$2,500. The right to occupy the streets and to furnish water was limited in the ordinance to 50 years. The city also, as in the Bothwell contract, granted the company the use of the 0.98 second foot of water during the term aforesaid. Extensions were also provided for upon the same terms as in the Bothwell contract. The right was also given the company to set and maintain water meters in any building except residences, and to charge for water at meter measurements instead of the rates fixed by the ordinance. It was also provided that "consumers shall have the right to have meters set and pay for water by meter measurement. Meters will be of such make and size as may be approved by the waterworks company, and will be furnished and maintained in good order by the consumer." The ordinance also contained a schedule of water rates to be paid by the consumers of water. These rates were not to be increased nor diminished during the term for which the right was granted, except that all rates, not including fire hydrants, should be readjusted "every 10 years by a committee of three, one

to be appointed by the city council, one to be appointed by the waterworks company, and these two to appoint a third member." For the use of water not specially designated in the schedule of rates the company was authorized to fix a reasonable rate. Ogden City also agreed to pay the sum of \$10,000 to the company as a full and complete compromise and settlement of all prior claims against the city for water rentals or for any and all other claims arising out of the prior litigation and rights or claims existing between the parties, and of all matters pertaining thereto. The amount of these claims does not appear, but it is fairly inferable that they were much in excess of the \$10,000 mentioned. In their complaint the plaintiffs attack the ordinance on the following grounds: That the city had no power to lease the 0.98 second foot of water; that it had no authority to waive the option right of the city to purchase the waterworks system provided for in the Bothwell contract; that the city, without legal authority, authorized the payment of extra compensation to the company for the performance of duties which it was already bound to perform; that the city had no power to waive, suspend, or relinquish the right to fix and regulate the water rates for the use of water, as contemplated in the ordinance; that the water rates fixed in the ordinance are exorbitant, unreasonable, and excessive. The plaintiffs further alleged that the city and the company threaten to enforce all and singular the matters complained of, and prayed that they be enjoined. The defendants filed separate answers to the complaint. The company admitted the making of the Bothwell contract set forth in the complaint, the passage and acceptance of the ordinance, the corporate character of defendants, and that it intended to carry on its water system and enforce the rates mentioned in the ordinance. It further answered that as to the leasing of the 0.98 second foot of water such alleged lease was only an extension or renewal of the right to said water provided for in the Bothwell contract, and that it was the intention of the company and the city that the company should continue the flow of said water through its pipes the same as theretofore, so that the city would not lose or forfeit its rights to said water by a nonuser thereof. It denied all other allegations of the complaint. The city's answer is practically the same as that of the company. Upon these issues a trial was had to the court, which found all the issues in favor of the defendant, and accordingly entered judgment against the contentions of the plaintiffs, from which they appeal.

Before proceeding to the merits we will dispose of the preliminary question which is raised by the defendants. It is asserted that the plaintiffs have no standing in court in their capacity merely as taxpayers. One of the plaintiffs, however, claimed to be directly affected by the water rates which were

claimed to be unreasonable and excessive. But, waiving this point, a general taxpayer of the city certainly is affected in case the city is devoting public funds to the payment of excessive and unreasonable rates for the use of water for municipal purposes. To the extent that the water rates are excessive his taxes are increased, and the mere fact that it increases in like proportion the taxes of all other taxpayers does not deprive him of the right to maintain an action to arrest the waste of public funds. The weight of authority is clearly to the effect that a taxpayer may obtain relief against the waste of public funds through the unauthorized or ultra vires acts of the municipality, where there is no special statute by which some particular officer is designated in whose name the action must be brought for the benefit of all taxpayers. *Crampton v. Zabriskie*, 101 U. S. 600, 25 L. Ed. 1070; *Read v. Atlantic City*, 49 N. J. Law, 559, 9 Atl. 759; *Grand Island Gas Co. v. West*, 28 Neb. 852, 45 N. W. 242; *Packard v. Hayes*, 94 Md. 233, 51 Atl. 32; *Gibson v. Board of Supervisors*, 80 Cal. 359, 22 Pac. 225; *Meyer v. Town of Boonville*, 162 Ind. 165, 70 N. E. 146; *Dyer v. City of Newport*, 94 S. W. 25, 29 Ky. Law Rep. 656. Upon the other hand, where a city is acting within its authorized powers, a taxpayer may not arrest its acts merely because such acts will be unwise, improvident, or extravagant; nor may he do this in any matter that is purely legislative or discretionary. This is well illustrated by the following authorities: *Incorporated Town of Tahlequah v. Guinn*, 5 Ind. T. 497, 82 S. W. 886; *Torrent v. Muskegon*, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715; *Wells v. Atlanta*, 43 Ga. 67. The questions in this case fall squarely within the rule announced by the cases first above cited, and hence the plaintiffs, as taxpayers, had the right to institute and maintain this action to the extent at least that they were directly affected as users of water, or to the extent that they may be indirectly affected as taxpayers. By this is not meant that they may champion the rights of other water users for excessive rates which in no way affect the plaintiffs, nor may they champion the rights of the water company or any other person where none of their private or public rights are directly affected.

Proceeding now to a consideration of the reasons assigned by plaintiffs why the ordinance in question should be held invalid and its enforcement enjoined, we remark: There was no evidence whatever offered that the water rates agreed upon between the city and the company for the use of water for city purposes were either unreasonable or excessive. With respect to the contention that one of the plaintiffs was charged unreasonable and excessive rates, the evidence did not sustain the contention, and the court found against it. Until the contrary is shown, the presumption will prevail that water rates agreed upon between the city and the com-

pany are fair and reasonable. *Wagner v. City of Rock Island*, 148 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; *Robbins v. Bangor Ry. & El. Co.*, 100 Me. 496, 62 Atl. 141, 1 L. R. A. (N. S.) 963. The question of excessive or unreasonable rates is therefore out of the case, and needs no further consideration.

It is urged that the granting of the 50-year privilege to the company to furnish water for the city constitutes a monopoly, and is against public policy and therefore void. The defendant company insists that this was not one of the grounds stated in the complaint as a reason why the ordinance should be held void, and that therefore we cannot consider it. The ordinance was, however, pleaded, and made a part of the complaint. All of its provisions were before the district court for consideration, and are now before this court. As to whether a particular provision, in comparison with all the other provisions, and in view of the allegations contained in the complaint, is legal or illegal, may therefore present a question of law merely. This particular question, we think, presents nothing more. It was therefore merely a matter of argument and not pleading. We think that the plaintiffs have the right to insist upon all questions of law which affect the legality of the ordinance in so far as they are directly and presently affected in their rights as taxpayers and water users. Whether they are so affected requires an examination of the question presented, and for that purpose we have concluded to examine into it. If the ordinance is not void, or if they are not affected, then in either event they must fail. The question is one of grave importance, and merits most careful consideration. It is not claimed that the city council did not have the power to enter into a contract with some one for the purpose of supplying the city and its inhabitants with water. Indeed the statutes of this state expressly confer that power upon municipalities. Neither is it contended that the statutes prescribe any period of time for which such contracts must be limited. But it is urged that, under the common law prevailing in this state as elsewhere, such a grant is void upon the ground that it constitutes a monopoly. A number of cases are cited in support of this contention. While in the cases cited, under the facts present in those cases, the courts so held, it seems to us that the facts upon which the claim is based here are readily distinguishable from those upon which the decisions rest in the cases referred to. In those cases one of two elements was always present—either the city council had exceeded the time limit imposed by the statute, or had in terms attempted to grant an exclusive right. Neither of these elements is present in this case, although it is strenuously insisted that the latter is present, if not in express terms, that it is so by necessary implication. There is nothing in the ordinance whatever which

makes the grant exclusive. The terms of the ordinance might be the same, although the same privileges were granted to two or more companies to furnish water to the city and its inhabitants. It is true the city agrees to take water and the company agrees to furnish it for a period of 50 years. But there is nothing contained in the ordinance that any other citizen or corporation may not at any time ask for and obtain the same privilege. It is not even specified how many hydrants the city agrees to pay for. All the specification that we can find is that the charge for fire hydrants shall be \$35 each annually. The things for which water shall be furnished free are specifically enumerated, but those which the city pays for are not. It is true that the ordinance provides in the first section that the company is given the right to do all things necessary "for the purpose of furnishing and supplying the said city and its inhabitants with water for all necessary and useful purposes." And in section 4 it is provided: "The rights and privileges herein granted shall continue in force for a term of 50 years and from and after December 1, 1906." The ordinance is somewhat loosely drawn and is not specific in many matters that might well have been made more specific. This condition may, however, be accounted for upon the theory that the waterworks were in existence and had been in operation for many years at the time the ordinance was passed. The matters involved in the contract had been litigated in various suits, and all that was then attempted between the city and the company was to modify in certain respects the old contract and to continue it in force as to all other matters not modified. Moreover, since the original contract was without time limit, a limit was fixed in the ordinance. As we have said, we fail to see in what particular the city granted an exclusive privilege to the company to supply water either to the city or to the inhabitants. Could it be reasonably contended that, if the city passed an ordinance extending the right to any one else to lay pipes in the streets and to supply water, this would be contrary to any of the express terms of the ordinance in question? The law upon the question as to whether a grant by a sovereign or one of its agencies is exclusive or not is well settled. It is elementary that, unless such right is expressly made exclusive, it is not to be construed so, except by unavoidable implication arising from the terms used in the grant. As is well expressed sometimes, if it is in doubt, the grant falls. This is well illustrated in the following cases: *Jackson Co. H. P. Ry. v. Interstate Rapid Trans. Co.* (C. C.) 24 Fed. 310; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685-696, 17 Sup. Ct. 718, 41 L. Ed. 1165; *Stein v. Blenville Water Supply Co.* (C. C.) 34 Fed. 145-148; *Bartholomew v. City of Austin*, 85

Fed. 359-364, 29 C. C. A. 568; *Hamilton Gas Light & Coke Co. v. Hamilton*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963.

If we assume, however, that the city agreed to purchase all the water used by it from the company for the full term of 50 years, it must still be conceded that in so doing it contravened no positive statute of this state. Plaintiffs concede that the city had the undoubted right to enter into a contract with the company, if limited in terms to a reasonable length of time. What, in view of the circumstances, is a reasonable time? Can we say as a matter of law that a contract not exclusive in terms to supply water for 50 years to a city in this arid region where the sources of supply are limited, appropriated, and controlled is necessarily unreasonable to the extent that it is absolutely void? Moreover, in addition to the uncertainty of the contract in this regard, are we required to consider it in a case where the matter affecting its validity is involved only indirectly by a taxpayer who is in no way personally affected one way or another? If, as the court found, the rates to be paid by the city for water are just and reasonable under the contract, and if this be likewise true with regard to the rates the water user is required to pay, what is there of substance that personally affects the taxpayer with regard to the length of time the contract is to continue? True he might complain if the contract were prohibited by a statute. So he might if the city had not the power to make any contract; but where such is not the case, and he has no personal interest that is affected, may he champion the rights of others? In this regard whether the company has or has not an exclusive right to supply the city with water for city purposes is a matter that must be determined when some one seeks to invade that alleged right against one who claims a subsisting right which is claimed to be invaded. It is not a matter of doubt that the company has not an exclusive right to supply water to the inhabitants of Ogden City under the ordinance in question. Any citizen or corporation may apply for a grant from the city to construct and operate waterworks to supply the inhabitants, and, if such a right be granted, there is nothing in the ordinance which in any way prevents any one or all the inhabitants from obtaining their water supply from such citizen or corporation. In this respect there is, and can be, no monopoly by reason of the provisions contained in the present ordinance. If the monopoly exists, therefore, it is limited to city water. If this limitation is void because unreasonable, then the city may disregard it at any time and obtain water from some other source. But whether it is so or not should be determined between parties directly and personally interested in its determination. The plaintiffs have no such personal interest, and hence they cannot, in advance, champion the rights

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of one who may, at some future time, acquire such interest. *Moore v. City of Walla Walla* (C. C.) 60 Fed. 961; *Dodge v. City of Council Bluffs*, 57 Iowa, 560, 10 N. W. 886; *Grant v. City of Davenport*, 36 Iowa, 396; *Bellevue Water Co. v. City of Bellevue*, 3 Hasb. (Idaho) 739, 35 Pac. 693. From the foregoing authorities, and from the facts as they are made to appear in this case, the plaintiffs do not come within the rule that we have attempted to follow in this case, namely, that they may be heard upon all questions that presently and directly affect them in their rights as taxpayers and water users; but it clearly appears that the claim that the city granted exclusive rights to the company is one that does not directly and presently affect the plaintiffs, and therefore they have no right to contest the ordinance upon that ground even though the right granted were exclusive. *Wood v. City of Victoria*, 18 Tex. Civ. App. 573, 46 S. W. 284. But even though this provision of the ordinance were held void this would not necessarily require us to inquire into the effect this would have upon other provisions. In *Flynn v. Little Falls El. & Water Co.*, 74 Minn. 180, 77 N. W. 38, 78 N. W. 106, the Supreme Court of Minnesota held that the fixing of water rates for a period of 30 years was unreasonable and beyond the power of the city. The rates in that case, however, were found to be grossly unreasonable and excessive, and upon other grounds their payment by the city was enjoined in an action instituted by a taxpayer. But even in that case the court declined to pass upon the effect the injunction would have upon other portions of the contract existing between the city and the water company.

It is further contended that the ordinance is void because the city council surrendered its governmental powers of regulating the water rates both with respect to the city and the inhabitants. This proposition, like the one just discussed, directly affects the powers of the city council. The principles involved, to some extent at least, are therefore applicable to both. In discussing the proposition, therefore, we shall not attempt to avoid all reference to the question just discussed, but shall to some extent blend the two propositions, and cite authorities that illustrate and cover both. That the fixing and regulating of water rates is a governmental function and cannot be surrendered nor suspended by the city council is agreed to by all concerned in this action. We need spend no time, therefore, on this proposition. The law being established on this point, does it follow that, if the provision with respect to the rates fails, this will necessarily invalidate the whole ordinance? The plaintiffs insist that this must necessarily be the result, while the defendant company contends that it does not invalidate the whole ordinance. If the city council were powerless, either to agree to rates for so long a period

of time, or to permit the company, or others, to fix them, because the power to do this is governmental and vested in the city council only, and cannot be delegated by it, it seems to us that the attempt to do this amounted to nothing. By attempting it the city lost nothing and the company gained nothing. The whole matter was left precisely where the law placed it. We are, however, not now dealing with a case where, in the absence of a constitutional provision, the courts hold that the Legislature may authorize a municipality to agree with a public service corporation upon rates to be charged for the services rendered, and may make such rates contractual and binding for the time specified in the legislative act. In such instances it has been held that the governmental right to regulate the rates is suspended during the life of the contract, if within the power conferred by the Legislature. This doctrine is illustrated in many cases. *Omaha Water Company v. City of Omaha*, 147 Fed. 1, 77 C. C. A. 267, and *Detroit v. Detroit Citizens' Street Railway Company*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592, are directly in point. The doctrine of suspension, as illustrated by the cases last above cited, does not apply unless the power to suspend is expressly conferred upon municipalities by the Legislature. In this state no such power has been expressly conferred, nor has it been done by necessary implication. The power, therefore, does not exist. Municipalities in this state, therefore, cannot enter into binding contracts with regard to the rates for services rendered to the public. The right to regulate and fix rates cannot be surrendered, and the duty to exercise the right whenever the rates are, or become, excessive, can be enforced at any time. The attempt to suspend the right by an ordinance in no way affected the city, and conferred no right upon the company. It simply amounts to a stipulation in the contract that the city was legally powerless to consent to, and the company as powerless to exercise, except in conformity to law. This attempt did not invalidate the whole ordinance. This, we think, is well illustrated by the cases hereinafter cited.

The plaintiffs assert that the rates agreed upon and the right to maintain them constituted an essential part of the whole contract; that, if the agreed rates cannot be enforced, then the whole contract falls because there can be no segregation of the consideration under the facts of this case. It would seem that the answer of the company that it concedes that the agreement with regard to the rates is invalid, and that it obtained no rights thereunder, ought to be a sufficient, if not conclusive, answer to this contention. If the company is willing to have the rates regulated as the law provides, namely, by any city council that the electors of Ogden City may choose from time to time, it would seem that the question of water rates involved in this contract is not only settled for the pres-

ent, but that it is settled for all time and in accordance with law. The courts have frequently held that, as the fixing and regulating of rates is a governmental function which may not be delegated nor surrendered by an agency of the sovereign without express authority, no contractual rights can be granted or obtained with respect thereto. This doctrine is thoroughly discussed and applied in the case of *Rogers' Park Water Co. v. Fergus*, 178 Ill. 578, 579, 53 N. E. 363. It is there held that every person dealing with an agency of the sovereign must take notice of the legal powers with which such agency is invested, and that these powers may not be evaded by contract. It is also held that water companies are quasi public servants, and that contracts to furnish a supply of water is a public duty which must be discharged in accordance with the law which always reserves the right to regulate and enforce reasonable rates for the services rendered, and that this law is a part of such a contract and may not be disregarded. It seems reasonably clear to us that in view of the law the company cannot now maintain an action to recover the rates agreed upon in this contract, if the city defended upon the ground and established the fact that the rates agreed upon were excessive and unreasonable. Neither could the company refuse to provide water under the contract at fair and reasonable rates for the services. This being so, how can a taxpayer annul a contract which neither of the parties thereto may avoid? A complete answer to a claim by the company for the agreed rates would be the lack of power upon the part of the city to agree to excessive and unreasonable rates; while a complete answer by the company, in case the city refused to pay at all, would be the use of the water by the city for which the law would require it to pay a fair and reasonable rate. In the case of *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518, Mr. Justice Sanborn, in passing upon a similar question, says: "If it (the company) does not receive this benefit, the city suffers no loss. The only effect upon the city is that it gets the waterworks for a less price than it agreed to pay for them. No reason occurs to us why, under this state of facts, the gas company or its successors may not waive the receipt of the exclusive right and recover the remainder of the consideration which the city promised to pay it. The grant of this exclusive right was neither immoral nor illegal. It was merely ultra vires. We know of no rule of law nor of morals which relieves the recipient of the substantial benefits of a partially executed contract from the obligation to perform or pay that part of the consideration which he can perform or pay, because the performance of an insignificant portion of it is beyond his powers." In the case quoted from an exclusive right was granted which was held void, but it was nevertheless held

that the city could not for that reason avoid all the other parts of the contract. In the case at bar the city is continually receiving the fruits of the contract, and the inhabitants enjoy a like benefit. The waterworks are constructed and in constant use. The time, labor, and money of the company have been expended for the purpose of supplying water to the city and its inhabitants. Is all this to be arrested at the request of a taxpayer? And are all the rights of the company to be ignored because of some provisions in the contract which the city was powerless to enter into, and which, if ignored, inure to the benefit of the city and the taxpayer? We think the following cases well illustrate that such is not the law: *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679; *City of Danville v. Danville Water Co.*, 178 Ill. 299, 53 N. E. 118, 69 Am. St. Rep. 304; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 303; *Tampa Waterworks v. Tampa*, 199 U. S. 241, 26 Sup. Ct. 23, 50 L. Ed. 170; *Illinois Tr. & Svcs. Bank v. Arkansas City*, 70 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; *Cedar Rapids Waterworks Co. v. Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081; *Jackson Co. H. P. R. Co. v. Interstate R. Tr. Co. (C. C.)* 24 Fed. 310; *Moore v. City of Walla Walla (C. C.)* 60 Fed. 961; *Knoxville Water Co. v. Knoxville*, 189 U. S. 438, 23 Sup. Ct. 531, 47 L. Ed. 887. In *State v. St. Paul City Ry. Co.*, 78 Minn., at page 340, 81 N. W., at page 201, it is said: "In short, while a municipality cannot impair the obligation of its contract under the guise of exercising its police power, yet it cannot surrender or barter away its police powers under the guise of making a contract." The principles involved in this case are all thoroughly considered and discussed in the foregoing cases. While in nearly all of them some matters incorporated into the contract were held to be void on the ground that the matters were ultra vires, still, in none of them, was the entire contract held to be void and nonenforceable. This doctrine is peculiarly applicable to cases like the one at bar, where everything pertaining to the contract has been executed except the part of continuing the services contemplated by it to be rendered for a term of years. It is true that in the cases of *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 143, and in *Edwards County v. Jennings*, 89 Tex. 618, 35 S. W. 1053, the Supreme Court of Texas held that provisions in the contract giving exclusive rights to the water company invalidated the whole contract. This, however, is based upon a constitutional provision in force in the state of Texas, and the cases in which it was held did not present the peculiar facts present in this case and present in the cases cited by us in support of our views. It may well be that an attempt to execute a contract before its execution is entered upon, or even an attempt to enter into

a contract which in part only is illegal or ultra vires would, in a proper proceeding, be enjoined as an entirety. In such a case there is no part performance to be considered, and the parties may easily enter into a contract by which all objectionable parts are avoided. To declare a whole contract void, however, simply because some parts of it are ultra vires but not expressly prohibited and not contrary to good morals, and where such ultra vires parts, if disregarded, inure to the benefit of the party objecting, is quite a different matter.

It is further insisted by the plaintiffs that the ordinance should be held void upon the ground that it provides that the water user shall pay for and maintain water meters if such user desires to pay for water by meter rates rather than the flat rates; and upon the further ground that extensions of the system need be made only when such extensions return a revenue upon the cost of making them amounting to 8 per cent.; and also upon the ground that, where no rates are specified in the ordinance for water, the company may establish and collect reasonable rates. These are all matters in which the plaintiffs are not now interested. No user of water is required to obtain a meter. The matter is entirely optional with him. If he demands a meter, and the company provides him with one, he suffers no injury. If, upon the other hand, the company refuses to provide one, if the law requires this of it, we can see no reason why he may not enforce his right in the courts precisely the same as he might do if the company had agreed to provide one, but, notwithstanding such promise, refused to do so. If the provision in this regard is void, then the water user cannot complain. If, upon the other hand, it is valid, then again he has sustained no legal injury by its enforcement. At all events it is not a matter in issue now, and, so far as the record discloses, may never become a live issue. With regard to the extensions the same reasons apply. There is not a word of testimony that 8 per cent. on the cost of making them will be an unreasonable rate for water service; nor is there a word of evidence that extensions are contemplated nor that any will be made. Moreover, so far as this record discloses, none of the plaintiffs may ever be affected by them if made. As we understand it, the effect of the provision is that the water users along the line of extension, not the city, must pay the stipulated amount. As taxpayers the plaintiffs are therefore not directly interested, and as users of water they never may be. If, however, the rates should be unreasonable and excessive, the courts are always open to the city or the taxpayers to prevent their enforcement. On the other hand, the courts are likewise open to the company to prevent the enforcement of confiscatory rates against it. The rate question is thus left open, and must so remain for

adjustment and regulation whenever the occasion calls for it.

With respect to the rates that are left to be fixed by the company, this ground is also covered by what we have already said. The city council certainly had the power to agree upon reasonable rates. This is all the company is authorized to impose by the provision of the ordinance now under consideration. Is it a matter of substance whether the city council proposes the rates or the company does so? The real thing to be kept in mind is that the rates, whatever they are, must be fair and reasonable. To make them so, and to maintain them as such, is the special province of the city council. But how, or through what sources or means, it arrives at such a rate, is not material.

A further objection urged is that the city council had no authority to surrender the option to purchase the water system which the city had under the Bothwell contract. But this, it seems to us, is not a judicial question. Whether the city council should have reserved an option to purchase the plant or not in the first instance was a matter purely discretionary with it. There was no legal duty imposed upon it to reserve such an option, and we know of no law whereby the exercise of the right could be enforced. The reservation of the right in the contract, as well as its exercise when made, were therefore matters purely of discretion vested in the city council. If discretionary in this regard, it must likewise be held discretionary with regard to whether the option should be abandoned or not. Whether it was wise or unwise, prudent or otherwise, to do so, is not a matter for judicial review. The option had been running for over 16 years. The price fixed was the original cost, and before the plant could be purchased, even at this price, the city would have to pay \$150,000 for the right to use the conduit, and thereafter pay one-half of the cost necessary to maintain it. It may well be that after such a length of time the use and wear and tear of the original plant no longer made the cost price a fair purchase price. Neither can it be said that the city did not receive ample consideration for surrendering the option. Large claims against the city were relinquished by the company, and the company now pays the city an annual license or occupation tax of \$2,500. Even if the question were one for judicial review, we cannot see in what way either the city or the taxpayers are prejudiced by the surrender of the option at the price fixed. Nor can we conjecture in what way the surrender of the option can possibly affect the present ordinance or its enforcement.

The objection urged against the ordinance because the city council requires the board of education of Ogden City to pay for water used upon the lawns surrounding the school buildings from June 1st to September 15th in each year is, we think, likewise untenable.

This was a matter that clearly fell within the province of the city council in readjusting the rates to be paid and in agreeing upon the quantity of water to be furnished free to the city by the company. The taxpayer has no better right to obtain water free or for less than what amounts to a reasonable compensation for the service than the company has to enforce excessive rates. There is not a word of evidence concerning the amount of water that will be required for such lawns, whether it will cost \$1 or \$1,000, nor that the arrangement in respect thereto is unfair or unreasonable. The entire claim is based upon the fact that under the Bothwell contract water for schoolhouse lawns was free, while under the ordinance it is not. For aught that appears from the record the change from the Bothwell contract to the present one may have been fair, just, and equitable in view of all the circumstances. That it was so, in the absence of evidence to the contrary, we must presume. If this be assumed, as it must be, how can a taxpayer be heard to complain? Indeed, so far as the record discloses, the present arrangement, although it does require payment for one item which was free before, may still redound to the benefit of the taxpayer when the whole contract is considered. Shall one or two taxpayers, therefore, be permitted to destroy a contract that may be for the benefit of many by simply pointing to an isolated matter which, if considered alone, might possibly affect them? We think not. If the rate agreed upon with regard to the lawns is or becomes unreasonable it can, and no doubt will, be adjusted. This is all the taxpayer is entitled to. The wisdom of the arrangement is not a matter for judicial review.

The last objection to be considered is one with regard to the so-called leasing to the company of the 0.98 second foot of water owned by the city. This presents a question not entirely free from difficulty. The Constitution (section 6, art. 11) provides: "No municipal corporation shall directly, or indirectly, lease, sell, alien or dispose of any waterworks, water rights, or sources of water supply now, or hereafter to be owned or controlled by it; but all such waterworks, water rights and sources of water supply now owned or hereafter to be acquired by any municipal corporation, shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable charges: Provided, that nothing herein contained shall be construed to prevent any such municipal corporation from exchanging water rights, or sources of water supply, for other water rights or sources of water supply of equal value, and to be devoted in like manner to the public supply of its inhabitants." Has either the letter or spirit of this provision been invaded by the city in dealing with the water mentioned in the ordinance? It is quite clear that the city legally may exchange the quantity of water mentioned for a like

quantity with any person or corporation. If it could effect such an exchange for all time, could it not do so for a limited time? The right to do the latter is necessarily included in the former. Now, what is it that the city has done in this case? Designating its act in this regard as one thing, rather than as another, is not controlling. When it is urged that a statutory or constitutional provision has been violated, we must look to the act rather than the name given to the act. In this connection it must not be overlooked that this court, in the case referred to in 28 Utah, 25, 76 Pac. 1069, has already passed upon and sustained the Bothwell contract. It was there held that the city had the power to deal with this 0.98 second foot of water in the manner set forth in the ordinance, and that the real consideration for the contract was the construction and maintenance of the water system and the supplying of the city and its inhabitants with water. True that contract was made before the Constitution went into effect. It is equally true that the ordinance in effect amounts to a mere continuance of that contract in so far at least as the water is concerned. If this be the correct view, then the question is hardly an open one. But, assuming it not to be the correct view, and that the ordinance must be construed as a new contract, does it violate the constitutional provision above quoted? It will be observed that so long as the city water is devoted to the use of the city and its inhabitants this provision is not infringed. Is this water so applied under the provisions of the ordinance? It seems to us that it is so admits of little if any doubt. From the statement of facts made at the beginning of this opinion, it appears that a large volume of water is delivered to the city free. Just what this volume is as compared with the 0.98 second foot owned by the city the record does not disclose. The present chief justice in the case referred to in 28 Utah, at page 44, 76 Pac., at page 1074, in discussing this point, said: "While the record does not disclose the exact quantity of water furnished to the city free under the lease, yet it is evident from the numerous public uses made of the water that the city used, without cost or expense of any kind on its part, a quantity equal to, or greater than, that leased to defendants. The payment of the nominal money consideration of \$1 provided for in the lease was evidently exacted as an annual acknowledgment of the city's title on the part of the lessee, and, as stated, not the real or true consideration. And, further, the water has not been diverted from the uses to which it was dedicated. The only change made is that it is being distributed by a private corporation instead of a public corporation."

Can the matter be regarded in a different light now? We think not. Does the constitutional provision above quoted stand in the way? Our answer is again in the negative.

Would it not be a most forced and unreasonable construction of the constitutional provision to say that it meant that a city owning a small quantity of water entirely insufficient for its public needs, say nothing of the needs of its inhabitants, could not make any arrangement with any person to permit its water to flow through the pipes owned and controlled by such person and to distribute it for the use of the city? Would it alter the case if such an arrangement were called a lease? Does it not in substance amount to this? The city has some water but no means of distribution. Some one has the means of distribution and an additional amount of water, which, if combined with what the city owns, the needs of the city and its inhabitants, may be met. In order, therefore, to make use of the city's water, it enters into an arrangement with the person owning and controlling the waterworks and the additional water to permit its water to flow through the system owned by such person and in order to preserve its title to the water the city requires the distributor to make a proper acknowledgment of this title. The mere fact that the city cannot say that the identical water owned by it is distributed to it in no way changes the effect of the arrangement. As we have already pointed out, the city may exchange water for water, and this in effect is all that it has done in this case, and that is all that can in any event be done under the provisions of the ordinance. If the ordinance had been worded so as to define the rights and purposes of the parties just as we have outlined them above, perhaps no one would have raised an objection. The mere fact that what was in fact intended and what is being accomplished is not precisely stated in apt phrases in the ordinance ought not, in a court of equity at least, affect the result. We are of the opinion that the arrangement with respect to the 0.98 second foot of water is not contrary to the provisions of the Constitution, and the ordinance should not, for that reason, be declared void. By what we have said it is not intended that cities may, by indirect acts, circumvent this constitutional provision. But what we mean is that, when it is clear that the facts complained of were not intended as an evasion or have in any manner violated the spirit of the Constitution, then the acts will be upheld, unless such acts are clearly prohibited by the language contained in the Constitution. In other words, the acts must fall within the spirit of the constitutional inhibition, and not merely within the name applied to them. It is well to remember that Constitutions, like other laws, are not to be interpreted alone by their words abstractly considered. The words should be read in the light of the conditions and necessities which they are intended to meet and the objects sought to be attained thereby. *State v. City Council*, 23 Utah, 13, 64 Pac. 460; 1 *Dillon's Municipal Corporations* (4th Ed.) § 3a.

We are constrained to hold, therefore, that the agreement fixing the rates for the entire period of the contract cannot be upheld; that the city council had the right to agree upon and fix temporary rates; that the rates agreed upon and set forth in the ordinance are presumed to be fair and reasonable until the contrary is shown; that the city council cannot delegate its duty to regulate, fix, and maintain reasonable rates, but that it must exercise this power and duty in that regard whenever the rates are or become excessive and unreasonable; that the city or any taxpayer may have recourse to the courts to enforce reasonable rates and prevent the company from collecting such; that the company may likewise have recourse to the courts to prevent the city council from enforcing confiscatory rates; and that the whole ordinance in question is not vitiated by reason that the city council agreed that the rates with regard to the hydrants should be maintained during the entire period of the time mentioned in the ordinance, nor because the city council agreed that the company or a committee may fix or revise certain rates; nor is the entire ordinance void upon the other grounds urged by the plaintiffs and discussed in this opinion. Since the present rates are reasonable as found by the court, and there is no present threat to enforce unreasonable rates and nothing for which present relief can be granted to any of the plaintiffs, there is no reason for and no ground upon which the judgment of the court can be reversed or modified.

The judgment, therefore, should be, and it accordingly is, affirmed, with costs to the defendants.

MCCARTY, C. J., and STRAUP, J., concur.

SPIKING et al. v. CONSOLIDATED RY. & POWER CO. et al.

(Supreme Court of Utah. Jan. 25, 1908.)

1. STREET RAILROADS—DEATH OF PEDESTRIAN—CARE REQUIRED.

A person crossing a street in front of an approaching street car is not required to use the same degree of care as persons traveling along, on, or across a steam railroad.¹

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 207, 208.]

2. SAME—CROSSING TRACKS.

A pedestrian desiring to take a street car standing on an opposite track was entitled to hastily cross an intervening track on which a car was approaching, provided he exercised ordinary care for his own safety in view of the surroundings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 207, 208.]

3. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence held to require submission to the jury of the issue of the contributory negligence

of a pedestrian, struck and killed by an approaching street car as he was crossing the track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 255-257.]

4. SAME—EVIDENCE—REPUTATION FOR CARE.

Where, in an action for the death of a pedestrian in collision with a street car, there were several eyewitnesses to the occurrence who testified, evidence that decedent was a careful and cautious man was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 238.]

5. TRIAL—RECEPTION OF EVIDENCE—NECESSITY OF OBJECTION—MOTION TO STRIKE—DISCRETION.

In an action for the death of a pedestrian by collision with defendants' street car, plaintiffs' counsel asked a witness how decedent was as to being a careful and cautious man. The witness answered, without objection, that he was careful, when defendants moved to strike the answer, and excepted to the court's refusal to do so. *Held*, that as the question indicated on its face that it called for incompetent evidence, in the absence of an objection to it, it was not an abuse of discretion to refuse to strike the answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 242.]

6. SAME—INSTRUCTIONS—ASSUMED FACTS—JUDICIAL NOTICE.

Where the fact that fenders were generally used on street cars was treated as a matter of general knowledge, of which the court would take judicial notice, and proof thereof was excluded for that reason, the court was entitled to assume that such fact existed, in its instructions, as if it had been proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 421.]

7. APPEAL—RIGHT TO ALLEGE ERROR—INCONSISTENT POSITION.

Where defendants objected to evidence to show that street cars generally were equipped with fenders, because the matter was one of general knowledge, they could not object on appeal that an instruction, in which the court took judicial notice of such fact, was erroneous because of the absence of evidence thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3600.]

8. STREET RAILROADS—INJURY TO PERSONS ON TRACK—INSTRUCTIONS.

Defendants, having objected to evidence that street cars generally were equipped with fenders, on the theory that such fact was a matter of common knowledge, which objection the court sustained, requested an instruction that there was no evidence that at the time of the accident fenders were in general use, and that there was no proof of negligence because the car that struck decedent was without a fender. The court charged that, if the jury found that the car did not have a fender, they could not find against defendants on that alone, unless they also found that, if the car had a fender, the "accident" might have been averted thereby. *Held* that, the term "accident" having been used in the instructions and evidence to refer to the collision itself, the instruction given in effect told the jury that the fender was not in the case as effectually as if the word "collision" had been used.

9. SAME—APPLIANCES—CARE REQUIRED.

A street railway company is only required to adopt methods, machinery, and appliances in accordance with the ordinary usage of the business.²

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 173.]

¹ Hall v. Ry. Co., 13 Utah, 243, at page 258, 44 Pac., at page 1046, 57 Am. St. Rep. 726; Thompson v. S. L. Rapid Tr. Co., 16 Utah, 289, 52 Pac. 92, 40 L. R. A. 172, 61 Am. St. Rep. 621.

² Fritz v. Electric Light Co., 18 Utah, 493, 56 Pac. 90.

10. SAME—SAFETY APPLIANCES—GENERAL USE.

The rule that it is necessary to prove that certain appliances are in general use by street railway companies before negligence can be predicated on the omission to supply them does not apply to appliances, the use of which is a matter of common knowledge.

11. WORDS AND PHRASES—"FENDER."

As applied to street railway cars, a fender is a guard or protection against danger to pedestrians coming in contact with a car.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2747.]

12. EVIDENCE—JUDICIAL NOTICE—FENDERS ON STREET CARS.

Where negligence, in an action for death of a pedestrian by being struck by a street car, was predicated entirely on the omission to provide the car with any fender or guard whatever, the court was entitled to take judicial notice of the purpose of fenders, as applied to street cars; such appliances being in common and general use on street cars.

13. STREET RAILROADS—DEATH OF PEDESTRIAN—CASE REQUIRED.

Where decedent was killed in a collision with a street car, and the court called attention to the particular circumstances of the case, an instruction that decedent was required to use his senses, and exercise that degree of care that men of ordinary prudence would have exercised under the particular circumstances of the case as disclosed by the evidence, was not objectionable as requiring too low a degree of care, in view of evidence that decedent was familiar with the surroundings and conditions prevailing at the place of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 207, 208.]

14. SAME.

Where the court repeatedly charged that decedent was required to use all his senses to avoid collision with a street car by which he was killed, and that, unless he did so, plaintiffs could not recover, an instruction was not objectionable in the use of the expression "observing the car," instead of requiring decedent to have "looked for the car" before attempting to cross the track.

15. SAME—CROSSING STREETS—PLACE.

Where decedent was killed in a collision with a street car, as he was crossing the track, at a point some distance from a street crossing, but at which a large number of persons habitually crossed the track, an instruction that he was entitled to rely on the assumption that the company and its servants would discharge their legal duty in approaching crossings by having their cars under control was not objectionable because the accident did not happen at a public crossing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 207, 208.]

16. SAME—DUTY OF RAILWAY COMPANY.

Where a point in a street some distance from a crossing was habitually used by a large number of persons in crossing the tracks of a street railway, it was the duty of the railway company to conform the movements of its cars to such condition and to approach such point with the same degree of care it was required to approach street crossings.

17. SAME—RIGHTS IN STREETS.

Where a street railway company is authorized to lay its tracks on a street, no part of the street is thereby withdrawn from the use of the public, the street being merely burdened with an additional easement in favor of the street railway company, with a preferential right of passage over it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 193.]

18. TRIAL—INSTRUCTIONS—REQUESTS.

It is not error to refuse requests to charge which are covered by instructions given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Trial, §§ 651-659.]

19. DEATH—DAMAGES—LOSS OF PROFITS.

In an action for wrongful death, an instruction authorizing consideration on the question of damages only of the income from property which decedent's skill, personal supervision, and diligence had a part in producing was not objectionable as authorizing consideration of profits arising out of decedent's business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 112.]

Appeal from District Court, Third District; M. L. Ritchie, Judge.

Action by Emeline Spiking and others against the Consolidated Railway & Power Company and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

P. L. Williams, G. H. Smith, and J. G. Willis, for appellants. Powers & Marlon-eaux, for respondents.

FRICK, J. This is an action for damages for personal injuries resulting in death. The plaintiffs, respondents in this court, are the widow and minor children of the deceased, Thomas W. Spiking, who, in August, 1902, was fatally injured by a street car while attempting to cross the street railway tracks on one of the streets in Salt Lake City. The acts of negligence charged against the defendants, appellants here, are: The omission to sound a gong or ring a bell, or to give any warning of the approaching car; the omission to have the headlight on the car lighted, and in omitting to have any lights on the car; the omission to have the car provided with a fender or guard of any kind; operating the car at a high and reckless rate of speed with the brakes released, and not having the car under the control of the motor-man or any other person while approaching and passing onto a certain switch, the place of the accident, and in omitting to look and ascertain whether the track was clear and free from persons passing to and fro at the point of the accident. The evidence is very voluminous, over 30 witnesses having been examined, a number of whom were eyewitnesses to the accident; and, as is usual, there is a conflict with regard to just how and when certain matters occurred, and with regard to the existence or nonexistence of others. From a careful reading of the entire transcript of the evidence, the following facts may be said to be fairly established: The point, or immediate vicinity, of the accident, is one of the principal business centers of Salt Lake City. The accident occurred on East Second South street, about 85 feet east of the east crossing of Main street, at which crossing the two streets intersect. At the time of the accident the appellants operated cars on three tracks on East Second South street running parallel, two of which continued west across Main street, and the

third, being the north track, terminated at the point of the accident in a switch which connected it with the middle one of the tracks mentioned. The north rail of the northerly track was 28 feet south of the north curb of East Second South street. At the time of the accident there was no overhead or trolley wire connecting the north with the middle track, and the cars going west on the north track were switched onto the middle track by what is termed a "flying switch," which was accomplished by the momentum acquired by the car in approaching the switch. On the north and middle tracks the cars went west, while on the south track they went east. On the night of the accident, August 16, 1902, the car on the north track was due at the switch at 20 minutes past 10 o'clock, but arrived at that point at about 18 minutes past 10. As the car was approaching westerly toward the switch, the deceased was seen by a number of witnesses to start from the north curb on Second South street, thence going in a southerly direction towards a car just starting east on the south track, which car would pass his home. Two witnesses testified on behalf of appellants, who were passengers on the car that struck the deceased, which was an open or summer car, that they saw the deceased start from the point stated, and saw him running or going hastily south towards the car on the south track. In the course the deceased was going he would cross the north track at the switch, and when he arrived there the car in question had also arrived at the switch, and the deceased collided with the front end of the car, which knocked him down, and he fell under the car, and the wheels of the rear trucks passed over one of his legs and one foot, crushing them, so that in a few days thereafter he died from the effects of the injuries. A number of witnesses testified that the car was running at a high rate of speed in approaching the switch, others said it was running faster than usual, while the motorman testified that it was moving at from $4\frac{1}{2}$ to 6 miles an hour. All the witnesses concur that no gong or bell was sounded, nor any warning of the approach of the car given. Some of the witnesses testified that there was no lighted headlight on the car, and all agree that just before the collision, or at the instant at which it occurred, all the lights in the car went out. The current was cut off at the time on account of the trolley leaving the north wire in making the cross-over from the north to the middle track, and the brakes were released so as not to arrest the speed of the car in making the cross-over. The motorman did not look for nor see the deceased until the instant he was struck by the car, at which time the power was off, and the only way the speed of the car could be checked was by means of the hand brake, which the motorman applied. There were lights in the streets, and other lights from the surrounding business houses, so that the car could have been

seen and was seen approaching from the east. The car was not provided with a fender or any guard. The Main street crossing across the tracks for pedestrians was about 85 feet west of the switch where the accident occurred, but a large number of people habitually crossed the tracks at the point of the accident and immediately to the east thereof. A considerable number of people were about the place at the time of the accident, not directly at the switch, but near there, to the north and south of it. The cars on all the tracks habitually stopped just east of the Main street crossing to receive and discharge passengers. There is some evidence that the deceased, to some extent at least, was familiar with the conditions prevailing at and about the switch as outlined above. Whether the deceased saw the car approaching does not directly appear. It does, however, appear that he was hurrying to catch the outgoing car. At the time of the accident there was also a car approaching from the east on the middle track some little distance in the rear of the car on the north track. Upon substantially the foregoing facts, the court submitted the case to the jury, who returned a verdict for respondents, upon which a judgment was duly entered. A motion for a new trial having been duly made and overruled, the appellants prosecuted this appeal.

A great number of errors are assigned, but as counsel have condensed them in their brief and in their oral argument, we shall consider those only that are relied upon in the argument.

The first alleged error we shall consider is the one presented last in the brief, but, as it logically comes first, we shall reverse the order. It is urged that the court erred in refusing to direct a verdict for the appellants upon the ground that the deceased was guilty of contributory negligence as a matter of law. In support of this contention it is asserted that the facts of this case bring it within the rule of *Teakle v. San Pedro, L. A. & S. L. Ry. Co.* (Utah) 90 Pac. 402, 10 L. R. A. (N. S.) 486, in which we held that a person, while walking along the railway tracks in the yard of the railway company and stepping in front of a moving train of cars without looking or listening when he knew the cars were being moved, was guilty of negligence as matter of law. It is contended that the uncontradicted testimony in this case is to the effect that the deceased by the exercise of ordinary care could have seen the approaching car in time to avoid the accident, and that, as matter of law, he must be held to have seen it, and that, therefore, he was guilty of negligence in attempting to cross the track ahead of the approaching car. That the car could have been seen approaching from the east for a distance of nearly a block there is little, if any, room for doubt. That the deceased was required to exercise ordinary care for his own safety, and to that end make use of all of his faculties for seeing and hear-

ing, no one questions; but whether he was required to exercise the same degree of care in attempting to cross a street railway track as in making a similar attempt with regard to a steam railroad, the authorities differ. Some of the cases cited by counsel for appellants, namely, *Cawley v. La Crosse City Ry. Co.*, 101 Wis. 145, 77 N. W. 179, and *Young v. Citizens' St. Ry. Co.*, 148 Ind. 58, 41 N. E. 927, 47 N. E. 142, and perhaps a few others, hold to the doctrine that the degree of care on the part of the pedestrian is the same in both cases—that is, that he must both look and listen—and in one case, at least, it is held that he must also stop to do so before crossing a street railway track. But the overwhelming weight of authority, including the decisions of this court, is to the contrary. It would seem to require but slight reflection to realize that, in the nature of things, there must be considerable difference between an attempt to cross a street railway and a steam railway, or in passing along the tracks of the one or the other. Without stopping to point out all the differences, we may be permitted to call attention to one of the fundamental differences between street and steam railways. The part of the street on which a street railway track is laid, and over which cars are operated, is not withdrawn from public use and travel. The rights and duties of the public and the street car operatives are mutual and reciprocal. The only right that the operators of a street railway possess over the public generally is a preferential right of passage over the tracks with the cars, and that between public crossings it is always the duty of the pedestrian or the person driving a vehicle to see to it that he does not impede the street car. But the street car company, in operating its cars, must likewise at all times and places exercise ordinary care so as not to injure any one who may be on or near the track, and at public crossings must have its cars under the control of the operator, and must exercise reasonable care to have them so in approaching the crossings; the degree of care to be exercised always depending upon the prevailing circumstances and conditions. As a general rule, therefore, where a collision occurs between a person lawfully using the street and a street car, the question as to whether the operator or such person, or both, were exercising the degree of care that the law imposes is a question of fact depending upon all the surrounding circumstances and conditions. The reciprocal rights and duties of persons and street railway companies in the use of the streets is well expressed in *Campbell v. Los Angeles Tr. Co.*, 137 Cal. 565, 70 Pac. 624, where, at page 566 of 137 Cal., page 625 of 70 Pac., it is said: "But, as has been frequently held by this court, the same character of care is not demanded of one crossing a street railroad, where cars are frequently passing at a slow rate of speed and can be easily controlled, as is demanded of one crossing an ordinary steam rail-

road running through the country, on which heavy trains, difficult to control, go at stated times with great speed. With respect to a street railroad, the mere fact that a person attempts to cross it when a car is seen to be approaching does not of itself constitute negligence. * * * Ordinarily, whether or not he (the person crossing) was negligent in attempting to cross, under the circumstances of the case, is a question for the jury." The same thought is expressed in *Hall v. Ry. Co.*, 13 Utah, 258, 44 Pac. 1049, 57 Am. St. Rep. 726, in the following language: "Persons traveling on the public street, along or across a street railway track, are not held to the exercise of the same degree of care and precaution as they are when traveling along, or upon, or across the ordinary steam railroad." To the same effect is *Thompson v. S. L. Rapid Tr. Co.*, 16 Utah, 289, 52 Pac. 92, 40 L. R. A. 172, 67 Am. St. Rep. 621. The case of *Marden v. Portsmouth, etc., R. Co.*, 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 470, is a well-considered case, in which a large number of cases of this class are reviewed, and where the Utah cases are cited with approval. In *Benjamin v. Holyoke St. Ry.*, 160 Mass. 3, 35 N. E. 95, 39 Am. St. Rep. 446, in referring to this subject, it is said: "The use of the street for electric cars and by the general public was concurrent; and the defendant (the company) was bound, in using the street, to have reference to its reasonable use by others." We have examined a large number of cases, and, from the decisions, we are forced to the conclusion that, where the conditions and circumstances are as they were in the case at bar, the question of negligence is within the province of the jury. In addition to the cases already mentioned, we cite the following well-considered cases: *Robbins v. Springfield St. Ry.*, 165 Mass. 30, 42 N. E. 334; *Newark Pass. Ry. v. Black*, 55 N. J. Law, 611, 27 Atl. 1067, 22 L. R. A. 374; *Lawler v. Hartford St. Ry.*, 72 Conn. 74, 43 Atl. 545; *Shea v. St. Paul City Ry.*, 50 Minn. 395, 52 N. W. 902; *Holmgren v. Twin City Rapid Tr. Ry.*, 61 Minn. 85, 63 N. W. 270; *Clark v. Bennett*, 123 Cal. 275, 55 Pac. 908; *McClain v. Brooklyn Ry.*, 116 N. Y. 459, 22 N. E. 1062; *Copeland v. Met. St. Ry.*, 67 App. Div. (N. Y.) 483-485, 73 N. Y. Supp. 856.

The law required that the deceased exercise ordinary care for his own safety. To this end he was required to make use of all of his senses to avoid injury. Did he meet this legal requirement at the time and place of the accident? It is easy enough to assume, when viewing the matters retrospectively, that one has failed in this, that, or the other thing, and, if he had not so failed, he would not have been injured. In view of all the circumstances, may not reasonable men differ with regard to his conduct, as disclosed by the evidence, just before and at the time of the accident? May not, likewise, reasonable men draw different conclusions

from the conceded facts? The deceased had a right to cross the track in an attempt to board the street car on the southerly track. He had a right to do so even hastily, provided he exercised ordinary care for his own safety in view of his surroundings. He may have seen the car on the north track approaching from the east. He may have assumed that it would reduce its speed on nearing the cross-over switch. But whether he saw it or not, the jury had a right to determine from all the facts whether or not he acted with reasonable care, and whether the motorman, in approaching the switch, did likewise. Moreover, as the car was approaching a place where a considerable number of persons habitually crossed the track, a place near the public crossing on Main street, and immediately east of which the cars habitually stopped to take on and discharge passengers, the deceased might have assumed that, if the motorman intended to make the cross-over without reducing the speed of the car, he would give some warning of his intention to do so. If the motorman had done either, it is quite probable that the accident would not have occurred. Under all these circumstances, it was a question of fact for the jury to say whether the deceased was guilty of negligence which directly contributed to the accident. Even an error of judgment by the pedestrian, based upon some act or duty required of the company or its servants, may be taken into consideration in determining who is in the wrong. This is well illustrated in the case of *Copeland v. Met. St. Ry.*, supra, where a woman, in attempting to cross a street car track ahead of an approaching car which she saw coming toward the point where she intended to cross, was struck and injured while in the act of crossing. The court, in referring to her conduct, used this language: "Her judgment that she could cross in safety was in fault only because of the fact that the motorman had decided not to stop in answer to the signal, 'Slow down;' nor did he, by the ringing of a bell, notify her of his intention." The car in that case was signaled to stop by the woman's son. It was a car which did not stop at the particular point, and proceeded on its course, and reached the point where the woman crossed the track in less time than she had calculated, and was injured by reason of this miscalculation. The case of *McClain v. Brooklyn Ry.*, supra, is likewise one where the facts and circumstances were in some respects similar to those at bar; and in that case it was also held that the conduct of the parties involved questions of fact to be determined by the jury. It may be that in some of the cases the conduct of the pedestrian may be of such a character that the question is one of law merely. The case of *Boring v. Union Trac. Co.*, 211 Pa. 594, 61 Atl. 77, affords an illustration of that class. There the injured person walked along the side of the street rail-

way track ahead of an oncoming car, and, without looking, suddenly stepped onto the track in front of the car, and was struck and injured. It was held that the injured person was negligent as a matter of law. We are, however, not dealing with such a case. In this case there were many matters to be considered, on at least some of which reasonable men might arrive at different conclusions. The *Teakle Case*, supra, was entirely different in this respect from the case at bar. There only one conclusion was permissible from the conceded facts; and hence it was a question of law, and was decided as such. We are convinced that the court committed no error in submitting the case to the jury.

The next assignment to be noticed, briefly stated, arises as follows: Mrs. Spiking, one of the respondents, testified as a witness in the case, and, before the respondents rested, counsel for appellants asked leave to recall her for further cross-examination. After this was concluded, her counsel proposed to ask her a further question upon a matter which he said was not proper on redirect, but desired to ask it because it had been overlooked. No objection being made, counsel asked the following question: "How was Mr. Spiking as to being a careful and cautious man?" The witness answered: "Yea, sir; he was very careful." Counsel for appellants offered no objection to the question, but immediately after the answer moved to strike it out as "irrelevant, immaterial, and incompetent." The court denied the motion, and permitted the answer to stand. Counsel for appellants now urge that the court erred in refusing to strike out the answer. That the evidence of the character contained in the foregoing answer is improper in view of all the evidence in the case must be conceded. This is well illustrated by the following authorities: *Adams v. C. M. & St. P. Ry.*, 93 Iowa, 565, 61 N. W. 1059; *Louisville Ry. Co. v. McClish*, 115 Fed. 268, 53 C. C. A. 60; *Glass v. Memphis & C. Ry.*, 94 Ala. 591, 10 South. 215; *Chase v. Maine C. Ry.*, 77 Me. 62, 52 Am. Rep. 744; *Towle v. Pac. Imp. Co.*, 98 Cal. 342, 33 Pac. 207. Some of the authorities are to the effect that, where there are no eyewitnesses in a case of death by accident, such evidence is proper. 1 *Shear. & Redf. Ev.* (5th Ed.) § 111; 1 *Elliott, Ev.* § 217. Conceding the evidence to be improper, can this court review the alleged error in view of the state of the record? The question was one propounded immediately after opposing counsel's attention was directed to the fact that the question would be asked out of the regular order. The question upon its face was one that indicated what the character of the answer thereto would be. The answer of necessity would be that deceased was either a careful man or a careless man. If the answer was that he was a careful man, then appellants' counsel did not want it, and, if it had been

to the contrary, respondents' counsel would have been opposed to it. But either way the testimony was improper. This is always the result, with regard to improper testimony, under conditions as above indicated; and in view of this the courts have evolved and adopted a rule of practice which is that where the question fairly indicates what the nature of the answer will be, then the adverse counsel must object to the question and obtain a ruling, and save an exception to make the error, if any be committed, available in a court of review. Error may not be predicated upon a denial of the motion alone. This rule is well stated in *People v. Williams*, 127 Cal. 216, 59 Pac. 583, in the following words: "When it is apparent from the question that the answer will contain evidence necessarily inadmissible, then the motion to strike out comes too late, unless preceded by an objection to the question; but the rule is otherwise when the evidence may, or may not, be admissible." The authorities are numerous to this effect, and among which we refer to the following: *Taylor v. State*, 100 Ala. 68, 14 South. 875; *Way v. Johnson*, 5 S. D. 237, 58 N. W. 552; *Wendt v. R. Co.*, 4 S. D. 476, 57 N. W. 227; *Cleveland, C. & I. Ry. Co. v. Wynant*, 134 Ind. 681, 34 N. E. 569; *Gran v. Houston*, 45 Neb., at page 836, 64 N. W. 245; *McClellan v. Hefn*, 56 Neb. 600, 77 N. W. 120; 3 Jones on Ev. § 898; 22 Pl. & Pr. 1310. In the foregoing cases, excepting those from Nebraska, where the record is like the one before us, it is held that the alleged error is not reviewable. In Nebraska, however, it is held that the motion to strike out is always addressed to the sound legal discretion of the trial court, and that a clear abuse of this discretion is always reviewable. If we adopt the rule generally recognized, we cannot review the alleged error, because under that rule a failure to object to the question waives the error. What would be the result if we should adopt the Nebraska rule? Has the trial court so clearly abused his legal discretion that, in view of the state of the record, error may be predicated thereon? When the motion to strike out was made, counsel for appellant offered some excuse for not making an objection before the question was answered. Whether the excuse was well founded depended upon the circumstances, all of which occurred in the presence of the court, and he necessarily deemed the excuse insufficient. We arrive at this conclusion from the fact that at various times during the trial, where answers had been made before an objection either was or apparently could have been interposed, the court permitted counsel on both sides to make objections, obtain rulings thereon, and take exceptions, so that the point could be reviewed by this court. In this instance no such permission was asked. If we attempted to review the action of the court from this point of view, we would have to hold that in the light

of the record the court did not abuse its discretion in denying the motion to strike out the answer. We do not wish to be understood as holding that in no case where improper evidence was elicited in this way, which in and of itself either made a case or stated a defense, it would not be held that the action of the trial court in denying a motion to strike out, when timely made, would not be reviewed. In such a case the record upon its face might show an abuse of discretion. Such is not the case before us, and therefore this assignment cannot be sustained.

The remainder of the assignments all refer to the instructions. In passing upon those alleged errors the length of the instructions makes it impracticable to set them forth in full. We, therefore, can do no more than to refer to the particular parts of which complaint is made. The instructions given by the court cover 20 typewritten pages of legal cap, and the requests cover 21 pages in addition to those given. There are many exceptions to those that were given, and many more to the refusal of requests not given.

The first assignment to be noticed relates to the refusal to give two special requests offered by appellants, and in the giving of an instruction upon the same subject by the court. In the complaint negligence was predicated upon the failure of appellants to equip the car with a fender or guard of some kind. At the trial respondents produced a witness who had been employed as a motorman and gripman for a period of nearly eight years on cars propelled by electricity and cable in various cities from Chicago to the Pacific Coast, including Salt Lake City. Counsel for respondents asked the witness whether or not, during the time that he was employed as motorman or gripman, cars in the different cities were equipped with fenders. This evidence was objected to as "Incompetent, immaterial, and irrelevant." Counsel for respondents then, by various questions and offers which cover about 10 pages of the transcript of the evidence, attempted to prove that the street cars, during the time the witness was employed as above stated, were equipped with fenders in the cities of Chicago, Omaha, Seattle, San Francisco, and Los Angeles, all of which was objected to, and the objections sustained. After counsel had made repeated offers to get into the record the evidence with regard to the use of fenders, counsel for appellants suggested that the purpose for which fenders were used was a matter of common knowledge, and not a subject of expert evidence. The court adopted this view, and ruled that the purposes for which fenders were used on street cars was a matter of which judicial notice could be taken by both the court and jury. Thereupon counsel for appellants objected to any evidence with regard to the use of fenders. Their objections were sustained. No evidence upon the subject of fenders was admit-

ted, except that the car in question was not equipped with a fender or guard of any kind. Upon this state of the record, counsel for appellants requested the court to instruct the jury that there was no evidence "that at the time of the accident guards and fenders were in general use by companies, in similar business, doing their business in a prudent manner," and that "there is no proof of negligence against the defendants, or either of them, on account of there being no fender upon the car." The court charged the jury upon this subject as follows: "If you find that such car did not have a fender, you cannot find against the defendants upon that alone, unless you find also from the evidence that, if the car had a fender, the accident might have been averted thereby." It is strenuously insisted that the refusal to instruct as requested, and that the giving of the instruction quoted above, constitutes prejudicial error. It is urged that the instruction was not based upon a subject of which there was any evidence; that by the repeated decisions of this court instructions must be based upon the evidence, and to instruct upon a subject unsupported by evidence constitutes prejudicial error. Undoubtedly such is the general rule, which has been laid down by this and many other courts. Does the claim here made come within the rule? We do not think so, for several reasons. From what has been said it is apparent that both the court and counsel for appellant treated the purpose for which fenders were used on street cars as a matter of general knowledge. If this was the correct view, then the object, purpose, and use of fenders was in the case to be considered by the jury, as if it had been testified to by witnesses. It is elemental that any facts which are generally known and accepted, and of which courts take judicial knowledge, are part of the case as facts, and the court may instruct upon them to the same extent as upon other facts. Counsel cannot at the trial obtain rulings in their favor upon objections to evidence upon the ground that it is immaterial because the matter is one of general and common knowledge, and then urge on review that there is no evidence upon the subject to support an instruction. But, apart from this, there is room for the contention that the instruction, after it was modified by the court, in effect still was merely negative. The court told the jury that they could not find against appellants upon the omission to equip the car with a fender unless they found that the accident could have been averted by the fender. When the court told the jury that they could not consider the absence of a fender unless they found that if one had been provided it would have averted the accident, he in effect told them that the fender was not in the case. All through the instructions, and in the evidence as well, where the term "accident" is used, it refers to the collision itself. If the court had used the term "colli-

sion" instead of "accident" in the instructions, all would at once agree that the presence of a fender could not have averted the collision. The fender was not calculated, like a gong or a bell, or even a headlight, to apprise one of an approaching car so as to avoid it. A fender could have been used to prevent a person colliding with the front end of the car from getting under the wheels by shoving him off the track or by carrying him along in front of the car. If the court had told the jury that a fender might be considered in case they found that it would have prevented the injuries—that is, the crushing of deceased's leg and foot—there would be more force to counsel's contention. Even then we think the instruction would not be subject to the criticisms made of it. We do not rest our decision with regard to this assignment upon what we have said about the negative character of the instruction; what we have said was for the purpose of illustrating the point that the instruction is not necessarily open to the construction placed upon it by counsel.

Passing now to the claim made by counsel that by this instruction the jury were authorized to require from the appellants a standard of care in the conduct of their business different from that which may have been generally prevailing—that is, in view that there was no evidence in the record with regard to the use of fenders generally—the jury could not be permitted to say that not to use one on the car in question constituted negligence. It is true, as is well said in section 44 of Labatt on Master and Servant, that: "The unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man." This doctrine with regard to the use of safety and other appliances is approved and adopted by this court, in speaking through the present Chief Justice, in the case of *Fritz v. Electric Light Co.*, 18 Utah, 493, 56 Pac. 90. We have no inclination to either question the soundness of the doctrine or to modify it; but we are convinced it is not applicable to the facts in this case. It does not follow that, because it may be necessary to prove that certain appliances are in general use before negligence can be predicated upon the omission to supply them, therefore the rule applies to all appliances of whatever kind or character, or for whatever purpose used. The purpose of some appliances may be so generally known that it becomes a matter of common knowledge; and therefore the proof in that regard may be dispensed with. This may be illustrated by referring to a few only of many instances that may be named. Would any one now assert that, before one could predicate negligence on the failure to provide a headlight on a locomotive engine during its use at

night, or in failing to provide cars in use with brakes, or in providing such locomotive engines or other boilers in use with what are known as "spark arresters," proof would have to be made that such appliances are in general use? We think not, for the simple reason that the purposes of the appliances above mentioned have become so generally known that proof of the fact is wholly unnecessary. This in time will no doubt be true of some of the appliances which now require proof of general use. If this be so, does the fender, as applied to street cars, come within the category of appliances whose purposes are a matter of common knowledge? We think it does. It certainly has a clear and well-defined meaning; and its purpose has also received legal recognition. "Fender," in 19 Cyc. 480, is defined as follows: "As applied to street railway cars, a guard or protection against danger to pedestrians." In the case of *Cape May Ry. v. Cape May*, 59 N. J. Law, 403, 36 Atl. 699, 36 L. R. A. 633, in referring to the term "fenders" as used in an ordinance, where the objection was made that the use of the term "fenders," without further definition, was vague and uncertain, and for that reason the ordinance was not enforceable, it was said, "The term 'fender' is well defined and readily understood as a guard and protection against dangers," and the ordinance was accordingly enforced. If, therefore, the term "fender" has acquired a well-defined meaning in law, and its purpose is legally recognized and understood, it must be so, because this meaning is the popularly and generally accepted meaning and purpose. The law does not precede but follows the popular and general understanding with regard to such matters. We think, therefore, that in this case, in view that the negligence was predicated entirely upon the omission to provide the car with any fender or guard whatever, the court had the right to take judicial notice of the purpose of fenders as applied to street cars. Had the complaint charged negligence in the use of an improper fender, or of one not in general use, then it no doubt would have been necessary to support the allegation with proper proof by showing the kind of fenders in use generally by those engaged in a similar business which was managed and conducted with ordinary prudence and care. But the negligence, if any, consisted in not providing any appliance whatever, the purpose of which is well known and recognized, and, this being so, the only proof that was required was to show its absence. If we are right in our conclusions, then it was for the jury to say, from all the facts and circumstances in evidence, together with the inferences to be drawn from them, whether or not a fender would have obviated the injuries. Unless the jury so found, the absence of a fender was wholly immaterial. The mere fact that no fender was provided did not, and could not, have any effect one way or the other, unless the fender would

have guarded and protected the deceased against injury. We remark further, that, in view of what we have said with regard to the purposes of fenders, it may well be that the street railway company can no longer excuse itself for not equipping its cars with fenders at this late date by simply pointing to the fact that others, engaged in similar business, do likewise. There are some things that it may be negligent to do, or omit to do, although all others do or omit to do them. This is well illustrated in the cases of *Webster v. Symes*, 109 Mich. 1, 66 N. W. 580, and *Ilwaco Ry. Co. v. Hedrich*, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169. We are convinced that appellants were not prejudiced in any of their substantial rights in this regard, and therefore this assignment must be overruled.

It is also claimed that the court erred in instructing the jury with regard to the duties devolving upon deceased in attempting to cross the track. In this regard the court in effect told the jury that the deceased was required to use his senses, and exercise that degree of care that men of ordinary prudence would have exercised under the particular circumstances of the case as disclosed by the evidence. It is urged that this was insufficient, because the deceased was shown to have been familiar with the surroundings and conditions prevailing at the place of the accident, and therefore the usual or ordinary test did not cover the case. We think otherwise. The court called attention to the particular circumstances of this case, and within these were necessarily included all the circumstances which had any bearing upon the conduct of either party. Moreover, there is no intimation anywhere in the record that any one made any claim that any consideration should be based upon the fact that the deceased did not know the conditions and circumstances surrounding him at the time of the accident, and that he did not know the conditions generally prevailing at that place. We cannot perceive any error in this regard.

Error is also predicated upon the instruction where the court referred to the care the deceased was required to exercise in looking for an approaching car. In this instruction the court used the expression of "observing the car" instead of "looking for the car" before attempting to cross the track. It is urged that to merely require one to observe an approaching car is not sufficient; that it does not meet the duty imposed by law, which requires that a pedestrian, before attempting to cross the track, must look to see whether or not a car is approaching. We think the jury clearly understood what the court desired to impress upon them in the instruction. The court repeatedly told the jury that the deceased was required to use all of his senses, and in different instructions told them what the law required of him, and, unless they found that he had complied with those requirements, the respondents could not

recover. In view of this the appellants could not have been prejudiced.

Another error assigned is that the court erred in directing the jury that a person, in attempting to cross a street railway track, "has a right to rely upon the assumption that the company and its servants will discharge their legal duty, in approaching crossings, by having their cars under control." It is urged that, in view that the accident did not occur at a public crossing, therefore the instruction is not based on the evidence and is contrary to law. The instruction, however, contains simply an abstract statement of the law, as applied to persons and street railroad companies, with regard to crossings generally. It is true that the accident occurred at a point some distance east of the main street crossing. But there was an abundance of evidence which tended to show that a large number of persons habitually crossed the track at and near the place of the accident. This, in effect, widened the extent of Main street crossing, all of which had existed for a long time prior to the accident, and was well known to the street car company and its servants; and hence it became their duty to adapt the movements of the cars to the prevailing conditions and circumstances. As we have already pointed out in this opinion, no part of the public street is withdrawn from use by placing a street railway track upon it. The street thereby is merely burdened with an additional easement in favor of the street railway company, with the preferential right of passage over it. The public are not merely licensees in using that portion of the street occupied by the street railway track. They are not there by the mere permission of the owner of the street railway; but they are there as a matter of legal right, and may so remain until the street railway company desires to pass over it with one of its cars. The right of passage by the company is a preferential right to which all others must yield. But, in exercising this right, the company and its servants must have due regard for the safety of those who may be on the street, or on or near the street railway tracks. If, therefore, any considerable number of persons habitually cross the track at a certain point, it is not material that such a point is not at the regularly established crossing in so far as it affects the care of the street railway company in passing that particular place. The right to the use of the public streets cannot be curtailed in this way. The public must have due regard for the preferential right of passage of the street cars, and must exercise the degree of care commensurate with this right; but the street car company may not say that it will not permit the use of streets except at public crossings, and that any person who attempts to use or cross them at other places does so at his peril. Both parties must so adapt

their movements and conduct as will conserve the rights of all, and whether the one or the other has departed from the standard of care required at a public crossing, or on any other part of the tracks occupying a portion of the street, is, and of necessity must be, ordinarily, a question of fact. By what we have said, we do not mean that a street car company must at all points move its cars at the same rate of speed, or exercise the same vigilance, or have its cars under control to the same extent as at public crossings; but what we desire to impress is that the company must at all places exercise a degree of care which the existing conditions require, and that pedestrians, or any one using the street with horses and vehicles, must do the same. The court in no way departed from this rule in the instructions; and therefore no error was committed in giving it.

Error is also based upon the refusal of the court to charge the jury as requested by appellants in their request numbered 32. This request is to the effect that it was the duty of the deceased in approaching the track to look for an approaching car, and that, if he had looked, and by looking would have seen the car in time to have avoided the accident, but did not do so, and if the motorman did not have the last clear chance to have avoided the accident by the exercise of reasonable diligence, then the verdict should be for defendants. While this charge was not given to the jury in the exact language employed by counsel, we think that the substance of it was covered in several instructions given by the court. Instruction numbered 20 given covers a portion of it; and this instruction was in substance the same as requests numbered 8 and 9, asked by appellants. In view of this, the court did not err in refusing the request.

The last assignment to be noticed is directed against an instruction given in relation to the measure of damages. The instruction is a very long one, covering the whole range of matters to be considered by the jury in determining the amount to be allowed the widow and minor children for the loss sustained by them through the death of the husband and father. In the instruction is included in substance the whole of the requests upon the subject offered by appellants. The exception and argument, however, are directed against the concluding part of the instruction, which reads as follows: "You will not consider, in fixing damages, any income from any property that the deceased had, if any, at the time of his death, produced by the property itself alone, independent of his care, skill, and supervision; but you should consider any income from any and all of his property which his skill, personal supervision, diligence, and care have a part in producing." It is strenuously argued that under this instruction the jury could have considered the profits arising out of deceased's business, and

that profits arising from any business or enterprise cannot be considered in actions of this kind, unless the profits are for past losses, and then they must be specially pleaded if a recovery is sought therefor. While the phraseology of the instruction is not to be approved as a model, nevertheless, for the reasons hereafter stated, it cannot be held that it was prejudicial to the rights of appellants. It may be conceded and it frequently has been held that mere future profits, arising out of a deceased's business, cannot be considered in a case of this character. But this is so because the element of future profits is too uncertain, besides being speculative and remote. Under our statute, both the wife and the children were heirs of the deceased, and as such were entitled to recover, not only for the loss of support, companionship, and the assistance he would naturally and probably be to them, but were entitled to all the pecuniary loss that they may have sustained by reason of his death, which could be established with reasonable certainty in view of all the circumstances pertaining to the subject-matter. The authorities under statutes similar to ours, we think, are clearly to this effect. In *Hayes v. Williams*, 17 Colo. 465, 30 Pac. 355, the rule or measure of damages is stated thus: "This rule allows, as compensatory damages, the estimated accumulations of deceased during 'the probable remainder of his life, if he had not come to an accidental death, having reference to his age, occupation, habits, bodily health, and ability.'" The rule in case of death of a husband and father is stated, in much the same terms, in section 160 of *Tiffany on Death by Wrongful Act*. See, also, *San Antonio & A. P. Ry. Co. v. Long*, 87 Tex. 148, 27 S. W. 113, 24 L. R. A. 641, 47 Am. St. Rep. 87. The instruction strictly limited the recovery to such accumulations as would likely be produced by the "skill, personal supervision and diligence" of the deceased, and all future income from any property the deceased owned, at the time of his death, not produced from the deceased's personal efforts, was excluded. Future profits, as such, were, therefore, not only not included, but they were expressly excluded, as an element for which a recovery could be had. The respondents in this regard were entitled to receive what they would have received if the deceased had lived. This, so far as the loss could be established with reasonable certainty, was the measure of damages. If from the evidence it appeared that the deceased's ability and habits were such as gave reasonable grounds to believe that he would accumulate property in excess of his expenditures, then his heirs were entitled to the loss so sustained by them. These losses cannot be limited strictly to a fixed sum of earnings for a day, week, or month. If absolute certainty were required, very little, if anything, could be recovered. Matters of this kind depend on the inherent probabilities,

and these were all in evidence on the part of appellants, as well as on the part of respondents; and in view of the evidence on this subject we are fully persuaded that no prejudicial error was committed, either in admitting the evidence upon the subject, or in giving the instruction complained of.

In concluding this opinion, we remark that this case has been tried three times. At the first trial the jury disagreed, and on the second trial a verdict was returned in favor of respondents, which was set aside by the trial court, and on the third trial the jury again rendered a verdict in favor of respondents, upon which the present judgment was entered. It is only fair to state that the counsel who presented the case to this court did not try it in the court below. We make this statement because the record presents exceptional features which may have arisen, in part at least, out of the theories of counsel trying the case, and which, according to their views, might not present the question in the precise form in which they have been argued before us. We have read the entire record with more than ordinary care. There were a large number of eyewitnesses who gave their version of the accident; every feature of the case was thoroughly covered by the instructions; and in the light of the whole record we are convinced that the case was properly submitted to the jury, and that, if they have committed any error of judgment in weighing and reconciling the evidence, it is one that the law, perhaps wisely, forbids us to review.

The judgment therefore should be, and accordingly is, affirmed, with costs to respondents.

MCCARTY, C. J., and LEWIS, District Judge, concur.

(16 Wyo. 321)

CHICAGO, B. & Q. R. CO. v. POLLOCK.

(Supreme Court of Wyoming. Feb. 10, 1908.)

1. CARRIERS—CARRIAGE OF LIVE STOCK—ACTION FOR LOSS—PLEADING—CONSTRUCTION.

In an action against a carrier for the loss of two of a larger number of horses delivered to defendant for transportation under a contract which provided that the shipper should do the loading the petition alleged that defendant, through its employé, "loaded said horses upon the cars of said defendant." There was a special finding that the two horses were lost or escaped between the time that they were turned over to the carrier and the time that they were loaded. *Held*, that the allegation that the horses were loaded by defendant might be construed to be for the purpose of showing a waiver of the agreement that the shipper should load them, and with the intention to allege that the act of loading was done by defendant instead of plaintiff so as to open the way to recover for a loss occurring while the horses were being loaded, that seeming to be the intention of the petition, the allegation being capable of such amendment, and defendant not having been misled, as appeared from the proceedings on the trial.

2. PLEADING—VARIANCE—MATERIALITY.

Under the express provisions of Rev. St. 1899, § 2736, no variance between allegation and

proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1338.]

3. SAME—AMENDMENT.

Under the express provision of Rev. St. 1899, §§ 3736, 3737, where a party alleges that he has been misled by a variance between the pleading and the proof, he must prove the fact, and also the respect in which he has been misled to the court's satisfaction, whereupon the court may order the pleading amended upon such terms as are just, and if the variance is not material the court may direct the fact to be found according to the evidence, and may direct an immediate amendment without costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 603–606.]

4. SAME—FAILURE OF PROOF.

Under the express provisions of Rev. St. 1899, § 3738, where an allegation to which proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not a case of variance, but a failure of proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1339, 1340.]

5. WRIT OF ERROR—REVIEW—HARMLESS ERROR—PLEADINGS—AMENDMENTS.

Where the pleadings might have been amended to correspond with the facts proved, a judgment will not be disturbed because no formal amendment was made.

6. CARRIERS—CARRIAGE OF GOODS—TIME LIABILITY COMMENCES.

The liability of a carrier as such commences at the time of delivery and acceptance of property for shipment.

7. SAME—CARRIAGE OF LIVE STOCK—DELIVERY—HORSES IN STOCK PENS.

Where horses are kept in a carrier's stock pens for a time under conditions during that period imposing no responsibility upon the carrier, when they are actually surrendered into the carrier's possession and control, though without change of location, and the carrier accepts them for transportation, the previous facts become of no consequence except as bearing on the question of the time of delivery and when the carrier's liability began.

8. SAME—DELIVERY—QUESTION FOR JURY.

Whether a shipper who had been keeping horses in a railroad stock pen, under his personal control, arranged with the carrier for the delivery in the same pen of the horses for transportation *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 962.]

9. SAME—LOADING BY CARRIER—LIABILITY FOR NEGLIGENCE.

Where a carrier undertakes to discharge the duty of loading live stock without notice to the shipper or his agent, it will be liable if negligent in performance of the act, notwithstanding a stipulation in the contract requiring the loading to be done by the shipper.

10. SAME—ACTIONS—NUMBER OF HORSES IN SHIPMENT—QUESTION FOR JURY.

In an action against a carrier for failure to transport all of a shipment of horses delivered and accepted for that purpose, where the evidence is conflicting as to the number of horses shipped, it is a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 962.]

11. SAME—SUFFICIENCY OF EVIDENCE.

In an action against a carrier for failure to transport all of a shipment of horses deliv-

ered and accepted for that purpose, evidence *held* sufficient to sustain a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 960.]

12. TRIAL—QUESTION OF FACT—CREDIBILITY OF WITNESSES.

The credibility of witnesses is a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 334, 335.]

13. WRIT OF ERROR—RESERVATION OF GROUNDS OF REVIEW—INCORPORATING ERRORS IN MOTION FOR NEW TRIAL.

Alleged errors in excluding evidence and in regard to misconduct of counsel at the trial, not assigned as grounds for a new trial, are not reviewable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1674, 1675, 1691–1696.]

14. SAME—REVIEW—HARMLESS ERROR.

In an action against a carrier for failure to transport all of a shipment of 56 horses claimed to have been delivered and accepted for transportation, the exclusion of a sheriff's office record and monthly report as to the inspection of the horses shipped, offered to show that only 55 horses were inspected, was not prejudicial, where a witness connected with the sheriff's office was permitted to state the fact shown by the record by referring to it, not to refresh his recollection, but by way of stating the total number shown by the record to have been inspected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194–4196.]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Action by F. G. Pollock against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lonabaugh & Wenzell and N. K. Griggs, for plaintiff in error. Robert P. Parker, for defendant in error.

POTTER, C. J. The defendant in error, who will be referred to as the plaintiff—his title in the district court—brought this action to recover the value of two horses, alleged to have been delivered to and received by the plaintiff in error, defendant below, to be transported by it, as a common carrier, from Sheridan, in this state, to Hammond, Ind., under two separate contracts, or bills of lading, each providing for the transportation of 28 horses; and it is alleged that, in violation of the defendant's said contracts, it failed to transport the whole number of horses as thereby agreed respectively, but that it transported from Sheridan 27 horses only of the number covered by each contract. The answer alleges that 27 horses only were in fact delivered and received under each contract, and that the number was mistakenly entered in each as 28 in consequence of plaintiff's erroneous statement to the defendant respecting the number. The principal issue to be tried, therefore, was whether the two horses in question had been delivered and received for such shipment.

That the defendant is a common carrier, operating a railroad running through Sheri-

dan county, in this state, is admitted by the pleadings. It appears from the evidence that there was but a single delivery of horses for the shipment aforesaid; that is to say, all the horses then proposed to be shipped by the plaintiff were delivered at one and the same time, but they were loaded into two cars, and a separate contract was made for the horses in each car. The plaintiff owned all the horses, and was named as consignee in each contract, and as the shipper in one of them. In the other contract one W. P. Palmer was named as shipper, and his name is subscribed to that contract. That appears to have been done to enable said Palmer to accompany the plaintiff with the horses, he having been employed, as plaintiff testified, to assist with the horses after their arrival at destination. This seems to explain the reason for the making of two contracts instead of one. They are alike in their terms except as to the name of the shipper and the number of the car containing the horses. Each contract contains the following stipulation: "It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge; that the second party (the carrier) shall not be liable for loss from theft, heat or cold, jumping from car, or other escape, injury in loading or unloading, injury which animals may cause to themselves or to each other, or which results from the nature or propensities of such animals." It is also stated in each contract that, in consideration of free transportation for one person to accompany the stock, "it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals, and that the railway company shall not be responsible for such attention and care." The sum of \$121 is stated in each contract and alleged in the petition as the freight rate to be paid for the agreed transportation. Notwithstanding the stipulation in the contracts as to loading the animals, the petition alleges, and the evidence shows, that the loading was done by an employé of the defendant, the foreman of its stockyards at Sheridan, the point of shipment; and from the evidence it appears that such loading occurred during the absence of the plaintiff. The discrepancy between the number of horses stated in the contracts and waybills and the number actually in the cars was noticed when the train carrying the horses reached Alliance, Neb., on the defendant's railroad. The horses were unloaded there during the night of their arrival, and but 27 were found to be in each car by the foreman of defendant's stockyards at that point, who assisted in unloading them, and the next morning, the horses having remained there until then, the plaintiff saw and counted the horses and discovered the discrepancy between the number stated in the contracts and which he claims to have been

delivered, and the number being transported. He thereupon at once made and filed a claim for the alleged missing horses with the defendant's representative at Alliance, which was referred to the defendant's freight claim agent. Thereupon some correspondence occurred between the latter and the plaintiff, resulting in an offer of settlement at a stated figure by said claim agent, but which offer plaintiff did not accept. That correspondence was introduced in evidence. Whatever the loss or escape, therefore, it occurred, if at all, before the unloading of the horses at Alliance, so far as the evidence is concerned.

The jury returned a general verdict for the plaintiff assessing the damages at \$160, with interest; and with their verdict returned answers to certain special interrogatories that had been submitted at defendant's request. Answering the special interrogatories the jury found that the two horses in controversy had not escaped from defendant's cars; that they were in the same pen at the stockyards with the other horses at the time the plaintiff directed or authorized the loading of his stock into defendant's cars; and that they escaped or were lost between the time of turning over the stock to defendant and the loading into defendant's cars, through the negligence of defendant's employés. A motion for judgment in favor of defendant, notwithstanding the verdict, was denied, and thereafter defendant's motion for new trial was also denied; whereupon judgment was rendered for the plaintiff upon and in accordance with the verdict for the sum of \$203.30, that being the amount of damages assessed by the jury, with legal interest from the day next succeeding the execution of the contracts and the alleged delivery of the horses, together with costs of suit. The defendant complains here of that judgment on error.

The following grounds of error are relied on in the brief of counsel for the defendant, plaintiff in error here: (1) That the evidence fails to establish the cause of action alleged. (2) That the evidence fails to show negligence on the part of defendant. (3) That plaintiff is not shown to be entitled to recover. (4) That the court erroneously excluded from the evidence the official report of the sheriff's inspection of the horses shipped by the plaintiff. (5) Alleged misconduct of plaintiff's counsel during the trial.

1. It is contended in the first place that upon the allegations of the petition and the special findings of the jury the plaintiff is not entitled to recover anything. This contention is based upon the finding that the horses were lost or escaped between the time that they were turned over to defendant and the time that they were loaded, which is claimed to be inconsistent and at variance with the allegation of the petition that the horses were loaded upon the cars of the defendant by an employé of defendant. In the cause of action upon one of the contracts,

after alleging the delivery and acceptance of 28 horses for transportation, it is alleged "that said defendant, through its employé one Gill Dodge, loaded said horses upon the cars of said defendant." In stating the cause of action upon the other contract a similar allegation appears. The breach of each contract is alleged to have been the failure to transport and convey the horses in accordance with its said contracts. Upon this it is argued that negligence before or during loading is not charged, and that the verdict appears, therefore, to have been founded upon a liability not alleged in the petition. One of the grounds contained in the motion for new trial was that of surprise based on the facts aforesaid, and an alleged lack of advice and knowledge on the part of the defendant that an attempt would be made to show negligence prior to the loading of the horses. A literal reading of the allegation as to loading might perhaps throw the petition open to the technical construction that it states that all the horses delivered had been actually loaded upon the cars of defendant. Though the contract stipulation requiring the shipper to load was not alleged, it is probable, as suggested in the brief for defendant in error, that the allegation that the horses were loaded by the defendant was inserted to show a waiver of the agreement in that regard; and that the intention was merely to allege that the act of loading was performed by the defendant instead of the plaintiff, and thus to open the way to recover for a loss shown to have occurred while the horses were being loaded. And this we are inclined to think is the sense in which the averment ought to be construed, in view of all the allegations of the petition. There is at least no harm in adopting that construction, since it is clearly a matter that was capable of amendment without changing the cause of action, and the circumstances are such as to render the variance, if any, immaterial; a question that we will now proceed to consider. Recovery was sought for an alleged failure to transport two horses alleged to have been delivered and accepted for that purpose.

The statute provides that no variance between allegation and proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits, and when it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect the party has been misled, whereupon the court may order the pleading to be amended upon such terms as are just; and when the variance is not material, the court may direct the fact to be found according to the evidence, and may order an immediate amendment without costs. Rev. St. 1899, §§ 3736, 3737. When the allegation to which the proof is directed is unproved, not in some particular or particulars only but in its general scope and meaning,

then it is not a case of variance, but a failure of proof. Id. § 3738. Where an amendment might have been allowed to correspond with the facts proven, a judgment will not be disturbed because no formal amendment was made. *Kuhn v. McKay*, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205. Now, the whole transaction, including the circumstances of the delivery of the horses, the time of such delivery, the number of the horses when taken in charge by the defendant, and when loaded, the method employed in loading, the chances of escape after the time plaintiff claimed to have made the delivery, and apparently everything connected with the transaction as well before as after the alleged delivery, was gone into by both parties upon the trial. Defendant's representative in receiving and loading the horses was a witness for the defendant, and he was examined at length concerning the entire matter. The district court must have taken these facts into consideration in deciding the motion for new trial; and we fail to observe any reasonable ground for holding the defendant to have been misled by the allegation referred to, or any ground for assuming that it could have more fully presented its case or the facts to meet a claim of liability at any time following the alleged delivery. Moreover, the instructions given to the jury, apparently without objection, presented the case as one for an alleged liability between the time of delivery and leaving Sheridan. For example, the fourth instruction charged the jury that "in no view of the case can plaintiff be held to recover in this action for the horses in question, or either of them, unless he shall have established by preponderance of the evidence that he absolutely did deliver such horses, or horse, to defendant for actual shipment." Now there could be no question about delivery after the loading. The sixth instruction stated that under the petition no question is raised as to loss or escape at any other point than Sheridan, and that the jury were not at liberty to find against defendant because of any evidence tending to show the loss or escape of the horses at any point other than Sheridan. None of the other instructions sought to distinguish between a loss before and after loading. The defendant complains of the refusal to give its requested instruction No. 7, but it is not in the record, and we are in no way informed as to what was stated by it. Should there be any reasonable doubt therefore as to the interpretation of the allegation in question, we think it is clearly one which the court might have ordered to be amended to conform to the facts; and that the alleged variance was not of such a character as to amount to a failure of proof.

2. The evidence was conflicting in regard to the number of horses delivered. Each contract or bill of lading called for 28, as well as each waybill; these were made out by the agent of defendant at Sheridan, and the

plaintiff testified that he did not state the number to the agent, and there was no evidence that he made any statements or representations as to number to such agent. He did testify however that he had 56 horses, and that he delivered all of them to the defendant for shipment; and he introduced in evidence the sheriff's certificate of inspection made at or about the time of the alleged delivery, showing the inspection of 56 horses for the plaintiff, "destination Hammond, Ind., shipped car 61857, 52585Q." According to the contracts and waybills the cars containing the horses were numbered 61857 and 62585. The sheriff may have made a clerical mistake in the number of one of the cars, or the mistake may be in the copy in the bill of exceptions. However, the discrepancy is not material to the controversy here, since there is no evidence of any other shipment at the time in question, and the discrepancy does not seem to have been mentioned at the trial. At the time that plaintiff claims by his testimony to have delivered the horses for shipment, they were, whatever their number, in one of the pens at defendant's stockyards at Sheridan, the particular pen being numbered 23 adjoining the loading chute or pen, or rather separated therefrom only by an alley 16 feet wide, a gate of the same width as the alley when closed separating the pen from the alley.

It appears that during several days immediately preceding this shipment a public horse sale had been conducted at said stockyards by one A. B. Clarke, who had been given the use of the stockyards for that purpose, except that the company reserved the right to use portions thereof if necessary for the unloading of animals from its cars while passing through Sheridan, and possibly for horses turned over to it at that point for shipment. While Mr. Clarke was using the yards as aforesaid, he or his agents allotted a certain pen or pens to respective buyers into which the horses bought from time to time by them were put. Under this arrangement the plaintiff was assigned the temporary use of pen 23, and the horses purchased by him were placed in that pen. During such sale, however, and while the pens were so used, that is to say, as a place for keeping the horses purchased, the pens so employed were under the exclusive control of the person conducting the sale, or his agents, so far as the company was concerned, and the horses might be taken out and others put in, without control or interference by the railway company. The plaintiff testified that he bought 56 horses, obtaining all but one at the sale aforesaid, and that the one not so obtained was bought from a party in Sheridan, and put in the same pen with the others; that at about six o'clock in the evening of the day of shipment while such horses were in the pen aforesaid, he counted them, and there were 56; that he then turned them over to the company for said shipment, and the company accepted

them. That he thereupon went into town to attend to some business, returning at about 7 o'clock, when he was informed by the agent that they had loaded his horses, and he was given the bills of lading. It does not appear that he made any further count of the animals that day. The representative of the company who loaded the cars testified that he loaded all the horses that were in the pen used by plaintiff sometime between 7 and 9 o'clock in the evening; that he drove the horses out of the pen 23 into the chute pen, counting them as they passed through the gate into the alley connecting with the chute pen; that there were 54 head, which he divided into two lots of equal number, and loaded them in separate cars. He stated that the night was dark and rainy, and that he used a lantern, but he believed he was able to make a correct count. He denied giving the number of horses to the agent, or to having any knowledge as to where the agent obtained his information respecting the number. It appears from his testimony that the officer who inspected the horses was there at the time he commenced loading, and though he admitted having known at some time that 56 were claimed to have been inspected, and seems to have gained that information from the officer, he was unable to recall whether or not he had learned that fact at the time of the loading, but admitted that the officer may have told him at that time. He had the key to the outside gate of the yards, and testified that he did not let anyone out with any of the plaintiff's horses after they had been turned over to him, and that he did not think it was possible for any of the horses to have escaped or to have been stolen while being loaded. In addition to the testimony of the plaintiff above mentioned, he was recalled on rebuttal, and then testified that the representative of the company to whom he had delivered his horses was the foreman of the stockyards, the witness who testified to having done the loading; that the horses were in the pen aforesaid when so delivered, and that the delivery occurred immediately after he had received the certificate of inspection. It appears that the inspection was made by a deputy sheriff, and the plaintiff testified that upon his return from town, when he found the contracts prepared and ready for signature, the inspecting officer was with the agent, which may perhaps account for the agent's information as to the number of horses.

Neither the party who was agent at the time nor the officer who made the inspection appears to have been called as a witness or to have testified. But an affidavit, or apparently a portion of one, made by the absent officer was permitted to be read by consent, subject to objection as to relevancy. In that affidavit which was offered by defendant, it was stated that after the date of the shipment the affiant saw in a stable at Sheridan one of the animals claimed by the plaintiff to

have been shipped and lost, but there is nothing in the evidence to connect the plaintiff with the act of placing the animal there, or to show that he knew of its having been there. Though the witness who had attended to the loading stated that the company had nothing to do with the horses while in pen 23, it appears from his own testimony that they were in that pen when he took charge of the horses as the company's representative, for he testified that he drove the horses out of the pen in loading them. The evidence showing that before the loading the plaintiff left the yards, and that he did not return until the loading had occurred is not disputed. It is clear, therefore, since he left the horses in the pen where they had been kept, and they were loaded without further act on his part, that it is a reasonable conclusion that they had been delivered before he left the stockyards, and therefore while in the pen. Though the company would not have been liable under the circumstances for losses had any occurred during the period that the horses were kept in the stockyards before actual delivery and acceptance for shipment, the fact that others previously had the temporary use of the yards does not exempt the company from liability as a common carrier after accepting possession for the purpose of transportation. The liability of the carrier as such commences at the time of delivery and acceptance of the property for shipment. 5 Ency. L. (2d Ed.) 181, 446; Hutchinson on Carriers (2d Ed.) § 82. In a recent Nebraska case the rule was stated to be well established as follows: "When a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, and the carrier so accepts them, the liability of the carrier as a practical insurer of the safe delivery of the goods at once attaches." Chicago, B. & Q. R. Co. v. Powers, 73 Neb. 816, 103 N. W. 678. Notwithstanding, therefore, that the horses had been kept in the yards one or two days or more under conditions during that period imposing no responsibility upon the carrier, when, if ever, though without change of location, the horses were actually surrendered into the possession and control of the carrier, and the latter so accepted them for transportation, the previous facts became of no consequence, except as bearing upon the question of the time of delivery, and when the liability as carrier began. It is clear that although the plaintiff had for a time been using a pen in the yards of the company for holding his horses, with personal control over them, neither he nor the company was prevented by that fact from changing the condition of affairs, and entering into an arrangement for the delivery in the same pen of the horses for transportation. Whether such a change was accomplished was a question of fact for the jury to determine.

The testimony of the defendant's superin-

tendent at Sheridan at the time of the shipment, does not, as contended, establish the fact that this particular lot of horses could not have gone into the company's possession until they were in the chute or loading pens. It does not appear by his testimony or otherwise that he gave any personal attention to this shipment. His testimony was directed generally to the arrangement with Mr. Clarke in relation to the use of the yards during the sale; and he stated that as no shipments had been previously booked for those days he had turned over the yards to Clarke for the purposes already stated, and that, in case of a proposed shipment while Clarke had control of the yards, the company would then have arranged with him about that, so as not to interfere with his sale. And in referring to the matter generally the witness stated that the company had nothing to do with the horses connected with the Clarke sale when they were put into the various pens, nor until their going into the chutes or loading pens, but that until then they could be handled in any way, driven away or shipped, and when put into the loading pens, they were then loaded in the car for the company. In making these statements it is clear that he was not referring specifically to this particular shipment, but to the situation generally resulting from the use of the yards for the Clarke sale. He was not examined about the specific facts connected with the delivery of plaintiff's horses, nor does he appear to have been present or to have had any personal knowledge about that delivery. Had there been an absence of any evidence tending to show a surrender of possession to the company before the horses entered the loading pens, the general situation would no doubt have controlled. We do not think his testimony or the facts testified to by him rendered it impossible for a delivery to have occurred while the horses were in pen 23. The testimony of the plaintiff and the foreman of the stockyards presented the facts to the jury respecting this particular shipment, and the time and manner of delivery therefor, a matter not touched upon specifically by the superintendent's testimony. Whether the Clarke sale had been closed at the time of this shipment is not clearly disclosed, though the inference is strong that it had. At any rate it would seem that the plaintiff's connection with the sale had ceased, and that he was prepared to arrange for the shipment of his horses.

There was some evidence to the effect that one horse bought by plaintiff at the Clarke sale had been put into another pen, and had been seen in the neighborhood of Sheridan after the shipment, but plaintiff testified to having rejected that horse, and to have excluded it in stating the number of horses he had purchased; moreover it appears to have been a different animal from either of the two alleged to have been missing. Under the contracts, which seem to have been completed

and signed after the loading, the shipper agreed to load and unload; but the defendant voluntarily did the loading, and under such circumstances as to constitute a waiver of the contract stipulation, so far as to render it liable for negligence on its part in performing the act if resulting in loss or damage. We understand the rule to be that where a carrier undertakes to discharge the duty of loading live stock without notice to the shipper or his agent, it will be liable if negligent in performance of the act, notwithstanding a stipulation in the contract requiring the loading to be done by the shipper. *Normile v. R. & Nav. Co.*, 41 Or. 177, 69 Pac. 928; *C., B. & Q. R. Co. v. Williams*, 61 Neb. 608, 85 N. W. 832, 55 L. R. A. 889; *Norfolk & W. R. Co. v. Sutherland*, 89 Va. 703, 17 S. E. 127; *Mo. Pac. R. Co. v. Kingsbury* (Tex. Civ. App.) 25 S. W. 322. The rule is certainly a reasonable one under circumstances such as are presented in the case at bar. It is not clear whether the special finding that the loss occurred between the time of delivery and loading refers to the time when the loading was begun or completed. If the latter was intended, then the rule above stated would apply.

The instructions seem to have fairly presented the law upon the issues, and are no here complained of, but we refer to them to show how the case went to the jury. They stated in substance that if but 27 horses were in fact delivered to the company to be placed in each of the two cars, then the fact that the contracts mistakenly stated that 28 were shipped in each would be immaterial, and the case should then be considered as though the contract read "27" instead of "28"; that while the horses were under plaintiff's control in the pen mentioned in the evidence, they could not be regarded as delivered to defendant; that a recovery could not be had unless an actual delivery of the alleged missing horses to the defendant was established; that if the horses were in a pen belonging to defendant, but only for the convenience of plaintiff in holding them or otherwise, then they were not delivered to defendant so as to make it liable for loss or escape therefrom. By reason of the peculiar language of the petition in stating that the defendant transported only 27 horses from Sheridan, the jury was instructed that no question was raised as to loss or escape at any point other than Sheridan.

The following instruction was requested by defendant: "You are instructed that as the plaintiff has declared, in his petition, upon the contracts of shipment, and also himself introduced said contracts in evidence, he is bound by their terms; and hence, as said contracts expressly state among other things that the defendant shall not be liable for the escape from defendant's cars of the horses in question, you cannot render a verdict against it for damages, on account of such escape, even though you should be satisfied

from the evidence that they did so escape." This was modified by adding the following: "Provided, however, that such escape was made without negligence on the part of the defendant or its employes," and, as so modified, was given. Though the modification was complained of in the motion for new trial, it is not shown to have been excepted to, and we do not understand that it is now claimed to have been error. The evidence being conflicting upon the question of the number of the horses, it was the peculiar province of the jury to pass upon it; and they seem to have done so by harmonizing as much of the evidence as possible. It must be remembered that the contracts were in evidence, and they would control in the absence of evidence deemed sufficient to overcome their recitals. If the testimony of plaintiff was to be believed, then the contracts correctly stated the number. There were some other circumstances in evidence corroborative of his testimony. There were others opposing it; such as the improbability that more than 27 head actually went into either car, and the testimony of the witness who loaded the horses that he found only 54, and that he loaded all that were in pen 23. The jury may have thought it possible for the two to have escaped after delivery and inspection and before the beginning of loading; in which case the testimony of said witness, as well as the plaintiff, may have been given credence. Defendant's evidence tended strongly, if not conclusively, to show that no escape had occurred between Sheridan and Alliance, hence the instruction restricting the liability to loss at Sheridan does not seem to have eliminated any chances of plaintiff's recovery upon the evidence. Though conflicting, the evidence appears to be sufficient to sustain the verdict. We cannot substitute our judgment for that of the jury, even if we should feel inclined to look at the effect of the evidence differently. The credibility of the witnesses was especially a matter for the consideration of the jury. We are therefore of the opinion that the claim as to insufficiency of the evidence is not supported upon the record.

3. The other alleged errors are not properly before us, not having been assigned as grounds for new trial. But we are inclined to think that the exclusion of the sheriff's office record and his monthly report as to the inspection of these horses made by authority of chapter 79, p. 79, Laws 1901, was proper, or at least not prejudicial. The purpose of the offer was to show that as appeared by such record and report only 55 horses had been inspected, excluding the rejected horse above referred to; and as a witness connected with the sheriff's office was permitted to state the fact shown by the record by referring to it, not to refresh his recollection, but by way of stating the total number shown by the record to have been inspected on the occasion in question, prejudice is not quite apparent. But the shipper and carrier

have nothing to do with the making of the record or report; and it was not shown nor offered to be shown that the plaintiff against whom they were sought to be introduced was present when they were made or had assisted in making them, or knew until they were produced at the trial what the contents were. As written evidence for the purpose aforesaid upon the issues here between the shipper and carrier they would appear to be objectionable on the ground of hearsay.

For the reasons aforesaid, no reversible error is perceived in the record, and the judgment will be affirmed.

BEARD and SCOTT, JJ., concur.

McKEE v. DODD. (S. F. 4381.)
(Supreme Court of California. Jan. 21, 1908.
Rehearing Denied Feb. 17, 1908.)

1. LIMITATION OF ACTIONS—COMPUTATION OF TIME—ABSENCE FROM STATE.

Code Civ. Proc. § 339, subd. 1, provides that an action upon a contract founded on a written instrument executed out of the state must be commenced in the state within two years. Section 351 declares that if, when a cause of action accrues against a person, he is out of the state, the action may be commenced within two years after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not a part of the time limited for the commencement of the action. *Held*, that where a note was expressly made payable in New York, and the parties were residents of that state when it was executed, but the maker was a non-resident thereof when the cause of action on it accrued and subsequently came to California, the statute only commenced to run in his favor when he came to the state, and where he left the state, returning for occasional visits which aggregated less than two years, the time that he was absent from the state was not a part of the time within which the suit could be brought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 439-455.]

2. SAME—NONRESIDENCE.

Code Civ. Proc. § 361, provides that when a cause of action has arisen in another state, and by the laws thereof an action thereon cannot be maintained by reason of lapse of time, an action thereon shall not be maintained against him in this state except in favor of one who has been a citizen, and has held the cause of action from the time it accrued. The maker of notes payable in New York left that state, was in Europe when the notes became due, and afterwards took up his residence in Hawaii after the maturity of the notes, and remained there for a length of time which, under the Hawaiian statute of limitations, would bar an action on the notes. *Held*, that the Hawaiian statute of limitations did not bar an action brought against the payor's executor in California, since the action arose primarily in New York, and the section has reference only to the primary and original jurisdiction in which a cause of action arises, and does not contemplate other jurisdictions where the debtor may have resided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 4-8.]

3. ACTION—NATURE AND ELEMENTS OF CAUSE OF ACTION.

A "cause of action" arises out of an antecedent primary right and corresponding duty and the breach of the right and duty by the

person on whom the duty rests; the primary right and duty and the wrong together constituting the cause of action in the legal sense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 1.

For other definitions, see Words and Phrases, vol. 2, pp. 1015-1019; vol. 8, p. 7598.]

4. LIMITATION OF ACTIONS—PLACE OF ACCRUAL OF CAUSE OF ACTION.

In a legal sense a cause of action cannot have two places of origin, but can arise in but one place, and, in the case of a note made payable in the state where the payee lives, it arises in that state.

5. COURTS—COMITY—RIGHTS OF CREDITORS.

As between the states the same rights are reserved by the Constitution to the citizens of one that are accorded to the citizens of another, but, beyond this, the ability of a creditor to pursue his debtor in a foreign jurisdiction rests wholly upon comity and upon the laws of such jurisdiction.

6. EXECUTORS AND ADMINISTRATORS—PRESENTMENT OF CLAIMS—CLAIMS OF NONRESIDENT CREDITOR—COMITY.

Since the statute does not forbid a creditor and resident of a sister state the right to present his claim against an estate being administered in this state, whether the administration be primary or ancillary, comity will dictate that such a claim should be entertained.

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by John McKee against Rebecca A. Dodd, executor of James Dodd. Judgment for plaintiff, and defendant appeals. Affirmed.

W. M. Cannon, for appellant. A. P. Black, for intervener. Mullany, Grant & Cushing, for respondent.

HENSHAW, J. This is an action on a claim against the estate of James Dodd, deceased, based upon three promissory notes which were executed in 1891 in New York to plaintiff, and payable in that state; plaintiff and the deceased at that time both being residents thereof. All of these notes by their terms became due and payable before the expiration of the year 1891. Shortly after their execution Dodd left New York and never returned. He was in Europe until May, 1892, and thence came to California, arriving here in June, 1892. He kept a liquor saloon in San Francisco until April, 1893, when he sold out his business and went to Honolulu, H. I. He entered business in Honolulu, resided and had his domicile there until his death in January, 1900. During the time of his residence in Honolulu he made visits to San Francisco, but the total length of his stays in this state aggregated less than two years. He left estate, consisting of real and personal property, in Hawaii and in California. His will was duly admitted to probate in Honolulu, and ancillary administration was had in the superior court of the city and county of San Francisco. Such property as he left in this state is here in process of administration. McKee, the plaintiff, continued to reside in New York. He presented the notes for payment to the executrix as a

claim against the estate in California, which claim was allowed by her. The court refused its allowance, whereupon this action was commenced. It was known to plaintiff that Dodd was residing in Honolulu. The court awarded judgment to plaintiff upon his claim and defendant appeals, presenting three contentions.

1. Appellant urges that the notes are barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, by which section an action upon a contract founded upon an instrument in writing executed out of the state must be commenced in this state within two years. Section 351 of the Code of Civil Procedure in this connection declares that "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not a part of the time limited for the commencement of the action." Appellant relies upon the case of *Palmer v. Shaw*, 16 Cal. 93, as supporting her contention that when Dodd came to the state the cause of action against him here arose, that the statute of limitations then began to run, and that his subsequent departure from the state did not stay this running; but in *Palmer v. Shaw*, not only was the court's attention not directed to this proposition, but in fact the defendant had been in the state more than two full years before the action was brought, whereas the deceased in this case had been in the state, aggregating all of his visits, less than five hundred days. The rule is to the contrary of appellant's contention, and has been expressly so decided in *Dougall v. Schulenberg*, 101 Cal. 154, 35 Pac. 635. That case is the exact parallel of this as to the leading question involved, and it is there declared that where a note sued upon was in express terms payable out of the state, and the payors were nonresidents of the state when the cause of action accrued, the statute only commenced to run in their favor when they came to this state, and if afterward they left the state, the time during which they were so absent will not be a part of the time within which the suit must be commenced. It follows herefrom that plaintiff's cause of action was not barred by subdivision 1 of section 339 and section 361 of the Code of Civil Procedure.

2. Appellant next contends that the cause of action was barred by section 361 of the Code of Civil Procedure. This section is as follows: "When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued."

In support of appellant's position under this section it was established in evidence that under the laws of Hawaii an action for the recovery of any debt founded upon any contract, obligation, or liability, where the cause of action has arisen in any foreign country, must be commenced within four years after the cause of action accrues. Appellant's reasoning and argument is this: That a cause of action "arose" against the deceased in Hawaii upon his arrival there after the maturity of the notes; that for failure to prosecute, the right of action became barred by the statute of limitations of Hawaii; that thus is presented a case under our section 361, where, by the laws of a foreign country, an action cannot be maintained upon a contract by reason of lapse of time, wherefore no action is maintainable against such person or his estate in this jurisdiction. It is at once apparent then that the crux of this matter is to be found in the true interpretation to be given to the phrase "when a cause of action has arisen." Appellant contends that the cause of action "arose" simultaneously in New York state at the time the promissory notes became due and payable, and also in Europe, where at that moment deceased chanced to be; that subsequently the cause of action arose successively in every country through which he passed, and arose finally in Hawaii upon his arrival there. If this be the true construction of the statute, then admittedly plaintiff's cause of action is barred. It may at once be conceded that the courts have experienced difficulties in construing statutes of limitations similar in their terms to our section 361. Appellant cites many cases under her contention that the weight of authority is with her. It would not be profitable to analyze these authorities to show in individual instances where the ruling of the court was determined by differences between their statutes and our own, nor where under other circumstances the reasoning does not appeal to us as cogent. Suffice it to say that, from a consideration of all the authorities and from the very reason of the matter itself, we are satisfied that appellant's position cannot be maintained. A cause of action, as Professor Pomeroy points out with his usual lucidity (*Remedies and Remedial Rights*, § 452 et seq.), arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests. "Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term and as it is used in the Codes of the several states." It was the right of plaintiff to look for payment of his debt at the time it became due and at the place of payment—New York state. It was the duty of the deceased to pay the debt, not only when it became due, but at the place of payment—New York state. His failure in this regard gave

rise to the cause of action, and, clearly therefore, that cause of action arose in the state of New York. In a legal sense the cause of action cannot have two places of origin. It can arise in but one place, and that, in such a case as this, is where the note is payable and the payee resides. As between the states the same rights are reserved by the Constitution to the citizens of one that are accorded to the citizens of another. But beyond this, the ability of a creditor to pursue his debtor in foreign jurisdictions rests wholly upon comity and upon the laws of such jurisdiction. This cause of action, therefore, did not arise against the deceased in Europe, where he chanced to be; and, indeed, in the particular country of his location at the time of his default, no remedy may have been open to plaintiff. Whatever subsequent remedies by way of rights of action may have accrued to plaintiff because of the deceased's presence in various states and countries, they were one and all subordinate to and depended upon the vital and essential fact that the cause of action had arisen against him in the state of New York. *Story v. Thompson*, 36 Ill. App. 370; *Chevrier v. Roberts*, 6 Mont. 319, 12 Pac. 702; *Doughty v. Funk*, 15 Okl. 643, 84 Pac. 484, 4 L. R. A. (N. S.) 1029; *McCann v. Randall*, 147 Mass. 81, 17 N. E. 75, 9 Am. St. Rep. 668. We conclude, therefore, upon this point that section 361 has reference only to the primary and original jurisdiction in which the cause of action arises, and does not contemplate other jurisdictions in which a cause of action may arise or accrue, depending upon the peripatetic inclinations of the defendant, and in the case at bar, unquestionably, the cause of action had its origin and primarily "arose" in the state of New York.

3. The last contention which appellant advances is that administration in this state being ancillary, no claim of a citizen of a foreign state can here be recognized at all, regardless of any question of the statute of limitations, but that such claim must be transferred to the court of primary jurisdiction. Undoubtedly, there is authority holding this view. Undoubtedly, also, this rule is ably controverted upon the ground that it is unsound in morals, as well as in law, and violates the constitutional guarantee of equal privileges and immunities to citizens. Reference herein may be made to the case of *Shellogg v. Perkins*, 34 Ark. 117, and to the conflicting views of the justices of that court upon the matter. In *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432, it was declared that a state statute giving to residents of that state a priority over non-residents in the distribution of the assets of a foreign corporation is violative of article 4 of the Constitution of the United States, giving equal privileges and immunities to the citizens of the several states, and as denying to every person within its jurisdiction the equal protection of the law. We find no stat-

ute of our state which, in terms, denies to a creditor and resident of a sister state the right to present his claim here, whether the administration in our courts be primary or ancillary, and, in view of the provision of the Constitution of the United States above referred to, we should doubt the validity of such a statute if found upon our books. However, upon this matter it is necessary here to say no more than that, since our statutes do not forbid, comity will dictate that such a claim should be entertained.

For these reasons the judgment appealed from is affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

(152 Cal. 643)

GILLESPIE et al. v. GOULEY. (S. F. 4,277.)
(Supreme Court of California. Jan. 21, 1908.)

1. QUIETING TITLE — PARTIES — PLAINTIFFS — JOINDER.

Two sons claiming that each owns a divided half of certain land under the will of their mother, and seeking to remove from their title the cloud of a fraudulent deed affecting the moieties of both, were properly joined as plaintiffs, under Code Civ. Proc. § 381, providing that any two or more persons claiming any interest in land under a common source of title, whether holding as tenants in common, joint tenants, copartners, or in severalty, may unite in an action against any person claiming an adverse estate therein, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quietting Title, § 65.]

2. JUDGMENT—PARTIES—MISJOINDER OF PARTIES PLAINTIFF—EFFECT.

A woman died leaving three sons. By her will certain land was to be divided equally between two of the sons. Before her death, however, she was defrauded of the land. The sons joined in a suit to recover the property. The court found that the two sons took as devisees, but that the third son had no interest in the subject-matter of the action, and, for misjoinder of parties plaintiff, gave judgment for defendant. Code Civ. Proc. § 578, provides that judgment may be given for or against one or more of several plaintiffs, and may, when justice requires it, determine the ultimate rights of the parties on each side as between themselves. *Held*, that the court should have dismissed the action as to the third son, retained it as to the other plaintiffs, and rendered such judgment in their favor as they were entitled to under the findings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 414.]

In Bank. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by William M. Gillespie, administrator, and others against Ellen Gouley, administratrix. From a judgment for defendant, plaintiffs appeal. Reversed, with directions.

John B. Carson, Carlton W. Greene, and Lewis & Royce, for appellants. Henry C. MoPike, for respondent.

HENSHAW, J. The facts necessary for an understanding of this action will be found

stated in the former opinion of *Gillespie v. Gouly*, 120 Cal. 515, 52 Pac. 816. The plaintiffs sued to recover the real property as the heirs at law of Ann Gilfeather, deceased, who was the original owner of it, and who had been defrauded of it by a judgment and proceedings taken thereunder while she was insane. Upon a retrial of the cause the court found these facts to be as charged. The answer, however, had affirmatively pleaded that these plaintiffs had no interest in the property as heirs at law of Ann Gilfeather, deceased, for the reason that Ann Gilfeather had died testate, and by her will had specifically devised the property in question to two of her sons; that is to say, to her son Dennis one-half of the property, specifically devised by metes and bounds, and to her son Edward the other moiety. The court found in accordance with the allegations of the answer. It further found that while these two sons took as devisees under the will of their mother, the third plaintiff, James, was not interested in the property or in the subject-matter of the action at all. There thus resulted, at least so far as the plaintiff James is concerned, a misjoinder of parties plaintiff. The court therefrom concluded that all of the plaintiffs must fail in their action, and gave judgment accordingly in favor of defendant. This appeal is upon the judgment roll alone, and it is contended that the court, under its findings of fact above adverted to, erred in the judgment which it gave.

The action is one, the bringing of which is authorized under section 738 of the Code of Civil Procedure. Section 381 of the same Code declares that any two or more persons claiming any estate or interest in land under a common source of title, whether holding as tenants in common, joint tenants, copartners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, etc. The plaintiffs Dennis and Edward, claiming as devisees, the common source of title being the will of their deceased mother, and seeking to remove from their title the cloud of the fraudulent deed which affected the whole land, indubitably brought themselves within the provisions of section 381 of the Code of Civil Procedure. Thus, in *People v. Morrill*, 26 Cal. 336, it is held that parties who have a common interest in annulling a patent, although their interest in the land adverse to the patent is not joint, may join as plaintiffs in an action to procure its cancellation. This is well nigh parallel to the case at bar. While the parties hold their moieties in severalty, they are seeking the annulment of a deed which equally affects the lands of both. Our Code section in this regard embodies the rule governing the joinder of parties to an action as enunciated by Judge Story, who says: "The result of the principles to be extracted from the cases on this subject seems to be that where there is a common liability

and a common interest, a common liability in the defendants and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit."

The plaintiffs, other than the brother James, were thus properly joined as plaintiffs in this action. The brother James, as has been stated, appears without any interest whatsoever in the controversy. What result should follow the determination of this fact? Section 578 of the Code of Civil Procedure presents the complete answer to this question. It declares: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves." Under the way thus clearly pointed out, the judgment of the court as to James should have been his dismissal from the action, retaining the action as to the other plaintiffs and rendering judgment in their favor, such judgment as, under the findings which the court made, they were clearly entitled to.

It follows, therefore, that the judgment of the trial court must be reversed, and a judgment in accordance with the foregoing entered; that is to say, as to the plaintiff James, a judgment dismissing him from the action, as to plaintiffs William Gillespie, representing Dennis Gilfeather and Edward Gilfeather, a judgment in their favor upon the findings made by the court.

It is ordered accordingly.

We concur: ANGELLOTTI, J.; LORIGAN, J.; SHAW, J.; McFARLAND, J.

152 Cal. 634

MUIR v. HAMILTON et al. (Sac. 1,246.)
(Supreme Court of California. Jan. 20, 1908.)

1. MORTGAGES—FAILURE OF CONSIDERATION FOR DEBT SECURED—EFFECT.

A client, to secure his contingent liability to pay his attorney in the event he was successful in a suit, gave the attorney a note for the amount of compensation, and gave a deed of real estate to a third person as security therefor. The suit was lost, and the note and deed remained in the hands of the original parties. *Held*, that the client was entitled to a cancellation of a deed which was in effect a mortgage, because there was a total failure of consideration for the note.

2. EVIDENCE—PAROL EVIDENCE—FAILURE OF CONSIDERATION OF NOTE.

As between the original parties to a note, failure of consideration thereof may be shown by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1981-1989.]

Department 2. Appeal from Superior Court, Placer County; Albert G. Burnett, Judge.

Action by William Muir against George W. Hamilton and another. From a judgment for plaintiff, defendants appeal. Affirmed.

J. M. Fulweller, Chas. Tuttle, L. L. Chamberlain, and Geo. W. Hamilton, for appellants. W. H. Slade, J. D. Meredith, and F. P. Tuttle, for respondent.

HENSHAW, J. Plaintiff brought his action to quiet title to certain parcels of land situated in the county of Placer. The gravamen of the action rests upon the following facts, which plaintiff alleges, and which the court found upon ample testimony, to be true: In the year 1897 plaintiff was engaged, as plaintiff, in a certain litigation with F. P. Tuttle. He employed the defendants, father and son, who were attorneys at law, to prosecute on his behalf this litigation, under an agreement that the defendants were to devote their time and legal services to the prosecution of the action, and, in the event that its final determination should be in favor of plaintiff, defendants should receive as compensation for their services the sum of \$5,500, of which sum the defendant George W. Hamilton was to receive \$2,500, and the defendant Joe Hamilton was to receive \$3,000. In the event, however, that the action was determined adversely to plaintiff, defendants were to receive no compensation whatever. For the purpose of securing this contingent obligation plaintiff executed and delivered to the defendant Joe Hamilton his promissory note for \$3,000, and to the defendant George W. Hamilton his promissory note for \$2,500. Furthermore, for the sole purpose of securing the payment of this contingent fee, so evidenced by the promissory notes, plaintiff executed a deed of all the property here in controversy to defendant George W. Hamilton. At the time it was agreed that this deed should be deposited by way of escrow with the defendant Joe Hamilton, and the defendant Joe Hamilton would hold the same in escrow until the final determination of the action of *Muir v. Tuttle*. In the event that the action of *Muir v. Tuttle* was finally decided in favor of plaintiff, Joe Hamilton was to deliver the deed to the defendant George W. Hamilton, who, under these circumstances, would take the same as security for the contingent fees. But in the event that the action of *Muir v. Tuttle* was finally determined in favor of defendant, said Joe Hamilton agreed to redeliver to plaintiff the deed and the promissory notes. The action of *Muir v. Tuttle* resulted in a final judgment for defendant. The defendant George W. Hamilton delivered his promissory note for \$2,500 to plaintiff, but the defendant Joe Hamilton failed, neglected, and refused to surrender his note for \$3,000 with the other securities and documents. The defendant George W. Hamilton secured possession of the deed, and in violation of the agreements, caused it to be placed of record in the office of the recorder of the county of Placer.

These findings, which as we have said are amply supported by the evidence, are sufficient to uphold the conclusions of law to the

effect that plaintiff was the absolute owner of the land, and was not indebted to the defendant Joe Hamilton in the sum of \$3,000, or in any sum whatever, nor to George W. Hamilton in any sum whatever; that the consideration for which the notes were given had wholly failed, and that plaintiff was entitled to his decree quieting title to the land in the complaint described; as a part of the relief under which decree, it was ordered that the deed of plaintiff to Hamilton be declared void and canceled.

The trial court stated that the vital question in the case was whether the agreement of plaintiff was to pay an unconditional or contingent fee. This, appellants say in their brief, is an illustration and a demonstration that the court has confused the true issue, and that the true issue is, did the execution and unconditional delivery of the promissory notes create an obligation against the plaintiff, and has that obligation been discharged? Under the facts of this case, the note still being in the hands of the original payee, we think the distinction that counsel makes is rather of form than of substance. There was not an unconditional delivery of the promissory notes. However closely the lips of the plaintiff might have been sealed under the law governing negotiable paper, if his notes had passed into the hands of an innocent purchaser for value before maturity, as between the original parties to an instrument, nothing is better settled than that the maker may show an original lack of consideration, or subsequent failure of consideration, which latter was done in this case. And equally is it well settled that such lack or failure of consideration may be shown by parol. *Billings v. Everett*, 52 Cal. 661; *Brady v. Henry*, 71 Cal. 483, 11 Pac. 385, 12 Pac. 623, 60 Am. Rep. 543; *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638; 4 Am. & Eng. Ency. of Law (2d Ed.) pp. 186, 196.

The deed which plaintiff gave was, in effect, a mortgage, and was given as security for the payment of the promissory notes. The consideration for the notes having failed totally, it was plaintiff's right, as the court decreed, that the deed itself should be canceled and annulled.

The judgment and order appealed from are, therefore, affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

153 Cal. 716
STANISLAUS WATER CO. v. BACHMAN.
(S. F. 3,890.)

(Supreme Court of California. Jan. 23, 1908.)

1. VENDOR AND PURCHASER—INNOCENT PURCHASER—NOTICE—RECORDS—WATER CONTRACT.

A contract by which a water company agrees to furnish through its canal to the owner of certain land water to irrigate it, for a term of years, he to make certain yearly payments therefor, is not to be recorded in the book in

which County Government Act, § 120, subd. 1 (St. 1897, p. 484, c. 277), provides that "deeds, grants, transfers and mortgages" of real estate shall be recorded; but the book provided by subdivision 12 for recording "such other writings as are required or permitted by law to be recorded," and in which it has been the custom to record water contracts and other agreements of like character, is the proper book in which to record it, so as to give constructive notice thereof.

2. MORTGAGES — FORECLOSURE — RIGHTS OF SUBSEQUENT INCUMBRANCES.

If a mortgage given by a water company on its water system was such as to make it paramount to the rights of a landowner under the contract thereafter made with him by the company to furnish through its canal water to irrigate his land for a term of years, he to make certain yearly payments therefor, yet, he not having been made a party to the foreclosure, though his contract was recorded prior to commencement of the foreclosure suit, the purchaser under the foreclosure holds the canal system and the waters thereof subject to the rights of such landowner, at least till those rights are terminated by foreclosure proceedings to which he is a party.

3. SAME—PROPERTY PASSING—SUBSEQUENTLY ACQUIRED WATER RIGHTS.

Though a mortgage of land is made prior to the contract of the landowner with a water company, by which the company agrees to furnish through its canal to him, his heirs or assigns, water to irrigate the land for a term of years, he to make certain yearly payments therefor, the water right, when acquired, having become an easement appurtenant to the land, passed with it under the foreclosure of the mortgage.

4. WATERS—CONTRACT FOR IRRIGATION—NATURE OF PROPERTY RIGHT.

The right conferred on a landowner by his contract with a water company to have water flow from its canal, through a lateral ditch, to his land, for its irrigation, for a term of years, is a servitude on the ditch and canal, and an appurtenance to the land, and so is real property.

5. VENDOR AND PURCHASER—INNOCENT PURCHASERS—CONTRACT FOR SALE OF WATER.

An agreement of a water company with the owner of land to furnish through its canal from a certain river to the landowner, his heirs or assigns, to irrigate the land, a flow of water sufficient to irrigate it each year for a certain number of years, the devices through which the water shall be drawn from the land to be constructed by the company and the landowner to pay a certain amount yearly therefor, the contract to have the force and effect of a covenant running to and with the land and the canal, is not a mere personal covenant of the company, but, while not a lien on the canal, is an agreement for sale of real property of the company, binding on the successor in title of the company's plant, taking with notice of the agreement.

6. WATERS—CONTRACT TO SELL FOR IRRIGATION—DEFINITENESS.

The agreement of a water company to sell water for a certain price for irrigation of certain land for a term of years is sufficiently certain, the water being described as water from a certain river, to be carried through the company's canal, and it being shown that it had but one canal leading from that river, though the lateral ditch was not described, except by the statement that the company was to deliver the water on the land by means of such head gates, weirs, and devices as it should construct for that purpose, a ditch through which water was conducted to the land having thereafter been constructed by the company, and the contract in this respect having thus been made definite.

7. SAME—IRRIGATION — CONTRACT RIGHTS — CONSTITUTIONAL PROVISIONS.

Const. 1879, art. 14, declaring the use of waters appropriated for sale, rental, or distribution to be a public use subject to the regulation of the state as shall be prescribed by law, and that the right to collect compensation for water supplied to any county, city, or town, or the inhabitants thereof, cannot be exercised except by authority of and in the manner prescribed by law, does not prevent a landowner acquiring and attaching to his land a right to the permanent use of water; and, in the absence of exercise of the power, delegated by statute to county boards of supervisors, of control and regulation of waters outside of cities, the terms of a contract for furnishing water for irrigation, for a term of years, at a fixed yearly rental, remain in full force, and constitute the measure of the rights of the parties.

In Bank. Appeal from Superior Court, San Francisco County; M. C. Sloss, Judge.

Action by the Stanislaus Water Company against S. Bachman. Judgment for defendant. Plaintiff appeals. Affirmed.

J. W. Dorsey and W. E. Cashman (James F. Peck, of counsel), for appellant. W. F. Williamson, amicus curiæ. Vogelsang & Brown (Samuel C. Wiel, of counsel), for respondent.

SHAW, J. The plaintiff sued the defendant to recover \$920 alleged to be due for water sold and delivered by the plaintiff to the defendant for the irrigation of 400 acres of land, or at the rate of \$2.30 per acre. The defendant admitted the receipt and use of the water on the land, and offered to allow judgment in favor of plaintiff for \$600, or at the rate of \$1.50 per acre. The case depends on the question whether or not the plaintiff can charge more than \$1.50 per acre per year for water for irrigation purposes. The court below held for the defendant, and gave judgment for plaintiff for \$600, without costs. The claims of the defendant are founded upon an agreement between one Threlfall, his predecessor in the ownership of the 400 acres of land, and a corporation known as the "Stanislaus & San Joaquin Water Company," the predecessor of the plaintiff in the ownership of the water and water system in question. The said Stanislaus & San Joaquin Water Company was the owner of water rights in the Stanislaus river and a canal, whereby the water was conducted through Stanislaus county, and it was engaged in the business of distributing and selling the water to farmers for irrigation purposes. Threlfall was the owner of a large tract of land. The following is a statement of the parts of the agreement that are material to the case: The company agreed to "furnish through its canal from the Stanislaus river" to Threlfall, "his heirs or assigns, during each and every year, for the term hereinafter mentioned, for the purpose of irrigating a tract of four hundred and sixty-one acres of land, * * * a flow of water sufficient to fully irrigate said land as often as necessary during each year of said term." The land described con-

sisted of 10 quarter sections, comprising about 1,600 acres, and the 461 acres was described as all those portions of the larger tract "lying north of Little Johns creek and south of Myrtle creek." The water was to be used for irrigating purposes only on said land, and was to be delivered by the company on the land in such manner as to make it available for use thereon. "The headgates, weirs, and other arrangements or devices through which the water shall be drawn from said canal" were to be made and placed in position by the company at its own expense, and it was to fix and control the manner of supplying the water. Threlfall agreed to pay the company "the sum of ten dollars per acre for each and every acre of said land" to which the company agreed to furnish water, with interest on such sum at 6 per cent. per annum, "principal and interest apportioned and commuted as follows: On the first day of November after the delivery of water under the contract * * * the sum of eighty cents for each and every acre of said land, and on the first day of November thereafter for the period of twenty years thereafter, a like sum, making in all twenty payments on each and every acre of said land aforesaid, which shall be in full payment of the amount provided to be paid herein," or Threlfall had the right at any time to "make a cash settlement in whole or in part of the amount unpaid, by paying the principal sum still unpaid and the interest accrued" to the time of settlement. Threlfall also agreed to pay, in addition to the above sums, the sum of \$1.50 per acre per year upon each acre of the land, "as a water rental therefor," to be paid on November 1st of each year perpetually. The ninth clause of the agreement contained the following: "The said parties agree to and with each other that this contract shall have the force and effect of a covenant running to and with the said land of the party of the second part [Threlfall] and the canal of the party of the first part" (the company). The contract was executed on the 18th day of June, 1896. The land to be irrigated was situated some eight or ten miles from the canal mentioned in the agreement, or from the point thereon at which the water was to be diverted therefrom. Under a subsequent contract with the company, Threlfall constructed for the company a lateral ditch leading from the point of diversion in the canal to his lands and the company accepted this work as full payment of the \$10 per acre agreed to be paid by Threlfall on the 400 acres of land for which it subsequently supplied water. This arrangement appears to have been understood as a release of both parties from the operation of the contract and the obligations thereof, with respect to the remaining 61 acres mentioned in the agreement. The company took possession of the lateral ditch, and thereafter used it to convey water from its main canal to the

lands of Threlfall and other lands in the vicinity. The Stanislaus & San Joaquin Water Company had executed a mortgage on July 26, 1895, upon all of its property, including the said main canal, and all lateral ditches and appurtenances of every character connected therewith. This was prior to the contract with Threlfall, and before the construction of the lateral ditch leading to his land. This mortgage was foreclosed, and on December 17, 1898, the mortgaged property, including said lateral ditch, was sold at the foreclosure sale to J. Dalzell Brown, and the deed thereunder was afterward executed to the plaintiff, as his successor. Neither Threlfall, nor Bachman, the defendant, were parties to the foreclosure suit. In 1893 and 1894 Threlfall executed certain mortgages on his land, which were foreclosed in 1898, and Bachman obtained title to said land by deed under the foreclosure decree. Neither the Stanislaus and San Joaquin Water Company, nor the Stanislaus Water Company, were parties to that action of foreclosure. During the year 1900 Bachman was the owner of the 400 acres of land, and the plaintiff was the owner of the canal and water system. It regularly supplied water to Bachman for the irrigation of the 400 acres of land during that year. The court finds that the reasonable value of the water so supplied, independent of the terms of the contract, was \$2.30 per acre, or \$920 for the land supplied. This, it may be observed, was substantially the same as the value fixed in the contract, being equal to the \$1.50 annual rental and the 80 cents for the annual payment agreed on. The foregoing are the principal facts upon which the rights of the parties depend.

1. The water right agreement between the Stanislaus & San Joaquin Water Company and Threlfall was on June 26, 1896, recorded by the recorder of Stanislaus county in a book kept by him in the recorder's office, and designated as "volume 6 of Miscellaneous Records." This is one of seven books of the same designation which are kept in the said office. Ever since the year 1854 it has been the custom in said county to record in these books so designated instruments filed for records of the classes known as agreements, mining locations, bills of sale, water rights, water contracts, certified copies of decrees confirming sale, articles of copartnership, assignments for benefit of creditors, assignments of sheriff's certificates of sale, bonds for deed and agreements for sale of real estate, and it does not appear that in that county any instrument of either of these classes has ever been recorded elsewhere than in said Miscellaneous Records. The substance of the agreement has been, in part, stated. There were other clauses further showing its complex character. The fifth provided that Threlfall might use water on only one-fourth of the land the first year, one-half the second year, three-fourths the third

year, and thereafter on all the land, paying rent only on the part used. By the seventh clause Threlfall granted to the company a permanent right of way over any land he owned for the canal of the company, and Threlfall was granted the right to use water from such canal for domestic purposes and to water stock, and to plant trees by the canal. The eighth provided that if, from causes not within its control, the company was unable to furnish the water, it should not be liable for the failure, and Threlfall should pay rent only for what water he received. Neither party was to be liable until delivery of water began or was tendered. It is claimed by the plaintiff that in legal effect this contract was a grant of real property—that is, of a right to demand and receive water for the irrigation of land—and that it should have been recorded in the book of deeds, instead of in the miscellaneous records, and that under the rule announced in *Cady v. Purser*, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391, the record in the latter imparted no constructive notice of its contents to the plaintiff as a subsequent purchaser of the canal system and water rights of the Stanislaus and San Joaquin Water Company, and that, as it bought without actual notice thereof, it took the canal system and all the water rights free from the obligations, burdens, easements, or servitudes imposed by that contract. On the other hand, plaintiff says, if it is not such a grant, then it is a mere personal agreement to sell and deliver water from year to year, binding only on the parties, and the plaintiff is free to demand and receive for water it may sell and deliver its full reasonable value without regard to payments made by Threlfall, under the contract, to plaintiff's predecessor.

Section 120 of the county government act (St. 1897, p. 484, c. 277), as it stood at the time this agreement was recorded, provided that the recorder must "record separately, in large and well-bound separate books, in a fair hand: (1) Deeds, grants, transfers and mortgages of real estate, releases of mortgages, powers of attorney to convey real estate, and leases which have been acknowledged and approved. (2) Mortgages of personal property." Then follow 10 additional designated classes of instruments, the section closing with class "12. Such other writings as are required or permitted by law to be recorded." The instrument in question does not come within either of the classes designated as "deeds, grants and transfers of real estate." No lawyer would call it a deed or a grant. No part of it is in the form usually adopted for such instruments. With respect to the rights secured to Threlfall under the agreement, it would not, in the ordinary use of language, be called a transfer of real estate. It is an executory agreement to sell and deliver, or, to use its words, "to furnish," water to Threlfall from year to year

for the irrigation of his land. Such an agreement confers a right to receive water upon the terms agreed on, and this is no doubt a right in real property, as will hereinafter appear, but it does not necessarily follow that the instrument by which it is conferred constitutes a present grant or transfer. Any agreement to sell or convey real estate gives the vendee a right which is an interest in real property, but such instruments are not grants or transfers, and no one would expect to find them recorded in a book set apart for deeds, grants, and transfers. It is a matter of common knowledge that such instruments are usually recorded in a book designated as a "Miscellaneous Record." The evidence shows that it has been the custom in Stanislaus county, ever since its organization in 1854, to record water contracts and other agreements of like character to that in question here in the books of Miscellaneous Records. We think it has always been the custom throughout the state to so record them. It must be admitted that a document so composite in its elements is better described as an instrument of miscellaneous character than as a grant or transfer of real estate, and that one would naturally look for it in the Miscellaneous Records. We think that record was the proper one in which to record it. We do not mean to imply by this that the record of such an instrument might not be effective for some purposes, if made in some other book. Courts should not be technical in such a matter where the instrument in question is so complex and difficult to classify as the one in question. The rights of parties under the recording act should not depend on the ability to properly determine the character of such an instrument. The mortgage of the water system of the Stanislaus & San Joaquin Water Company, by foreclosure whereof the plaintiff obtained title thereto, is not set forth in the record, and hence we cannot determine whether or not it was contemplated that that company, as a going concern, was thereby authorized to make contracts, such as that with Threlfall, whereby it might obtain funds to pay the principal and interest of the mortgage, and by which the mortgagee would be bound. But, if that mortgage was paramount to Threlfall's rights, it could not be enforced against him without a foreclosure to which he was a party, if suit was begun, as is conceded here, after his contract was recorded. He was not made a party thereto, and the consequence is that the plaintiff holds the canal system and the waters thereof subject to the rights of Threlfall and his successors in interest, at least until those rights have been terminated by foreclosure proceedings to which he, or they, are parties.

2. The rights of Bachman under the agreement are the same as those of Threlfall. It is immaterial that the mortgages of Threlfall's land, under which Bachman acquired title, were executed before Threlfall obtain-

ed the water right. The water right, when acquired, became an easement appurtenant to the land (*Farmer v. Uklah Water Co.*, 56 Cal. 13) and passed with it, upon the foreclosure sale in the same manner as any other appurtenance or fixture passes with the title and possession of land (Civ. Code, §§ 1084, 1104; *Cave v. Crafts*, 53 Cal. 140; *Farmer v. Uklah Water Co.*, supra; *Cross v. Kitts*, 69 Cal. 221, 10 Pac. 409, 58 Am. Rep. 558; *Smith v. Corbit*, 116 Cal. 591, 48 Pac. 725). It was an incident of the land, and would pass as such by a conveyance of the land, without express mention and without any reference thereto, such as by the use of the word "appurtenances" or otherwise. A conveyance of land upon a foreclosure sale must of necessity, at least as between the parties to the mortgage, carry with it a water right appurtenant to the land acquired and used by the mortgagor for the benefit of the land, although obtained after the execution of the mortgage and before the sale on foreclosure. We are cited to no authority for or against this proposition, and have not succeeded in finding any relating to it, but from the nature of the case it must be correct. Fixtures subsequently attached to mortgaged land pass to the purchaser at foreclosure sale, although not mentioned or referred to in the mortgage. *Merritt v. Judd*, 14 Cal. 72; 2 *Jones on Mortgages*, § 1657; 1 *Am. & Eng. Ency. of Law*, 255. The same rule applies to improvements made by the mortgagor on mortgaged land. 1 *Jones on Mortgages*, §§ 147, 681; *Union Water Co. v. Murphy's Flat Co.*, 22 Cal. 631; *Tibbetts v. Moore*, 23 Cal. 215. We are unable to perceive any material difference in principle, in this respect, between fixtures and improvements attached to or erected upon land and a water right attached to land as an appurtenance, such as that here involved, and we hold that it is governed by the same rules. This principle probably applies also to the right of the Stanislaus Water Company to the lateral ditch built for the Stanislaus & San Joaquin Water Company from the main canal to Threlfall's land. It was used in connection with the canal for its benefit, and it was therefore an appurtenance to the canal. Although not in existence at the time the canal and water system was mortgaged, it became a part of the system as soon as it was constructed. It is not necessary to this case to determine whether or not it passed to the plaintiff by the foreclosure sale under the prior mortgage. The two interested parties appear to have assumed that it did. It was included in the foreclosure sale and in the deed to the plaintiff, and the plaintiff took possession of it accordingly and used it to carry to the plaintiff's land the water for the rental of which it here claims compensation. Under these circumstances, it is immaterial, in this action, how it acquired title to the lateral.

3. We have assumed that the right conferred on Threlfall by the agreement with the

canal company was real property. This is controverted by plaintiff, and its argument is, for the most part, founded on the assumption that it was either personalty, or that the agreement constituted nothing more than a personal covenant of that company which does not bind the plaintiff, as its successor. We think neither of these propositions is correct. That water in its natural situation upon the surface of the earth, whether as a flowing stream, as a lake or pond, or as percolations in the soil, is real property will not be disputed. That it may become personalty by being severed from the land and confined in portable receptacles is also evident. There is a remark in the opinion of Field, J., in *Heyneman v. Blake*, 19 Cal. 595, which has apparently given rise to the notion that when water is confined in artificial channels it thereupon becomes personal property. The learned jurist there says: "Water when collected in reservoirs or pipes and thus separated from the original source of supply is personal property, and is as much the subject of sale—an article of commerce—as ordinary goods and merchandise." The law then authorized the formation of corporations to engage in "any species of trade or commerce." The corporation in question was organized to engage in the business of distributing and selling water to the inhabitants of a city for their use. The question under discussion was the authority to organize such a corporation under that law. The language quoted from the opinion is apt for the disposition of the question to which it was addressed, but it is by no means tantamount to a decision that water becomes personalty as soon as it is diverted from its natural channel or situation. No such question was involved in that case. The earth is composed of land and water and the water is not different in this respect from other material substances composing a part of the earth. Trees when felled and cut into logs and lumber; coal, iron, gold, and silver when taken from the mine; rocks when quarried from their bed; oil when pumped from its depths; clay when burned into bricks or converted into cement—all are real property before the change, but upon severance forthwith become personalty. The business of collecting water in reservoirs, conducting it in pipes to houses of a city, and there selling and delivering it to the occupants of such houses, is a process of severing the water from its connection with the earth and changing it into personal property. The person engaged therein is as much engaged in trade and commerce as is the miner, the oil producer, the brickmaker, or the cement manufacturer who sells his product. But the substances in which these persons deal do not become personalty until the severance is complete. The right to the water in the pipes and the pipes themselves, usually constitute an appurtenance to real property in such cases, and, if so, the water usually re-

tains its character as realty until severance is completed by its delivery from the pipes to the consumer. The right in water which has been diverted into ditches or other artificial conduits, for the purpose of conducting it to land for irrigation, has been uniformly classed as real property in this state. "The right to water must be treated in this state as it has always been treated, as a right running with the land and as a corporeal privilege bestowed upon the occupier or appropriator of the soil; and as such, has none of the characteristics of mere personality." *Hill v. Newman*, 5 Cal. 446, 63 Am. Dec. 140. The right to have water flow from a river into a ditch is real property; and so also is the water while flowing in the ditch. *Lower K. R. W. D. Co. v. K. R. & F. C. Co.*, 60 Cal. 410. A wrongful diversion of water flowing in a ditch is an injury to real property. *Last Chance, etc., Co. v. Emigrant D. Co.*, 129 Cal. 278, 61 Pac. 960. The right to take water from a river and conduct it to a tract of land is realty. *South Tule, etc., Co. v. King*, 144 Cal. 454, 77 Pac. 1032. The right to have water flow through a pipe from a reservoir to and upon a tract of land is an appurtenance to the land. *Standart v. Round Valley Co.*, 77 Cal. 403, 19 Pac. 689. An undivided interest in a ditch and in the water flowing therein is real property. *Hayes v. Fine*, 91 Cal. 398, 27 Pac. 772. A ditch for carrying water is real estate. *Smith v. O'Hara*, 43 Cal. 376; *Bradley v. Harkness*, 26 Cal. 77. And, where one person has water flowing in a ditch and another has the right to have a part of such water flow from the ditch to his land for its irrigation, the right of the latter is a servitude upon the ditch, and is real property. *Dorris v. Sullivan*, 90 Cal. 286, 27 Pac. 216. So, in the case at bar, the right of Threlfall and his successor, Bachman, under the agreement, to have the water flow from the plaintiff's canal through the lateral ditch, to the land, for its irrigation, is a servitude upon the ditch and upon the canal, is an appurtenance to the land, and is real property.

4. We think it is also clear that the effect of the agreement was to confer upon Threlfall a right to such portion of the water flowing from the Stanislaus river through the canal of the company as should be required for the full irrigation of the land, and to have the canal and ditch used for the purpose of conducting the same to the land, and that it is more than a mere personal covenant on the part of the company.

The agreement declares, in effect, that the obligations thereby imposed on the company shall have the force and effect of a covenant running with its canal. Covenants running with real property bind the assigns of the covenantor in the same manner as if they had personally entered into them. Civ. Code, § 1460. A lien is a charge imposed upon specific property by which it is made security for the performance of some act. Civ. Code,

§ 2872. If it had been provided that the agreement to furnish the water should bind the canal of the company, there would have been created thereby a lien on the canal for the performance of the act of furnishing the water as agreed. *Fresno Canal Co. v. Rowell*, 80 Cal. 114, 22 Pac. 53, 8 Am. St. Rep. 112; *Fresno Canal Co. v. Dunbar*, 80 Cal. 530, 22 Pac. 275. By declaring that it should have the effect of a covenant running with the land of one party and with the canal of the other, the parties adopted the technical definition of such covenants to express their intention, and, in effect, declared, in the words of the Civil Code, § 1460, that the rights under the agreement should be "appurtenant to such estates, and pass with them, so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee in the same manner as if they had personally entered into them." This is not a declaration that it should bind the canal. Hence it does not come within the rule of the cases above cited, and it created no lien on the canal. But the agreement is, in legal effect, an agreement to sell a right or interest in real property. Water, flowing in a canal or artificial conduit, and delivered therefrom upon land, for the irrigation of that land, does not change its character from realty to personality. It remains real property throughout the process, and until it serves its purpose by being absorbed into the land which it moistens. Hence, the agreement to furnish the necessary water from the canal from year to year, during the times specified, and to deliver it upon the Threlfall lands for the irrigation thereof, for an agreed price, was in substance and effect an agreement for the sale of real property of the canal company. Such an agreement, with all its terms, is binding, not only upon the maker, but upon all persons who subsequently acquire the maker's title to the property agreed to be sold, with notice of the agreement. The plaintiff, as we have seen, bought with notice, and it is therefore as much bound to comply with this part of the agreement according to its terms as if it had executed the same.

The agreement is sufficiently certain in all its particulars. The water to be furnished and sold was identified by describing it as water from the Stanislaus river to be carried through the canal of the company. It was shown by the evidence that the company had but one canal leading from that river. The lateral was not described, except by the statement that the company was to deliver the water on the land by means of such head gates, weirs, and devices as it should construct for that purpose. This left the company at liberty to choose the location and size of the ditch, provided it was so located and was of sufficient size to comply with the terms of the agreement. The uncertainty in this respect did not render the agreement invalid. It was made certain when the ditch was con-

structed. *Winslow v. Vallejo*, 148 Cal. 725, 84 Pac. 191, 5 L. R. A. (N. S.) 851, 113 Am. St. Rep. 349. Thus the subject of the agreement, the means by which it was to be performed, and the price to be paid, were sufficiently identified and described. As the Stanislaus & San Joaquin Water Company had already received part of the agreed price, neither it nor its successor, the plaintiff, was entitled to claim more than the balance of \$1.50 per acre for each year, as provided in the agreement.

5. The appellant suggests that under the provisions of article 14 of the Constitution, adopted in 1879, the use of water appropriated for sale, rental, or distribution is a public use, the regulation and control of which, including the right to collect compensation for such use, is vested in the state, and that, by reason of these provisions, the making of a contract whereby one citizen is given the exclusive right to a part of such water, or by which it is set apart to a particular tract of land, at a rate fixed in the agreement, would destroy the control of the state and convert the public use into private property. If the water right of the Stanislaus & San Joaquin Water Company was in private ownership and use at the time the Constitution of 1879 was adopted, we do not see how it could become dedicated to public use by the adoption of the Constitution, or at all, except by consent express or implied of its owners. The record does not show whether it was acquired before or after that date. But, if it is conceded that the water right has become subject to public use in the sense in which that term is used in the Constitution, we do not think that any violation of the Constitution appears. The constitutional provision was not intended to prevent a landowner from acquiring and attaching to his land, a right to the permanent use of water for its irrigation. If the right to the use of water for that purpose cannot be made permanent, but is subject to change or termination at the hands of the public authorities under the guise of regulation and control, then such use would be of little value. Water for irrigation is not ordinarily used for annual crops for which the place of use can be changed from year to year, perhaps without serious injury, but for trees, vines, and alfalfa, which must be given water each year for a series of years to be successfully grown at all. To make land valuable for such use, it must have the right to a permanent and continuous use of water. The constitutional provision was not intended to prevent this. The purpose was to foster and encourage such industries, rather than to hamper and obstruct them by destructive limitations upon the right of acquiring private property. Permanent rights to the use of water for irrigation may still be obtained by contract, notwithstanding the provisions of the Constitution, subject only to the condition that the state may, if it chooses to do so, regulate and

control the use. This question was fully considered and decided in *Fresno C. & I. Co. v. Park*, 129 Cal. 443, 62 Pac. 87, and we refer to that case for a full discussion of the subject. How far the state can go in the regulation and control of the use when thus secured by private contract it is not necessary here to decide. The Legislature had delegated the power of control and regulation of waters outside of cities to the boards of supervisors of the respective counties. St. 1885, p. 95, c. 115; St. 1897, p. 49, c. 54; St. 1901, p. 80, c. 62. It does not appear that there has been any attempt to regulate or control the use of water in Stanislaus county, and consequently the terms of the contract remain in full force and constitute the measure of the rights of the parties. *Fresno C. & I. Co. v. Park*, *supra*. And under the present statute the contract rights prevail in all cases; the boards of supervisors being powerless to affect or interfere with them. St. 1897, p. 49, c. 54.

There are no other questions demanding notice.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

152 Cal. 701

Ex parte BAGSHAW. (S. F. 1,416.)

(Supreme Court of California. Jan. 23, 1908.)

1. LICENSES—FAILURE TO OBTAIN—EFFECT OF ORDINANCE.

A city or town ordinance is a "law of this state," within Pen. Code, § 435, prescribing a penalty for conducting business, etc., for which a license is required by any "law of this state," without procuring such license, and one who disobeys such an ordinance, not only violates it, but the state law.

2. SAME—PROSECUTION—JURISDICTION.

Mun. Corp. Act, § 882 (St. 1905, p. 73, c. 76), gives the recorder's court in certain towns concurrent jurisdiction with justices' courts of actions, etc., arising within the corporate limits, and exclusive jurisdiction of all prosecutions for violating ordinances of the towns. Pen. Code, § 435, makes it a misdemeanor to conduct any business, etc., without a license required by law. Section 19 provides that where no different punishment is prescribed the penalty for a misdemeanor shall be within certain limits. Section 1425 gives justices of the peace jurisdiction of misdemeanors where the punishment is within that prescribed by section 19. *Held*, that a justice of the peace has jurisdiction of a prosecution for violating Pen. Code, § 435, by conducting business without a license in violation of a town ordinance, it being one of the cases in which such section 882 gives exclusive jurisdiction to the recorder's and the justices' courts; the clause of such section conferring exclusive jurisdiction upon recorder's courts not being intended to deprive the justices' court of jurisdiction of any offense under the general state law.

3. CRIMINAL LAW—JUDGMENT—SUFFICIENCY.

A judgment is not void for failure to sufficiently show the offense of which one was convicted, where the record includes a complaint specifically charging an offense under Pen. Code, § 435, making it a misdemeanor to conduct business without a license required by law,

and the judgment refers to such complaint and imposes a penalty properly imposed upon a conviction of such offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2538.]

In Bank. Application by Thomas H. Bagshaw for a writ of habeas corpus directed to W. P. Taylor, sheriff. Writ discharged, and petitioner remanded.

O. F. Meldon, for petitioner. Thomas P. Boyd, for respondent.

ANGELLOTTI, J. Petitioner seeks to be discharged from the custody of the sheriff of the county of Marin, by whom he is held under a commitment issued by the justice's court of Sausalito township of said county, based upon a judgment given in said court upon a conviction therein of the crime of carrying on the business of selling liquor in the town of Mill Valley, a municipal corporation of the sixth class in said county, without taking out or procuring the license prescribed therefor by an ordinance of said town.

The principal contention of petitioner is that said justice's court was without jurisdiction to entertain or try said case. The municipal corporation act provides that in municipal corporations of the sixth class there shall be a recorder's court, which shall have concurrent jurisdiction with the justice's court of all actions and proceedings, civil and criminal, arising within the corporate limits of the city or town, and "exclusive jurisdiction of all actions for the recovery of any fine, penalty, or forfeiture prescribed for the breach of any ordinance of such city or town, of all actions founded upon any obligation created by any ordinance, and of all prosecutions for any violation of any ordinance." Section 882 (St. 1905, p. 73, c. 74.) (The italics are ours.) The claim is that this provision confers exclusive jurisdiction upon the recorder's court of a prosecution for the carrying on of a business within the limits of a town, without taking out the license prescribed therefor by an ordinance of the town. Section 435 of the Penal Code, however, provides: "Every person who commences or carries on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor." It has been expressly held by this court that a county or city and county ordinance is a "law of this state" within the meaning of this section. In re Lawrence, 69 Cal. 608, 611, 11 Pac. 217; Ex parte Christensen, 85 Cal. 208, 210, 24 Pac. 747; Ex parte Mansfield, 106 Cal. 400, 39 Pac. 775; Ex parte Stephen, 114 Cal. 278, 46 Pac. 86. There is no distinction material here between a county ordinance and a city or town ordinance. The latter is as much a "law of this state" within the meaning of such section as is a county or city and county ordinance, and it has so been held by the Dis-

trict Court of Appeal for the First district. Ex parte Sweetman, 4 Cal. App. 601, 90 Pac. 1069. It appears to us to necessarily follow that the prosecution here must be held to be not for a violation of the ordinance of the town of Mill Valley, but for the commission of a crime created by a general law of the state—section 435 of the Penal Code. It is true that it is one of the essentials of such a crime that there should be an ordinance of the town prescribing a license, but this does not affect the question. The Legislature of the state has seen fit to make it a crime under the state law for any one to carry on a business for which a license is required by any law or ordinance, without procuring such license, and one who does so, not only disobeys the ordinance, but also violates the state law, and is guilty of a crime by reason of the express provision of such law. The misdemeanor created by section 435 of the Penal Code is precisely like any other misdemeanor created by the Penal Code, and punishable as it is by imprisonment in a county jail not exceeding six months or by fine not exceeding \$500, or by both such fine and imprisonment (section 19, Pen. Code), is within the jurisdiction of any justice's court of the county in which it is committed. Section 1423, Pen. Code. It is one of the cases in which, by section 882 of of the municipal corporation act, the recorder's court of the city or town in which the offense is committed is given jurisdiction "concurrent with the justice's courts." It was not intended by that portion of section 882 which confers exclusive jurisdiction upon the recorder's court in certain classes of cases to deprive the justice's court of jurisdiction of any offense under the general state law. As to all such cases, the jurisdiction in the recorder's court is simply one concurrent with the justice's courts. The prosecutions for violations of ordinances declared to be within the exclusive jurisdiction of such recorder's court are prosecutions for acts which are crimes solely by reason of the fact that they are made crimes by ordinance, supplemented by the provisions of the municipal corporation act. That act makes the violation of any ordinance of the city or town a misdemeanor (section 867, Municipal Corporation Act, St. 1888, p. 272, c. 49), and if it were not for section 435 of the Penal Code, it may be that a prosecution for doing business without procuring the license required by the town ordinance would be within the exclusive jurisdiction of the recorder's court. But such act being also a crime under the general state law, a prosecution therefor will lie in the state courts.

The judgment is not void for failure to sufficiently show the offense of which petitioner was convicted. The record before us, which includes the complaint specifically charging an offense under section 435 of the Penal Code, and to which complaint the judgment in terms referred, sufficiently

shows the judgment to have been based upon a conviction of the offense so charged, and the penalty imposed was expressed in certain and definite terms, and was one within the power of the court to impose upon a conviction of such offense.

The writ must be discharged, and the petitioner remanded to the custody of the sheriff of Marin county, and it is so ordered.

We concur: SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.; SLOSS, J.

(152 Cal. 697)

MERCED BANK v. PRICE et al. (S. F. 4,796.)

(Supreme Court of California. Jan. 23, 1908.)

1. APPEAL.—PROCEEDINGS NOT IN RECORD—AMENDMENT OF RECORD—AMENDMENT AFTER CERTIFICATION.

On an appeal from an order denying a new trial, where the bill of exceptions on the motion was certified and filed before the motion was made, it may not be amended by inserting therein specifications of error authenticated by the trial judge as having been settled and allowed as a part of the engrossed bill of exceptions and believed by him to have been included therein, but inadvertently omitted therefrom, since the appeal from the order denying a new trial must be heard upon the same record upon which the motion for a new trial was heard and determined.

2. SAME.—TIME OF AMENDMENT.

Under Code Civ. Proc. § 473, allowing amendments to pleadings and proceedings on the ground of mistake, inadvertence, etc., if made within a reasonable time, but in no case exceeding six months after the judgment or proceeding is taken, a bill of exceptions on motion for new trial may not be amended more than six months after it was certified and filed by inserting therein specifications of error authenticated by the trial judge as having been settled and allowed, but inadvertently omitted from the engrossed bill, and the order of the trial court allowing such amendment is void.

In Bank. Action by the Merced Bank, a corporation, against James D. Price and others. On a motion by defendants for an order to amend the record. Motion denied.

G. G. Goucher, W. H. Larew, and J. S. Larew, for appellants. J. W. Knox, for respondent.

PER CURIAM. This is a motion for an order permitting appellants to file, as a part of the transcript and record on appeal herein, certain specifications of the particulars in which it is claimed that the findings of the trial court are not sustained by the evidence, and certain specifications of errors of law, which were not included in the engrossed bill of exceptions as certified by the trial judge. It is made to appear by an order of the trial judge, based on the motion of appellants, that such specifications were in fact allowed and settled by the judge as a part of the bill of exceptions, and were intended and believed by him to be included in and to constitute a part of the engrossed bill signed and certified by

him, but that they were by accident and inadvertence omitted from such engrossed bill. The appeal before us is one from an order denying appellants' motion for a new trial. The bill of exceptions was ordered settled on September 21, 1906, and the engrossed bill of exceptions was signed and certified by the judge on November 3, 1906, and filed as a record of the court. The order denying the motion for a new trial was made on January 4, 1907, and the appeal from such order to this court was perfected on March 1, 1907. No proceeding was instituted in the superior court for the correction or amendment of said engrossed bill by inserting said specifications until more than six months had elapsed from the date of certification thereof by the judge. On May 14, 1907, eleven days after the expiration of such six months, appellants gave notice of a motion, to be made May 27, 1907, for an order authenticating said specifications as the specifications allowed and settled by the court as a part of the bill of exceptions on the 21st day of September, 1906, and as intended and believed by the court to be included in and to constitute a part of the engrossed bill signed on November 3, 1906, and the court, after hearing said motion, made the order asked on June 10, 1907. A certified copy of such order, attached to a certified copy of such specifications, has been produced in this court.

1. In our judgment at least two of the objections made to the granting of the motion are good. The proceeding instituted by the motion for authentication, etc., in the trial court was one for the amendment of the record of that court upon which the motion for a new trial had been heard and determined. It is immaterial in this connection that the proposed amendments merely included matters that had in fact been allowed by the judge, and thus ordered included in the bill to be subsequently signed by him. Whether or not a bill of exceptions has been correctly engrossed so as to embody all that the judge at the time of actual settlement ordered incorporated in it is a matter to be determined by the judge at the time the engrossed bill is presented for certification (*Ryer v. Rio Land, etc., Co.*, 147 Cal. 485, 82 Pac. 62), and his certification of the same is a determination that it is so correctly engrossed. The bill when certified by the judge is filed with the clerk (section 650, Code Civ. Proc.), and as so certified becomes the record of the court, and the only record in the matter. The motion for a new trial, so far as it is based on a bill of exceptions at all, is based and must be heard and determined on the bill of exceptions as so certified and filed, or as previously corrected under section 473 of the Code of Civil Procedure. It is settled that an appeal from an order denying a new trial deprives the superior court of jurisdiction to set aside such order; that, while that order is in force, the record upon which it is based cannot be changed; and that this court must review the order upon the

same record upon which it was made. See *Baker v. Borello*, 131 Cal. 617, 63 Pac. 914. A different rule applies where the bill of exceptions is to be used on an appeal from a decision made before the bill of exceptions was settled; the effect of an amendment in such a case being simply to enable this court to review the decision of the lower court in view of all the facts which that court had before it when it made its decision. This is shown by *In re Lamb*, 95 Cal. 408, 30 Pac. 568, an appeal from an order setting apart a homestead, where, after appeal taken, the judge of the superior court allowed the bill settled after the making of the order, to be amended by the insertion of specifications of insufficiency of evidence. It is possible that in the case at bar, if it could be made to appear that the motion for a new trial was heard and determined upon on the theory that said specifications were in fact a part of the certified bill, a different rule might obtain. It is, however, unnecessary to determine this question for two reasons: First, the record does not so show; and, second, the motion here made must also be denied upon a second ground, which we will now proceed to discuss.

2. It has already been noted that no application for any amendment was made within six months after the certification of the engrossed bill by the judge. As we have seen, the certification was an adjudication by the judge that all the matters ordered incorporated in the bill had been set forth therein, and that the bill so certified constituted the bill of exceptions as ordered settled by him. It constituted a "proceeding" taken against appellants within the meaning of section 473 of the Code of Civil Procedure, through the mistake, inadvertence, and excusable neglect of appellants. It is settled that, under the procedure in this state, the power of the court to amend its record in matters of this character, and thus to relieve a party from the effect of a mistake, etc., therein, is derived from and limited by the terms of section 473 of the Code of Civil Procedure, allowing amendments to pleadings or proceedings on the ground of mistake, inadvertence, surprise, or excusable neglect. See *Fountain Water Co. v. Superior Court*, 139 Cal. 648, 73 Pac. 590, and cases there cited. It was held in the case just cited that, when a statement on motion for new trial is settled and filed, it becomes a record of the court, and is only subject to the action of that tribunal within the time limited by section 473 of the Code of Civil Procedure, and that section authorizing relief to be granted a party only when application is made therefor within six months from the time the judgment, order, or proceeding against him is taken, an application for amendment made more than six months from the date of certification is too late, and a court is without power to grant the relief. This conclusion was in line with several prior decisions of this court, and we find nothing in conflict therewith. The well-settled rule that a court has the power

to correct its records at any time, so as to make them truly show a judgment or order actually made, where such judgment or order has been incorrectly entered or recorded by reason of mistake of a ministerial officer making the entry, such as the clerk of the court, has no application here. It follows from what we have said that the order of the superior court allowing the amendment is void, and that the specifications sought to be filed cannot be considered as a part of the bill of exceptions on this appeal.

The motion must be denied; and it is so ordered.

152 Cal. 712

FERGUSON et al. v. BASIN CONSOL. MINES. (Sac. 1,461.)

(Supreme Court of California. Jan. 23, 1908.
Rehearing Denied Feb. 20, 1908.)

1. EVIDENCE—STATEMENTS OF AGENT—AUTHORITY.

Statements and admissions by the superintendent of defendant's mine, supporting plaintiff's contention as to the location of a boundary line in controversy, were inadmissible to bind defendant, in the absence of proof that the superintendent was authorized to make them apart from the fact that he was in charge of defendant's property, and this, though the witness asserted an interest in the adjoining mine claimed by plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 893-907.]

2. SAME—ADMISSIONS AGAINST INTEREST—PREDECESSOR IN TITLE.

Under Code Civ. Proc. § 1849, providing that, where one derives title to real property from another, the declaration, act, or omission of the latter while holding the title in relation to the property is evidence against the former, declarations made by a grantor after having parted with his title are inadmissible against the grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 840-851, 1126.]

3. APPEAL—REVIEW—PREJUDICIAL ERROR.

The erroneous admission of declarations of defendant's agent not within the scope of his authority directly supporting plaintiff's contention was prejudicial to defendant and ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4186.]

4. EVIDENCE—RECORDS—JUSTICE OF THE PEACE—DOCKET ENTRIES.

Since, under Code Civ. Proc. § 911, specifying the matters required to be entered in a justice docket, the justice is not required to enter the fact of the service of the summons, a docket entry showing the mode of service was not prima facie evidence of the facts stated, under section 912, declaring that the entries required to be made in a justice's docket are prima facie evidence of the facts stated therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 462.]

5. JUSTICES OF THE PEACE—JURISDICTION—PRESUMPTION—BURDEN OF PROOF.

Since the law presumes nothing in favor of a justice's jurisdiction, the burden is on the party claiming under a justice's judgment to show affirmatively that the justice had jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 216.]

6. SAME—EVIDENCE.

In order to show that a justice had jurisdiction to render the judgment relied on, it is necessary to show that the summons had been issued and served as required by law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 216.]

7. SAME—PROCESS—SERVICE OUTSIDE COUNTY—CERTIFICATE OF COUNTY CLERK.

Where a justice's judgment was based on a summons served outside the county, the burden was on a party claiming under such judgment to prove that there was attached to the summons a certificate of the county clerk that the person issuing the summons was at that date an acting justice of the peace, as required by Code Civ. Proc. § 849.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 216.]

Department 1. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Thomas Ferguson and others against the Basin Consolidated Mines. From a judgment for plaintiffs, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

Myrick & Deering and F. P. Tuttle (Henry G. Tardy and T. W. Hubbard, of counsel), for appellant. L. L. Chamberlain and John M. Fulweller, for respondents.

SLOSS, J. The plaintiffs, claiming to be the owners and entitled to the possession of an undivided three-fourths of a placer mining claim in Placer county, brought this action to recover damages from the defendant, which, it is alleged, unlawfully entered upon plaintiffs' ground, and took therefrom gold-bearing earth and gravel of the value of \$5,000. The complaint asks judgment for \$3,750, three-fourths of the value of the earth and gravel so taken. The cause was tried without a jury, and the court, finding in favor of the plaintiffs' ownership as alleged, and that the defendant had entered and taken away earth and gravel of the value of \$3,573.83, gave plaintiffs judgment for \$2,679.77. The defendant appeals from the judgment and from an order denying its motion for a new trial.

1. The property claimed by plaintiffs is known as the "Harkness claim." The defendant was in possession of ground lying to the north of the Harkness claim. Certain ground had been worked by the defendant, and the dispute between the parties was whether this ground lay north or south of the northerly boundary line of the Harkness claim. The contention of the plaintiffs was that their northerly boundary line ran north of the ground worked by the defendant, and that this ground was therefore included within their claim. The plaintiffs, after showing that one Whitney was superintendent of defendant's mine, were allowed to show, over proper objection by the defendant, that Whitney had made statements and admissions tending to support plaintiffs' contention as to the location of the boundary line. This was error. There was no showing of

the extent of Whitney's authority beyond the fact that he was in charge of the defendant's property. An agent cannot bind his principal by declarations against the principal's interest, unless the making of such declarations is within the scope of the agent's authority. As superintendent in charge of a mine, Whitney had no authority to make any statements regarding the extent of the ground claimed or owned by his principal, and any such statements, if made by him, were not binding upon the appellant. *Walrath v. Champion Mining Co.*, 171 U. S. 298, 18 Sup. Ct. 909, 43 L. Ed. 170; *Hartford Iron M. Co. v. Cambria M. Co.*, 80 Mich. 491, 45 N. W. 351. See *O'Hara v. O'Brien*, 107 Cal. 309, 40 Pac. 423. The question is not affected by the fact that Whitney asserted an interest in the Harkness mine, which was claimed not by his employer but by the plaintiffs. Such interest was, in relation to the present controversy, adverse to defendant, and certainly could not authorize Whitney to bind his employer by declarations in his own favor and against the interest of the appellant. Nor are the statements of Whitney rendered admissible by reason of evidence that the defendant had acquired its title by conveyance from him. To be admissible against his grantee, the declarations of a predecessor in interest must have been made by him while holding the title (Code Civ. Proc. § 1849), and here the declarations of Whitney appear to have been made after his conveyance. Since these declarations went to support the contention of the respondent upon the very point in controversy—i. e., whether the ground worked by the appellant was located within its claim or within that of the respondents—it is clear that the admission of this testimony was prejudicial to the appellant, and that the error so committed necessitates a new trial.

2. In view of the necessity for another trial, a point discussed by counsel may be briefly referred to. The plaintiffs offered evidence tending to show that in 1894 the title to the Harkness claim was in Harkness Gold Mining Company, a corporation. To deraign their title, the plaintiffs relied upon an execution sale following a judgment in the justice court of township No. 6 of Placer county against Harkness Gold Mining Company. The sale was to Spencer and Sellar, who conveyed to one Cusick, under whom the plaintiffs claim. It is urged by appellant that the court erred in admitting in evidence the certificate of sale and the deed issued by the constable to Spencer and Sellar pursuant to the execution sale, for the reason that the plaintiffs had failed to show that the justice court had acquired jurisdiction to render the judgment upon which the execution was based. It appears that all of the original papers in that action had been lost or destroyed. Plaintiffs offered in evidence the entries in the justice's docket, which were, as the court stated, "admitted only for the purpose of showing those matters that may lawfully be

entered in the justice's docket." The entry with reference to return of summons reads as follows: "1894, June 15. Summons returned as served in San Francisco, California, on the seventh day of June, 1894, by J. J. McDade, Sheriff of San Francisco Co., California, by J. J. Tiernan, Deputy Sheriff, on W. S. Chapman, President of the Harkness Gold Mining Co., the defendant therein named, by delivering to him personally, in the City and County of San Francisco, State of California, a copy of said summons attached to a copy of the complaint in said action." No appearance having been made, judgment by default was rendered on the 28th day of June, 1894.

The entries required to be made in a justice's docket are prima facie evidence of the facts stated. Code Civ. Proc. § 912. But the fact of the service of summons is not one of the matters required to be so entered (Code Civ. Proc. § 911), and the entry above quoted is therefore no evidence that the justice ever acquired jurisdiction to render the judgment upon which the execution was issued. *Fisk v. Mitchell*, 124 Cal. 359, 57 Pac. 149. The burden was upon plaintiffs, claiming under the judgment, to show that the justice had acquired jurisdiction. "The jurisdiction of justices' courts being special and limited, the law presumes nothing in favor of their jurisdiction, and a party who asserts a right under a judgment rendered in such court must show affirmatively every fact necessary to confer such jurisdiction." *Rowley v. Howard*, 23 Cal. 401; *Lowe v. Alexander*, 15 Cal. 296; *Jolley v. Foltz*, 34 Cal. 321; *Kane v. Desmond*, 63 Cal. 464. It was necessary, therefore, for the plaintiffs, who were founding their claim of title upon this judgment, to show affirmatively that the court had acquired jurisdiction to render the judgment. To do this it was necessary to show that the summons had been issued and served as required by law; and, if the summons was served outside of the county in which it was issued, it was necessary to show that there was attached to the summons the certificate of the county clerk that the person issuing the summons was, at its date, an acting justice of the peace. Code Civ. Proc. § 849. Without such certificate no valid service out of the county could be made. Since in this case the only service attempted to be shown was one out of the county, the plaintiffs, in order to sustain the burden imposed upon them of proving every fact necessary to confer jurisdiction, were bound to show that such certificate had been attached to the summons. It is argued that the testimony of Mr. Lardner, who had been the attorney for the plaintiffs in the action in the justice's court, is sufficient to show that the summons as served complied with this requirement of the law. It is further contended by the respondents that even if this proof was not made, the appellant did not make a sufficiently specific objection to the admission in evidence of the certificate of sale and the

execution deed based upon the judgment in question. Neither of these propositions need be discussed, since they are not likely to arise upon a new trial. What has been said on the subject is mentioned merely for the purpose of indicating to counsel that upon such new trial the plaintiffs, if they rely upon a judgment of the justice's court, must, as a part of their case, show that that court acquired jurisdiction over the defendant in the action.

It is unnecessary to consider the other points made.

The judgment and order appealed from are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.

152 Cal. 645

CITY OF LOS ANGELES v. LOS ANGELES FARMING & MILLING CO. (L. A. 1952).*

(Supreme Court of California. Jan. 23, 1908.)

1. TRIAL—TRIAL BY COURT—SUBMISSION ON STIPULATED FACTS—EFFECT OF FINDINGS BY COURT.

Where a case is submitted on a stipulated statement of facts, findings by the court are unnecessary, but, where they do not materially change the facts as stipulated, they are not reversible error.

2. PUBLIC LANDS—SETTLEMENT OF MEXICAN GRANTS—PROCEEDINGS—SCOPE AND EFFECT—WATER RIGHTS.

Act Cong. March 3, 1851, c. 41, § 9 Stat. 631, to ascertain and settle private land claims in California, was intended to segregate private from public land, and did not contemplate presentation of claims to anything but "land"; and hence, where a city filed a petition with the board of land commissioners for an adjudication of its claim to lands, founded upon a grant to its predecessor, it was not necessary to present therein its claim to water rights pertaining thereto, and its claim to the water rights of its predecessor was not adversely adjudicated by a decision that it was not entitled to all the land claimed.

3. SAME — EXTENT OF PATENTEE'S RIGHT — "LAND."

The word "land," as a conveyance, carries every kind of property, right, and appurtenance which is legally embraced in that word, but what rights go to a patentee of land depend, not upon any supposed adjudication contained in the patent, but upon the general law of the state where the land is situated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 317, 318.

For other definitions, see Words and Phrases, vol. 5, pp. 3975-3984; vol. 8, pp. 7700-7701.]

4. WATERS AND WATER COURSES—RIGHTS OF RIPARIAN OWNERS — EXTENT OF RIGHT — STATE LAWS.

While the patentee of land situated on a natural water course in a state where the common-law doctrine of riparian ownership prevails would be entitled to have the water of the stream flow down to his land without any material diminution in quantity, no such right would accrue to a patentee of land in an arid region, where irrigation is necessary to successful agriculture, and where the state law allows a riparian owner to divert a reasonable amount of the water to irrigate his riparian land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 27-33.]

*For opinion on petition to rehear, see 93 Pac. 1135.

5. SAME.

The right of a riparian owner in fee of land to the use of natural water running through it is subordinate to any paramount right to the use of such water existing under the general law in some other person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 33-37.]

6. SAME—RIGHTS OF SUCCESSOR TO MEXICAN PUEBLO.

Under Mexican law a pueblo, as a quasi public corporation, had power to distribute to the common lands and to its inhabitants the waters of an unnavigable river on which the pueblo was situated, and a riparian owner could not appropriate water so as to interfere with the common use or destiny which a pueblo on the stream had given to the water, and a city which is the successor of a pueblo holds the lands and water rights of its predecessor in trust for its inhabitants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 266.]

7. QUIETING TITLE—SCOPE OF RELIEF—INJUNCTION—COMPLAINT—GENERAL PRAYER.

A general prayer in a complaint in an action to quiet title is sufficient to support an injunction where the facts alleged warrant it.

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the city of Los Angeles against the Los Angeles Farming & Milling Company. From a judgment for plaintiff and certain orders denying motions by defendant, defendant appeals. Affirmed.

R. M. Widney, for appellant. W. B. Mathews, H. T. Lee, and J. R. Scott, for respondent.

McFARLAND, J. The plaintiff is a municipal corporation. Its corporate territory is situated on the Los Angeles river, an unnavigable stream which rises in the San Fernando valley several miles above and northerly of the city, and flows southerly until it reaches the northern corporate boundaries of the city. The defendant is the owner in fee of land on and riparian to said river and situated about 10 miles above the city. The plaintiff claims, as successor of a Spanish and Mexican pueblo, the prior and paramount ownership of the use of the water of the river from its source to the city and from the surface to bed rock, so far as the same may be necessary to give an adequate supply of water for the use of its inhabitants, and for municipal and public uses and purposes of plaintiff. Defendant denies that plaintiff has any such asserted ownership, and claims that as owner in fee of the said land, and as part and parcel thereof, it has the riparian right to the use of the water of the river as it flows through its land. This action was brought to quiet plaintiff's title and ownership of the use of said water as above stated, and to have it adjudicated that any right which the defendant may have to the use of the water is subordinate and subject to plaintiff's said ownership. The case was tried without a jury, and judgment was rendered for plaintiff as prayed for, and defendant ap-

peals from the judgment. It also appealed from several orders denying certain motions made by defendant; but these appeals do not present any question substantially different from those presented by the appeal from the judgment, and, if the judgment should be affirmed, so also should be the orders.

The case was submitted on a stipulated statement of facts. The court, however, made a few additional findings, and appellant contends that it was error to make these findings, and that for this reason the judgment should be reversed. The making of these additional findings was unnecessary, and perhaps improper and erroneous; but it does not follow that for this reason the judgment should be reversed. So far as the findings may be considered as findings of fact, they do not materially change the facts as stipulated; and, if the stipulated facts warrant a judgment, it should stand. *Higgins v. San Diego Sav. Bank*, 129 Cal. 194, 61 Pac. 943; *McMenomy v. White*, 115 Cal. 339, 47 Pac. 109. It is not necessary to recite here in any great detail the facts as stipulated. Indeed, the situation of the city of Los Angeles with respect to the Los Angeles river, and its claim to the use of the water of the river, have been quite fully stated in former opinions of this court and are familiar facts. *Vernon Irr. Co. v. Los Angeles*, 106 Cal. 287, 39 Pac. 762; *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585. For the purposes of this appeal, it is necessary to state only the following facts: In the year 1781, under Spanish rule, the pueblo of Nuestra Senora Reina de Los Angeles was established, embracing four square leagues of land which is included in and is part of the present city of Los Angeles. This pueblo continued in existence under Spanish and Mexican dominion until after the acquisition of California by the United States in February, 1848, under the treaty of Guadalupe Hidalgo. It is stipulated that, "under the laws of the Kingdom of Spain, said pueblo upon its foundation, by virtue of a grant under such laws, had the paramount right, claimed by the plaintiff in the present case, to use all the water of the river, and such paramount right continued to exist under that government, and the Mexican government, until the acquisition of California by the United States." The plaintiff was first organized as a municipal corporation on April 4, 1850, by an act of the Legislature of California, and, with various changes in its charter, has continuously been a municipal corporation ever since. On October 26, 1852, it filed a petition with the board of land commissioners created by the well-known act of Congress of March 3, 1851 (9 Stat. 631, c. 41), entitled, "An act to ascertain and settle the private land claims in the state of California." In this proceeding it claimed title in fee to a "tract of land" known as the "pueblo lands" of the pueblo of Los Angeles founded upon the Spanish grant of 1781, and alleged

to contain 16 square leagues. The commissioners rendered a decision in which they held that the city was entitled to said pueblo lands, but that they embraced only 4 square leagues, and the claim of the city to the other part of the alleged 16 leagues was rejected. In accordance with this decision a patent of the United States was afterwards, on August 9, 1866, issued to plaintiff for the four square leagues. The land owned by appellant, the Los Angeles Farming & Milling Company, was granted by the Mexican government to the predecessors of appellant in 1846, and was presented to the said board of land commissioners, and after proper proceedings regularly taken a patent of the United States was on June 8, 1873, duly issued to said predecessors for a tract of land through a part of which the Los Angeles river flows, so that the land is riparian to said river. The patent does not contain on its face any reservation or exception.

Appellant contends that the above two proceedings before the land commissioners and the patents which followed constitute final adjudications: First, that the city had only title to four square leagues of land with such appurtenances as regularly belonged to the ownership in fee of lands, but had not any ownership in the use of the water above the limits of the land granted, such as is alleged to have belonged to the old pueblo; and, second, that the patent to appellant's predecessors finally adjudicated that they were the riparian owners of the use of the waters of the river running through the land, as part and parcel of their estate. This contention is not maintainable. The act of March 3d was intended to segregate private from public lands. No word designating property is used in it other than "land." Appellant contends that the city, in its petition to the commissioners, should have set up its claim to the pueblo claim to the water; but the act does not contemplate presentation of a claim to anything but "land." The city was no more called upon to set up its water rights as successors to the pueblo than were appellant's predecessors called upon to set up the riparian rights of the owners of the land claimed by them. Of course, the word "land" as a conveyance, carried every kind of property, right, and appurtenance which is legally embraced in that word; but what rights go to a patentee of land depend, not upon any supposed adjudication contained in the patent, but upon the general law of the state where the land is situated, and those rights may be essentially different in different localities. For instance, if a piece of patented land is in a state or territory where the English common law doctrine of riparian ownership prevails to the full extent, the patentee of the land, if it is situated on a natural water course, would have the right to have the water of the stream flow down to his land without any material diminution in quantity, and could have the upper riparian proprietor

enjoined from diverting the water in any way or for any purpose which would materially diminish the flow; but such right would not accrue to a patentee of land in an arid region of a western state where irrigation is necessary to successful agriculture, and where the original rule as to riparian ownership has been modified by the state law, so as to allow a riparian proprietor to divert a reasonable amount of the water of a stream and use it to irrigate his riparian land, although a material part of the water would be absorbed and prevented from flowing down to the lower proprietor. It is quite clear that the rights which are embraced in the word "land" are determined by the law of the country where the land is situated. In *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 833, 35 L. Ed. 428, the Supreme Court of the United States say: "In our judgment the grants of the government of land bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie." The right of a riparian owner in fee of land to the use of natural water running through it is subordinate to any paramount right to the use of such water existing under the general law in some other person.

The only question in the case, therefore, is whether under the general law of the locality the old pueblo of Los Angeles, and the respondent herein, as its successor, had and have, as against appellant, the prior and paramount ownership of the use of so much of the water of the Los Angeles river as is necessary for its inhabitants and for general municipal purposes; and this question need not be discussed as an original one, for it has been answered in the affirmative by former decisions of this court.—In *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674, the whole subject of water rights in California, both before and after American dominion, was involved, and extensively discussed. The law on the subject under Spanish and Mexican rule was very fully considered. As to pueblo rights the court says: "The laws of Mexico relating to pueblos conferred on the town authorities the power of distributing, to the common lands and to its inhabitants, the waters of an unnavigable river on which the pueblo was situated. It is not necessary to say that the property of the nation in the river, as such, was transferred to the pueblo, but it would seem that a species of right to the use of all its waters necessary to supply the domestic wants of the pobladores, the irrigable lands and the mills and manufactories within the general limits were vested in the pueblo authorities, subject to the trust of distributing them for the benefit of the settlers." It is further said: "Each pueblo was quasi a public corporation. By the scheme of the Mexican law it was treated as an entity or person, having a right as such, and by reason of its title to the four leagues

of land, to the use of the water of the river on which it is situated, while as a political body, it was vested with power, by ordinance, to provide for a distribution of the waters to those for whose benefit the right and power were conferred." And it is further said: "From the foregoing it appears that the riparian proprietor could not appropriate water in such manner as should interfere with the common use or destiny which a pueblo on the stream should have given to the water; and seemble that the pueblos had a preference or prior right to consume the waters even as against an upper riparian proprietor." In *Vernon Irrigation Company v. City of Los Angeles et al.*, the present plaintiff was a defendant, and the rights of the old pueblos and of the present city as its successor were directly involved. The opinion of the court delivered by the late Justice Temple, then commissioner, contained an exhaustive review of the Spanish and Mexican law on the subject. The views expressed in *Lux v. Hagglin* as to the rights of the pueblo in the waters of the river are approved. The opinion is very lengthy, and we will quote only an expression or two from it. It is said: "Our courts have determined that the successors of these pueblos hold the public lands in trust for the inhabitants, and that the Legislature can control the execution of the trust; and that the United States has, in accordance with the decisions, confirmed the lands to the successors of the pueblos." And it is further said: "I am satisfied with the conclusion reached in *Lux v. Hagglin*, supra, that pueblos had a right to the water which had been appropriated to the use of the inhabitants similar to that which it had in the pueblo lands, and that the right of its successor, the city, to the water, for its inhabitants and for municipal purposes, is superior to the rights of plaintiff as a riparian owner." *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585, is another case in which the right of the old pueblo and the present plaintiff to the waters of the river was immediately involved. An exhaustive opinion is also written in this case by the chief justice, speaking for the court, and, the conclusion reached in *Vernon Irrigation Company* is approved, the court saying: "But the appellants go still further, and contend that, when the land in controversy was granted to their predecessors, there was no pueblo of Los Angeles, and consequently no pueblo right to which any of their rights could be subordinated. * * * This question, however, ought to be considered closed by the previous decisions of this court in the *Vernon Irrigation Company* Case and others. All of the laws and public documents upon which its solution depends are within the judicial cognizance of the courts, and, whether they were actually noticed or not in previous decisions, they must be deemed to have been considered and allowed their due weight. The question is one of law,

rather than of fact, and its decision in one case is a precedent in others." The foregoing decisions are determinative of the prior and paramount right of the pueblo, and of plaintiff as a successor, to the use of the water of the river necessary for its inhabitants and for ordinary municipal purposes. The questions as to what extent this right goes, a question somewhat considered in the *Pomeroy Case*—that is, for the use of the inhabitants of what territory, and for what municipal purposes can the water be taken as against a riparian owner—does not arise, and need not be considered in the case at bar. Appellant's case is presented in the record as resting upon the proposition that neither the pueblo nor the plaintiff has or had any right whatever to use water of the river that is prior or paramount to appellant's right as a riparian proprietor; and the present decision would not be authority in a case, if any such case should ever arise, where the question would be as to the extent of plaintiff's prior and paramount right, and not as to the existence of that right to any extent.

The judgment not only quiets plaintiff's title, but also enjoins appellant from doing certain acts; and appellant contends that the injunction was erroneous because no injunction was prayed for in the complaint, and no facts are alleged which would support an injunction. So far as the prayer is concerned, the general prayer for relief is sufficient, and the facts alleged warranted an injunction, so that this contention cannot be maintained. Moreover, the injunction is of very little importance, and it cannot be prejudicial to appellant. It does not enjoin appellant from interfering with any particular amount of water, but merely restrains it "from claiming or asserting any right to the water, except in subordination and subject to the said paramount right of said plaintiff." This is merely in accord with the part of the judgment which quiets the title, and adds nothing of consequence to it.

The judgment and orders appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

152 Cal. 688

SUTTER COUNTY v. NICOLS. (Sac. 1,453.)
(Supreme Court of California. Jan. 23, 1908.)

1. WATERS AND WATER COURSES — OBSTRUCTION—NUISANCE—DISCHARGING DÉBRIS INTO RIVER.

The discharging of tailings and debris from a mine into rivers, whereby the beds are filled up and the waters caused to overflow lands and approaches to bridges, and carry the debris onto the lands, injuring them and threatening the bridges with destruction, constitutes a nuisance unless authorized by law.

2. TAXATION—POWER OF LEGISLATURE—EMINENT DOMAIN—PRIVATE PURPOSE.

The legislative power does not extend to the raising of local taxes to pay for improvements for private benefit or profit, nor to the

taking or damaging of the private property of one person for the private benefit of another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 51.]

3. EMINENT DOMAIN — PURPOSES — MINING PURPOSES.

The business of mining for the benefit of the mine owner is a private enterprise, and the right of eminent domain cannot be invoked in aid of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 79.]

4. MINES AND MINERALS—STATUTORY REGULATION—POWER.

While laws may be enacted in the exercise of the police power, requiring the owner of a hydraulic mine to use all reasonable precautions to prevent injury to others or the obstruction of navigable streams from the discharge of mining debris into them, and to ascertain the means best adapted to that end, the law cannot declare that the observance of such means or precautions shall exonerate the mine owner from liability if, notwithstanding their use, injury is caused to others by such discharge.

5. SAME—HYDRAULIC MINING—CONSTRUCTION OF STATUTE.

Act Cong. March 1, 1893, c. 183, 27 Stat. 507 [U. S. Comp. St. 1901, p. 3553], provides for the appointment of the California debris commission. Persons desiring to operate mines by hydraulic process must file a verified petition with the commission and a release to the United States of the right to regulate the manner in which debris from the mines shall be restrained, and the amount of debris that may be produced. A notice specifying the contents of the petition must be published, and a hearing is provided for at which claims of all interested persons may be heard, if the commission find in favor of the petitioner it makes an order specifying the method of operating the mine, building restraining works, etc. *Held* that, while the purpose of the act was to prevent injuries from the discharge of debris from hydraulic mines, it was not intended to exonerate the miner from liability therefor, nor to limit the powers of the state courts to protect private property from threatened injury, and to redress inflicted injury thereto from the operation of hydraulic mines, though carried on under a permit and in strict compliance with the plans of the commission.

6. SAME.

The provisions of the act directing notice to be given and authorizing a hearing at which all persons interested may appear were not intended to conclude and estop the owners of lands below with respect to subsequent injuries that might be inflicted, but were designated to enable the commission in reaching its decision to obtain all aid which it could derive from the suggestions of all interested persons.

In Bank. Appeal from Superior Court, Sutter County; Edwin A. Davis, Judge.

Action by the county of Sutter against William Nicols. From a judgment for plaintiff, an order denying a new trial, and an order refusing to vacate the judgment and give judgment in his favor, defendant appeals. Affirmed.

W. H. Carlin, Tuttle & Tuttle, and Solinsky & Wehe, for appellant. Lawrence Schillig, Dist. Atty., and Devlin & Devlin, for respondent.

SHAW, J. The record herein presents appeals by the defendant from the judgment from an order denying his motion for a new trial, and from an order denying his motion,

under sections 663 and 663½ of the Code of Civil Procedure, to vacate the judgment given, and render judgment in his favor. Each of the three appeals presents the same question.

The complaint states a cause of action by the county of Sutter, as owner of the lands in Yuba City, upon which the county courthouse and hall of records stand, also of a bridge across Feather river between Yuba City and Marysville, and a half interest in two other bridges over Bear river, to enjoin the defendant from dumping or discharging into said rivers the tallings and debris of his mines, to the injury of said property. It was alleged, in substance, that by the discharge thereof into said rivers the said debris and refuse from defendant's mines had filled up the beds of the rivers and caused the waters thereof to overflow to and upon the said lands and the approaches to said bridges, and to carry said debris and refuse to and deposit them upon said lands, whereby said lands are greatly injured and said bridges are threatened with destruction, and that, if continued, great damage to plaintiff's said property will ensue, and said bridges will be destroyed. The court found the facts in accordance with these allegations of the complaint, and gave judgment accordingly. Unless the facts stated in the special defense pleaded in the answer, and found to be true by the court, legalizes the nuisance complained of and authorizes the defendant to continue the same, regardless of the injury it may cause to private property, the judgment is admitted to be correct and fully sustained by the evidence and by the decisions in *County of Yuba v. Kate Hayes M. Co.*, 141 Cal. 360, 74 Pac. 1049, and *Woodruff v. North Bloomfield G. M. Co. (C. C.)* 9 Sawy. 441, 18 Fed. 753.

The special defense was that the defendant was engaged in mining upon a claim, known as the "Polar Star Mine," had erected below the same a dam for impounding the debris coming from such mine, had obtained from the California debris commission, under the authority of the act of Congress approved March 1, 1893 (27 Stat. 507, c. 183 [U. S. Comp. St. 1901, p. 3553]), a permit to operate his mines upon said claim by hydraulic process, that all the mining done by him and all the debris discharged therefrom, was done solely in strict compliance with and obedience to said permit, and that he did not intend or threaten to operate said mines or discharge such debris, except in compliance therewith and under the authority thereof. The court found these allegations to be true, but also found that the dam so constructed was insufficient to prevent, and did not prevent, said debris from being carried down to and upon plaintiff's property, to its injury, that it is not a permanent structure, but is liable to be carried away by the forces of nature, and that said permit was no bar to the action. The latter is really a conclusion, and its ac-

curacy presents the sole question in the case. The act of Congress provides for the appointment of three army engineers to be known as the "California Débris Commission." Its jurisdiction, so far as it affects hydraulic mining, extends to the territory drained by the Sacramento and San Joaquin rivers. Hydraulic mining directly or indirectly injuring the navigability of said river systems, except as permitted under the provisions of the act, is prohibited. The commission is directed to adopt plans to prevent damage from debris resulting from mining operations, with a view of restoring the navigability of said rivers to the condition existing in 1860, and of permitting hydraulic mining, so far as it can be done "without injury to the navigability of said rivers or the lands adjacent thereto." Any person or persons who desire to operate a mine, or mines, by hydraulic process, must file with the commission a verified petition and a release or surrender to the United States, of the right or privilege to regulate the manner in which the debris from such mines shall be restrained and the amount of debris that may be produced from such mines. Thereupon a notice, specifying the contents of the petition and fixing a time previous to which all proofs are to be submitted, is to be published in a daily paper, or in three issues of a weekly paper. On or before the time fixed "all parties interested, either as petitioners or contestants, whether miners or agriculturists, may file affidavits, plans and maps, in support of their respective claims. Further hearings, upon notice to all parties of record, may be granted by the commission when necessary." If "within thirty days after the time so fixed" a majority of the commission decide in favor of the petitioner, the commission must thereupon make an order specifying in detail the method and manner of operating such mine, the restraining works to be built, the location and material thereof, and such further safeguards "as will protect public interests and prevent injury to the navigable rivers, and the lands adjacent thereto," all to be done at the expense of the miner. The mine owner must then construct the prescribed works, under the supervision of the commission, and upon the completion thereof "permission shall thereupon be granted to the owner or owners of such mine or mines to commence mining operations subject to the conditions of said order and the provisions of this act." The order may be modified from time to time, and the permission may be suspended, as conditions may demand. The act contains many other provisions relating to the administrative duties and powers of the board, which are not important to the question.

It is the contention of the appellant that the act empowers the commission to act as a judicial tribunal by which, in the prescribed proceeding, all persons liable to injury may have their rights ascertained and their property protected from the effects of debris by

the adoption and enforcement of a plan appropriate and sufficient for that purpose, and that the decision and orders of this tribunal are binding and conclusive upon all parties affected by the mining operations authorized by the permit granted, even if it should turn out that the plan adopted was wholly inadequate and ineffective to prevent injury. There are instances wherein, for the purpose of apportioning, to the persons specially interested and benefited, the cost of a local public improvement, or, for the purpose of fixing the amounts to be paid for private property taken for or damaged by such public improvements, special tribunals have been established, with power to make a conclusive determination in a special proceeding upon constructive notice to all parties interested. The proceedings before city councils for the improvement or opening of public streets are familiar examples. But it is essential in all such cases that the thing to be accomplished shall be a matter of public concern and for the public benefit. The legislative power does not extend to the raising of local taxes to pay for improvements for private benefit or profit, nor to the taking or damaging of the private property of one person for the private use and benefit of others. The business of mining for the benefit of the mine owner is as much a private affair as that of the farm or factory, and the right of eminent domain cannot be invoked in aid of it. *Con. C. Co. v. S. P. R. R. Co.*, 51 Cal. 271; *Lorenz v. Jacob*, 63 Cal. 73; *Dower v. Richards*, 73 Cal. 480, 15 Pac. 105; *Amador, etc., Co. v. De Witt*, 73 Cal. 485, 15 Pac. 74. The mine of the defendant was carried on solely for his own personal profit. Laws could be enacted, in the exercise of the police power, requiring him to use all reasonable precautions and means to prevent injury to others, or the obstruction of navigable streams, from the discharge of mining debris into the streams and to ascertain and devise the means and plans best adapted to that end. But the law is powerless to declare that the observance of such means or precautions shall exonerate him from liability if, notwithstanding their use, injury is caused to other persons by such discharge of debris. This proposition appears to be conceded in the argument in this court. Appellant here contends that the main objects and purposes of the act are to encourage the production of gold with a view to the maintenance of the gold standard, and to preserve and improve the navigability of the rivers, both of which subjects it is argued are within the scope of the legislative powers of the United States; that by this law the hydraulic miners are made the public agents of the United States to carry out the plans adopted by the commission for the accomplishment of the said purposes and objects; that these are public purposes designed to promote the general welfare; that the powers of Congress, in providing for public improvements within its sphere of action, are limited only by the

provisions of the Constitution of the United States, which, unlike that of this state, does not provide that private property cannot be taken or damaged for public use, without compensation, but only that it cannot be taken for public use without compensation; that the injury to the plaintiff from the debris in question does not constitute a taking of its property, but only a damage thereto; and hence that the depositing of such debris by mining, in pursuance of the permit is a lawful act, and the resulting injury *damnum absque injuria*. The production of sufficient gold to maintain the gold standard may be a matter of public importance, and it may be within the power of Congress to encourage it by appropriate legislation. It probably has the same power with regard to any other industry tending to increase the wealth of the nation. It cannot be admitted, however, that the mining of gold to be applied wholly to the private use of the miner, to whatever extent it may increase the general output, is a public purpose in behalf of which the power of eminent domain may be resorted to, or for which the private property of others may be taken, or its injury lawfully authorized.

The preservation and improvement of the navigability of navigable rivers is no doubt a proper subject of congressional legislation. The act in question is intended to promote those objects by providing for the regulation, restriction, and supervision of hydraulic mining upon the headwaters of those rivers. It does not purport to make the miners the agents of the United States to preserve the rivers below in their present state, or restore them to a former condition. Its provisions are calculated to so control and restrict the operations of the mines as to prevent the further clogging of the navigable streams by mining debris which otherwise would occur, and to devise plans and means whereby hydraulic mining, so controlled and restricted, may be carried on without injury to other persons. They were never intended to give such miners full license, in case the plans proved ineffectual to prevent it, either to fill up the river channels or to commit injuries to private property, by discharging debris into the streams. The commission is given power to revoke the permit, or to modify the plans. That is perhaps sufficient to protect and preserve the navigable streams. At all events, that is a public matter, and the public authorities alone are authorized to act. But no power is given to the commission to redress private injuries, if any should occur. It is unnecessary to decide whether the injury here committed and threatened constitutes a taking of private property for public use or not. We are of the opinion that, while it was the purpose of the act in question to prevent such injuries, if possible, it was not intended to exonerate the miner from liability therefor, or, in any respect, to limit or restrict the powers of the state courts to protect private property from threatened

injury and to redress inflicted injury thereto from the operation of hydraulic mines, though carried on under a permit and in strict compliance with the plans and directions of the commission, and that the act does not have that effect. The provisions of the act directing notice to be given and authorizing a hearing at which all parties interested may appear were not intended to conclude and estop the owners of lands below with respect to subsequent injuries that might be inflicted, but were designed to enable the commission to obtain all aid which it could derive from the suggestions of all interested persons, including those who might believe their property to be in danger, in order that it would be better advised as to the means and plans necessary to prevent injury.

The judgment and orders appealed from are affirmed.

We concur: ANGELOTTI, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.

152 Cal. 705

MARRIOTT v. WILLIAMS et al. (S. F. 4,215.)

(Supreme Court of California. Jan. 23, 1908.
Rehearing Denied Feb. 20, 1908.)

1. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for personal injuries inflicted by defendants, it appeared that defendant went to plaintiff's house to demand a retraction of a published article, and that, after a scuffle, plaintiff started upstairs. Defendant testified that plaintiff made a movement as though he was going to draw a revolver, and thereupon defendant shot plaintiff, who afterward crawled upstairs. Plaintiff and his wife were permitted to testify that, after reaching his bedroom, plaintiff asked his wife to come into the room and lock the hall door of a room opening into the bedroom and the door of the bedroom. *Held* that, if the admission of the testimony was error, it was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160].

2. SAME.

In an action for personal injuries inflicted by defendant, plaintiff testified on cross-examination that he was the prosecuting witness in a criminal prosecution for the same assault, but the court refused to allow proof of defendant's acquittal on the criminal charge. *Held*, that the evidence could only be admissible to show plaintiff's bias for impeaching purposes, and where plaintiff's intensity of feeling was freely admitted and manifested throughout the case the rejection of the evidence was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

3. ASSAULT AND BATTERY—DAMAGES—EXEMPLARY DAMAGES—ADMISSION OF EVIDENCE—WEALTH OF DEFENDANT AT TIME OF TRIAL.

In an action for injuries, where malice is alleged and exemplary damages asked, evidence of defendant's wealth is admissible to enable the jury to determine what amount of punishment would be inflicted by compelling defendant to pay a given sum of money, hence, it is proper to show defendant's wealth at the time of the trial instead of at the time of the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 46.]

4. SAME—DEFENSES—PROVOCATION.

In an action for injuries, the publication of an alleged defamatory article by plaintiff cannot be considered in reduction of the actual damages, but only in reduction of, or set-off against, exemplary damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 48.]

5. SAME—SELF-DEFENSE.

In an action for personal injuries, self-defense is an affirmative defense, and the burden of proving it is upon defendant, for there is no presumption that a bodily injury is justifiable, and the justification must be proved by the one asserting it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 36.]

6. TORTS—JOINT LIABILITY—VERDICT—DIFFERENT DEFENDANTS.

In an action against two or more persons for a single tort, there cannot be different verdicts for different sums against different defendants upon the same trial, for all who are guilty at all are liable for the whole amount of the actual damages, irrespective of the degree of culpability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Torts, §§ 29, 38.]

In Bank. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Frederick Marriott against Thomas H. Williams and another. From a judgment against Williams and from an order denying a new trial, he appeals. Affirmed.

H. T. Creswell and P. F. Dunne, for appellant. Hiram W. Johnson and Albert M. Johnson, for respondent.

SHAW, J. This is an action to recover damages for personal injuries inflicted upon the plaintiff by defendants. The jury rendered a verdict against the defendant Williams alone, and judgment was entered accordingly. The appeal is by the defendant Williams from an order denying his motion for a new trial.

The complaint alleges that the defendants entered plaintiff's home and there assaulted, beat, and wounded him, shooting him twice in the leg, breaking both bones below the knee, and piercing the fleshy part of the thigh, and bruising and cutting his head and hand. The answer admits that Beale inflicted the cuts and bruises on the head and hand, and that Williams shot plaintiff in the leg, but alleges that it was all done in necessary self-defense. Upon the trial, there was practically no controversy over the fact that Beale cut and bruised the plaintiff's head and hand by beating him with a pistol, and that Williams shot plaintiff in the thigh and below the knee, breaking the bones as alleged.

The plaintiff was the publisher of a weekly paper called the "News Letter." The defendants went to his house for the avowed purpose of demanding and procuring from him a retraction of a statement published in the paper. Upon entering the hallway of the house, the plaintiff asked them for their hats, and took Beale's hat and started toward the rear of the hall to hang it on the hat rack. Before, or immediately after, this was done,

Beale demanded of Marriott the retraction, and almost immediately struck the blows on the hand and head, while the two were engaged in a scuffle. Marriott broke away and started to run up the stairway, which was on the left side of the hallway. There were 20 steps in the stairway and about the fourteenth step from the bottom it made a quarter turn to the left to reach the floor above. When he had gone perhaps a little more than half way up, Williams shot at him three times, hitting him twice, as alleged. Upon receiving the shot which broke his leg, the plaintiff fell forward upon the upper steps and crawled to the upper floor and into his bedroom. Almost immediately his wife came into the room from the upper part of the stairway where, as she testified, she witnessed a part of the shooting. The defendants did not pursue Marriott, but stood on the lower floor during the altercation and shooting and until Marriott had disappeared, and then left the house.

Over the objection of the defendant, the plaintiff and his wife were allowed to testify that immediately after the shooting and upon his arrival in the bedroom he asked her to come in where he lay and lock the door of that room, and also to lock the hall door of another room which opened into the bedroom, and that she immediately did so. The objection to this evidence was that it was immaterial and incompetent. This ruling is assigned as error. It may be conceded that these acts and declarations were not part of the *res gestæ* of the shooting. They occurred after the injury was done, and not in the sight or hearing of the defendants. They tended to prove no fact material to the case, except the physical condition and mental state of the plaintiff after he was shot. They would tend to show the plaintiff's fear that the defendants would follow him and inflict more injury, or annoy him or his wife in some way, and that he was himself unable to take the precautions requested. We may concede that the evidence was incompetent to prove his physical condition, but its effect on that part of the case would be so trivial and inconsequential that it could not produce injury. So far as they tended to show that the defendant was at that time in fear, if we concede that they were not part of the *res gestæ* on that point, they were immaterial. The ruling, then, was perhaps technically erroneous. The inquiry arises whether the proof of said acts and declarations was substantially prejudicial to the case of the defendant.

Counsel contends with much earnestness that it was very prejudicial because of its bearing upon the issue of self-defense. The defendant Williams testified that Marriott, as he was running up the stairway, turned his side around to the left, at the same time making a motion for his hip pocket, and that thereupon he (Williams), believing that Marriott intended to draw a pistol to shoot him, drew his own pistol, and fired three times at Marriott as fast as he could. Beale also tes-

tified that he saw the threatening motion of Marriott. This motion of Marriott constitutes the sole basis of the claim of self-defense on the part of Williams. He took no part in the assault on the lower floor of the hall. The argument in regard to the effect of the evidence about the locking of the doors runs thus: The motion towards the hip pocket was prompted by courage and a spirit of combat. The locking of the doors was requested because Marriott was then in fear and desired protection. Proof of the manifestation of the latter feeling, so soon after the manifestation of the former, tended to throw doubt on the existence of the former, and, to that extent, tended to disprove the making of the hip-pocket motion. This argument is not of great force, at best, and what little strength it has is much impaired when we consider that, in the meantime, Marriott had received two severe wounds, one of them dangerous, had had his leg broken by one of them, and that at the time he requested the locking of the doors he was lying on the floor of his bedroom suffering indescribable agonies from his wounds, as he testifies. Such intervening circumstances and such condition would probably unnerve the most courageous person, or at least remove all desire to attack, and substitute therefor the desire for protection. There are, however, other facts which show that the evidence could have had no substantial prejudicial effect. It was proven, without contradiction, that Marriott did not have a pistol, or other weapon, upon his person. The fact was established. Not having any pistol to draw, he could not have made the motion with the intent to draw it. There was, therefore, no real danger to Williams, no necessity for him to shoot in self-defense, nothing, at most, but a mere appearance of danger. If the suspicious motion was made, as claimed, it must have been one of those involuntary movements of the arms which many people make in running, which Williams, in his combative spirit, mistook for a motion to draw a pistol, or it may have been a pretense of such motion, made by Marriott to intimidate the defendants and prevent their further pursuit or gain time to reach a place of safety. If it was the latter, it would be entirely consistent with the feeling of fear and the desire for protection manifested in the bedroom, and proof of the existence of one would not tend to disprove the other. If it was the mere accidental and unconscious motion made in running, it would have no significance at all with respect to his state of mind and the proof of the subsequent fear and desire for protection would be proof of an immaterial fact. In either case the evidence objected to could have produced no injury to the defendants' case.

With regard to the blows, inasmuch as the verdict was in favor of Beale, who alone inflicted them, we must assume that the jury held them to be justified, and hence, the effect of the evidence of locking the doors on this part of the case was not injurious.

What has been said is also applicable to the objection to the admission of similar evidence, introduced in rebuttal, in connection with proof of declarations by Mrs. Marriott, inconsistent with her testimony as a witness for plaintiff, and nothing further need be said with regard thereto.

The defendants had been acquitted upon a criminal prosecution for the assault upon Marriott. On cross-examination Marriott testified, in answer to the defendants' questions, that he was the prosecuting witness in that case. The court refused to allow proof of the fact of acquittal of the criminal charge. The evidence was pertinent only to show his feeling and bias against the defendants and thereby to impeach his credibility as a witness. Even if we concede that natural chagrin at the defeat of the criminal prosecution might have added to the intensity of his feeling, and that, in general, the proof would be admissible for that purpose, solely, it would be harmless error here, where the feeling was freely admitted and was manifest throughout the case, and where the circumstances were such that it would have been inferred by the jury, even if there had been no proof or exhibition of it.

The complaint alleged malice on the part of the defendants and asked exemplary damages. It was therefore proper to allow evidence of the defendants' wealth. *Sloan v. Edwards*, 61 Md. 100; *Webb v. Gilman*, 80 Me. 177, 13 Atl. 688; *Draper v. Baker*, 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143; *Brown v. Evans* (C. C.) 17 Fed. 912; 3 Cyc. 1095; 2 Am. & Eng. Ency. of Law, 997; 1 Ency. Ev. 1004. Such evidence is admitted to enable the jury to determine what amount of punishment would be inflicted upon the defendant by compelling him to pay a given sum of money. Hence it is proper to show his wealth at the time of the trial, as was done here, instead of at the time of the injury. In mitigation of damages the defendants pleaded the publication of the articles above referred to, which, as they allege, were defamatory, and gave them just cause for great indignation. The court instructed the jury that these matters could not be considered in reduction of the actual damages accruing from his pain, physical injuries, loss of time, and moneys expended, or any other element of actual damages, but only in reduction of, or set-off against, the exemplary damages. That this was a correct exposition of the law is well settled. *Goldsmith v. Joy*, 61 Vt. 488, 17 Atl. 1010, 4 L. R. A. 500, 15 Am. St. Rep. 923; *Badostain v. Graziade*, 115 Cal. 429, 47 Pac. 118; *Fenclon v. Butts*, 53 Wis. 351, 10 N. W. 501; *Corcoran v. Harran*, 55 Wis. 122, 12 N. W. 468; *Donnelly v. Harris*, 41 Ill. 128. The assault and injury to the plaintiff were admitted. The answer that they were inflicted in self-defense was an affirmative defense, which it was necessary for the defendants to establish by a preponderance of the evidence. A person who sues for a personal injury at the hands of another is

not bound to prove, in the first instance, that he was not the aggressor and that the defendant did not act in self-defense. He must prove the assault and the injury, if they are denied. In so doing, he may incidentally bring out facts tending to support a plea of self-defense, and if so the defendant will be entitled to the benefit of such evidence. But the burden of proof to establish the self-defense remains with the defendant. There is no presumption that a bodily injury is justifiable, and the justification must be proven by him who asserts it. The instructions of the court embodying these propositions were properly given. *Sellman v. Wheeler*, 95 Md. 751, 54 Atl. 515; *Gizler v. Witzel*, 82 Ill. 326; *Johnson v. Strong*, 58 S. W. 430, 22 Ky. Law Rep. 577; *Phillips v. Mann*, 44 S. W. 379, 19 Ky. Law Rep. 1705; *Rhinehart v. Whitehead*, 64 Wis. 42, 24 N. W. 401.

In actions against two or more persons for a single tort, there cannot be two verdicts for different sums against different defendants upon the same trial. There can be but one verdict for a single sum against all who are found guilty of the tort. All who are guilty at all are liable for the whole amount of the actual damages arising from the injury inflicted, irrespective of the degree of culpability. *Huddleson v. Borough*, 111 Pa. 110, 2 Atl. 200; *McCool v. Mahoney*, 54 Cal. 492; *Nichols v. Dunphy*, 58 Cal. 607; *Everrord v. Gabbert*, 83 Ind. 492; *Carney v. Reed*, 11 Ind. 417; *Coolsey on Torts*, p. 136; 1 *Suth. Dam.* § 140. The court did not err in instructing the jury to this effect.

There are some other objections to the charge to the jury, and there are other rulings in the admission of evidence which are questioned, but they are all either covered by what we have said, or they are too trivial to require notice.

The order is affirmed.

We concur: MCFARLAND, J.; LORIGAN, J.; ANGELLOTTI, J.; BEATTY, C. J.

152 Cal. 731

PEOPLE ex inf. BOARD OF HARBOR
COM'RS FOR SAN DIEGO BAY v.
KERBER et al. (L. A. 1,983.)

(Supreme Court of California. Jan. 24, 1908.
Rehearing Denied Feb. 20, 1908.)

1. NAVIGABLE WATERS—TIDE LANDS—WHAT
CONSTITUTE.

Land lying between the lines of the ordinary high and low tides, and covered and uncovered successively by the ebb and flow thereof, constitutes tide lands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 180-187.]

2. SAME—TITLE.

Tide lands fronting on navigable waters vest in the state by virtue of its sovereignty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 180-187.]

3. SAME—PRIVATE TITLE—NO ACQUISITION BY
PRESCRIPTION.

Tide lands fronting on a navigable bay constitute property devoted to a public use, of which private persons cannot obtain title by

prescription, founded upon adverse occupancy for the period prescribed by the statute of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 180-193; vol. 1, Adverse Possession, §§ 24-57.]

4. SAME—ABANDONMENT OF PUBLIC USE.

Though the public use in tide lands fronting on a navigable bay may, by some lawful act of public authority, be abandoned, and if the state then holds the title it will thereafter hold it as a proprietor, if the statute of limitations can run against the state respecting the lands, it will only begin from the date when the public use ceased.

5. SAME—CONSTITUTIONAL LAW.

Const. 1879, art. 15, § 3, provides that all tide lands within two miles of any city or town and fronting on a navigable bay, etc., shall be withheld from grant or sale to individuals, etc., and article 4, § 31, prohibits the gift of state property by the Legislature. Article 22, § 1, repeals all laws inconsistent with the Constitution. Held that, so long as such tide lands remain subject to navigation, they cannot be alienated by the state except for navigation purposes, and title thereto may not be acquired by individuals by prescription; so far as Code Civ. Proc. § 315, limiting actions by the people to sue for land, and Civ. Code, § 1007, providing that occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar suit to recover property confers prescriptive title thereto, would enable title to such lands to be acquired, they were repealed by the Constitution.

6. SAME—SEA-WALL LINE—ESTABLISHMENT—
EFFECT.

The establishment of a sea-wall line by the San Diego harbor commissioners, under authority of Pol. Code, §§ 2587, 2588, does not constitute an abandonment of the public use in tide lands between that line and the shore, where no wall has been built nor projected, and no obstruction to navigation has been placed on the line, since, under sections 2579, 2588 and 2589, the line may be changed before the wall is built so as to cause such lands to remain in the part of the bay reserved for navigation.

7. SAME—ALCALDE GRANT EFFECT.

A purported conveyance by the alcalde of the pueblo of San Diego on March 18, 1850, of tide lands passed no title, since at that time title had accrued to the United States as sovereign; St. 1850, p. 121, c. 48, incorporating San Diego, not validating alcalde grants, and Act May 14, 1861 (St. 1861, p. 363, c. 356), confirming such grants near Oakland, San Francisco, and San Quentin prison, not ratifying such conveyance.

8. STATUTES—AFFECTING STATE'S TITLE—
CONSTRUCTION.

Statutes depriving the state of its property must be construed favorably to the state, or, at least, not strictly against it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 319.]

Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by the people of the state of California, by the State Board of Harbor Commissioners for San Diego Bay, against H. Kerber and others. From the judgment, defendants appeal. Affirmed.

Stearns & Sweet and Haines & Haines, for appellants. Shaw & Winnek and Victor E. Shaw, for respondent.

SHAW, J. This action is prosecuted under the authority of section 2578 of the Political

Code, to recover possession of certain premises alleged to constitute a part of the tide lands of the bay of San Diego. Plaintiff had judgment for part of the land sued for, and the defendants appeal from that part of the judgment. The defendants denied ownership of the lands by the state, and pleaded, as a defense, the 10-year statute of limitations, as set forth in section 315 of the Code of Civil Procedure. The court found that the defendants have been in adverse occupancy of the land for more than 10 years next before the action was begun. The evidence shows that their occupancy began on January 1, 1887, and has continued ever since that time. The claim of the defendants is that the action is barred by the statute, and that, under the provisions of section 1007 of the Civil Code, they have acquired title to the land by prescription.

The land in question lies between the lines of the ordinary high and low tides and is covered and uncovered successively by the ebb and flow thereof. It is, unquestionably, tide land, in the usual meaning of that term. *People v. Davidson*, 30 Cal. 386; *Rondell v. Fay*, 32 Cal. 364; *Oakland v. Oakland Water F. Co.*, 118 Cal. 182, 50 Pac. 277. It is situated next to the shore line at ordinary high tide and constitutes a strip of land 40 feet in width, running from the line of Atlantic street on the west to the line of California street on the east, assuming that those streets extend into the bay. The said shore line at that point is 10 feet south of the south line of H street in the city of San Diego. The land extends 40 feet into the water at ordinary high tide, and, under the existing natural conditions, it is not disputed that it fronts on the waters of San Diego Bay, and constitutes a portion of the waters thereof used for navigation. It either adjoins or is within the city of San Diego. Tide lands of this character vest in and belong to the state by virtue of its sovereignty. *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; *Farish v. Coon*, 40 Cal. 57; *People v. Morrill*, 26 Cal. 337; *Ward v. Mulford*, 32 Cal. 365. And when such tide lands are situated in a navigable bay, and constitute a part of the water front thereof, as is the case here, they constitute property devoted to a public use, of which private persons cannot obtain title by prescription, founded upon adverse occupancy for the period prescribed by the statute of limitations. In *Ward v. Mulford*, supra, on page 372 of 32 Cal., the court says on this subject: "Such land is held in trust for the benefit of the people. The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them, her grantee takes them upon the same terms upon which she

holds them, and, of course, subject to the public rights above mentioned." See, also, *Oakland v. Oakland W. F. Co.*, page 184 of 118 Cal., page 286 of 50 Pac., where the same passage is quoted with approval. Property thus held by the state in trust for public use cannot be gained by adverse possession, and the statute of limitations does not apply to an action by the state or its agents to recover such property from one using it for private purposes not consistent with the public use. This is the settled rule in this state, with respect to all properties so devoted to public use, and tide lands—underlying waters forming part of the waters of a navigable bay used for navigation—are not, in this respect, to be distinguished from property used for other public purposes. Upon this point the rule is thus stated: "It is immaterial where the title—that is, the record title—is held, whether by the state at large, or by a county, or by some municipal department or other official body. There can be no adverse holding of such land which will deprive the public of the right thereto, or give title to the adverse claimant, or create a title by virtue of the statute of limitations. The rule is universal in its application to all property set apart or reserved for public use, and the public use for which it is appropriated is immaterial. The same principles which govern the adverse holding of a street, a public square, a quay, a wharf, a common, apply to the adverse holding of a schoolhouse. The public is not to lose its rights through the negligence of its agents, nor because it has not chosen to resist an encroachment by one of its own number, whose duty it was, as much as that of every other citizen, to protect the state in its rights." This rule has been often repeated in the opinions of this court. *Hoadley v. San Francisco*, 50 Cal. 275; *People v. Pope*, 53 Cal. 437; *Visalla v. Jacobs*, 65 Cal. 434, 4 Pac. 433, 52 Am. Rep. 303; *San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405; *Yolo Co. v. Barney*, 79 Cal. 378, 21 Pac. 833, 12 Am. St. Rep. 152; *Mills v. Los Angeles*, 90 Cal. 522, 27 Pac. 354; *Orena v. Santa Barbara*, 91 Cal. 621, 28 Pac. 268; *San Francisco v. Bradbury*, 92 Cal. 418, 28 Pac. 803; *Archer v. Salinas*, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; *Ames v. San Diego*, 101 Cal. 394, 35 Pac. 1005; *Home v. San Francisco*, 119 Cal. 537, 51 Pac. 950; *Holladay v. San Francisco*, 124 Cal. 353, 57 Pac. 146; *San Francisco v. Sharp*, 125 Cal. 586, 58 Pac. 173; *S. P. Co. v. Hyatt*, 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522.

It is true that the public use may, by some lawful act of public authority, be discontinued or abandoned, and that, in that event, the property may thereupon cease to be protected by this rule. If the title is at that time held by the state, it will thereafter hold it as a proprietor and not as a public agent or sovereign in charge of a public use. If an adverse possession can be maintained, or if the

statute of limitations can run against the state, in regard to such proprietary property, it will begin from the date when the public use ceased and not before. If the power is left to the Legislature, it may then provide for the sale of such property, and order that it may become the subject of private ownership. But, as was said in *Yolo Co. v. Barney*, supra, the fact that the public authorities in charge of the property have power to discontinue or abandon the public use and sell the property for private use does not affect the rule above cited, nor enable an occupant to gain it by adverse possession before that event occurs, or to invoke the statute of limitations to protect his possession against the state. This was the rule applicable to such property, so held and used, before the adoption of the Constitution of 1879. To make such tide lands more secure against unwise disposition by the Legislature to the detriment or destruction of the public rights, the following provision was inserted therein: "All tide lands within two miles of any incorporated city or town in this state, and fronting on the waters of any harbor, estuary, bay, or inlet, used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships or corporations." Article 15, § 3. Other constitutional provisions prevent the gift of any state property by the Legislature. Article 4, § 31. So long, therefore, as property of this character remains subject to use for the purposes of navigation, it cannot, without an amendment of the Constitution, be disposed of by the state in any manner, except in furtherance of the purposes of navigation to which it is dedicated. The provisions of the Constitution are of higher force than the statute of limitations, or the statute defining the manner of acquiring title to property by adverse occupancy. If the state is without power to dispose of this land for private use at all, its officers and agents must be without power to make a virtual disposition of it by their neglect in permitting private persons to occupy it for a period of 10 years, under claim of ownership, and thus giving such persons an opportunity to invoke for their benefit a legislative declaration that such occupancy will bar the state of its title. So far as the statutes referred to may have had that effect before the adoption of the Constitution, they must be considered as having ceased to exist when the Constitution took effect. The Constitution declares that all laws inconsistent with its provisions shall cease upon its adoption. Article 22, § 1. In this view of the case, it is immaterial whether title by prescription under the Code is, or is not, founded upon the presumption that the possession was originally taken under a grant which had been lost in the lapse of time, as was the case at common law, even if it were conceded that the rule that there can be no adverse possession of property devoted to public use did not apply to this land.

It is claimed that the land in controversy is not now devoted to public use for navigation; that, by lawful action of the harbor board, the public use has been discontinued and abandoned, and the land made available for sale to private use, and thus has become proprietary in character; that this occurred more than 10 years before the action was begun; and hence, that the statute of limitations has barred the action, and the defendants have acquired title. This theory is based on the fact that on March 17, 1890, the board of harbor commissioners of San Diego, under the provisions of sections 2587 and 2588 of the Political Code, established a line for the location of a sea-wall or a harbor embankment to be thereafter erected, and that this land is between that line and the shore, and some 150 feet distant from the sea-wall line. It may be admitted that when a sea-wall shall be constructed on this line, and the water between it and the shore is thereby excluded from use for navigation, the land between the wall and ordinary high-tide line, not abutting on the wall, nor lying so near it as to be reasonably necessary for purposes incidental to and in furtherance of navigation, may become proprietary lands, which, like ordinary public land, may be sold by the state to private persons for private use not connected with navigation. Perhaps, before such wall is constructed, land within the sea-wall line, and so remote therefrom that its use for private purposes would not be detrimental to the public use or the public right, might be disposed of to private persons in connection with and in aid of the building of such wall, and its adaptation to purposes of navigation and commerce, as, for instance, to raise funds wherewith to build the wall. We are not called upon here to express any opinion on these questions. No such case is presented. No such disposition of the land has been made to the defendants, or to any person. No sea-wall has been built or projected. No barrier or obstruction to navigation has been placed on the line. For all practical purposes the bay is open to navigation to the actual shore line of high tide over the land in question as fully and freely as before the line was so located. It still remains, in fact, a part of the bay of San Diego, which, by section 2579 of the Political Code, is placed in the possession and control of the harbor commissioners, with all the rights, privileges, easements, and appurtenances connected therewith. They may, at any time, change the location of the line. Pol. Code, §§ 2579, 2588, 2593. Before a sea-wall is constructed, and before private rights accrue from such construction, it would seem that their power to make such change is unlimited. It may therefore be changed so as to include this land within the waters of the bay set apart exclusively to navigation. In *People v. Williams*, 64 Cal. 499, 2 Pac. 393, the court says: "The mere establishment of a harbor line does not deprive the state of

the right to control and regulate the water within the line." We think the establishment of the sea-wall line has no effect whatever upon the character of the waters and tide lands between it and the shore as property devoted to use for navigation, at least, until some further action is taken looking to the erection of the wall, or the abandonment of the public use of the waters between it and the shore.

On March 18, 1850, the alcalde of the pueblo of San Diego, in consideration of the building of a wharf by the grantees, executed a deed purporting to convey to Jose Aguirre and others 15 acres of land, including the land in controversy. The defendants claim under this deed, and deraign title therefrom by a regular chain of conveyances. The wharf was built, but is gone. Defendants do not claim that they ever maintained any wharf. San Diego was incorporated on March 27, 1850, nine days after the execution of this deed. St. 1850, p. 121, c. 46. This conveyance could not have been of any force or effect to pass the title. At that time the title had accrued to the United States as sovereign. The community which afterward became the city of San Diego was then a mere unincorporated village, or, at most, a Mexican pueblo, exercising some powers in that capacity. Whatever powers it may have possessed over this land as a Mexican pueblo before the cession of the territory to the United States, those powers had ceased when the cession took place, and the sole power and authority to dispose of such lands was thereupon transferred to the United States, and was by it transmitted to the state of California at the time of its admission as a state on September 9, 1850. There is nothing in the incorporating act creating the city of San Diego, that purports to validate the previous grants of tide lands made by the alcalde. The act of May 14, 1861, refers only to marsh and tide lands within 5 miles of the city of Oakland and San Francisco, or within 1½ miles of San Quentin prison. The proviso in that act declares that no sales of such land within those limits shall be confirmed by the act, "excepting alcalde grants which are hereby ratified and confirmed." St. 1861, p. 363, c. 356. Statutes which operate to deprive the state of its property are to be construed favorably to the state, or, at all events, are not to be construed strictly against it. Under any theory of interpretation applicable thereto, this statute should not be deemed a ratification of previous alcalde grants of tide lands in or adjacent to San Diego.

We have said nothing so far upon the question whether or not the provisions of section 315 of the Code of Civil Procedure do, in fact, apply to actions by the state for the recovery of possession of these tide lands, aside from their exemption under the Constitution, or as lands devoted to public use. For the purposes of the discussion we have

assumed that they would apply but for such exemption, and that their effect was similar to that of section 318 respecting private property, except as to the length of the period of limitations. The language of the two sections, however, is materially different. Section 318 declares the action barred, unless the plaintiff, or his privies, were "seised or possessed of the property in question within five years before the commencement of the action." Section 315 is as follows: "The people of this state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless: 1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or, 2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof within the space of ten years."

The title of the state to lands lying between high and low tide accrued upon the admission of the state to the Union. If all actions to recover such lands are barred under subdivision 1, § 315, if begun more than 10 years after the title of the state accrued, it would follow that the state could not, at this time, maintain any action for possession thereof against a trespasser, in any case, regardless of the time the unlawful possession had continued. In view of this absurd result it may be doubted if section 315 is applicable at all to actions to recover possession of such tide lands. A doubt on this subject is expressed in *Farish v. Coon*, 40 Cal. 57, but the point was not decided. It is not necessary to decide it here. We have noticed it to this extent, merely to explain that we do not decide that the statute was intended to apply in any case.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(152 Cal. 618)

POMONA LAND & WATER CO. et al. v.
SAN ANTONIO WATER CO. et al.
(L. A. 1,817.)

(Supreme Court of California. Jan. 17, 1908.
Rehearing Denied in Bank Feb. 16, 1908.)

1. WATERS AND WATER COURSES—IRRIGATION
—SALVAGE AND DEVELOPED WATER—RIGHT
TO.

Where, under a contract with defendant, plaintiffs were only entitled to one-half of the natural flow of a stream as it reached a dam, any water defendant saved by impounding the water above and bringing it to the dam by pipe line, thus saving the water otherwise lost by seepage, etc., above the dam, and any water developed from the bed of the stream, are essentially new waters, and the right to use and distribute them belongs to defendant, under the principle that, where one is entitled to use a given amount of water at a given point, he may not complain of any prior use made of the water not impairing the quantity or quality to which he is entitled, and that he may not claim any excess of water over the amount to which he is entitled however it may be produced.

2. SAME—CONTRACTS.

The only covenants binding those who do not personally incur the obligation are those running with land, and under Civ. Code, § 1462, the only covenants running with land are those contained in a grant of an estate in realty and made for the direct benefit of the property or some part of it then in existence, and hence, where parties in 1877 agreed that the waters of a stream should be divided at a dam for the use of owners on both sides of the stream, and that the parties should at their joint expense develop the waters from their source to the dam, and that the development work should proceed with reasonable diligence until completed, and their successors, plaintiff and defendant, in 1897 agreed that the natural flow of the stream should be divided at a dam, defendant is bound only by the last contract, and is not deprived by the terms of the first of the exclusive right to water saved by it by impounding the waters of the stream above and bringing it to the dam, thus saving the water otherwise lost by seepage, etc., above the dam, and water developed from the bed of the stream; the development work being done 30 years after the first contract was made.

3. SAME—FINDING.

Where defendant is entitled to water saved and developed by it above the natural flow of a stream, the court must determine with such exactness as possible how much water is saved and developed.

4. SAME.

Where a contract provided plaintiff and defendant should divide the natural flow of a stream, subject to the water right of another, established by a judgment against plaintiff and defendant's predecessor, defendant could acquire such right for its own use, within the limitations of such judgment.

5. JUDGMENT—INTERPRETATION—RESORT TO PLEADINGS.

Resort may be had to the pleadings in a case and the issues joined thereunder to explain and to limit the language of a judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 969.]

6. WATERS AND WATER COURSES—ACTION TO ESTABLISH RIGHTS—JUDGMENT.

Where one only claimed a right to use 20 inches of water of a stream for domestic purposes and to irrigate his land, a judgment awarding him that amount, but not showing the purpose for which it might be used, did not entitle him nor his successor to transport water beyond the watershed for other uses.

7. SAME—WATER RIGHTS—ACQUISITION BY PRESCRIPTION.

Where plaintiff and defendant water companies agreed upon a division of the natural flow of a stream at a dam, subject to the right of another to use 20 inches for a specific purpose, and defendant acquired such right, though it did not have a right to use water thereunder for another purpose, where for a long time it openly, notoriously, and under a claim of right diverted the water for another purpose to a point near the dam and did not allow it to flow over it for division, it acquired a prescriptive title to the quantity used.

In Bank. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by the Pomona Land & Water Company and others against the San Antonio Water Company and others. From the judgment both parties appeal. Plaintiffs' appeal denied; judgment partly reversed with directions on defendants' appeal and defendants' appeal partly denied.

Rehearing denied in bank; BEATTY, C. J., dissenting.

A. P. Nichols, J. S. Chapman, and Stephens & Stephens, for plaintiffs. Otis, Gregg & Surr and H. W. O'Melveny, for defendants.

HENSHAW, J. This is an action in form for an injunction to restrain the defendants from their alleged unlawful diversion of the waters of the San Antonio creek. In its essence the action is to determine the conflicting claims of plaintiffs and of defendants to certain of these waters. The Pomona Land & Water Company represents the users of water to the west of San Antonio creek—the "Pomona people." The San Antonio Water Company represents and supplies the lands and people to the east side of the creek—the "Ontario people." At a fixed point upon the stream a dam had been erected, and at this dam the waters which flowed thereto had, under agreement, been divided between the Pomona people and the Ontario people as follows: When the water which reached the dam amounted to or was less than 624 miner's inches, the supply was equally divided between the west side and east side users. When it exceeded 624 inches the west side users were entitled to 312 inches and the east side users to all of the rest. Over this there is no controversy. By contract and deed between the Pomona Land & Water Company and the San Antonio Water Company the water rights of the former were conveyed to the latter, and the latter company agreed in effect to make distribution of the waters in the proportions above set forth.

The defendant the Ontario Power Company is a corporation created for the purpose of generating power. The San Antonio Water Company owns the lands riparian to the San Antonio creek above the division dam, and granted permission by lease to the Ontario Power Company to do certain work and erect necessary structures, to the end of developing power from the waters of San Antonio creek above the division dam and before such waters reached the dam. Measurements of the natural flow of the stream were taken by these defendant corporations at a point $2\frac{1}{4}$ miles above the division dam and again at the division dam, from which they became satisfied that from the upper point of measurement the stream was a losing stream, and that 19 per cent. of its surface flow was lost by seepage, percolation, and evaporation between that point and the division dam. In the belief, therefore, that its duty to plaintiffs was only to distribute to them their proportion of the natural flow of the water as it reached the division dam, the defendants held that any excess over the natural flow which they could save by impounding the waters $2\frac{1}{4}$ miles above the division dam in a pipe line, and bringing it thus down to the division dam without waste, would be salvage water, rescued water, or developed water, the rightful use of which would be theirs absolutely. This then in fact is what was done. The Ontario Power Company impound-

ed all the waters of the stream in a 30-inch pipe line, and carried them down to their power house above the dam. They leased, in turn, to the defendant San Antonio Water Company the salvage water, estimated at 19 per cent. of this natural flow. By plaintiffs and respondents it is insisted upon this appeal that the Ontario Power Company is a mere agency in this regard of the San Antonio Water Company, and that its rights to this salvage water are no greater than are the rights of the San Antonio Water Company. The next contention is that it was the legal duty of the San Antonio Water Company under certain agreements and contracts, hereinafter to be considered, to divide this salvage water with plaintiffs equally with the rest of the water of the stream at all times when the total amount of that water did not exceed 624 inches.

For convenience, the Ontario Power Company may be dropped from the case, and the questions may be considered from the point of view for which plaintiffs and respondents contend; that is to say, from the point of view of the rights and duties of the San Antonio Water Company. The right to this salvage water, estimated by the San Antonio Water Company to be 19 per cent. of the natural flow, is the first matter in controversy between these parties. The amount of the water so saved, the court expressed itself unable to determine from the evidence. Under its view, however, that whatever the amount might be it should be divided under the contention of plaintiffs, it was unnecessary to determine the amount. If, however, the position of the defendant the San Antonio Water Company is correct—if it is entitled to this water—then an accurate finding upon this question becomes of extreme importance to all of the litigants.

After the natural flow of the stream had, as above described, been impounded in a pipe line and carried down to the division dam, leaving the bed of the creek dry, the San Antonio Water Company undertook certain development work in the bed of the creek, laying a pipe line in the saturated gravels, and thus rescuing, impounding, and using from 25 to 50 inches of water. As to this water its position is the same as that which it takes with regard to the salvage water. It argues that, as it is delivering to plaintiffs all of their proportion of the natural flow to which alone they are entitled, all other waters which it may save or develop belong to it; that, as it is giving to plaintiffs all of their proportion of the natural flow which by any possibility could reach the division dam, this water so rescued from the bed of the creek cannot be part of that, and although it comes from the creek is newly developed water, and their property. Upon this the court took plaintiffs' view that, under the agreements above adverted to, one-half of this water belonged to plaintiffs whenever the total flow was less than 624 inches, but that

plaintiffs should bear one-half of the cost of the development, estimated at \$750. From the conclusion reached by the court upon both these matters and expressed in its judgment, the defendants appeal.

Still a third matter of controversy exists between the parties, to which consideration must now be paid. One Dexter asserted the right to 20 inches of water for use upon his lands upon the east side of the creek, and in fact his right to this water was embodied in a judgment in litigation growing out of these very questions, a judgment to which all the parties to this action, their predecessors or representatives in interest were parties. In the contract between the Pomona Land & Water Company and the San Antonio Water Company, to which reference has heretofore been made, it is "agreed between the parties hereto that all the waters of San Antonio creek, except the twenty inches of water owned by Richard Gird and known as the Dexter claim, have been for more than fifteen years last past owned and used equally in common by certain parties on the Ontario and Pomona sides of the San Antonio creek," etc. And, further, it is declared "that after the execution of this agreement and of the deeds hereinafter mentioned all the waters of San Antonio creek and its tributaries, excepting the so-called Dexter claim of twenty inches above referred to, shall be allowed to flow undiminished to said point of diversion" (the division dam). Dexter sold his land and water right to Gird. Gird in turn, after the execution of this contract, sold both to the San Antonio Water Company. The San Antonio Water Company insists upon its right to take the Dexter 20 inches of water, which it will be remembered, was water which for years had been diverted from the stream above the division dam. Respondents, upon the other hand, contend still by force of certain contracts, to which reference has been made, that upon the acquisition by the San Antonio Water Company of this Dexter claim it became that corporation's duty to permit that 20 inches to flow to the dam and there to be divided. The court upon this found generally with the plaintiffs, to the effect that such was their right, but it found moreover that by adverse use for sufficient time the San Antonio Water Company had acquired a new title by prescription to 18 inches of this water, and for that amount gave them judgment. Upon this so-called Dexter claim there are cross-appeals, appeals by the plaintiffs from the judgment in favor of the defendants for the 18 inches, and from the court's order denying its motion for a new trial, and upon the part of the defendants, who insist upon their title to the full 20 inches awarded to Dexter by the judgment above referred to.

1. Salvage and Developed Water. It may not successfully be disputed that if, in fact, all the water to which plaintiffs were entitled was the one-half of the natural flow of the

stream as it reached the division dam, and that if in fact they receive this water, then the 19 or any other percentage, which was saved by the economical method of impounding the water above, and the 25 inches, more or less, which were rescued as developed water from the bed of the stream, were essentially new waters, the right to use and distribute which belonged to defendant. This principle has been enunciated by this court as early as *Butte Company v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769, and has been reaffirmed, however varying the forms may have been, whenever it has been presented. The principle in brief is this: That where one is entitled to the use of a given amount of water at a given point, he may not complain of any prior use made of the water which does not impair the quality or quantity to which he is entitled, and, upon the other hand, he may not lay claim to any excess of water over the amount to which he is entitled, however it may be produced. In the *Vaughn Case*, supra, the question turned upon the prior use. In *Crelghton v. Kaweah Irrigating Company*, 67 Cal. 222, 7 Pac. 659, it is said: "At best, the plaintiffs would be entitled only to have the defendant enjoined from obstructing the flow of that which would have naturally flowed unaided by artificial means, with which the plaintiff is not connected." In *Wiggins v. Muscupabe L. & W. Co.*, 113 Cal. 195, 45 Pac. 164, 32 L. R. A. 667, 54 Am. St. Rep. 337, this whole question is elaborately considered, and full recognition is accorded of the right to water of one who saves as well as of one who develops it. It there appeared that 100 inches of water were naturally lost by absorption and evaporation in passing through the natural channel from the dam and ditch of an upper riparian owner to the land of a lower owner. It was held that a court of equity in dividing the flow of the stream might allow the upper owner to provide artificial means for carrying all the waters of the stream in excess of the 100 inches to the land of the lower owner, and permit the upper owner to use so much of the 100 inches as he could save by such artificial means, and, quoting from the opinion, it is said: "The plaintiff could under no circumstances be entitled to the use of more water than would reach his land by the natural flow of the stream, and, if he receives this flow upon the land, it is immaterial to him whether it is received by means of the natural course of the stream or by artificial means. On the other hand, if the defendant is enabled by artificial means to give to the plaintiff all of the water he is entitled to receive, no reason can be assigned why it should not be permitted to divert from the stream where it enters its land and preserve and utilize the one hundred inches which would otherwise be lost by absorption." This same doctrine is recognized by all the courts which have been called upon to con-

sider it. *Platte Irrigation Co. v. Buckers Irrigation, Milling & Improvement Company*, 25 Colo. 77, 53 Pac. 335; *Herriman Irrigation Co. v. Butterfield Mining Co.*, 19 Utah, 453, 57 Pac. 541, 51 L. R. A. 930; *Farnham on Waters*, § 672. Indeed, as we read plaintiffs' brief, we are led to believe that this doctrine is not disputed, but that, because of defendants' contractual obligations, it is insisted that plaintiffs are entitled to their share of this salvage and developed water. A consideration of these agreements is thus imposed.

At the outset it should perhaps be stated that none of these waters are used in virtue of riparian rights upon lands riparian to the stream, but are either diverted and consumed upon lands without its watershed, or used solely under claims by appropriation. In 1877, Loop and Meserve, owners of lands upon the west side of the stream and claiming water rights in the stream, entered into an agreement with the Cucamonga Water Company, claiming water rights in the stream for the use of lands and people on the east side thereof. At the time of this agreement each of the contracting parties claimed by pre-existing rights and titles. The substance of the agreement was that at the division dam the water should be divided equally between the parties; that the parties should, at their joint expense, develop the waters of the stream from their source to the division dam; that the development work should proceed with reasonable diligence until completed. Each party to the contract agreed to supply out of his moiety such water as any other person upon his side of the stream was entitled to.

In August, 1882, Loop and Meserve, the west side users, entered into a contract with Mills and Wicks, the substance of which agreement is that Loop and Meserve, reserving to themselves 1 miner's inch of water for every 8 acres of their lands, which water Mills and Wicks agreed to deliver to them, conveyed to Mills and Wicks any excess water over that amount. Mills and Wicks agreed to do development work for the purpose of increasing the flow of the water. This, obviously, it was for the interest of Mills and Wicks to do, since the excess over the amount which was to go to Loop and Meserve was their own. It is to be remembered, however, that this agreement affected only the waters to which the west side users were entitled, and in no way affected the waters of the east side users. Moreover, time was made of the essence of the contract as to the work of development. A deed in consummation of the agreement was placed in escrow to be delivered upon the performance by Mills and Wicks of their part of the contract. The deed was placed in escrow and was delivered to Mills and Wicks in April, 1885, whereby it was established, as between the parties, that the covenants, the performance of which Mills and Wicks had under-

taken, had been fully complied with, and thus Mills and Wicks were relieved from any obligation of making any further water developments. And, finally, there is established not only this complete performance by Mills and Wicks, but the contract does not attempt to impose the duty of any further or future developments upon the assigns of Mills and Wicks. The Chaffey's had succeeded to the interest of the Cucamonga Water Company, and consequently to such transitive rights and duties as were imposed under the contract of 1877 with Loop and Meserve. In 1882 the Chaffey's in turn made an agreement with Mills and Wicks, by which contract it was agreed that all the waters of the stream were to be allowed to run undisturbed to the division dam, where the waters were to be divided into two equal parts, which parts were to be taken by the respective parties to the contract. "At said dam all waters flowing into or over said dam shall be divided into two equal parts," etc. It was further agreed that all development of the canyon was to be at the joint and equal expense of the parties in accordance with their plans first agreed upon. Subsequently, in December, 1882, Mills and Wicks conveyed their rights to the plaintiff the Pomona Land & Water Company, while the defendant the San Antonio Water Company succeeded to all the rights of the Chaffey's. Then, finally, upon April 23, 1897, the plaintiff the Pomona Land & Water Company entered into an agreement with the defendant the San Antonio Water Company and in pursuance of that agreement conveyed its rights in the waters of the stream to the San Antonio Water Company. Thus the defendant the San Antonio Water Company has come to be the owner of all the rights in the waters formerly belonging to Mills and Wicks, the Chaffey's, and the San Antonio Water Company. (It also acquired the Dexter right, as has been above stated, but that right is a matter for separate consideration.)

The agreement of the San Antonio Water Company with the Pomona Land & Water Company is the only agreement to which it is directly a party, and by which it can be legally bound. Of course, in taking the rights of the Pomona Company, as in taking the Chaffey's' rights, it took cum onere and subject to all the legal burdens which, by the express terms of the preceding contracts or by necessary implication of law, devolved upon it; and the especial obligation which plaintiffs insist was thus cast upon the San Antonio Company is that of the duty to do work of development to increase the flow of the water, which increased flow should be for the mutual benefit of the west side and east side users. Or that, if it were not the duty of the defendant to do such development work, still, if it did do it, the result is the same, and the plaintiffs acquire a right in the new water. But, if this is so, since the defendant the San Antonio Water Company was

not a party to any of the earlier contracts, and since no such obligation is in terms imposed upon it by its contract with the Pomona Land & Water Company, it must follow that these earlier contracts contained a covenant carrying with it the transitive quality of binding those who did not personally incur the obligation. But the covenants, and the only covenants which bear this quality, are covenants which run with the land, and the only covenants which run with the land are those which are found in section 1462 et seq. of the Civil Code. "Every covenant contained in a grant of an estate in real property which is made for the direct benefit of the property, or some part of it then in existence, runs with the land." Civ. Code, § 1462. Clearly, none of these earlier contracts contain any such covenant. *Fresno Canal Co. v. Rowell*, 80 Cal. 118, 22 Pac. 53, 13 Am. St. Rep. 112. There is no privity of estate or tenure here. There is no grant of an estate. Thus, says *Erle, J.*, in *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611: "There is a wide difference between the transfer of the burden of a covenant running with the land and the benefit of the covenant, or, in other words, of the liability to fulfill the covenant, and the right to exact the fulfillment. The benefit will pass with the land to which it is incident; but the burden or liability will be confined to the original covenantor, unless the relation of privity of estate or tenure exists or is created between the covenantor and the covenantee at the time when the covenant is made." "The obligation of all contracts is ordinarily limited to those by whom they are made, and if privity of contract be dispensed with, its absence must be supplied by privity of estate." 1 *Smith's Leading Cases*, p. 178, note. The covenants then touching this matter were not founded in grant, so there was no privity of estate between the parties at the time the covenants were made. They were merely personal covenants binding only upon the covenantors. In the contract of December, 1877, the provision as to development work was that it should be done at the joint expense of the parties, and should proceed with reasonable diligence until completed. It cannot be said that such an agreement binds the defendant who was not a party nor privy to the contract, and whose development work was done 30 years after. So, too, as to the agreement made by the west side users with Mills and Wicks. The development which Mills and Wicks were called upon by their contract to do they had done, and it was not incumbent upon them to do anything more. In short, the rights and duties of the San Antonio Water Company are governed in this regard entirely by the contract which it made with the Pomona Land & Water Company. That agreement makes provision for the 312 inches which is to be diverted to the Pomona side under the conditions above stated (that is to

say, no more than that, under any circumstances, and one-half of the flow when the amount shall be less than 624 inches); provides, after expressly excepting the Dexter claim of 20 inches, that "all the waters of San Antonio creek and its tributaries shall be allowed to flow undiminished to said point of diversion"; provides that the San Antonio Water Company shall be entitled to all water in excess of the 312 inches which is to be diverted to the Pomona side; contains the covenant upon the part of the San Antonio Water Company that it will "never by any development or works which it may or shall make or do in the San Antonio canyon, or any of its tributaries, diminish the flow of water to said users below the said amount of 312 inches which they are now and long have been entitled to receive"; provides that the waters shall be permitted to flow to said users as they are now and have been long permitted to flow, and nothing in the agreement shall enlarge or abridge the rights of the users of water; and San Antonio Water Company shall be under no higher or greater obligations to the users of water (represented by the Pomona Land & Water Company) under or by virtue of this agreement than it has been in the past, except to deliver water into the said Pomona conduit as herein directed. Then, finally, it declares that "It is further understood and agreed between the parties hereto that if in future the party of the second part [the San Antonio Water Company] shall construct a pipe line in said San Antonio canyon, in such event said party of the second part herein shall deliver to the users of water hereinbefore referred to the water which said users of water are now, under and by virtue of said deeds and agreements, entitled to at the intake, where now such users of water receive the water to which they are entitled from the San Antonio creek at the point known as the division dam." Having in mind the fact that the parties were, and for years had been, using the surface flow of the stream, and that surface flow only as and when it reached the division dam, that the contract provides for the uninterrupted or rather undiminished flow to the division dam, and that the water which is to be divided is the water then flowing at this point of division, the conclusion is irresistible that the plaintiffs' rights have become fixed, and are measured by their proportion of the natural flow of the stream when that flow reaches, without hindrance or diminution, the division dam. But this is a very different proposition from that contended for by plaintiffs, wherein they insist upon their proportionate share of any water over and above that natural flow which may be developed or saved. To such water we are of opinion that they show no right at all. There is not here involved any question of impairment of quality or quantity by the use of the pipe line. The facts then stand that by use of this pipe line defendant brings down and

delivers to plaintiffs the one-half of the surface flow at the division dam to which they are entitled, and the circumstance that, in addition, the defendant rescues and devotes to beneficial use an additional quantity of water affords no grievance to the plaintiffs, so long as that additional quantity is determined with the nicest exactness possible.

We thus come to the question of how much water was actually saved by the pipe line; that is to say, how much water in excess of that which would reach the division dam does the pipe line carry, for to that excess defendant is clearly entitled. The defendant contends for 19 per cent., and put in evidence the elaborate measurements which it made by clock work, covering a period of some four months, and the testimony of competent engineers in explanation and support of those measurements. Upon this question the court found that the defendants have not saved 19 per cent. of the water; that the average measurement showed a saving of 19 per cent.; that the measurements did not show any uniform percentage of loss, but by many it appeared that the loss was greater than 19 and by others that it was less, and that the percentages claimed to be saved varied from 13 per cent. to 22 per cent., and that no fixed percentage would fairly represent the so-called salvage; and that to determine the amount saved at all the various stages of water in different seasons, and different times in the same season, could only be ascertained by constant measurements every year and throughout the year. This finding amounts to a mere negation, but in the view which the court took, that whatever water was saved belonged in equal portions to plaintiffs and defendants, an exact finding as to the amount saved was immaterial. Under the view here expressed, that defendant is entitled to the water saved, it becomes necessary for the court to find specifically upon this matter. The difficulty which the court experienced in arriving at the facts is not an unusual one, but it is one which nevertheless must always be met. As was said in the early case of *Butte v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769: "There may be some difficulty in cases like the present, in determining with exactness the quantity of which parties are entitled to divert. Similar difficulty exists in the case of a mixture of wheat and corn. The quantity to be taken by each owner must be a matter of evidence. The courts do not, however, refuse the consideration of such subjects because of the complicated and embarrassing character of the questions to which they give rise. If exact justice cannot be obtained, an approximation to it must be sought, care being taken that no injury is done to the innocent party." It will, therefore, be the duty of the trial court, upon a rehearing of this matter, with the evidence before it, to determine with such exactness as may be possible the percentage of salvage water.

What has been said as to the salvage water is equally applicable to the water developed and carried by the pipe line along the bed of the creek. This pipe line, the court finds, collects and preserves an amount of water varying from 25 to 50 inches. The court finds as to this water that, under the changed mode of diversion by the Ontario pipe line, none of it reaches the dam, but if the old system of natural flow prevailed, then this water would flow to the division dam, or would go to support and sustain the surface stream to the extent that the waters filled the soil and gravel beneath the surface stream. All this may be quite true, and yet afford no argument to support plaintiffs' claim to this water, nor yet any reason why there should be a return to the older system of diversion. It might be that it required 1,000 inches of water to fill the voids and to support a surface flow of 50 inches. Yet, as in the Muscupiabe Case, if the owner of the 50 inches received that amount of water, he could not assert any title to the 1,000 inches of water which, by a change in the mode of delivery, not to his injury was preserved from waste. So here, if plaintiffs get the one-half of the natural flow to which they are entitled delivered, unimpaired in quantity and quality, through a pipe line, they are not injured by the fact that other water, which otherwise would go to waste, as merely supporting the surface flow, was rescued. Nor can they lay claim to any of the water so saved.

2. The Dexter Claim. The origin and history of this claim has already been set forth, together with the disposition which the court made of it. Plaintiffs, as appellants upon this matter, insist that under the agreement of 1877 between Loop and Meserve and the Cucamonga Water Company, it was the duty of the Cucamonga Water Company to protect the predecessors of plaintiffs, and consequently plaintiffs themselves, against this Dexter claim, which was against the waters of the east side; that the same duty devolved upon the defendant; and that in the acquisition of this Dexter claim it was but performing the duty cast upon it by the contract of 1877; consequently that the Dexter water should come out of the moiety due to the east side users without impairment of the full one-half to which plaintiffs are entitled. But Dexter had obtained a judgment against plaintiff the Pomona Land & Water Company representing the parties to whom the west side water was distributed, and the Chaffey, who then held the title to the east side water, which judgment was a consent judgment, and was acquiesced in by all concerned. Moreover, in the contract between the Pomona Land & Water Company, as has been repeatedly pointed out, the Dexter 20 inches is recognized as an existing outstanding water right, and the division of the waters contemplated is repeatedly declared to be all the water at the division dam, except-

ing the Dexter claim to 20 inches. There can be no doubt, therefore, not only of the right of the defendant to acquire this outstanding and hostile water right, but, after acquiring it, to use the water as its own, within the limitations of the judgment which established the right. Herein it is contended by defendant that the judgment awarded to Dexter an absolute right to 20 inches, to be used wheresoever and in whatsoever way he deemed fit, and reference for a parallel judgment is made to the case of *S. O. Investment Co. v. Wilshire*, 144 Cal. 68, 77 Pac. 767. The judgment in the case at bar, after reciting that a stipulation had been filed and signed by the parties that judgment by consent "be entered in favor of defendant for twenty inches of water under a four inch pressure," etc., states: "It is therefore ordered, adjudged, and decreed that plaintiffs are entitled to the use, enjoyment, and control of all the water of San Antonio creek described in their complaint, save and except the amount of twenty inches, * * * and the defendant be and is hereby perpetually enjoined from diverting from said San Antonio creek any greater or larger amount than the twenty inches hereinabove described." It is well settled that resort may be had to the pleadings and issues joined thereunder to explain and to limit the language of a judgment. 23 Cyc. 1101; *Van Fleet, Former Ad.* § 376 et seq. In the Dexter Case it appears, by an inspection of the pleadings, that the action was for an injunction to restrain Dexter from diverting any of the waters of the stream. Dexter made answer that he was not interfering with the waters of the stream nor with any of plaintiffs' rights therein, saving as in his answer afterwards set forth, and in that answer he alleged ownership of riparian land and that he was using, and that there was necessary for use upon his land for irrigation and for domestic purposes, a perpetual flow of 80 inches of water. Under this condition of the pleadings, it was that the Dexter judgment was entered, and thus it clearly appears that Dexter's sole claim was 20 inches of water as riparian owner for domestic use and for purposes of irrigation upon the land which he owned. The estoppel of this judgment can go no further. Therefore the entire change in use made by defendants whereby none of the water is used upon the Dexter land, but all of it is transported to land without the watershed, is clearly a use not countenanced by the judgment, and one which, as the court finds, is injurious to plaintiffs. Because under the original use upon the riparian lands a large percentage of the water found its way back to the stream and so to the division dam, thus increasing the amount to which plaintiffs were entitled. The use of the defendants wholly eliminated this water. It follows, therefore, that the use of the water now made by defendants does not derive support from the Dexter judgment, nor yet

from the subsequent use of Gird, Dexter's grantee, who used the water as Dexter had used it. But the defendants for a long time had openly and notoriously, and under this claim of right, diverted the water by flume at a point immediately above the division dam, and had not allowed the water to flow over that dam for division and distribution. To the extent of 18 inches the court finds that the defendants thus had acquired a prescriptive title, and the findings to this effect are fully supported by the evidence. It follows, therefore, that as to the Dexter claim the defendants are entitled to 18 inches of water and no more.

For these reasons it is ordered that the appeals of plaintiffs be denied; that such part of the judgment as is appealed from by defendants touching their claim to the salvage water and to the water impounded by the pipe line in the bed of the creek be reversed, with directions to the trial court to determine the percentage or amount of water so saved or developed, which said amount, with the 18 inches to which defendant (San Antonio Water Company) has acquired prescriptive title growing out of the Dexter claim, may first be taken by defendant, after which the remaining waters are to be divided as in the judgment provided. The defendants' appeal from that portion of the judgment affecting the Dexter claim is also denied. Defendants will recover their costs upon appeal.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; McFARLAND, J.

7 Cal. App. 98

SAN FRANCISCO SULPHUR CO. v. ÆTNA INDEMNITY CO. (Civ. 369.)

(Court of Appeal, First District, California. Dec. 9, 1907. Rehearing Denied Jan. 6, 1908.)

ATTACHMENT — UNDERTAKINGS — ACTIONS — PLEADING.

In an action on an undertaking to procure the release of an attachment, a complaint which fails to allege that defendant executed or delivered the undertaking is bad on demurrer.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the San Francisco Sulphur Company against the Ætna Indemnity Company. From a judgment overruling a demurrer to the complaint, defendant appeals. Reversed, with directions.

Geo. F. Hatton and H. F. Peart (Franklin P. Nutting, of counsel), for appellant. Wm. J. Herrin, for respondent.

COOPER, P. J. This action was brought to recover upon an undertaking given to the sheriff of the city and county of San Francisco in order to procure the release of an attachment. A demurrer was interposed to

the complaint, upon the ground that it does not state facts sufficient to constitute a cause of action, and the same was overruled.

It is claimed that there is no allegation that defendant ever made, executed, or delivered the undertaking attached to the complaint as an exhibit, and that for this reason the judgment is erroneous, and the demurrer should have been sustained. Upon examination, we can find no allegation in the complaint that defendant ever made, executed, or delivered the contract upon which recovery is sought. It is elementary that, in order to state a cause of action against a surety upon an undertaking, the complaint must in some way allege or show that the defendant executed or delivered the undertaking. *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156; *Petty v. Church*, 70 Ind. 290. The demurrer to the complaint should have been sustained.

The judgment and order are reversed, and the trial court is directed to allow the plaintiff a reasonable time in which to amend its complaint, if so advised.

We concur: KERRIGAN, J.; HALL, J.

SAN FRANCISCO SULPHUR CO. v. ÆTNA INDEMNITY CO. (Civ. 371.)

(Court of Appeal, First District, California. Dec. 9, 1907. Rehearing Denied Jan. 6, 1908.)

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the San Francisco Sulphur Company, a corporation, against the Ætna Indemnity Company, a corporation. From a judgment overruling a demurrer to the complaint, defendant appeals. Reversed, with directions.

Geo. F. Hatton and H. F. Peart (Franklin P. Nutting, of counsel), for appellant. Wm. J. Herrin, for respondent.

PER CURIAM. It having been stipulated that the judgment in this case shall follow that of the same entitled case, No. 369 (this day decided) supra, the order denying defendant's motion for a new trial is therefore reversed, and the trial court is directed to allow the plaintiff a reasonable time in which to amend its complaint if so advised.

7 Cal. App. 112

MYERS v. KENYON et al. (Civ. 400.)

(Court of Appeal, First District, California. Dec. 12, 1907.)

1. DEDICATION—ESTOPPEL TO DENY DEDICATION.

One who platted a block into lots with an alleyway through the center thereof, sold lots with reference to a map on which the alleyway is marked, and received the price, was es-

topped from asserting title to the alleyway and closing it as a right of way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 34-47.]

2. VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE.

A purchaser of land covered by an alleyway through the center of a block, on each side of which was a line of houses with gates opening into it, was not an innocent purchaser, and acquired the land subject to the burden imposed on it by the vendor who platted the block into lots with an alleyway through the center thereof, and who conveyed lots with reference to the alleyway.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 488, 545-547.]

3. EASEMENTS—SUIT TO QUIET TITLE—EVIDENCE.

Where, in a suit to quiet title to a right of way over a strip through the center of a block, the legal title to which was in defendant, plaintiff claimed that the right of way was based on the act of the grantor of defendant in platting the block into lots with an alleyway through the center thereof, and conveying the lots with reference to the alleyway, evidence of the acts of the grantor with reference to buildings on the lots, gates opening on the alleyway, and statements to intending purchasers of lots was admissible.

4. EVIDENCE—DOCUMENTARY EVIDENCE—IDENTIFICATION OF DOCUMENT.

Where a book of maps containing a map of a block platted by the deceased owner was delivered by the widow of the deceased to the attorney for his estate, it was proper to receive the testimony of the attorney for the purpose of identifying the book; the fact that the map existed, and that it was a map delivered to the attorney by the widow, going to its identity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1656.]

5. WITNESSES—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

The delivery by the widow of a deceased owner of a map of a block platted by the deceased to the attorney for the estate of the deceased was not a privileged communication from client to attorney.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 759-762.]

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action to quiet title by C. E. Myers against Silas T. Kenyon and others. From an order denying a motion for a new trial after judgment for plaintiff, defendants appeal. Affirmed.

Stoney, Rouleau & Stoney, H. B. Montague, and A. S. Newburgh, for appellants. Edward F. Treadwell, for respondent.

COOPER, P. J. This action was brought to quiet the plaintiff's title to a right of way over a strip of land 18 feet in width, the fee of which is in defendants. Defendants deny that the plaintiff is the owner of the right of way, and ask to have their title quieted as against the plaintiff. Findings were filed, upon which judgment was entered for plaintiff. This appeal is from an order denying the defendants' motion for a new trial.

The question is as to whether or not the plaintiff is the owner of the alleged right of way. The court finds in effect that the de-

fendants' predecessors and grantors dedicated the said strip of land as an alleyway about the year 1883, and that ever since the plaintiff has openly, notoriously, continuously, and peaceably, under a claim of right so to do, and adversely, used said strip of land as an alleyway for ingress and egress to and from the lot of land owned by plaintiff and particularly described in the complaint. The findings are fully supported by the evidence, which we do not deem necessary to state in detail.

Prior to the year 1883 one Comerford was the owner of Horner's addition block 94, in the city and county of San Francisco, bounded by Duncan and Twenty-Seventh, Church and Sanchez streets, and was engaged in the business of building houses and selling them. He subdivided this block into lots fronting on Duncan and Twenty-Seventh streets 105 feet deep, which left a strip of land running through the block from Church to Sanchez street 18 feet wide, cutting the block in the center, the lots on the north side of the alley fronting on Twenty-Seventh street, and those on the south side fronting on Duncan street. Comerford built houses on the block, the back fences of the lots being on the line of the alleyway, with gates opening thereon. Each house so built covered the entire width of its lot, and had a back gate for an exit into the alleyway, or for an entrance from the alleyway. Comerford sold the lots with reference to this alleyway after he had so laid out the lots with the alleyway 18 feet wide, and stated to purchasers of the lots that the alleyway would be convenient for the owners. When plaintiff purchased his lot, he was shown a map in Comerford's office, on which the alleyway was laid out and platted. Comerford had a book in which he had all his property in San Francisco platted, and in which this block was platted with the alleyway laid out and marked "Comerford street." The alleyway, after being so opened, laid out, and platted, was at all times used, and has up to the present time been used, continuously by plaintiff and by all the other residents of the block as an open alleyway, without let or hindrance, and with no objection from Comerford during his lifetime. The owner of the block of land, having subdivided it into 50 lots, leaving an alleyway through the center, 25 lots on each side of it, and having sold the lots with reference to the map and alleyway, and received the money therefor from the purchasers of the lots, would be estopped from afterwards asserting title to the alleyway and closing it up as a right of way. Having left it open and upon the map while selling the lots, and receiving the money, he must continue to leave it open afterwards. Common honesty would require of such owner that he should not deceive or mislead any purchaser or sell him a lot under false pretenses. If, after the lots were sold, the owner could change his mind and close the ends of the alley, and use it as a stock corral, the owners of the lots would find their back gates opening into the corral. The

law will compel the owner to keep the alleyway open for the use of the owners of the lots in such case. It must follow that all subsequent purchasers would purchase with notice. One cannot purchase the land covered by such alleyway, with a line of houses on each side of it, and gates opening into it, it being in continual use every day, without opening his eyes and looking. In such case he cannot claim to be an innocent purchaser. He would get the title in fee to the land, but subject to the burden imposed upon it by the former owner. It needs no citation of authorities to sustain the principles here stated.

The defendants claim that the court erred in the admission of certain evidence referred to in exceptions 2 to 9, inclusive. The evidence related to the acts and conduct of Comerford in 1883 with reference to buildings upon the lots, back gates, maps, and statements to intending purchasers. The evidence was admissible, and went to the very essence of the plaintiff's case.

It was not error to receive the evidence of the witness Drum, for the purpose of identifying a book of maps in his possession as attorney for the estate of Comerford, deceased. The book contained the map of the block on which the alleyway was marked and laid out by Comerford in his lifetime. The fact that the map existed, that it was a map delivered to the witness by the widow of the deceased, went to its identity, and the "delivery of the map was not a privileged communication from client to attorney." It would be a strange doctrine that a client could deliver a map, deed, contract, or other document into the hands of his attorney, and then prevent such map or other document from ever being brought to light or produced, for the reason that such delivery was a privileged communication.

No other question is raised that merits discussion.

The order is affirmed.

We concur: KERRIGAN, J.; HALL, J.

7 Cal. App. 120

PEOPLE v. MALTAIS. (Cr. 55.)

(Court of Appeal, Third District, California.
Dec. 13, 1907.)

LARCENY—EVIDENCE—SUFFICIENCY.

In a prosecution for grand larceny, evidence held sufficient to sustain a conviction.

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Harry Maltais was convicted of grand larceny, and appeals. Affirmed.

B. K. Collier, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was accused by information of having on January 5, 1907, at the county of Siskiyou, unlawfully and fe-

loniously stolen \$80, lawful money of the United States, then and there the personal property of one J. Root, contrary, etc. He was found guilty of grand larceny and sentenced to four years' imprisonment in the state prison at San Quentin.

Defendant appeals from the judgment and from the order denying his motion for a new trial. He urges as grounds of appeal: First, that the evidence is insufficient, generally, to sustain the verdict; second, that the evidence is insufficient particularly, because the venue was not proven; third, that the court erred in overruling the objection made to a certain question asked by the prosecution of witness Ladue on cross-examination.

There is evidence tending to establish the following facts: Root, the complaining witness, came to the town of Dunsmuir from a lumber camp where he had been working, about midnight, or later, of January 4, 1905. He had come by way of Castella, where he had been drinking intoxicants to some extent. Arriving at Dunsmuir, he went to the Palm saloon, which was a rooming house as well as a saloon, and resumed his drinking and remained there at times most of the night. He went across the street during the night to the Weed restaurant, and had supper, and there met defendant, whom he had not before known or seen. He returned to the Palm saloon and defendant followed him. Root treated defendant and others several times, and finally toward the morning of January 5th asked for a room. He brought with him something over \$100 in \$20 gold pieces and some silver. When treating in the saloon, he displayed his purse and its contents in a way to apprise defendant of what money he had. When he asked for a room, defendant offered to show him to it, and did so, taking the key and unlocking the door. As Root was about starting to his room, he again made known his possession of the money in the hearing of defendant. On reaching the room, defendant returned to the saloon and got a couple of drinks, and took them to the room, where he and Root drank them. Root had meanwhile undressed and got in bed, placing his trousers under the pillow, leaving their legs hanging out. After drinking defendant left the room and Root went to sleep, not locking the door. He arose about 11 o'clock of that forenoon, and went down to the saloon, called for a drink, and, upon getting his purse, discovered that all the \$20 gold pieces were gone. He found in his coat pocket a \$10 bill which had been given him in part as change for a \$20 gold piece during his drinking carousal and some small silver. There was evidence that he had at least four \$20 pieces when he went to bed. Some time near noon of January 5th defendant deposited in the Dunsmuir State Bank four \$20 gold pieces, and it was the only time he had ever deposited any money there or transacted any business with the bank. At the time he remarked to the cashier, "You won't say

anything about this on the outside, will you?" There was evidence that defendant was working in the Weed restaurant at \$1.25 per day and board, and that he had been seen previously by persons who knew him and that he appeared to have no money except some small change. He cashed his certificate of deposit at the Weed Hotel on January 7th. Mr. Weed testified that he had known defendant as Mol-tin, and he had so signed his name and Weed called his attention to the name in the certificate as Maltals, to which defendant replied that it was a mistake though he had so signed his name at the bank. When Root started to go to his room, defendant said he knew about the rooms and would show him where to go, and there was evidence tending to show that defendant had never roomed there.

Defendant introduced some testimony tending to show that about Christmas he had one or two \$20 pieces, part of which he spent in saloons about that time, and that on December 31st defendant had drawn a chance at a raffle calling for \$1.25, but he "said he didn't have the money. Said he would pay for it that evening. He was working at the Weed lunch counter then. He came back that evening and paid it." Defendant testified that when he came to Dunsmuir he had about \$100, part of which he spent at saloons, but that the money deposited by him was his own which he had brought with him to that town. He explained that he deposited the money "so as not to gamble it away." He explained that he told the cashier not to mention the deposit because "parties would borrow it" if they knew he had it. He also testified: "I never before that time made a deposit of money in Dunsmuir. I never had enough at a time when I was there before to make a deposit." He had arrived at Dunsmuir with this and other money, amounting to over \$100, according to his testimony, on December 22d, but he did not explain why he had not deposited the money before the morning of January 5th. It is not necessary to further notice the testimony. It is chiefly circumstantial, and not strongly inculpatory, but we cannot say that it was wholly insufficient to justify the verdict of guilty. *People v. Wong Chong Suey*, 110 Cal. 117, 42 Pac. 420. The venue was distinctly proved. The testimony upon the point was doubtless overlooked by defendant's attorney in preparing his brief.

A witness had testified to defendant's having two \$20 gold pieces when he came into witness' saloon; that he had spent \$5 or \$6 there at that time. On cross-examination he was asked: "And he may have spent that much or more in every saloon in town that day, so far as you know?" The record shows that, while the court overruled defendant's objection to the question, the witness made no answer.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

7 Cal. App. 103

PEOPLE v. TRASK. (Cr. 105.)

(Court of Appeal, First District, California.
Dec. 11, 1907.)

1. CRIMINAL LAW—APPEAL—EXCEPTIONS—EXAMINATION OF JURORS.

The course of the court relative to the examination of jurors cannot be reviewed in the absence of exceptions reserved thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2658-2661.]

2. JURY—PEREMPTORY CHALLENGES—PRELIMINARY EXAMINATION.

Defendant may not put questions to jurors simply to gain information as to the advisability of exercising peremptory challenges.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 561-561.]

3. SAME—ACTUAL BIAS—QUESTIONS.

The questions to a juror: (1) Have you ever served as a juror on a charge of robbery? (2) how long have you served as a juror in this department of the court? (3) how many men have you ever convicted of robbery? and (4) what is your age?—are irrelevant and immaterial on the matter of actual bias.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 561-561.]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Grant Trask was convicted of robbery, and appeals. Affirmed.

Wm. M. Gibson, for appellant. Attorney General Webb and W. H. Langdon, Dist. Atty., for the People.

HALL, J. This is an appeal from a judgment convicting defendant of the crime of robbery, and also from the order denying his motion for a new trial.

The only reasons suggested why the judgment and order should be reversed grow out of the method adopted by the trial court for the impanelment of the jury to try defendant. Immediately after the first 12 names had been drawn, and the persons so drawn had been sworn to answer questions, the judge of the court examined each of them as to his qualifications, and each by his answers showed himself possessed of all the statutory qualifications, and each answered that he had never heard of the case, did not know any of the parties, counsel, or witnesses, and had no opinion as to the guilt or innocence of the defendant, and had never expressed any such opinion. The judge thereupon announced that all of the jurors appeared *prima facie* to be qualified jurors, but that either counsel could challenge either one or all of the jurors for any statutory cause, and, if such challenge was not denied by opposing counsel, the challenge would be allowed, and the juror excused without further examination; but that, if the challenge was denied by opposing counsel, then, on the issue so made, the juror challenged could be questioned and examined by counsel on both sides. The judge further gave at some length his reasons for the course thus adopted, making it quite clear that he did not consider that counsel had any right to exam-

line a juror on the voir dire in advance of a challenge to such juror.

The brief of appellant is almost entirely devoted to a discussion of what he claims to be error in this action of the court. But he nowhere points out where the bill of exceptions shows that he either objected or excepted to this action of the court, and after a diligent examination of the bill of exceptions we have not been able to find any such objection or exception noted therein. Nowhere do we find that defendant's counsel objected to the court examining the jurors, or that he expressed any wish to examine them as to their qualifications before challenging, except that he did ask to be allowed to put three stated questions to each juror "solely for the purpose of determining whether he should exercise peremptory challenges." Defendant having reserved no exception to the action of the court above set forth, we are not called upon to determine whether the course adopted by the court was erroneous or not.

Defendant asked permission to ask of each juror, before challenging either of them for cause, three questions, viz.: Where do you live? What is your business? Are you a man of family? "solely for the purpose of determining whether he should exercise his peremptory challenges," as he himself stated. The court refused to allow such questions to be put by counsel, or to put them himself, but stated that counsel could ask them subsequently should they become relevant or material to any challenge that might be interposed. To this ruling defendant reserved an exception. The court, however, did not err in so ruling. Defendant is not entitled to put questions simply for the purpose of gaining information as to the advisability of exercising peremptory challenges. *People v. Hamilton*, 62 Cal. 382; *People v. Brittan*, 118 Cal. 409, 50 Pac. 664. Defendant successively challenged each of the jurors "under subdivision 2 of section 1073 of the Penal Code," that is, for actual bias and, each of said challenges being denied by the district attorney, defendant asked each of said jurors the following questions, and no others, viz.: (1) Have you ever served as a juror on a charge of robbery? (2) how long have you served as a juror in this department of the superior court? (3) how many men have you ever convicted for robbery? and (4) what is your age? The court sustained the objection made by the district attorney that the questions were incompetent, irrelevant, and immaterial to the issue being tried, and the defendant excepted. An answer to any of the above questions could not have tended to show the state of mind of the juror with reference to the case or to either of the parties. The questions were therefore irrelevant and immaterial to the question then being tried, and the objections were properly overruled. *People v. Brittan*, 118 Cal. 409, 50 Pac. 664. No other evidence being offered, the court properly overruled the challenge to each of said jurors.

There being no other reasons suggested why the judgment or order should be reversed, both judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

(7 Cal. App. 31)

WEST v. WILL C. PRATHER & CO.

(Civ. 459.)

(Court of Appeal, Second District, California, Dec. 4, 1907.)

1. CORPORATIONS—CONTRACTS—EXECUTION—REPUUDIATION—ESTOPPEL.

Plaintiff, having a lease of a hotel from defendant, agreed with its president to cancel the same and surrender possession to defendant in consideration of its guaranteeing to pay certain sums specified in the contract, and furnish plaintiff board and room in the hotel for a year, or at his option pay him \$25 per month in lieu thereof. Plaintiff delivered possession, canceled the lease, and defendant immediately leased the property to another. Plaintiff remained at the hotel for 10 days, when defendant paid for his board and room up to that time, and denied further obligation under the contract. Held, that though the contract was defectively executed, so that the acceptance and retention of benefits would not constitute a ratification as provided by Civ. Code, §§ 2309, 2310, the facts constituted an estoppel precluding the corporation from repudiating the contract.

2. SAME—OFFICERS—AUTHORITY OF PRESIDENT—EVIDENCE.

In an action for breach of a corporation's contract executed between plaintiff and its president, plaintiff having testified that he called at the company's office on two occasions where he talked with such president, the question as to who was operating the business there was admissible to show the president's implied powers, and that he was its managing agent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1735.]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by L. M. West against Will C. Prather & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

Thornton Alexander, for appellant. Jones & Drake, for respondent.

SHAW, J. Judgment was rendered herein for plaintiff, from which defendant appeals upon a bill of exceptions.

The action is based upon a contract alleged to have been made between the parties, whereby plaintiff, who was in possession of a hotel under a lease thereof, agreed to cancel said lease and surrender possession of the property, with certain furnishings, to defendant, who agreed to guarantee payment of certain sums specified in said contract and furnish plaintiff room and board in said hotel for a period of one year; or, at its option, pay him at the rate of \$25 per month in lieu thereof. Plaintiff alleges that, pursuant to the terms of the contract, he canceled the lease and delivered possession of the hotel and other property mentioned in the contract to defendant, who immediately leased the same to another party. Plaintiff remained at the hotel for 10

days, when defendant paid the proprietor the sum of \$8.33, covering the cost of his room and board for such time, and denied any further obligation under said contract.

Defendant is a corporation and the transaction is admittedly within its powers. No corporate seal was attached to the contract, but it was signed: "Will C. Prather & Co., Will C. Prather, Prest." The defense is that said Prather as president of said company had no authority to execute the contract on its behalf, and therefore the court erred in receiving said contract in evidence unaccompanied as it was by a copy of the resolution authorizing its execution. The uncontradicted evidence shows that plaintiff delivered the property to the corporation, and that it, within a few hours after the execution of the contract, placed another party in possession of the premises under a new lease, from whom it collected rent. Prather, on behalf of the company, had charge of all the negotiations relating to the transaction, and subsequent lease of the hotel. Having by virtue of this contract obtained a cancellation of plaintiff's lease, the transfer of certain personal property, and ousted plaintiff from possession of the hotel, which it leases to another party, the defendant by its counsel solemnly avers that the act of its president in executing the contract on its behalf was unauthorized. The evidence is sufficient to show that Prather was held out by the corporation as possessing the authority which he assumed. *Crowley v. Genesee Mining Co.*, 55 Cal. 273; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 Pac. 527. The company, with full knowledge of all the facts involved, imparted through its president acting in its behalf, accepted and retained the benefits of the transaction. Conceding the contract to be one required to be in writing, and defectively executed by reason whereof such acceptance and retention of benefits would not constitute a ratification (sections 2309, 2310, Civ. Code), the facts nevertheless constitute an estoppel against the attempted repudiation of the contract on the part of the corporation (*Phillips v. Sanger Lumber Co.*, 130 Cal. 431, 62 Pac. 749; *Blood v. La Serena L. & W. Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252).

It is also contended that the court erred in overruling defendant's objection to the question put to the plaintiff, as follows: "Who was operating the business there?" Plaintiff had testified to calling at the office of the company upon two occasions, where he had talked with Prather. Appellant admits the purpose of the question was to elicit evidence tending to show Prather's implied powers and that he was managing agent of the company. Such being its purpose, the ruling of the court upon the objection was not error.

Our views render it unnecessary to discuss the ruling of the court in denying defendant's motion for a nonsuit.

Judgment affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

7 Cal. App. 184

BRAY v. COHN. (Civ. 417.)

(Court of Appeal, Third District, California.
Dec. 14, 1907.)

1. PRINCIPAL AND SURETY — PAYMENT BY SURETY—EFFECT.

Notwithstanding Civ. Code, §§ 2348, 2849, providing that a surety on satisfying the obligation is entitled to enforce every remedy and to the benefit of every security which the creditor has against the principal, payment of a note by the surety thereof extinguishes the obligation, and his remedy is on the implied obligation of the principal to reimburse him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 524.]

2. LIMITATIONS OF ACTIONS—ACTIONS ON IMPLIED OBLIGATIONS.

The remedy on the implied obligation of the principal debtor to reimburse the surety paying the debt is barred in two years after the return to the state of the principal debtor after the payment of the debt by the surety.

Appeal from Superior Court, Kings County;
M. L. Short, Judge.

Action by M. G. Bray against D. S. Cohn. From a judgment for defendant on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

R. H. Countryman, for appellant. Charles W. Slack and T. M. McNamara, for respondent.

HART, J. A demurrer to the complaint upon the ground that this action was barred by the provisions of section 339, subd. 1, Code Civ. Proc., was sustained, without leave to amend, and thereafter judgment entered in favor of respondent. From said judgment, this appeal is taken.

On the 30th day of January, 1899, the respondent, Cohn, executed and delivered to the Bank of British Columbia, at the city of San Francisco, his promissory note for the sum of \$3,000, with interest at the rate of 7 per cent. per annum, said note being payable one day after date. At the request of Cohn, and for the purpose of enabling him to secure said money, and "as part of the same transaction," one Moses Samuel, in writing, promised and agreed with said Bank of British Columbia "that, if said defendant did not pay said promissory note, he [said Samuel] would pay the same." On or about the 30th day of January, 1899, Cohn departed from the state of California, and did not return until about the 23d day of July, 1901, and defendant during the period between the said 30th day of January, 1899, and the said 23d day of July, 1901, was absent from the state. Shortly after Cohn's departure from the state, the Bank of British Columbia made a demand on Samuel for payment of accrued interest upon the note, which interest was paid by him, and the said Samuel continued, upon the demand of said bank, to pay the interest accruing from time to time on said note until the 7th day of August, 1900, when, written demand having previously been made upon him by the bank for its payment, Samuel paid the principal and the unpaid interest upon said note. Thereup-

on, the complaint alleges, the bank surrendered and delivered said note to said Moses Samuel. Thereafter Samuel assigned the note to the plaintiff, who filed his complaint, declaring upon said note, on the 15th day of June, 1905, a little less than four years after the return of the defendant to the state.

The contention of the appellant is that the payment by his assignor of the note and the surrender and delivery to him of the same by the bank amounted to an assignment thereof, and that, therefore, he was subrogated to all the rights exercisable by the original payee thereunder. Upon this assumption (and if well founded his contention would be true) he claims that he was entitled to institute suit for recovery upon the note at any time within four years from the date of the return of the defendant to this state. In support of this position, appellant relies upon section 2848 of the Civil Code, and insists that section 1473 of said Code has no application to sureties. The respondent, on the other hand, maintains that section 1473 of the Civil Code does govern the rights of sureties in a case like the present one, and that consequently the payment of the note by Samuel, who was a surety, extinguished its obligation, and that his only remedy against the principal obligor was by an action upon an implied obligation; that is, in assumpsit for money expended for and in behalf of the defendant. The question presented by the demurrer is no longer an open one in this state. Section 2848 of the Civil Code provides that a surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and section 2849 of the same Code declares that a "surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety at the time of entering into the contract of suretyship, or acquired by him afterwards," etc. Those sections are construed by the appellant as having the effect of perpetuating the life of the obligation after the debt has been paid, and passes for enforcement to the surety, who has made payment. But our appellate courts have, in some comparatively late cases, given those sections an interpretation which does not harmonize with the views of the appellant. *Yule v. Bishop*, 133 Cal. 578, 65 Pac. 1094. In that case, in which the point under discussion is elaborately and exhaustively considered, it is said: "In this state, as early as 1862, in the case of *Chipman v. Morrill*, 20 Cal. 130, it was decided, in effect, that by the surety's payment the principal obligation was extinguished, and that the action of the surety was upon the assumpsit which the law implies where a surety is compelled to advance money for his principal. That there might be no room for controversy, with the enactment of the Code the question was laid at rest in this state by the declaration that the full performance of the obligation by any person on behalf

of the principal with his assent, if accepted by the creditor, extinguishes the obligation"—citing section 1473 of the Civil Code.

The more recent case of *Crystal v. Hutton*, 1 Cal. App. 251, 81 Pac. 1115, reaffirms the rule as declared in *Yule v. Bishop*, supra, and cites a large number of California cases to the same effect. In that case the appellate court, speaking through Presiding Justice Chipman, says: "However the question may be regarded elsewhere, we think the rule firmly settled in this state that payment by the surety of the obligation evidenced by a promissory note under the circumstances shown in the complaint extinguishes the obligation, and that the remedy given the surety in such case is upon the implied obligation of the principal debtor to reimburse the surety 'what he has expended.'"

The remedy of the plaintiff being, therefore, upon the implied obligation, it was his duty, in order to have preserved his right of action, to have brought his suit within two years from the date of the return of the defendant to the state. Having failed to do this, the demurrer was properly sustained upon the ground that his right of action was barred.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

7 Cal. App. 140

LINDLEY v. BLUMBERG et al. (Civ. 426.)
(Court of Appeal, Second District, California.
Dec. 18, 1907. Rehearing Denied Jan. 17,
1908; Denied by Supreme Court Feb. 13,
1908.)

1. EVIDENCE — SUFFICIENCY — INCONSISTENT TESTIMONY.

Positive testimony on direct examination, though inconsistent with that given on cross-examination, is sufficient to support a finding of the trial court.

2. TRUSTS—RESULTING TRUST—PART PAYMENT OF CONSIDERATION — RELATION BETWEEN PARTIES.

Where a wife contributes \$800 to a \$1,750 payment on land purchased in her husband's name and a mortgage is given for the balance, a resulting trust arises in favor of the wife for sixteen thirty-fifths of the property and in favor of the community for the balance.

3. VENDOR AND PURCHASER—BONA FIDE PURCHASER—EVIDENCE.

Evidence held sufficient to sustain a finding that a conveyance by a husband to his wife was for a valuable consideration.

4. CONTRACTS—"VALUABLE CONSIDERATION."

Valuable consideration is such as money or the like, and the adequacy or inadequacy of the amount or its disproportion to the actual value of the property does not affect the question of the kind of consideration, since the adequacy of consideration is merely an element of good faith, and has no bearing upon whether the consideration is a valuable or good one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 222-232.

For other definitions, see Words and Phrases, vol. 8, pp. 7271-7273.]

5. VENDOR AND PURCHASER—PURCHASE PRICE —PAYMENT.

Plaintiff leased premises for five years, with the privilege of buying at any time during the

life of the lease. He built a barn upon the premises, and paid the rent for three years, and then sought specific performance of the option to purchase. *Held*, that the rent paid and the cost of the barn were not payments on the purchase price of the property, but, considered most favorably to plaintiff, were merely payments for the right to buy at a specified price within a certain time.

6. SAME—BONA FIDE PURCHASER—NOTICE.

To entitle a party to protection as a subsequent purchaser in good faith and for value, as against the title of a grantee under a prior unrecorded deed, he must aver and prove the possession of his grantor, purchase of the premises, the payment of the purchase money in good faith, without notice, actual or constructive, prior to and down to the time of its payment. Hence, where one holding an option to purchase land had notice of a prior unrecorded deed, before he exercised the option or paid the purchase price he is not a bona fide purchaser, and cannot recover.

7. SPECIFIC PERFORMANCE—RELATION—RECOVERY OF PART PAYMENT.

If plaintiff made a payment under an option to purchase land belonging to defendant under a prior unrecorded deed, of which he had no notice, and both plaintiff and defendant acted in good faith, plaintiff could recover from defendant only the amount actually paid before notice of defendant's rights, since he is protected only to the extent that he is hurt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 412-419.]

8. VENDOR AND PURCHASER—BONA FIDE PURCHASER—STATUTORY PROVISIONS.

Civ. Code, § 1214, provides that a conveyance of real property is void as against a subsequent purchaser in good faith for a valuable consideration whose conveyance is first duly recorded. Plaintiff rented land for the term of five years, with an option to purchase during the life of the lease. Defendant held a prior unrecorded deed from plaintiff's lessor, which deed was not recorded until after the recording of the lease and option. Plaintiff built a barn on the premises and paid the rent, but did not offer to exercise the option until after the recording of defendant's deed. *Held*, that plaintiff was not a subsequent purchaser in good faith for a valuable consideration within the meaning of the section.

9. SAME—DEFENSES—ESTOPPEL.

In an action for specific performance of an option to purchase land during the life of a five-year lease which contained the option, it appeared that defendant held a prior deed, which was not recorded until after the record of the lease and option; that defendant knew of the execution of the lease by her husband, who was her grantor, but did not know of the option it contained; and that plaintiff erected a barn on the premises in question, but there was no showing as to the time the barn was built and no attempt to exercise the option until after defendant's deed was recorded. *Held*, that defendant was not estopped to assert her title against plaintiff's option, there being no act or failure to act on her part which resulted in injury to plaintiff or which by unfair means gave her an advantage over him.

10. SPECIFIC PERFORMANCE—ALTERNATIVE RELIEF—DAMAGES—PRESUMPTION.

Where the court, in an action for specific performance of an option to purchase land during the life of a five-year lease which contained the option, found the value of the property at the time of making the lease and at the time of the trial, but there was no evidence or finding as to any value at any intervening time, it must be presumed that there was no increase in value from the time of making the lease up to the time plaintiff attempted to exercise his option, at which time he had constructive notice of defend-

ant's prior deed from the lessor, and hence plaintiff could recover no damages for failure to convey.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 412-422.]

11. TRIAL—TRIAL BY COURT—FINDINGS—MATTERS ALLEGED BUT NOT PROVED.

In the absence of evidence to support an allegation necessary to be proved, the finding upon the issue raised thereby should be against the person making and failing to prove the allegation.

12. VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE.

Though defendant asserts a claim to property, if no knowledge of the claim is brought home to plaintiff, he will not be affected by the assertion to others of the claim.

13. SPECIFIC PERFORMANCE—REMEDY AGAINST GRANTEE UNDER OR BY UNRECORDED DEED.

Where both parties acted in good faith, one holding possession of land under a lease and option to purchase which has been recorded is not entitled to compel specific performance of the option by the grantee claiming under a prior unrecorded deed from the same person.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by S. K. Lindley against Mrs. F. H. Blumberg and others. From a judgment for defendant Dina E. Simpson, and an order denying a new trial, plaintiff appeals. Affirmed.

J. S. Chapman and Ward Chapman, for appellant. C. L. Shinn and McNutt & Hannon, for respondents.

TAGGART, J. This is an action to compel specific performance of an option to purchase real estate. The option is contained in a lease of the premises, which are the subject of the option. Judgment was for defendant Dina E. Simpson, and plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

On the 17th day of January, 1901, William Simpson made a lease to plaintiff of the premises in dispute for the term of five years from that date, at a monthly rental of \$10, payable quarterly in advance. The lease contained an option in the words and figures following, to wit: "The party of the first part hereby gives to the party of the second part, his heirs and assigns, the exclusive right to purchase said property for eighty (\$80) dollars per front foot cash during the life of this lease, and upon payment of said amount agrees to furnish a good deed and unlimited certificate of title from Title Insurance & Trust Company, or Title Guarantee & Trust Company, of Los Angeles, showing said property clear of all incumbrance." This instrument was regularly recorded in the records of leases of Los Angeles county on January 28, 1901. On August 20, 1902, William Simpson died testate, and letters testamentary issued to the defendant Dina E. Simpson, his widow, as executrix, on the 24th day of September, 1902, and she thereupon qualified as such executrix. On September 23, 1902, the Union Bank of Savings, which had been the designated agent to receive the rent for said

property, refused to receive the rent for the quarter beginning October, 1902, claiming to act upon notice given by Dina E. Simpson, both individually and as executrix. On October 2, 1902, Mrs. Simpson notified plaintiff that she was the owner in fee of the leased premises by virtue of a conveyance thereof to her by William Simpson by deed dated October 20, 1896. This deed was not recorded in the office of the recorder of Los Angeles county until August 22, 1902.

By a decree of distribution entered in the estate of William Simpson, deceased, on the 15th day of February, 1904, the whole of said estate was distributed to the defendant Dina E. Simpson, but the lot here in question was not described in said decree. On the 23d day of February, 1904, plaintiff, claiming to exercise his right of purchase under said option, offered to pay to defendant the purchase price for the lot in gold coin, as provided in the option given by William Simpson, but she refused to accept the same or to convey the property to plaintiff. Plaintiff paid all rent due to the time the above notice was given, and has regularly tendered that falling due since then, at the times specified in the lease, but defendant Simpson refused to receive such rent either as executrix or individually. A number of defenses, based upon allegations of weakness of mind of William Simpson, and acts of fraud and undue influence perpetrated in procuring the execution of the option, were presented by defendants' answer to the complaint; but, these were eliminated from consideration here by the rulings of the court upon the demurrer to the answer, and its findings of good faith upon the part of plaintiff in all transactions connected with the execution of the lease and option.

The court found that a valuable and adequate consideration was given for the lease and the option contained therein; that the property leased had no rental value in the market, and the premises were of the value of only \$50 per front foot at the time of the execution of the writing containing the lease and option; that plaintiff erected a barn on said premises at a cost of \$300 after said instrument was executed; that he would not have rented said premises or constructed said barn but for the option in said lease; that this fact was known to the lessor at the time the lease was made; that said contract was fair and just to the lessor; that plaintiff paid the rent to William Simpson up to the time of his death, and that the defendant Dina E. Simpson knew, or could have learned, that said payments were being made in pursuance of said lease; that she had knowledge of the making of the lease on the day it was executed, but did not know any of its terms until after its execution, and did not know that it contained the option until 10 days later; that plaintiff had no notice or information at the time of the execution of the lease that Dina E. Simpson had any right, title, or interest in the property. The findings upon which the

judgment in favor of the defendant rests may be summarized as follows: She was not personally present at the time the lease was executed, and did not know its contents until 10 days thereafter. It is not true that the lease or option was given with her full knowledge or consent or acquiescence, and it is not true that at the time of the execution of said instrument, nor at any other time until the 2d of October, 1902, she did not assert or claim any right, title, or interest in said property, or make any objection to said lease or option, but she did not make any such objections to plaintiff until that date. The deed from William Simpson to her was for a valuable consideration and conveyed the title to the leased premises, and she was the owner of said property from the date of that deed. The market value of the premises have greatly increased since January 17, 1901, and the premises, at the time of the trial, were worth about \$29,000. Plaintiff has received in rents from said premises more than sufficient to compensate him for the rents paid by him and the cost of the improvements placed on the property by him, and has been fully reimbursed and recouped for all expenditures made by him under said lease and option. The conclusions of the trial court from the facts found are that plaintiff is not a purchaser or incumbrancer in good faith so as to entitle him to a specific performance of his contract against the defendant Dina E. Simpson, and that she is not estopped from asserting her title against the option of plaintiff. Appellant contends that the judgment is not supported by the findings; but, if the court so contrives the findings as to sustain the judgment, it should nevertheless reverse the judgment and order a new trial, because the evidence is insufficient to support the findings.

The finding that the defendant Dina E. Simpson acquired the premises from her husband in 1896 for a valuable consideration is attacked by appellant upon his motion for a new trial as not being supported by the evidence in two respects—first, that the deed was not delivered; and, second, that a valuable consideration was not shown. In regard to the first matter, the testimony of the witness Samson, who drew the deed, is: "I drew it up, and I made it (the deed), and he signed it and delivered it to his wife, and she delivered it to me and wanted I should take care of it." It is contended that on cross-examination the testimony of the witness was inconsistent with his statement on direct examination. Assuming this to be true, the trial court might elect which, if either statement, it would believe, and the finding indicates which it accepted as true; but we do not think the two statements are necessarily inconsistent. The evidence shows that the lot was purchased in the name of Wm. Simpson in 1895 for \$3,750—\$1,750 in cash, and the balance secured by mortgage on the property. Eight hundred dollars of the de-

fendant's money "went into the property." There is no showing whether this was a loan to William Simpson or a contribution to the cash paid for the property. If the former, the property became community property and William Simpson owed defendant \$800; if the latter was the case, a resulting trust arose in favor of defendant to the extent of sixteen thirty-fifths and in favor of the community for the other nineteen thirty-fifths of the property. If William Simpson made the deed of October 20, 1896, to defendant in payment of an existing debt of \$800 due to her from him, the consideration was a valuable one, and if he conveyed to her as trustee of a resulting trust she took sixteen thirty-fifths in execution of the trust and the rest, or community portion of the property, passed to her for the consideration mentioned in the deed—\$1 and love and affection. If it were necessary to sustain the finding that the conveyance was for a valuable consideration, there is evidence sufficient to do so. *Hussey v. Castle*, 41 Cal. 241. A valuable consideration is such as money or the like and the adequacy or inadequacy of the amount, or its disproportion to the actual value of the property, does not affect the question of the kind of consideration. The adequacy of the consideration is an element of the good faith of the transaction, and has no bearing upon whether the consideration is a valuable or a good one. *Frey v. Clifford*, 44 Cal. 342; *Clark v. Troy*, 20 Cal. 224. Mrs. Simpson, then, was the owner of the property at the time the premises were leased to the plaintiff, and when the latter purchased the option. Under the findings, these two contracts must be considered as one. The court found the property had no rental value at the time the lease was made. In the absence of any finding that it subsequently acquired a rental value, we may assume that the entire promise to pay \$10 per month for five years was in consideration for the option. The erection of the \$300 barn may also be attributed to plaintiff's desire to procure the option and as a part payment therefor. Taken in the the most favorable light for the appellant, he paid \$900 for the option, \$300 in building a barn upon the premises, and the \$600 which he obligated himself to pay at the rate of \$10 per month, quarterly in advance, for five years.

This price paid and to be paid for the right to purchase within five years should not be confused with the purchase price of the property. The latter was to be \$80 per front foot, whether the right was exercised the day following the execution of the option or the last day of the five years; so that the \$900 was no part of the purchase price of the property. The option was purely executory in its character, and on October 2, 1902, when defendant notified appellant of her title to the property, no part of the purchase price of the lot had been paid, and plaintiff had not become a purchaser of the property. All his transactions were conduct-

ed in good faith, and for all that he had received he had given an adequate and valuable consideration, and the agreed price for the property was adequate at the time the option was given, and this was sufficient against the maker of the option; but he had not purchased the property. He did not exercise his right to do so under the option until February, 1904, one year and four months after he had notice of defendant's unrecorded deed.

To entitle a party to protection as a subsequent purchaser in good faith and for value against the title of a grantee under a prior unrecorded deed, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment; for if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser. *Eversdon v. Mayhew*, 65 Cal. 163, 3 Pac. 641; *Wilhoit v. Lyons*, 98 Cal. 413, 33 Pac. 325; *Beattie v. Crewdson*, 124 Cal. 579, 57 Pac. 463; *Kenniff v. Caulfield*, 140 Cal. 45, 73 Pac. 803. If it were conceded that the entire \$900 were paid, and agreed to be paid, as part of the purchase price for the property (only the rent from January, 1901, to October, 1902, actually was paid), defendant would only be required to refund to plaintiff the amount paid by him before receiving notice of her right in order to enforce her claim to the property. Plaintiff is entitled to be protected only to the extent that he is hurt. *Davis v. Ward*, 109 Cal. 191, 41 Pac. 1010, 50 Am. St. Rep. 29; *Combination Land Co. v. Morgan*, 95 Cal. 552, 30 Pac. 1102. The finding of the court that he has been fully reimbursed and recouped for expenditures made by him under the lease and option recognizes his right to protection pro tanto. The conclusion of the trial court that plaintiff was not a subsequent purchaser in good faith and for a valuable consideration, as those terms are used in section 1214 of the Civil Code, is sustained by the record.

We are likewise unable to agree with appellant's contention that the conclusion of the trial court that respondent is not estopped from asserting her title against plaintiff's option is unsupported by the findings. In order that she should be estopped it is necessary that some act or failure to act upon her part should have resulted in injury to plaintiff, or in her acquiring some advantage over him by unfair means. In other words, to quote from appellant's brief: "To raise an equitable estoppel, the party estopped must by his declaration or conduct (or silence) mislead another to his prejudice so that it would be a fraud upon him to allow the true state of facts to be proved (*Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365), and the representations or conduct must either have been done with intent to deceive,

or with such carelessness or culpable negligence as to amount to a constructive fraud (*Griffeth v. Brown*, 76 Cal. 280, 18 Pac. 372). The vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." *Dickerson v. Colgrove*, 100 U. S. 580, 25 L. Ed. 618.

The question whether respondent is estopped by her acts or silence to set up her prior title against appellant's depends upon her knowledge of her husband's acts in relation to the leased property. At the time the lease was made respondent knew that her husband was going to lease the property. The same day, when her husband came home, she learned that the lease had been executed, and that he had leased it for a term of five years. She had no other knowledge of the contents of the lease or the option until 10 days thereafter. There is no evidence and no finding as to when the barn was erected upon the premises. It might have been and probably was built within 10 days after the execution of the lease and before respondent had knowledge of the option. Had she known of its construction, she would have been justified in assuming that it was built in order that plaintiff might use the premises to advantage under the lease. In the absence of evidence and finding, the presumption must be in support of the judgment. As respondent had no knowledge that the barn was constructed by reason of the option, no estoppel can be imputed to her on this account.

Plaintiff's status was not changed from that time until October 2, 1902, except by the payment of the \$10 per month rent. The court finds the value of the property was \$50 per front foot at the time of the making of the lease, and the value of the lot at the time of the trial (October, 1905) to be in gross \$29,000. There is neither evidence nor finding to show value at any intervening time. There is nothing by which it can be determined how long the market value of the property continued at \$50 per front foot. If, as appellant contends, he was prejudiced by being prevented from buying other property in the neighborhood at \$50 or \$80 per front foot and holding it until its value increased to \$376 per front foot, this was not because of any act of respondent. In the absence of evidence or finding as to intermediate values, it will be presumed in support of the trial court's finding that respondent was not estopped, and that \$50 per foot continued to be the value of the property until after appellant had notice of respondent's title and claim. Having had this notice before the rise in values, appellant cannot successfully contend that any loss or injury of this kind was due to the act of respondent. He was under no obligation to carry out the option or pay any part of the

\$80 per front foot purchase price, and could have released himself from the option by simply withdrawing at any time.

All the obligations entered into by appellant so far as the option was concerned were without knowledge of the respondent at the time the obligations were assumed. The appreciation in value of the property was after appellant had notice of respondent's title and information that she intended to maintain her rights against the option. It cannot therefore be said that appellant suffered any loss or injury on account of disappointing expectations for which respondent was responsible.

Finding 10 is attacked by appellant as unsupported by the evidence. This finding merely negatives certain allegations of the complaint, and when considered with finding 14 distinguishes between the knowledge upon the part of the respondent that the lease had been made and knowledge of its contents. The testimony of the respondent is that she and her husband had talked about leasing the property for three years, and that the agent who drew the lease called and asked her if she was willing to the leasing of Main street and she answered, "Certainly." When her husband came home that evening he told her he had leased for five years. She negatives all other knowledge of the contents until several days after, when her husband told her that he had given the option. There is a direct conflict between her evidence and that of the agent in this respect, but the evidence supports the inference that neither the lease nor the option were given with full knowledge, consent, or acquiescence on her part. There is an absence of evidence in respect to the other part of finding 10, which is assailed, to wit, that "It is not true that at the time of the execution of said instrument, nor at any other time until the 2d day of October, 1902, said defendant did not assert or claim any right, title, or interest in said property, nor make any objection to said lease or option." This was a negative allegation of the complaint which was denied by the answer. In the absence of evidence to support an allegation necessary to be proven, the finding upon the issue raised thereby should be against the person alleging and failing to prove it. This rule was followed by the trial court; but we do not think the finding material, as it is immediately followed by the further finding that she made no claim or objection to the plaintiff until October 2, 1902. If no knowledge of her claim was brought home to the plaintiff, he would not be affected by such assertion to others. The point that the evidence is insufficient to support the finding of a delivery of the deed of October 20, 1896, has heretofore been considered, as has also the evidence in relation to the purchase of the property in 1896 by William Simpson and respondent's contribution to the purchase price in that transaction. The weak-

nesses and inconsistencies and conflicts in the evidence which supports the findings to which our attention has been called by appellant are apparent; but it is not necessary that the trial court accept and act upon the testimony that appeals most strongly to us in order to sustain its findings against an attack for insufficiency of the evidence. There is evidence, and the trial court has accepted and acted upon it.

The good faith of all parties is declared by the decision of the trial court, and the question, is a party holding possession of real property under a lease and option to purchase, which has been recorded, entitled to compel a specific performance of the option by a grantee claiming under a prior unrecorded deed from the same person? was answered by denying specific performance. There is evidence in support of the inference of fact, and the conclusion of law is correct.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 116

HERZOG v. HEMPHILL et al. (Civ. 388.)

(Court of Appeal, First District, California.

Dec. 12, 1907.)

1. NEGLIGENCE—CONDITION OF BUILDINGS—DUTY OF OCCUPANT TO LICENSEE.

Deceased entered defendants' tamale stand with another, by the license and permission of defendants, and volunteered to show his companion the way to the urinal, often used by customers, and always pointed out by defendants, when requested, and permission to use which was always granted by them. The route thereto lay through an adjoining room to a stair landing, with two flights of stairs; the one to the left going above, and that to the right going down to the urinal in the basement. The landing was not lighted, and because of that deceased fell into a hole to the left of the left-hand stairway, and received the injuries from which he died. The urinal was not designed for the use of patrons of the stand, nor was it designed for use or used as a part of the business conducted on the premises. *Held*, that deceased was a mere licensee, so that defendants assumed no duty to him except not to inflict any wanton or willful injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 41-47.]

2. SAME—PERSONS INVITED—WHAT IS INVITATION.

The owner or occupier of lands or buildings must exercise ordinary care to render the premises reasonably safe to persons whom he induces to come thereon by invitation, express or implied, which invitation may be manifested by the arrangement of the premises or the conduct of the owner; but mere permission, or a habit of an owner in allowing people to enter and use a certain portion of his premises, is not indicative of an invitation, but a license.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 41-47.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Joseph Herzog, administrator, against Lizzie J. Hemphill and another.

From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

William R. Daingerfield and James A. Ballentine, for appellant. Garber, Creswell & Garber and Morrison & Cope, for respondents.

KERRIGAN, J. This is an action for damages for the death of plaintiff's intestate alleged to have been caused by the defendants' negligence. The appeal is from the judgment entered in favor of the defendants upon the sustaining of their demurrer to the complaint, the plaintiff having declined to amend it.

The complaint in substance alleges that the defendants were in possession of certain premises in San Francisco, and had the sole management and control thereof, including a tamale stand, at which stand tamales were sold to the public; that Alfred N. Herzog, the deceased, entered the premises June 6, 1901, at about 10 o'clock in the evening to purchase tamales, and that he was accompanied by a friend, Miller. The complaint alleges that the deceased and his friend entered said premises by license and permission of the defendants; that while there Miller expressed the desire to visit the urinal on the premises, and the deceased volunteered to show him the way thereto, deceased knowing its location, and Miller never having visited it; that prior to the time of this accident the urinal had often been used by patrons of the premises by license and permission of the defendants, and its location was shown or told by all and any of said defendants to any of said customers whenever requested, and said patrons and their friends were at all times allowed to and did use the same; that the route from the tamale stand to the urinal was through a door adjoining the tamale stand into an open room, thence across said room to a stair landing, wherefrom two sets of stairs proceeded, the one at the left upward to the second story, the one at the right downward to the basement and urinal; that within two feet of said door, and at the left of said left-hand stairway there was a "stair landing, recess, or cul-de-sac, about two feet square, terminating in an abrupt precipice, or death trap, wholly unfenced, unprotected, and unlighted"; that deceased went with his friend through said door into said room, and that "said stair-landing, precipice, death trap, and stairway" were not sufficiently lighted to enable a person to reach the urinal in safety, and on visiting the urinal he would be likely to step off said precipice and fall into said death trap and be killed, or seriously injured; that defendants well knew of the unprotected and unlighted condition of said death trap, but that deceased was ignorant thereof; that by reason of defendants' failure to fence and guard said recess, cul-de-sac, and death trap the same was dangerous

to all persons going to said urinal or near the same; that the deceased, in guiding Miller to said urinal, attempted to follow said route; that by reason of the defendants' negligence in the premises deceased fell into said death trap, sustaining injuries from which he subsequently died, and to recover damages for which this action is commenced.

The complaint was demurred to upon the ground that it states no cause of action, and we think the ruling of the trial court in sustaining the demurrer was correct. The complaint does not show that the deceased was more than a mere licensee as to the portion of the premises where the accident occurred. It is a well-settled rule of law that the owner or occupier of lands or buildings who, by invitation, express or implied, induces persons to come upon his premises, is under a duty to exercise ordinary care to render the premises reasonably safe; but he assumes no duty to one who is on his premises by permission only, and as a mere licensee, except that while on the premises no wanton or willful injury shall be inflicted upon him. *Means v. Southern Cal. Ry. Co.*, 144 Cal. 473, 77 Pac. 1001; *Schmidt v. Bauer*, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580. In the latter case, which in many respects is similar to the one at bar, the defendant kept a saloon, and a customer, who had purchased beer, inquired the way to the urinal, apparently ignorant of the location thereof. The defendant pointed the way. In the direction indicated there was a stairway leading to the urinal, and also a door leading upon a porch, from which the stairway led into the back yard. This latter route the plaintiff followed, and, when returning to the saloon, instead of coming back through the door by which he had passed out, he passed into the other, leading into the private portion of the house, where the floor had been taken up, leaving an open space, into which he fell and was injured. It was held that the obligation of the owner of the premises was to keep the access or passageway thereto in such condition as to avoid injury to persons who have been "induced by the invitation or allurements of the owner, express or implied, to enter therein." We quote from this case: "The keeper of a public place of business is bound to keep his premises and the passageways to and from it in safe condition, and use ordinary care to avoid accidents or injury to those properly entering upon his premises on business. But this rule applies only to such parts of the building as are a part of, or used to gain access to, or constitute a passageway to and from, the business portion of the building, and not to such parts of the building as are used for the private purposes of the owner, unless the party injured has been induced by the invitation or allurements of the owner, express or implied, to enter therein. * * * Conceding that the respondent was not wrongfully in the place where the accident occurred, and giving the

most liberal construction to the evidence, he was there by the mere license of the appellant, and for that reason the appellant owed him no duty, and he went there subject to all the risks attending his going."

There is no doubt that an invitation may be manifested by the arrangement of the premises, or by the conduct of the owner. *Sweeny v. Old Colony & Newport Ry. Co.*, 10 Allen (Mass.) 373, 87 Am. Dec. 644; *Redigan v. Boston & Maine R. R.*, 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. Rep. 520; *Rooney v. Woolworth*, 74 Conn. 720, 52 Atl. 411; *Ivay v. Hedges*, L. R. 9 Q. B. Div. 80; *Benson v. Baltimore Traction Co.*, 77 Md. 535, 26 Atl. 973, 20 L. R. A. 714, 39 Am. St. Rep. 436; *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. 478. Mere permission, or a habit, however, of an owner of allowing people to enter and use a certain portion of his premises, is indicative of a license merely, and not of an invitation. *Redigan v. Boston, etc., R. R. Co.*, supra; *Phillips v. Library Co.*, supra; *Rooney v. Woolworth*, supra. In the last case the plaintiff had been in the defendant's store as a customer. After making a purchase she left the store by a rear door, and was injured by falling into an unguarded excavation on defendant's premises in a dark alley just outside the door. The plaintiff had frequently used the rear door, under express permission from one of the clerks, and it was customary for people other than those connected with the store to use this entrance. The court held that the arrangement of the store was such as to indicate that the rear entrance was intended for use by expressmen and deliverymen, and not for the use of customers, and that therefore, in spite of the fact that it was actually used by people other than expressmen and deliverymen, when it suited their convenience, the plaintiff should be treated as having used the door merely as a licensee and not upon an implied invitation. There is no allegation that the urinal was designed or maintained for the use of patrons of the store; nor any allegation that it was designed for use or used as a part of the business conducted on the premises.

From what has been said, it follows that the judgment should be affirmed. It is so ordered.

We concur: COOPER, P. J.; HALL, J.

7 Cal. App. 106

GARDNER et al. v. SAN GABRIEL VALLEY BANK. (Civ. 422.)

(Court of Appeal, Second District, California.
Dec. 11, 1907. Rehearing Denied
Jan. 10, 1908.)

1. TRIAL—FINDINGS—QUESTIONS OF LAW OR FACT—OWNERSHIP.

While ownership may be pleaded and found as an ultimate fact, it may also be pleaded as

a conclusion of law, and may be determined by the court as such.

2. APPEAL — REVIEW — RECORD NECESSARY — OWNERSHIP.

Where ownership is purely a question of fact, it can only be considered on a record bringing up the evidence from which the ultimate fact was deduced, or upon a judgment roll from which it appears that ownership was found as an inference of fact entirely from other facts found; but, if the court must determine ownership by the construction of a writing or mere application of legal principles to facts found by the court, it is a question of law, which may be determined from the judgment roll alone.

3. TRIAL — TRIAL BY COURT — QUESTIONS OF LAW OR FACT — OWNERSHIP.

Whether a finding of ownership in a particular case is the finding of an ultimate fact or a conclusion of law must depend on the issues to be tried, and in an action to quiet title to an easement in a certain stairway, where plaintiffs claim by virtue of a reservation in a certain deed from their grantor to defendant, and the answer admits whatever right was created in the grantor by the instrument, but denies that it granted the privileges claimed by plaintiffs, or that plaintiffs succeeded to the rights, and plead an extinguishment of the servitude by nonuser, and the court found that defendant had not otherwise than as expressed in the deed acquiesced and consented to the use by plaintiffs of the privileges claimed, that no use of the stairway was made by plaintiffs prior to the erection of a second story to plaintiff's property subsequent to the deed, and that plaintiffs are not the owners of the right or easement of using the stairway, etc., the question of ownership was determined by a construction of the deed upon the theory that the admitted reservation was an easement in gross and not one which would pass as appurtenant by the grant to plaintiffs; and hence the court on appeal may consider and determine the questions presented from the record which includes the deed containing the reservation in question.

4. EASEMENTS — RESERVATION — CONSTRUCTION — APPURTENANT EASEMENT — STATUTORY PROVISIONS.

Defendant received a conveyance of the north 75 feet of a certain lot containing a reservation of a stairway at the south end, to be perpetually maintained such as should give access therefrom to the second story of the brick building now owned by the grantor, that the grantor should have the right to use the stairway wholly at the cost of the grantee for erection and maintenance, and that, whenever said brick building of the grantor should be built so as to have two or more stories, the owner thereof should have the right of support therefrom in the adjoining wall of said bank building so high as the bank building wall should have been erected, etc. The second story of the brick building was not built until after the south part of the lot subsequently came into plaintiffs' hands. Held, that the reservation was intended for the benefit of the south part of the original lot, that the easement in the stairway, etc., passed as appurtenant, for the contract in providing for support of the second story declared the right to be exercised in the future, though created presently, and an easement is presumed to be appurtenant rather than in gross, and especially in view of Civ. Code, § 1069, providing that a reservation in a grant is to be interpreted in favor of the grantor and Code Civ. Proc. § 1864, providing that when different constructions of a provision of a contract are equally proper, that is to be taken which is most favorable to the party in whose favor the provision is made, since an appurtenant servitude would be assignable, and tend to increase the value of the dominant estate.

5. SAME — EFFECT OF NONUSER — EASEMENTS ACQUIRED BY DEED.

No length of time of mere nonuser will operate to impair or defeat the right to an easement acquired by deed, and this is especially true in view of Civ. Code, § 806, providing that the extent of a servitude is determined by the terms of the grant, and section 811, relating to extinguishment of servitudes, which provides under subdivision 4 for extinguishment by disuse, only in case of servitudes acquired by enjoyment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 77-79.]

6. SAME — TRANSFER — INCIDENTAL RIGHTS.

Under Civ. Code, § 1104, providing that a transfer of real property passes all easements attached thereto, and section 1084, providing that the transfer of a thing transfers also all its incidents unless expressly excepted, the right to use an adjoining stairway in defendant's building which is appurtenant to certain real estate passes with the conveyance of the real estate, and carries with it such other incidental rights as are necessary to the full enjoyment of the servitude imposed upon defendant's building by the reservation creating the easement.

7. SAME — DETERMINATION OF INCIDENTAL RIGHTS.

Where a deed to certain property reserved the right to use a stairway in the premises conveyed for access to the second story of adjoining premises not conveyed, the rights incident to the enjoyment of the servitude must be determined from the evidence as to custom, usage, and the conditions surrounding the parties at the time the servitude was created.

8. SAME — STAIRWAY — DOOR.

Where an easement in the use of a stairway for the purpose of access to the second story of a building on grantor's property is reserved in a deed of the adjoining property, no custom or usage can sustain the maintenance of a door at the entrance of the stairway which would interfere with the convenient use of the stairway by the grantees of the original owner of the easement and their tenants; for otherwise the easement itself would be destroyed.

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by Miriam Gardner and another against the San Gabriel Valley Bank, a corporation. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

Frank James, Craig & Wood, and Volney H. Craig, for appellants. Wright, Bell & Ward, for respondent.

TAGGART, J. This is an action to quiet plaintiffs' title to an easement, and to restrain defendant from interfering with the use by plaintiffs and their tenants of a stairway in the rear of defendant's building and the maintenance by said tenants of their professional and business signs in the passageway and entrance to said stairway; such right being claimed under an easement alleged to have been created by deed. Judgment was for defendant, and plaintiffs appeal from the judgment.

From the findings it appears that during the year 1886 one Chas. A. Gardner, who was the owner of a lot numbered 1 on a certain subdivision of lands situate in the city of Pasadena (said lot being located at the southeast corner of Colorado street and Fair Oaks

avenue of that city), entered into an agreement to sell to Bates and Janes the north 75 feet of said lot. Bates and Janes in September, 1886, conveyed to defendant their interest in the lot acquired under the agreement. On April 9, 1887, Gardner made a conveyance of the 75 feet to defendant by a deed, a copy of which is attached to the complaint and marked "Exhibit A," and contains the following reservation: "Reserving the following specified rights in the granted premises to the grantor, his heirs, executors, administrators and assigns, against the grantee, its successors and assigns: (1) Whereas, the said grantee has erected on the premises hereby conveyed a brick building with a stairway four feet and six inches wide at the south end thereof (being the south end of the premises hereby conveyed and facing on Fair Oaks avenue), it is agreed and understood that said stairway shall be perpetually maintained as shall give access therefrom to the second floor or story of the said brick building now owned by the party of the first part and said first party shall have the right to use said stairway wholly at the cost of the grantee for erection and maintenance thereof. And it is a condition of this conveyance that if said stairway shall cease to exist, and shall not be restored immediately, the grantor shall be entitled to build and maintain in the place and instead thereof a stairway of equal width and size, or less if he prefer, for his exclusive use until said destroyed stairway shall be restored by the grantee for use on the conditions now existing as to the present stairway. (2) Provided, further, and upon condition that whenever said brick building of the grantor shall be built so as to have two or more stories, the owner thereof shall have the right of support therefrom in the adjoining wall of said bank building, so high as said bank building wall shall have been erected, such support to be made or obtained in good workmanlike manner without injury to the building used." Prior to the date of that deed, and while holding possession under the agreement, the defendant erected upon the said north 75 feet a two-story brick building, a part of the first floor of which was to be used for its banking business. At the south end of, and within said building, a stairway leading from Fair Oaks avenue to the second floor of the bank building was constructed. Before making the deed to the defendant, Gardner had built the one-story building, mentioned in the reservation in the deed, on the remaining portion of lot 1, the north wall of which building joined the south wall of the bank building. On September 27, 1894, Gardner and his wife granted and conveyed to Katherine Gardner, one of the plaintiffs, and Edith M. Gardner, the south 50 feet of lot 1 with the one-story building thereon, and on April 1, 1904, Edith M. Gardner granted to the other plaintiff, Miriam Gardner, all her estate in said south 50 feet of lot 1. During the month of July, 1904,

plaintiffs erected a second story on their said one-story building, and constructed thereon five offices or rooms for rent to tenants, and caused an opening to be cut through the south wall of defendant's building to serve as a passageway to the stairway in defendant's building, and since the completion of plaintiffs' second story their tenants have used defendant's stairway and said opening as a way to and from said second story of plaintiffs' building. Plaintiffs' tenants placed signs in defendant's stairway, indicating their offices and business, which were removed by defendant because the latter claimed that neither plaintiffs nor their tenants had any right to the use of said stairway for any purpose. Defendant also placed doors at the entrance of said stairway. The court further finds "that defendant has not at all times up to the 21st day of July, 1904, or at all (otherwise than as expressed in said deed 'Exhibit A'), acquiesced and consented to the use by plaintiffs and their tenants of all the rights, privileges and easements so claimed by plaintiffs, or any of them"; that no use of said stairway was made by plaintiffs or their tenants prior to the erection of their said second story; and "that the plaintiffs are not and have not been since the deeds of conveyance to them as aforesaid, the owners of the right, privilege, or easement of using said entrance to defendant's bank building and said stairway and landing, for the purpose of reaching the second story of plaintiffs' said building, or otherwise."

Respondent contends that the finding that plaintiffs are not the owners of the easement is of an ultimate fact and cannot be modified by the other findings which are characterized as findings of probative facts. *Smith v. Acker*, 52 Cal. 217; *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740. It is true that ownership may be pleaded and found as an ultimate fact, but it is equally true that it may be pleaded as a conclusion of law, and may be determined by the court as such a conclusion and not a fact. *Levins v. Rovegno*, 71 Cal. 273, 12 Pac. 161. In a case where ownership is purely a question of fact it can, of course, be considered only upon a record bringing up the evidence from which the ultimate fact was deduced, or upon a judgment roll from which it appears that ownership was found as an inference of fact entirely from the other facts found. *Geer v. Sibley*, 83 Cal. 4, 23 Pac. 220. But it is also the case that, if the court must determine the ownership by the construction of a writing or the mere application of the proper legal principles to the facts already found by the court, it is a question of law and may be determined from the judgment roll alone. *Savings & Loan Soc. v. Burnett*, 106 Cal. 539, 39 Pac. 922. Whether a finding of ownership in a particular case be the finding of an ultimate fact or of a conclusion of law, then, must depend upon the issues to be tried. Plaintiffs claim a right of passage over de-

defendant's stairway by virtue of the reservation in "Exhibit A." The answer admits whatever right was created in Charles A. Gardner by that instrument, but denies that that deed granted to Gardner, his heirs and assigns, the rights and privileges which plaintiffs claim exist thereunder, or that plaintiffs succeeded to such rights. Defendant also pleads an extinguishment by nonuser of the servitude imposed upon its property by the deed, "Exhibit A."

Taking all the findings together, it is apparent that the question of ownership in this case was determined by the trial court by a construction of the deed, and upon the theory that the admitted reservation in the deed created an easement in gross, and not one which was appurtenant to the 50 feet of lot 1, which was retained by Gardner when he conveyed the other 75 feet to the defendant. There is no doubt, then, that this court can consider the questions presented on this appeal, and determine them from the record presented. Examining the deed of April 9, 1887, and the circumstances surrounding its execution, it is clear that the reservation therein was intended to be for the benefit of the south 50 feet of lot 1. No reason or motive for the reservation of a servitude in gross is apparent, and the instrument itself, by its very terms, contemplates the use of the stairway in connection with the building of Gardner (then but one story) adjoining defendant's building to the south. The clause in the instrument reserving the right to support from defendant's south wall "whenever said brick building of the grantor shall be built so as to have two or more stories" establishes a state of facts which render inapplicable the authorities cited by respondent to support the position that an easement does not pass as an appurtenance, unless it was actually appurtenant at the time of the conveyance. The parties themselves by their contract have declared the easement created to be a right to be exercised in the future, though created presently. An easement is never presumed to be attached to the person of the grantor when it can fairly be construed to be appurtenant to some other estate. *Hopper v. Barnes*, 113 Cal. 639, 45 Pac. 874. This rule is strengthened in its application to this case by the statutory provision that a reservation in a grant is to be interpreted in favor of the grantor (Civ. Code, § 1069; Code Civ. Proc. § 1864), as the appurtenant servitude is assignable, and tends to increase the value of the estate to which attached.

The easement having been acquired by deed, no length of time of mere nonuser will operate to impair or defeat the right. *Washburn on Easements*, 640. This is consonant with the rule of our Code which provides for the extinguishment of servitudes by "disuse" only when acquired by enjoyment. Civ. Code, §§ 806, 811, subd. 4; *Smith v. Worn*, 98 Cal. 212, 28 Pac. 944. The right to use

the stairway, being appurtenant to the south 50 feet of lot 1, passed to the plaintiffs with the conveyance of that property to them. Civ. Code, § 1104. It carried with it also such other and incidental rights as were necessary to the full enjoyment of the servitude imposed upon defendant's building by the reservation in the Gardner deed. Civ. Code, § 1084.

As the case must go back for retrial, the trial court must determine from the evidence before it what incidents were to be implied from custom, usage, and the conditions surrounding the parties to the contract at the time it was made. No custom or usage, however, could sustain the erection or maintenance of a door at the entrance to the stairway which would be a barricade or interfere with the free and convenient use of the stairway by plaintiffs and their tenants. *Teachout v. Capital Lodge, etc.*, 128 Iowa, 380, 104 N. W. 442. This would destroy the easement itself. The question of what is a reasonable protection of the entrance to the stairway is a matter for the trial court to consider in the light of the evidence introduced.

Judgment reversed, and cause remanded for a new trial.

We concur: ALLEN, P. J.; SHAW, J.

HYDE et ux. v. SEATTLE ELECTRIC CO.
(Supreme Court of Washington. Feb. 7, 1908.)

CARRIERS—INJURIES TO PASSENGER.

In an action for injuries to a passenger on a street car, owing to a vehicle colliding with the car while he was standing on the running board, evidence held insufficient to show negligence on the part of defendant.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Frank R. Hyde and wife against the Seattle Electric Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Richard Saxe Jones and Jas. A. Snoddy, for appellants. Hughes, McMicken, Dovell & Ramsey, for respondent.

DUNBAR, J. This is an action for personal injuries received upon the Madison street cable line in the city of Seattle. The testimony is undisputed. The court, after the testimony of the plaintiffs was in, sustained a motion for nonsuit on the part of the defendant. The facts briefly are, in substance, as follows: The plaintiff Frank R. Hyde was riding on the Madison street cable line. The car upon which he rode consisted of a closed portion in the rear and an open portion in front, and had longitudinal seats in the open portion; the method of getting on the car in the open portion being by stepping on a running board or first step, and, if the passenger desired to go further, and opportunity offered, to step from the running board onto

the second step, or deck of the car. At the time of, and some time prior to, the time when the injury occurred, Madison street from Fourth avenue to Second avenue was being regraded, and dirt was being removed from the street and adjacent property by teams which came out of the excavations at the side of the tracks and down Madison street on the north side from Third avenue to Second avenue. The plaintiff Hyde testified that, as the car came down the hill, he noticed a team passing at and about the Second avenue crossing. The wagon was loaded with dirt. The car continued down the hill, not stopping at Third avenue. Hyde at that time was standing on the second step or deck of the car, leaning against the stanchion, which is the support of the roof of the car. When the car got down nearly to the level of Second avenue, where the plaintiff had been accustomed to alight, he prepared to step off from the car by putting one foot down on the lower step and taking hold of the iron handle of the forward end of the car with his right hand, holding on to the stanchion behind him with his left hand. He testifies that the car did not stop exactly where he expected it to stop, but went a few feet further. While standing on this board ready to step off when the car stopped, the wagon which he had noticed before came in contact with the car, overlapping the board of the car, striking plaintiff's right leg, breaking it in two places. For this injury this action was brought. Upon the dismissal of the action after the motion for nonsuit was granted, this appeal was taken.

It is contended by the appellants that the court erred in granting the motion for nonsuit and rendering judgment for the respondent; that a case was made which should have been submitted to the jury on the two main propositions, viz., whether there was any negligence on the part of the company, and whether there was contributory negligence on the part of the appellant Frank R. Hyde. Appellants rely very strongly on the two cases of *Weir v. Seattle Electric Company*, 41 Wash. 637, 84 Pac. 597, and *Ranous v. Seattle Electric Company* (Wash.) 92 Pac. 382. Reference to those cases convinces us that they have no bearing on the principles of law involved in this case. In the *Weir* case the plaintiff, relying upon the signal to stop at the place of his destination, took his position on the lower step, with his hand on the extension, ready to alight, while the car was slowly approaching the far side of the street; but, instead of stopping, the speed of the car was suddenly accelerated to such an extent that *Weir* was hurled from the car. *Ranous v. Seattle Electric Company* was substantially the same case. But here the appellant was not injured by being misled by the respondent into taking an unsafe position, or by any unc customary or unexpected act on the part of the motorman. It would be a harsh rule to announce that a street car company would be responsible for any damages that might be sustained by a

passenger by reason of a vehicle coming in contact with the car. The car traveling on a fixed track has a right to presume that its right of way will be respected. Of course, this is aside from the question of the duty of the street car company to protect its passengers when danger from contact from the outside is known. But in this case the car was pursuing its way, and there was nothing to indicate that the wagon which was traveling parallel with the car would get any nearer to the track than it was. If danger from that source was apparent, it was just as apparent to the appellant as it was to the gripman, for appellant testifies that when he was at Third avenue, which is one block away from the place where the accident occurred, he saw and noticed the wagon. His attention having been called to the wagon at so short a distance from the scene of the accident, and knowing the condition of the street in that locality, he having testified that he had traveled on that car several times a day for a great length of time, it seems to us that the court rightly concluded that he was negligent in attempting to get off in so close proximity to the wagon. Notwithstanding the presumption in which a passenger may indulge, that the street car company will use the highest degree of caution and care, both in protecting its passengers while upon the car and in furnishing them a safe place to alight from the car, the passenger must use some little caution himself, and will not be justified in stepping into a place of imminent and apparent peril when he alights from a car. If a wagon is standing immediately in front of the steps of a car, a passenger would not be justified in stepping into it and entangling himself in its wheels or spokes, or in stepping into a place of danger of any kind.

There is a good deal said in appellants' brief in relation to the passage of an ordinance by the city requiring the street car companies to maintain a watchman at the point where the appellant was injured; but an examination of the ordinance shows that it provided that this duty devolved upon the street car companies only after notification by the city, and there is no testimony that such notice was ever given; so that really the question of the effect of the ordinance need not be discussed. If the respondent was negligent at all, it was by reason of the fact that common prudence would demand of it to maintain a watchman at this place, outside of any legislation on the part of the city. We are not prepared to say that the condition was such that it was the duty of the respondent to maintain a watchman at this place, or that if there had been a watchman there in the prosecution of the ordinary duties of a watchman at such places, viz., the preventing of passengers from getting in the way of moving cars, he probably would have considered it his duty to have prevented this wagon from traveling as close to the track as it did travel. We are satisfied from the tes-

timony that the accident occurred by the wheels of the wagon slipping and lurching through the mud down toward the car; that it was an accident for which the street car company was not responsible, and one which it could not be called upon to anticipate.

It is also contended by the appellants that the testimony shows that an inexperienced motorman was employed to operate the cars in this dangerous street, the grade here being exceedingly steep. But we think there is no testimony that would warrant this contention, or that shows any incompetency on the part of the motorman or other employes of the car company.

Under all the circumstances of the case, we fail to find any negligence on the part of the respondent, but think that there was negligence on the part of the appellant in not noticing the danger in taking the position that he did take when the wagon was in such close proximity to him.

The judgment is affirmed.

HADLEY, C. J., and ROOT, FULLERTON, MOUNT, CROW, and RUDKIN, JJ., concur.

MORRIS v. WARWICK.

(Supreme Court of Washington. Feb. 10, 1908.)

1 COSTS—ADDITIONAL SECURITY.

"Insufficient security," within Ballinger's Ann. Codes & St. § 5186, providing that non-residents may be required to give security for costs, and that a new or additional bond may be ordered upon proof that the original bond is "insufficient security," means insufficiency in the amount of the bond as well as insufficiency of the sureties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 521.]

2. SAME—DISMISSAL—FAILURE TO FILE COST BOND—PROPRIETY.

Under Ballinger's Ann. Codes & St. § 5186, providing that non-residents may be required to give security for costs, that an additional bond may be ordered on proof that the original bond is "insufficient security," and that proceedings may be stayed until such bond is filed, an action is properly dismissed for plaintiff's failure to file an additional cost bond required by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 538.]

Appeal from Superior Court, Lincoln County; W. T. Warren, Judge.

Action by Joseph N. Morris against Maynard Warwick. From an order dismissing the action for plaintiff's failure to file an additional cost bond, plaintiff appeals. Affirmed.

J. T. Mulligan, N. T. Caton, and Martin & Wilson, for appellant. Merrill, Hibschan, Oswald & Merrill, for respondent.

RUDKIN, J. This action was commenced in the court below on the 1st day of April, 1905. On the 5th day of May, 1905, the defendant entered his appearance and moved the court for an order requiring the plaintiff to

execute and file a \$200 cost bond on the ground that he was a nonresident of the state. On the same day a cost bond in the sum of \$200 was filed on the part of the plaintiff. The case was thereafter tried, and a judgment of nonsuit entered; but the judgment of nonsuit was reversed by this court, and a new trial ordered. *Morris v. Warwick*, 42 Wash. 480, 85 Pac. 42. After the cause was remanded, another trial was had, and the jury failed to agree. The defendant thereupon moved the court for an order requiring the plaintiff to execute an additional cost bond, filing an affidavit in support of the motion, showing that the costs already incurred by the defendant amounted to the sum of \$650. On the 24th day of June, 1907, an order was entered requiring the plaintiff to give and furnish an additional cost bond in the penal sum of \$650 within 40 days from that date. After the expiration of the 40 days the defendant moved the court to dismiss the action for failure to file the additional cost bond within the time directed, and from the order granting this motion the present appeal is prosecuted.

On this record two questions are presented:

(1) Had the court authority to require the additional cost bond under the circumstances stated? and, (2) If so, was the action properly dismissed for failure to comply with the order of the court in that regard? The statute under which the bond was demanded reads as follows: "When a plaintiff in an action resides out of the county, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action shall be stayed until a bond, executed by two or more persons, be filed with the clerk, conditioned that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of two hundred dollars. A new or additional bond may be ordered by the court or judge, upon proof that the original bond is insufficient security, and proceedings in the action stayed until such new or additional bond be executed and filed. The plaintiff may deposit with the clerk the sum of two hundred dollars in lieu of a bond." Ballinger's Ann. Codes & St. § 5186.

Counsel for appellant contend that the term "insufficient security" in the above section means insufficiency of the sureties on the bond filed in the first instance and not insufficiency in the amount of the bond. There are numerous statutes in this state authorizing courts and boards to require additional bonds from officers and litigants. Such are the statutes relating to official bonds (Ballinger's Ann. Codes & St. § 1522); attachments (Id. § 5356); injunctions (Id. § 5439); executors and administrators (Id. § 6157); guardians (Id. § 6404); appeals (Id. § 6512). The context of these several statutes generally shows what is meant by insufficient security. Some of those cited clearly refer to the insufficiency of the sure-

ties on an existing bond, while others as clearly relate to the amount of the bond as well. We think the statute under consideration is of the latter class. The first part of the section requires nonresidents of the county and foreign corporations to give security for costs. The amount of such costs is necessarily indeterminate at the time of the commencement of the action, and the next provision fixes the amount of the original bond at the sum of \$200. This sum may not be sufficient security in all cases, and therefore the next provision authorizes the court to require an additional bond. Such was the view taken by this court in *Robinson v. Haller*, 8 Wash. 300, 36 Pac. 134, where we said: "It is urged by the appellant that in cases where there are numerous defendants the costs would, in all probability, aggregate a sum far in excess of \$200, and that therefore a single bond would not be a sufficient protection. But to meet this contingency the same section of the statute provides that a new or additional bond may be ordered by the court or judge upon proof that the original bond is insufficient security, and proceedings in the action stayed until such new or additional bond be executed and filed." See, also, 11 Cyc. 190.

The court, therefore, acted within its jurisdiction in requiring the appellant to give the additional bond, and the action was properly dismissed for failure to comply with the court's order. *Carlson Bros. & Co. v. Van De Vanter*, 19 Wash. 32, 52 Pac. 323.

There is no error in the record, and the judgment is affirmed.

HADLEY, C. J., and CROW, MOUNT, and DUNBAR, JJ., concur.

TIPTON v. ROBERTS et ux.

(Supreme Court of Washington. Feb. 5, 1908.)

1. LANDLORD AND TENANT—RECOVERY OF POSSESSION—ANSWER—PLEA OF TENDER—SUFFICIENCY.

In an action for unlawful detainer, defendant alleged that, after failure of plaintiff to make promised repairs necessary to put the premises in tenantable condition, he made such repairs, and on the next rent day paid plaintiff, by check, the rent due, less the amount of the repairs, and also paid him by check the rent for the following month when due, plaintiff retaining both checks until the beginning of this action, when he returned them. *Held*, that defendant's answer was not demurrable on the ground that it was a counterclaim; it being an averment of tender, and was sufficient to prevent forfeiture for nonpayment of rent.

2. SAME—RENT—PAYMENT.

Where, in an action for unlawful detainer, a tenant, after requesting his landlord to do so, made necessary repairs to property, and paid the next month's rent, by check, less the sum spent for repairs, the acceptance of the receipted bill of repairs by the landlord's agent and its retention by the landlord until the beginning of the action constituted a payment of the part of the rent represented thereby.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Robert Tipton against J. H. Roberts and wife. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Alfred M. Craven, for appellant.

PER CURIAM. This is an action for an alleged unlawful detention of real estate. The defendants concededly occupied the premises as tenants of the plaintiff until November 1, 1906. By the terms of the lease, the rent was payable monthly on the 1st day of each month, and the complaint alleges that it was so paid until the said 1st day of November, when default was made. It is alleged that notice in writing was given to defendants, requiring them to pay the rent or surrender the premises, neither of which things has been done. The failure to pay rent is denied by the defendants. The cause was tried by the court without a jury, and resulted in a judgment dismissing the action, from which the plaintiff has appealed.

It is contended that the court erred in overruling appellant's demurrer to the affirmative defense. The demurrer was interposed upon the theory that the respondents had attempted to plead a counterclaim, which cannot be done in an action for unlawful detainer within the decision in *Phillips v. Port Townsend Lodge, etc.*, 8 Wash. 529, 36 Pac. 476. The court overruled the demurrer upon the theory that the legal effect of the facts alleged was that of an allegation of payment or tender. We think there was no error in this regard. The allegations were that the house needed repairing in the way of papering some rooms; that respondent promised to so repair, but afterwards failed and neglected so to do; that, in order to make the house so that it could be used and occupied by respondents, they were compelled to make the repairs, and did so at an expense to themselves of \$12.10. It is alleged that on the 1st day of November, the day the rent became due and before any notice to quit was given, the respondents paid to appellant, by check, the rent due, less the sum paid for repairs, and that they thereafter paid by a similar check the rent for the month of December; that appellant retained the checks until after the commencement of this action, and then returned them to respondents by mail. It is argued that the allegations do not amount to a plea of payment or tender, for the reason that it is not alleged that appellant accepted the checks. Service in the action was made December 27th, which was near two months after the check, less the amount of repairs, was delivered to appellant. The check was not returned until after that time. Such inexcusable delay to reject the payment either in amount or kind should be treated as an acceptance, or at least as effecting a tender to the extent of preventing an attempted forfeiture for nonpayment of rent.

Other errors urged relate to the findings of the court. The findings were in general ef-

fect in accord with the affirmative allegations of the answer as above stated. It was also found that, prior to the commencement of the action, respondents duly tendered all rent due, less the said sum paid for repairs and \$4 paid for water rent; the tender being kept good in court. No objection was made to the manner of original tender or payment by check; the objection being merely to the amount because of the deduction for repairs. But the receipted bill for repairs was accepted from respondents by appellant's agent, and retained by the latter, so that it represented a payment. The amounts of the remaining tenders were therefore correct, and there was no default.

The findings are sufficiently justified by the evidence, and the judgment is affirmed.

KESTER v. SCHOOL DIST. NO. 34 OF WALLA WALLA COUNTY.

(Supreme Court of Washington. Feb. 13, 1908.)

1. SCHOOLS AND SCHOOL DISTRICTS — ELIGIBILITY OF TEACHERS—ACTIONS.

Under Ballinger's Ann. Codes & St. § 2322, providing that no person shall be accounted as a qualified teacher who has not first received a certificate from the state board of education, etc., and section 2416, providing for the issuance of a temporary certificate to any teacher to whom a certificate has been granted by any county board of examiners, etc., an action to recover salary as a school teacher will not lie unless plaintiff shows that he is regularly licensed to teach as provided by law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 287.]

2. SAME.

Under Ballinger's Ann. Codes & St. §§ 2322, 2416, a mere letter from a county school superintendent stating that an applicant's papers are sufficient to entitle him to a temporary certificate, and that such certificate will be granted on application as provided by statute, is not the equivalent of a temporary certificate.

Appeal from Superior Court, Walla Walla County; Thos. H. Brents, Judge.

Action by J. W. Kester against School District No. 34 of Walla Walla County, a municipal corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

W. B. Mitton and Brooks & Bartlett, for appellant. Rader & Barker, for respondent.

RUDKIN, J. In the latter part of January, 1907, the plaintiff entered into a contract with the defendant school district, whereby the plaintiff undertook to teach in the school of the district for the remainder of the school term at a salary of \$100 per month. On the 5th day of February, 1907, the plaintiff presented himself, and requested that he be allowed to enter upon the discharge of his duties as such teacher, but such request was refused by the defendant. At the time the plaintiff entered into the contract to teach, and at the time he presented himself and offered to enter upon the performance of his duties, the only certificate

or authority to teach possessed by him was the following letter from the county school superintendent of Walla Walla county: "Telegram received this morning. Your papers are sufficient to entitle you to a temporary certificate, which will be granted upon application as per statute." On the foregoing facts the court below entered a judgment of dismissal, from which the present appeal is prosecuted.

Sections 2322 and 2416 of Ballinger's Annotated Codes and Statutes provide as follows:

"Sec. 2322. No person shall be accounted as a qualified teacher, within the meaning of the school law, who has not first received a certificate issued by the superintendent of public instruction, or who has not a state certificate or life diploma from the state board of education, or who has not a temporary certificate or a special certificate granted by the county superintendent according to law: Provided, That nothing in this section shall be construed as invalidating any certificate in force at the time of its passage, but the same shall remain in force for the period for which each was issued."

"Sec. 2416. Any teacher to whom a certificate has been granted by any county board of examiners in this state, or by lawful examiners in any state or territory, the requirements to obtain which shall not have been less than the requirements to obtain a certificate in this state, or any teacher holding a diploma or certificate of graduation from any state or territorial normal school, or from the normal department of the university of the state of Washington, may present the same, or a certified copy thereof, to the county superintendent of any county in this state where said teacher desires to teach, and it shall be the duty of said county superintendent, upon such evidence of fitness to teach, to grant to said person a temporary certificate: Provided, That the provisions of this clause shall apply only to such teachers as were not residents of the county at the time of the last preceding examination, or were not able, by reason of sickness or other unavoidable cause, to attend said examination: And provided further, That the county superintendent may require of such a person a written statement of such facts, verified by affidavit."

Under these sections an action to recover salary or wages as a school teacher will not lie unless the plaintiff shows that he or she is regularly licensed to teach as provided by law. *Kimball v. School District*, 23 Wash. 520, 63 Pac. 213. It seems to us too plain to admit of argument that a mere letter from a county school superintendent stating that an applicant's papers are sufficient to entitle him to a temporary certificate, and that such certificate will be granted on application as provided by statute, is not the equivalent of a temporary certificate. Where a certificate is required as a condition precedent to the

right to enter upon an employment or exercise a privilege, a promise to grant the certificate on application will not satisfy the requirements of the law.

The judgment of the court below is therefore affirmed.

HADLEY, C. J., and DUNBAR, FULLERTON, CROW, ROOT, and MOUNT, JJ., concur.

HARRIS v. GREAT NORTHERN RY. CO.
(Supreme Court of Washington. Feb. 11, 1908.)

CARRIERS—CARRIAGE OF GOODS—FREIGHT RATES—LIABILITIES.

Where two freight rates are provided by a carrier, one in contemplation of the ordinary carrier's liability, and the other a less rate by reason of a limitation of that liability, and goods are delivered to it for shipment in the ordinary manner, without any agreement relative to any limitation of liability or reduction in freight charges, the carrier assumes the ordinary liability of a carrier, and the law will imply that the usual rate is the one which was intended.

Fullerton, Mount, and Rudkin, JJ., dissenting.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by W. H. Harris against the Great Northern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

M. J. Gordon and Charles A. Murray, for appellant. Swanson & Ripley, for respondent.

ROOT, J. This action was begun by the respondent against the appellant to recover \$1,454.10, the alleged value of household goods which were shipped by the respondent from Somers, Mont., to Spokane, Wash. Appellant's answer contained two affirmative defenses; one that at the time the goods were shipped respondent signed an agreement accepting a lower rate for the transportation of said goods and binding himself that in the event of loss his recovery should not exceed the valuation of \$5 per hundredweight. The second affirmative defense set forth that defendant was engaged in interstate commerce, and kept on file in its offices at stations along its railway schedules of rates at which freight would be transported; that during all of the times involved such schedules were on file at Kalispell, Mont., where the contract of shipment was made for the goods in question, there being no station at Somers, Mont., and that said schedules so on file contained its rates for household furniture from Somers, Mont., to Spokane, Wash., one rate being 50 per cent. lower than the other, and said lower rate being based upon the condition published in said schedules; that in the event of loss of goods shipped at said lower rate the shipper should recover for such loss not to exceed \$5 per hundredweight, and that while said rates were so on file the plaintiff, with knowledge of said rates and the conditions pertain-

ing to the respective rates, caused to be shipped the goods described in his complaint from Somers, Mont., to Spokane, Wash., and at the time of delivery of said goods to the appellant for transportation respondent requested that said goods be shipped at said lower rate, based upon said condition pertaining thereto; that the appellant accepted said goods for transportation upon said condition; that while said goods were in transit, and without any fault on the part of the appellant, they were consumed by fire; that the weight of said goods was 4,280 pounds, and the value at \$5 per hundredweight \$214, which amount appellant offered to pay, and tendered into court, together with \$4 accrued costs. The case was tried to a jury, and resulted in a verdict in favor of the respondent for \$1,198.85, for which sum judgment was rendered, and from which judgment this appeal is taken.

In his reply respondent denied that he signed the agreement above mentioned, and the verdict may be taken as a finding by the jury that he did not sign the agreement. Respondent in his reply denied that he knew of the schedule of rates being on file, or knew the conditions attached. Respondent also testified that all that was said about freight or rates at the time the goods were shipped was that the freight would be paid to Spokane. It appears to be conceded that the jury found that the respondent did not sign any contract of release. It is urged, however, by appellant that, under the interstate commerce law, the shipper was obliged to take notice of the published tariff rates of the railway company, and must be charged with the knowledge of the two rates that were provided by said tariff schedule. As to what extent the shipper or intending shipper shall take notice of the posted or published schedule of rates, we are not called upon to decide at this time. From evidence offered by appellant it appears that the schedule reads as follows: "Household goods not for sale or speculation, individual personal effects, secondhand furniture, stoves, etc., carrier's liability limited to \$5 per hundred pounds in case of loss, and so receipted for, car load shipment prepaid guaranteed, less than car load shipments prepaid, first-class rate. Household goods, not otherwise specified, not for sale or speculation, car load shipments prepaid or guaranteed, less than car load shipments prepaid, first and a half." The clause therein "and so receipted for" would seem to indicate that the rate therein provided for should apply only where a receipt was actually issued showing the limitation of the liability. It does not appear that respondent received any such receipt or entered into any agreement whatever for a limitation of the carrier's ordinary liability. Where two rates are provided, one in contemplation of the ordinary carrier's liability, and the other a less rate by reason of a limitation of that liability, it would seem, in the absence of an understanding or agreement between the shipper and the transportation company, that the car-

rier would assume the ordinary liability which rests upon a common carrier of goods, and that the usual rate for carrying said goods would be the one which the law implies. In other words, the lesser rate is only available as a matter of special contract, or where it is intended and understood by the shipper and carrier to apply in a given instance. In this case it appears that the respondent delivered his goods to the appellant for shipment in the ordinary manner, without anything being said, and without any arrangement being made, or any agreement being entered into, relative to any limitation of liability or reduction in the freight charges from the usual rate charged for ordinary shipments with the usual carrier's liability.

This being true, we think the rulings of the trial court complained of were not erroneous, and that the judgment of that court is sustained by the evidence and the law. It is therefore affirmed.

HADLEY, C. J., and CROW and DUNBAR, JJ., concur.

FULLERTON, J. (dissenting). I dissent from the conclusion reached in this case. Since there were two published rates fixing different liabilities on the carrier, the shipper had in the first instance the right of selection. But as he did not exercise that right the duty of making the selection devolved from necessity on the carrier. When, therefore, the carrier in good faith selected the lesser rate, and shipped the goods thereunder, the selection in my opinion fixed the rights of both of the parties. The carrier should not be permitted on a successful completion of the contract of carriage to collect the higher tariff, nor should the shipper be permitted to collect any more than the limited value in case of a loss of the goods.

The judgment should be reversed, with instructions to enter a judgment in favor of the appellant.

MOUNT and RUDKIN, JJ., concur with FULLERTON, J.

(48 Wash. 448)

BROWN v. KINNEY.

(Supreme Court of Washington. Feb. 13, 1908.)
APPEAL—RECORD—EXCEPTIONS, BILL OF—
TIME FOR FILING—EXTENSION OF TIME.

Where a bill of exceptions or statement of facts was not filed within the time required by law, it will be stricken in the absence of any showing in the record that an extension of time was either asked for or granted by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2472-2476.]

Appeal from Superior Court, Benton County; W. W. Zent, Judge.

Action by O. S. Brown against James F. Kinney. From a judgment for plaintiff, defendant appeals. Affirmed.

G. A. Lane, for appellant. J. W. Callicotte, for respondent.

PER CURIAM. Motion is made to strike appellant's bill of exceptions or statement of facts on the following grounds: (1) That said bill of exceptions or statement of facts was not filed or served as required by law; (2) that said bill of exceptions or statement of facts was not certified to by the judgment in the court where the cause was tried; (3) that no notice was given by the appellant to the respondent as to the time or place when appellant's bill of exceptions or statement of facts would be settled by the court; and (4) that no copy of appellant's certified copy of his bill of exceptions or statement of facts was returned to respondent at the time of the service of his brief. In consideration of the conclusion we have reached on the first ground of the motion, it is unnecessary to discuss the others. The judgment was rendered on the 24th day of April, 1907, and appellant's bill of exceptions was not filed or served until July 27, 1907. The record does not show that any extension of time was either asked for or granted by the court. Under the uniform rulings of this court, the statement of facts must be stricken.

The appeal does not present any questions for determination here excepting such as are embodied in the statement of facts. Therefore the judgment of the lower court will be affirmed.

(48 Wash. 398)

FORD v. SMITH et al.

(Supreme Court of Washington. Feb. 7, 1908.)
SALES—ACTION FOR PRICE—DEFENSES—
BREACH OF WARRANTY—SCIENTER.

Where, in an action for the purchase price of a team of horses, defendants set up a breach of warranty, they are entitled to judgment if they establish the breach, without proving a scienter on the part of the seller, even though the answer alleges false representation and deceit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1253.]

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Thomas Ford against George H. Smith and another. From a judgment for plaintiff, defendants appeal. Reversed, with instructions to grant a new trial.

Aust & Terhune, McBride & Dalton, and W. B. Stratton, for appellants. Jay C. Allen, for respondent.

DUNBAR, J. This action was brought by the respondent to recover the purchase price of a team of horses sold to the appellants. The appellants answered, alleging false representations and deceit on the part of the plaintiff in the sale of the horses, to wit, that the plaintiff represented that the horses were sound and true; also that the plaintiff warranted the horses to be sound and true, and that upon the delivery of the horses to the defendants and trial by them of said horses it was discovered that the representations made by the plaintiff were false, and

that the horses were not sound, or at least that one of them was not, in that he was what is termed "wind-broken," or unsound in wind, and also balky. The answer is a long one, setting up with great particularity all the circumstances of the trade, but what we have stated is in substance the answer, and indicates the issues involved. Verdict was rendered in favor of the plaintiff. Judgment was entered, and appeal taken.

The court, among other things, instructed the jury as follows: "If you do find that the plaintiff warranted the horses, even if you do find that the horses were not as represented, yet the defendants must show by a fair preponderance of the evidence that the plaintiff knew at the time that said representations were false; that is, that the plaintiff knew at the time that the horse was unsound in wind and balky, and further that defendants relied on said statements." The court further instructed: "Before you can find a verdict for the defendants you must believe from a preponderance of the evidence that plaintiff did make the representations as to the horse being sound and free from defects as claimed by defendants, and you must further believe that the defendants relied thereon, and further that they were false, and you must go further and find that plaintiff knew they were false when he made them." Other instructions along the same line were given, but the ones set forth we think sufficiently indicate the error which it is alleged the court made. These instructions constituted prejudicial error. In an action for breach of a warranty it makes no difference whether the seller knew that the alleged facts which he warranted to be true were true or not. The warranty is the contract upon which the purchaser relies, and the breach of the warranty constitutes the gist of the action. If it were otherwise, a warranty would have no more force or effect than a representation without a warranty; and, when a warranty is relied upon, it is well established that the scienter need not be alleged or proven. It is true that the answer in this case also alleges false representation and deceit. But these allegations do not destroy the allegations in relation to warranty, or prevent a recovery upon proof of the breach of the warranty. *Shippen v. Bowen*, 122 U. S. 575, 7 Sup. Ct. 1283, 30 L. Ed. 1172, and cases cited.

The respondent recognizes the force of this position, but claims that the instructions of a court must be viewed by this court in the light of the circumstances surrounding the case which is tried, and asserts that the theory of a warranty was an afterthought on the part of the appellants, and that the case was framed and tried on the theory only of false representations and deceit. But the answer directly alleges a warranty and the breach thereof, and the testimony of the appellants is plain and positive to the effect that the respondent did warrant and guaran-

tee to the appellants that the horses were sound and true. It is true this testimony is contradicted by the respondent, but the jury had a right to determine these issues under proper instructions; and, in this case, even if they had found that the warranty had been made as alleged and sworn to, they could not have found in favor of the appellants unless they had further found that the respondent knew that the alleged facts which he warranted to be true were untrue at the time the warranty was made, a finding which, as we have seen, it was unnecessary for the jury to make.

In view of the fact that another trial will be had, we express no opinion on the questions of false representations and deceit, which developed in this case, and which raise the questions so often raised in cases of this kind, as to what was a false representation of fact and what was a mere expression of opinion, questions which are largely determined by the circumstances of the particular case. But for the error above discussed, the judgment must be reversed, with instructions to grant a new trial.

HADLEY, C. J., and ROOT, CROW, RUDKIN, MOUNT, and FULLERTON, JJ., concur.

REYNOLDS et ux. v. DICKSON et al.
(Supreme Court of Washington. Feb. 8, 1908.)

1. PLEADING—DEFECTS IN COUNTERCLAIM—CURED BY EVIDENCE.

The defect, if any, in an affirmative defense based on the ground that the facts alleged therein do not arise out of the transaction sued on, and are not available as a counterclaim, is cured by the introduction without objection of testimony in support thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1354, 1386.]

2. SET-OFF AND COUNTERCLAIM—CLAIMS CONNECTED WITH TRANSACTION SUED ON.

In a suit for the rescission of an agreement for the exchange of a farm for a stock of goods, and the cancellation of a chattel mortgage to secure a note given for the value of the goods in excess of the value of the farm, an answer demanding damages for the failure of plaintiff to pay mortgages on the farm, pursuant to his agreement, and asking for the foreclosure of the chattel mortgage, alleged facts so connected with the subject-matter of the action as to be available by way of a counterclaim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 49–51.]

3. EXCHANGE OF PROPERTY—RIGHTS OF PARTIES—FRAUD—EVIDENCE—SUFFICIENCY.

In a suit to rescind an agreement for the exchange of real estate for a stock of merchandise on the ground of fraud, evidence held insufficient to show fraud.

Appeal from Superior Court, Lincoln County; W. T. Warren, Judge.

Action by J. Q. Reynolds and wife against M. M. Dickson and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Martin & Wilson, for appellants. Merritt, Hirschman, Oswald & Merritt, for respondents.

DUNBAR, J. The complaint in this case, briefly stated, alleged that the respondents, who were engaged in the mercantile business in the town of Reardon, state of Washington, defrauded the appellants, who were farmers and alleged to be inexperienced in the mercantile business, by inducing them to exchange their farm for a stock of goods. The agreed value of the farm or real estate was \$7,000. Under the contract they were to receive goods out of the respondents' store to that amount. An invoice was taken, and it was discovered that there was some \$1,630 in goods in excess of \$7,000, the value of the real estate. For this \$1,630 worth of goods the appellants gave their note and chattel mortgage. It is alleged that the goods did not invoice the amount which the invoice showed by the sum of \$3,630; the plaintiffs alleging that the invoice book had been stolen by the appellants immediately upon the conclusion of the trade, and that the fraud had not been discovered until about five months after the trade had been made. The prayer was for a temporary restraining order to prevent the respondents from in any way interfering with the goods; that the chattel mortgage be canceled; that the deed to the land which had been executed be canceled; that the agreement made and entered into be rescinded; and that, in case it was found impossible to place the parties to the agreement in the position which they had occupied prior to the contract, they take judgment against the respondents in the sum of \$3,630, together with costs and disbursements. The respondents answered, denying all the material allegations of the complaint, and asking for damages by reason of the failure of the appellants to pay certain mortgages on the real estate which they had sold to respondents, and which it was alleged they had agreed to pay, and also asking for a foreclosure of the chattel mortgage aforesaid. After the appellants had introduced their testimony, on motion, a nonsuit was entered against them, and evidence was heard in support of the respondents' cross-complaint, and judgment entered in favor of the respondents upon both demands. A demurrer was interposed to the affirmative answer and cross-complaint of the respondents, which demurrer was overruled. It is assigned that the court erred in overruling this demurrer, in sustaining objection to testimony offered for the purpose of showing the amount of goods on hand in February when the second invoice was taken, in rejecting proof tendered by appellants as shown by the statement of facts, and in granting the nonsuit, in rendering judgment on respondents' cross-complaint, and in not granting a new trial.

The first contention is that the demurrer should have been sustained to the answer and cross-complaint, for the reason that it did not set forth a counterclaim under the statute. It is admitted by appellants that, if the counterclaim arises out of the same trans-

action, it is sufficient, but it is contended that it did not. Testimony was introduced in support of this affirmative defense without objection on the part of the appellants, and under the rule laid down by this court in *Jacobson v. Aberdeen Packing Company*, 26 Wash. 175, 66 Pac. 419, the defect, if any has been cured. But, in addition to this, it seems to us that the affirmative matter here was undoubtedly so connected with the subject-matter of the plaintiffs' action that it was entitled to be admitted by way of counterclaim. What was said by this court in *Duggar v. Dempsey*, 13 Wash. 396, 43 Pac. 357, applies in full force to this case. There it was said: "One of the objects of the suit was to have this mortgage and the notes secured thereby declared invalid, and to have them canceled and delivered up. This being so, their validity was necessarily involved in a trial of the issues made upon the complaint, and that was one of the issues which would necessarily have arisen if an independent action to foreclose the mortgage had been instituted by the defendants. The facts to be determined under the complaint in this action, and in an independent action to foreclose the mortgage, would have been substantially the same; hence there was no good reason why the whole matter should not be determined in the action first brought. The subject-matter of the counterclaim was so connected with the cause of action set out in the complaint that it could properly be interposed."

So far as the merits of the case are concerned, we are not inclined to disturb the judgment of the trial judge. The admission of testimony showing the amount of goods on hand in February would not have aided the court in determining the amount of goods on hand at the time of the sale in September; for, while it is true the appellants testified that they had kept an account of the cash sales and testified to the amount of such sales, it appeared from their own testimony that they were unable to determine from that fact what amount of goods such cash receipts represented according to the original invoice price. They testified that some of the goods were sold at the regular retail price, some at cost, and some below cost, and that they could not tell what proportion had been sold at a profit, what proportion at cost, and what proportion below cost. The whole testimony was so indefinite that the court could only hazard a guess as to the actual amount of the goods delivered. There was no testimony offered showing fraud or conspiracy on the part of the respondents, and no testimony tending to prove the allegation of the complaint that the respondents had stolen the invoice book; all the testimony on that subject being to the effect that the appellants had not been able to find it. This stock of goods had been received by the appellants at the price shown by the invoice. They assumed control of the business and managed it for nearly five months, buying, selling, and re-

placing goods, before making the discovery that they had been defrauded by misrepresentations as to the amount of goods they had received. Under such circumstances, proof of fraud ought to be more definite and convincing than is the testimony given and tendered in this case.

Affirmed.

HADLEY, C. J., and MOUNT, CROW, FULLERTON, and RUDKIN, JJ., concur.

GRAY v. GRANGER et ux.

(Supreme Court of Washington. Feb. 11, 1908.)

1. APPEAL—RECORD—AFFIDAVITS INTRODUCED IN LOWER COURT.

Affidavits introduced in the lower court will not be considered on appeal, unless they are included in the statement of facts and certificate of the trial judge.

2. DISMISSAL AND NONSUIT—VOLUNTARY DISMISSAL—RIGHTS AS TO COUNTERCLAIM.

Plaintiff has no right to dismiss his action where the answer not only contained denials of some of the material allegations of the complaint, but also set up an affirmative defense denominated a counterclaim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal and Nonsuit, §§ 33-35.]

3. SET-OFF AND COUNTERCLAIM—NATURE OF REMEDY.

Statutes allowing counterclaims should be construed liberally, to the end that controversies may be adjusted in a single action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, § 3.]

4. SAME—FACTS CONNECTED WITH TRANSACTION SUED ON.

Where the complaint alleged that the grantor of defendant held the premises sued for as security for a debt, that the conveyance to defendant was void, and prayed for judgment declaring the conveyance to defendant void and that plaintiff be adjudged the owner of the premises, an affirmative answer alleging that defendant had been the owner in fee simple of the premises since the conveyance, and had been in the actual, open, and notorious possession thereof, that the value of the property had been paid by him to his grantor, that he had no knowledge or information of any claim of plaintiff, and that the land was purchased in good faith, sufficiently showed an adverse claim so as to constitute a counterclaim within Ballinger's Ann. Codes & St. §§ 4912, 4913, defining a counterclaim as a cause of action arising out of the transaction sued on, etc.

Appeal from Superior Court, Lincoln County; W. T. Warren, Judge.

Action by James B. Gray against H. H. Granger and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

E. T. White, Cordiner & Cordiner, and John C. Kleber, for appellant. Neal, Sessions & Myers, for respondents.

DUNBAR, J. Epitomizing the pleadings in this case, the complaint alleged that at the time of the commencement of the action, and for more than 15 years immediately prior thereto, plaintiff had been in possession of certain lands described therein; that theretofore the plaintiff had purchased

said lands from the Northern Pacific Railroad Company, receiving therefor a land contract, and that the said land contract was duly paid by the said plaintiff to the said railroad company as therein provided; that subsequently the plaintiff borrowed from the Big Bend National Bank of Davenport the sum of \$610.24, and gave a note to said bank as evidence of such loan; that, in order to secure the payment of the said loan, plaintiff, concurrently with the execution of said note, assigned the said contract to the said bank for security, and as security only; that subsequently the bank procured from the railroad company, under and pursuant to the terms and provisions of the contract aforesaid, a deed to said land; that the said assignment of the said contract and the said deed made under said contract were given, accepted, and held by the said bank as security for said loan only, and that the real title to said land always did, and now does, vest in the plaintiff; that thereafter, to wit, on November 25, 1904, the said bank became insolvent, and one Eugene T. Wilson, as receiver, took charge of its assets, and thereafter, without foreclosing the security given it by the plaintiff and without any proceedings upon the note which had been renewed, to enforce the payment of the same and to condemn the said land for the payment of the same, conveyed the same to the defendants, and alleged that such sale was null and void, and that the claim of the defendants to the land in question was without any right whatever, and that the said defendants had no estate, right, title, or interest whatsoever in or to such land or premises, or any part thereof, and prayed judgment that the plaintiff be pronounced the real owner of the land; that the bank be held to have held such lands as security only for the payment of the note; that the deed by the said receiver to the defendants be declared null and void; that the said defendants be decreed to make, execute, and deliver to plaintiff a deed of conveyance to all of their right, title, and interest in said lands, or, if they fail to do so, that some person be appointed by the court to execute such deed, and in the meantime that the defendants be enjoined from selling, conveying, mortgaging, or otherwise interfering with said lands. The answer denied the material allegations of the complaint, and for an affirmative answer alleged that the defendants since the 14th day of October, 1905, had been the owner in fee simple of the property described in the complaint, and that since said time had been in the actual, open, and notorious possession thereof, and alleged the execution of the deed by the bank to the defendants; that the actual value of the property had been paid by the defendants for the land; that at the time of the purchase there were no improvements upon said premises; that the same were unfenced and unoccupied by plaintiff or any one else; that

defendants prior to the purchase of said land went over said land, and examined the same, and ascertained that the same was not in the possession of any person whomsoever; that defendants nor either of them had any knowledge or information of any character from any source whatever of any claim on the part of plaintiff or any other person; that the land was purchased in good faith for a fair and reasonable consideration, relying upon the record title as shown by the county auditor's office of said county, and prayed that plaintiff take nothing by the action; that defendants be decreed to be the absolute owners of said land; that all clouds upon the title of defendants on said property by reason of any claims to said premises be removed, and that defendants' title to said property be purged of all claims whatever by plaintiff against said property. The reply denied the affirmative matter set up in the answer. When the case came on for trial, the plaintiff asked for a continuance, which was denied, and he then moved to dismiss this action, which was also denied by the court. The case then proceeded to trial; both the plaintiff and defendants offering testimony. Judgment was rendered in favor of the defendants. The plaintiff appeals from such judgment, assigning that the court erred in denying appellant's motion for a continuance and denying appellant's motion to dismiss the action and for judgment of nonsuit, and in entering judgment for respondents.

The appellant's motion for a continuance was based on a purported affidavit by the appellant to the effect that one O. C. May was a necessary and indispensable witness for and on behalf of the plaintiff, and that he was not now, and had not been since the commencement of the action, a resident of the state; setting forth what he expected to prove by said witness. Motion is made to strike this affidavit from the files, which must be sustained under the uniform rulings of this court. So far as the record appears, this affidavit comes to this court without any proof of its having been a part of the record or of the statement of facts. It is true that in the case of *State v. Vance*, 29 Wash. 435, 70 Pac. 34, affidavits used in the court below are considered on appeal, but, as expressly stated, on the ground that they constituted a part of the motion before the lower court, and were referred to and identified in express terms by the court in passing upon the motion before him. This case was distinguished from the case at bar, and from former and subsequent cases in which this question has arisen, in *Chevallier Co. v. Wilson*, 30 Wash. 227, 70 Pac. 487, where the cases were reviewed, and where it was stated that the question was settled that affidavits introduced in the lower court would not be considered on appeal unless included in the statement of facts and certificate of the trial judge.

On the second proposition, that the court erred in not allowing the plaintiff to dismiss the action and for a judgment of nonsuit, it was decided in *Waite v. Wingate*, 4 Wash. 324, 30 Pac. 81, that the plaintiff had a right to dismiss his action where the answer contained denials of some of the material allegations of the complaint, and also affirmative defenses which defendants had denominated a counterclaim, and in which title was set up in themselves, which it will be seen is substantially the condition of the case here. But this case was overruled in *Washington National Building, etc., Association v. Saunders*, 24 Wash. 321, 64 Pac. 546, where the cases were reviewed at length, and where it was said: "It is concluded that the rule announced in *Waite v. Wingate*, supra, is not in consonance with the spirit of the Code nor in accord with the better authorities." And in concluding the case it was said: "It would seem inconsistent with our liberal practice to dismiss the action, and then allow the same relief upon the commencement of another action in different form."

It is contended by the appellant that the affirmative matter pleaded in the answer does not constitute a counterclaim, and is not a set-off. Section 4912, Ballinger's Ann. Codes & St., provides that: "The answer of the defendant must contain: (1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; (2) a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition." Section 4913 says: "The counterclaim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." The subject of the action here is the title to the land in controversy, and certainly the answer of the defendants arises out of both the contract and the transaction set out in the complaint, and is very materially connected with the subject of the action. The general rule is that statutes allowing counterclaims should be construed liberally, to the end that controversies may be adjusted in a single action; and, under the reform procedure adopted by this state, it would be a pernicious practice to drive parties from a court which had jurisdiction of the subject-matter and jurisdiction of the parties to the commencement of another action in the same forum. This has been the uniform decision of this court. That the affirmative matter pleaded in the answer was so connected with the subject-matter of

the plaintiff's action as to be entitled to be put in by way of counterclaim. See *Duggar v. Dempsey*, 13 Wash. 397, 43 Pac. 357; *First National Bank of Snohomish v. Parker*, 28 Wash. 234, 68 Pac. 756, 92 Am. St. Rep. 828; *Reynolds v. Dickson* (decided Feb. 8, 1908) 93 Pac. 910. The reason assigned by appellant to sustain his contention that the affirmative answers are insufficient to constitute a counterclaim is that it does not show any adverse claim on the part of the appellant. We think this is too narrow a construction to put upon the answer. While the answer in words does not state that the appellant has an adverse claim, the whole tenor of the answer is to the effect that he does. The complaint which brought forth the answer alleged this claim in no uncertain language, and was notice to the respondents that the appellant did claim the land in question. So that it would be doing violence to a construction of the whole record to hold that there was no allegation in the answer that the appellant alleged a claim to the land; and also the prayer of the answer, which is a part thereof, and which demanded relief from the allegations of the complaint in relation to the title to the land.

The court on the merits found all the questions of fact in favor of the respondents, finding that none of the averments of the complaint had been sustained. These findings are not excepted to. No error is discovered in the record, and the judgment will therefore be affirmed.

HADLEY, C. J., and CROW, MOUNT, ROOT, FULLERTON, and RUDKIN, JJ., concur.

JOHNSON v. CONNER et al.

(Supreme Court of Washington. Feb. 11, 1908.)

1. ADVERSE POSSESSION—ENTRY UNDER CLAIM OF RIGHT—POSSESSION.

While an entry on the land of another under the belief that it is government land, and that the entryman may hold it as such, may not of itself constitute an entry under claim of right, yet, when an entry is made in good faith, and the entryman, on discovering his mistake, proceeds to openly and notoriously hold the same adversely and in hostility to the title of the actual owner, his acts are an adverse holding and a disseisin under a claim of right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 365-370.]

2. SAME—NONPAYMENT OF TAXES—EFFECT.

The nonpayment of taxes by one in possession of land is insufficient in itself to show the holding was not adverse when such adverse holding is clearly shown by competent evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 504-516.]

3. SAME—HOSTILE POSSESSION.

Where an entry on land was made under a claim of right, and the subsequent possession was maintained openly and notoriously in hostility to the title of the real owner, the possession was, after the occupant had learned of the owner's title, adverse, and became a bar to a

recovery by the real owner at the expiration of 10 years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 65-76.]

4. SAME—EVIDENCE.

Evidence held to show title in one by adverse possession for 10 years.

5. SAME—EXTENT OF POSSESSION.

It is not necessary for a person claiming a tract of land adversely to prove that he has actually occupied, used, improved, or inclosed all of the tract, but it must appear that he openly and notoriously claimed the entire tract, and that by his possession, use, or improvement of a portion thereof he intended to hold the whole tract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 547-589.]

6. APPEAL—DISCRETION OF COURT—PARTIES.

Where, in an action to quiet title, brought against persons claiming under a conveyance from a grantee of plaintiff, plaintiff claimed title by adverse possession, and that a lease of the premises to him, signed by him and a defendant, and the deed to the grantee, were procured by fraud, and defendants claimed the deed and lease showed a waiver by plaintiff of a claim to the premises, it was within the discretion of the trial court to refuse plaintiff's application, made at the close of his case, and after defendants had introduced a part of their evidence for leave to file a complaint in intervention on the part of the grantee, because made too late.

7. CANCELLATION OF INSTRUMENTS—FRAUD—MISTAKE—WEIGHT OF EVIDENCE.

A written instrument should not be set aside for fraud or mistake, unless the evidence of fraud or mistake is clear and convincing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, §§ 102, 103.]

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action to quiet title by William Johnson against Herbert S. Conner and others. From a judgment for defendants, plaintiff appeals. Affirmed.

James B. Reavis and Osborne V. Willson, for appellant. McBride, Stratton & Dalton, George Donworth, and Bogle & Spooner, for respondents.

ROOT, J. In the year 1883 appellant established a home upon certain lands abutting the shores of Smith's Cove, in King county. These lands had been conveyed by the government to one Dr. Smith some years before, and he was the owner thereof at the time of the entry by appellant. The latter, however, claims that he supposed the land to belong to the government and to be subject to entry, and that he went upon the same with the intention of acquiring the title thereto under the land laws of the government. He continued to reside upon said premises until the commencement of the present suit in 1907. In November, 1906, appellant, apparently without consideration and in trust, executed a quitclaim deed to a portion of these premises to one Czerney, who subsequently executed a quitclaim deed for the same to one Thompson for the benefit of all of these respondents. On the 26th of July, 1906, appellant and wife signed an instru

ment, also signed by Herbert S. Conner, wherein and whereby the latter assumed to let and lease unto appellant and wife a portion of the lands involved in this litigation. It is urged by respondents that the purpose of this lease and this quitclaim deed was to show a waiver by appellant of any claim to the premises covered by said instruments, and to quiet the title in respondents. Appellant claims that said lease was obtained from him by misrepresentation and fraud, that the deed was likewise obtained, and that he was incompetent to transact business when said instruments were executed, and did not realize or understand their purpose and effect. Respondents claim that \$25 was paid to Czerney for the quitclaim deed which he executed. The latter disputes this. The trial court found in favor of respondents upon all the material issues, and entered a decree quieting title to the premises in them. From this decree, the present appeal is prosecuted.

Appellant does not claim to have entered the premises under color of title, but maintains that his entry was under a claim of right. He testified that he believed, at the time he entered the land, that it was government land and subject to entry, and that he located thereupon with the intention of taking it under the land laws of the United States government. Several witnesses as to the acts and statements of the plaintiff during his early occupancy of the land strongly corroborate him; and we do not find any evidence tending to show that he did not so believe and intend at that time. Some time after appellant located upon this land, he ascertained that the same was owned or claimed by Dr. Smith. It is impossible to tell from the evidence how long this was after his entry. It was evidently within a year or two. Dr. Smith testifies that he had some talk with appellant about the matter, and gave him permission to stay there without charging him any rent. He says, however, that to the best of his recollection the appellant occasionally brought eggs to the family, which he took to be payment on the rent. Appellant denies positively that he ever agreed to pay any rent, or that he ever did pay any rent, or that he was a tenant of Dr. Smith, and says that the eggs were delivered to Dr. Smith and family merely as a neighborly courtesy, and especially as a return of courtesy on the part of the doctor's family in sending him berries, fish, etc. Appellant was at this time living in a building left upon the premises by persons who had theretofore been "logging off" the timber. The little evidence shown by the record as to paying rent is indefinite, and does not indicate whether it was for the premises or for the use of the building; it appearing that there were several buildings or shacks upon the land, and that considerable bartering, buying, selling, and leasing of these took place between Smith, plaintiff, and various other

persons without much or any reference to the ownership of the land upon which the buildings stood. Whatever may have been the fact as to the rent or as to appellant's possession being permissive on the part of Dr. Smith, it is evident that appellant's occupancy of the land soon after became hostile to the claim of Dr. Smith, and adverse and exclusive as to him and everybody; that appellant proceeded openly and notoriously to exercise exclusive dominion over the premises occupied, and so continued to do for over ten years. He cultivated patches of garden, built some fences, engaged in the business of raising chickens, ducks, fancy dogs, rabbits, Belgian hares, and Australian rats, and kept boats for hire. He made his living there. He and numerous neighbors testified that he claimed the premises as his own, and drove off people who came thereupon to hunt, camp, pick berries, locate buildings, or for other purposes. Some of the old-time neighbors testified that he told them he was holding the premises adversely, and would have perfect title after ten years. Numerous witnesses testified that the place was well known throughout the community as "Dog Johnson's place."

While an entry upon the land of another, under the supposition and belief that it is government land and that the party entering may hold the same as such, may not of itself constitute an entry under claim of right, yet, where such an entry is made in good faith, and the entryman upon discovering his mistake proceeds to openly and notoriously hold the same adversely and in hostility to the title of the actual owner or claimant, we think this constitutes an adverse holding and disposes under a claim of right as understood in this state. *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 190; *Flint v. Long*, 12 Wash. 342, 41 Pac. 49; *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936; *Hesser v. Slepman*, 35 Wash. 14, 76 Pac. 295; *Mather v. Walsh*, 107 Mo. 121, 17 S. W. 755; *Francoeur v. Newhouse (C. C.)* 43 Fed. 236; 1 Cyc. 1028. The evidence shows by a clear preponderance that appellant held actual, uninterrupted, and notorious possession of a portion of these premises adversely to everybody for a period of 10 years, after he learned of Dr. Smith's claim, and after he had decided to hold adversely thereto, and prior to the date of the quitclaim deed to Czerney. It is urged that he paid no taxes. The nonpayment of taxes, while evidence against the holding being adverse, is nevertheless insufficient in itself to prove that the holding was not adverse, when such adverse holding is clearly shown by other competent evidence. Appellant would not be expected to pay taxes as long as he thought it was government land. That he did not pay taxes afterwards is merely evidence as to intention, which is readily overcome by the other positive evidence in the case. It is not necessary that the claim or right shall continue through the statutory

period; the entry being under such claim and the possession being afterwards maintained openly and notoriously in hostility to the title of the opposing claimants or real owners. After the occupant has learned of such owner's claim or title, the possession is adverse and becomes a bar to a recovery by the owner at the expiration of the 10-year period. We think, under the evidence and facts appearing in this record, that appellant conclusively shows 10 years' open and notorious adverse possession of these premises prior to the date of the Czerney deed and Conner lease.

It next becomes necessary to ascertain the amount of the respondents' land to which appellant thus established adverse possession, or rather to ascertain whether or not of such respondents' lands he obtained title to any other than those covered by the Conner lease and Czerney quitclaim deed. We think the evidence fails to show that he did. In this action he is claiming between 30 and 40 acres of land, but we do not think that the evidence establishes an adverse claim to and holding of all this or any portion of respondents' lands other than those covered by the Conner lease and Czerney deed. Of course, it is not necessary for a person claiming a certain tract of land adversely to prove that he has actually occupied, used, improved, or inclosed all of said tract. But it must appear that he openly and notoriously claimed the entire tract and that his possession, use, or improvement of a portion thereof was intended to hold, not merely that particular portion, but the whole of the entire tract. We do not think that the evidence in this case shows such occupancy, claim, use, or improvement as manifested an intention to hold any portion of the land now claimed other than that covered by said lease and quitclaim deed, which we will now consider.

The trial court apparently entertained the view that the validity of the deed to Czerney could not be questioned in this action, for the reason that Czerney was not made a party to this action. Attorneys for appellant seem not to have seriously questioned this view. After appellant had put in all of his evidence and rested his case, and after respondents had introduced a portion of their evidence, the attorneys for appellant asked to file a complaint in intervention on the part of the said Czerney, under which it would have been possible to go into all questions affecting the validity of said quitclaim deeds. The trial court denied this application upon the ground that it came too late. The writer of this opinion thinks it might have been well to have granted this application; but the majority of the court feel that the trial court acted well within its discretion, and committed no error. We are therefore confined to the evidence now before us. Upon the evidence touching the question of fraud, misrepresentation, and incompetency of appellant to make such lease and deed, the trial

court found against appellant. There was much conflict in this evidence. Remembering that written instruments should be set aside for fraud or mistake only where the evidence is clear and convincing, and bearing in mind that the trial judge had the advantage of seeing and hearing the witnesses upon the stand, we are not justified from this record in setting aside his conclusion.

The judgment is therefore affirmed.

HADLEY, C. J., and RUDKIN and DUNBAR, JJ., concur. MOUNT and CROW, JJ., concur in the result.

In re MCKEEVER'S ESTATE.

(Supreme Court of Washington. Feb. 11, 1908.)

1. HOMESTEAD—SETTING APART HOMESTEAD—ORDER—REVIEW.

An order setting apart premises as a homestead for the widow and children is in the nature of a final judgment, that can only be set aside on motion for new trial within the time limited, or by motion or petition under Ballinger's Ann. Codes & St. § 4953, authorizing the court to relieve a party from an order taken against him through his mistake, inadvertence, or excusable neglect, or section 5153, empowering the court to vacate or modify an order for the reasons therein specified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 304.]

2. SAME.

It is not a ground for vacating an order setting apart premises as a homestead for the widow and children that the premises, being the community property of the widow and decedent, and their homestead, and selected as such by the widow, vested on decedent's death in the widow to the exclusion of the children, and for entry of an order to that effect within Ballinger's Ann. Codes & St. § 4953, authorizing the court to relieve a party from an order taken against him through mistake, inadvertence, or excusable neglect, or within section 5153, empowering the court to vacate or modify an order for casualty or misfortune and other reasons therein specified.

Appeal from Superior Court, San Juan County; Geo. A. Joiner, Judge.

Petition by Faith Helen McMillin, formerly Faith Helen McKeever, administratrix of William McKeever, deceased, to vacate a former order setting aside the homestead for the use of the widow and minor children of William McKeever, deceased, and to enter an order setting aside the homestead for her sole use and benefit to the exclusion of the children. From an order denying her petition, she appeals. Affirmed.

Douglas, Lane & Douglas, for appellant. W. R. Garrett, for respondents.

RUDKIN, J. William McKeever, a resident of San Juan county, in this state, died intestate on the 10th day of January, 1906. On the 8th day of March, 1906, his widow, Faith Helen McKeever, was appointed administratrix of his estate. On the 5th day of February, 1907, an order was entered in

the estate matter, on application of the administratrix, setting apart the property now in controversy as a homestead for the use of the widow and two minor children of the deceased. On the 3d day of July, 1907, the widow, having remarried in the meantime, petitioned the court to vacate the former order setting aside the homestead for the use of the widow and minor children, and to enter an order setting the same aside for her sole use and benefit, to the exclusion of the children. The only reason assigned for vacating the first order is contained in the following paragraph of the petition: "That your petitioner is advised and now believes that the above-described property, being the community property of the petitioner and said William McKeever, deceased, and being the homestead of the petitioner and said William McKeever, and having been duly selected as a homestead by the petitioner by declaration filed and recorded as aforesaid, vested upon the death of said William McKeever in your petitioner as the surviving widow of said deceased, free and clear of any claim, right, title, or interest of the said minor children, and your petitioner is informed and believes that it is her legal right to have said premises set apart to her as aforesaid." From an order denying the prayer of this petition, the present appeal is prosecuted.

The order setting aside the homestead in the first instance was in the nature of a final judgment that could only be set aside on motion for new trial within the time limited by law, or by motion or petition based on some statutory ground. The statutory grounds for such a proceeding are specified in sections 4953, 5153, Ballinger's Ann. Codes & St. It is manifest that the petition under consideration does not fall within any of the provisions of these sections, and the judgment of the court below is accordingly affirmed.

HADLEY, C. J., and FULLERTON, CROW, MOUNT, ROOT, and DUNBAR, JJ., concur.

MERRILL v. O'BRYAN.

(Supreme Court of Washington. Feb. 10, 1908.)

1. PARTNERSHIP—SCOPE OF BUSINESS.

It is within the scope of a partnership operating freight steamers on a river to purchase lumber for the construction of warehouses at terminal and intermediate points for the housing of freight, or for use in the construction of barges, or in repairing the steamers.

2. SAME.

One dealing with a partner without notice may hold the copartners, where the transaction is such as may be reasonably concluded is embraced within the partnership business as incident or appropriate thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 193.]

3. APPEAL—QUESTIONS OF FACT—CONCLUSIVE-NESS.

Whether an act of a partner is within the scope of his authority is a question of fact for

the trial court, whose finding the court on appeal will not disturb when there is evidence to support it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

4. PARTNERSHIP—SCOPE OF BUSINESS—AUTHORITY OF PARTNERS.

A partnership operated freight steamers on a river. A partner, while at one terminal point looking after the firm business, purchased lumber from a third person which was used in the construction of a warehouse there. Held, that the partner had actual and apparent authority to bind his partners, authorizing the third person to sue the partners for the lumber.

5. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EVIDENCE—DECLARATIONS OF AGENT.

The authority of an agent is not established by proof of his own declarations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 416-419.]

6. EVIDENCE—ADMISSIONS BY PARTNERS.

Where, in an action against partners for lumber bought by one of them, the partnership and the general nature of its business were admitted, the declaration of the partner buying the lumber, to the effect that he would use and did use it for a specified purpose, was the mere admission of a fact concerning partnership transactions, and was admissible against all the partners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 965-975.]

7. CONTINUANCE—GROUNDS—SURPRISE AT TRIAL.

Where, in an action against partners operating freight steamers on a river for lumber bought by one of them for a freight warehouse at one of the terminal points, it appeared that a copartner made an affidavit about three months before the trial in which he denied that the lumber was used to erect a warehouse by authority of the partnership, the refusal to grant a continuance on the ground of surprise by reason of plaintiff's evidence showing the necessity for building the warehouse was proper.

Appeal from Superior Court, King County; John B. Yakey, Judge.

Action by John Merrill against Thomas O'Bryan and others. From a judgment for plaintiff, defendant Thomas O'Bryan appeals. Affirmed.

P. D. Hughes and Fenley Bryan, for appellant. Peters & Powell, for respondent.

HADLEY, C. J. This is an action to recover the contract price of a quantity of lumber and a small amount of building paper. The amount sought to be recovered is \$5,890. The action was brought by the vendor of the lumber against Thomas O'Bryan, Edward M. Sullivan, and L. E. J. Davis, copartners under the firm name of Dawson & White Horse Navigation Company. The defendant O'Bryan is the only member of the partnership who was served with summons, or who appeared in the action. The contract of sale was made with the defendant Sullivan at St. Michaels, Alaska, in September, 1901, and the lumber was delivered into his charge at that time and place. He delivered to the plaintiff a draft on the Canadian Bank of Commerce for the payment of \$5,890, upon condition expressed in the draft that the lum-

ber and paper, an invoice of which was attached to the draft, should arrive at Dawson, Yukon territory, on or before November 1, 1901. The draft was signed: "Dawson & White Horse Nav. Co., per E. M. Sullivan, Manager." It was presented to said bank about July 1, 1902, and payment was refused. Meantime the lumber did not arrive at Dawson before November 1, 1901, or at all, for the reason that Sullivan used it in the construction of a warehouse at St. Michaels. The defendant partners were the owners of steamers plying the Yukon river, and were at that time engaged in the transportation of freight up and down said river between Dawson and St. Michaels. The defendant O'Bryan, who appeared and defended, admits that Sullivan was a member of the partnership at the time he bought the lumber, but claims that as such partner he had no authority to purchase the lumber in behalf of the partnership, for the reason that the partnership was a nontrading one, and existed for the purpose of carrying on a transportation business only. The court tried the cause without a jury and rendered a judgment in favor of the plaintiff for the full amount with interest against the partnership, enforceable against the joint property of the partners, and against the separate or any property of the defendant O'Bryan. Defendant O'Bryan has appealed.

The court found that the sale was made to the partnership through the defendant Sullivan, a member of the firm; that it was agreed that, in the event the lumber was not transferred to Dawson on or before November 1, 1901, then payment for it should be made on July 1, 1902; that it was not transferred to Dawson for the reason before stated, and that the warehouse erected at St. Michaels by the use of the material was for the partnership, and to enable defendants to house and store such freight as might come into their possession at St. Michaels consigned to points up the Yukon river, and which should come into their possession after the closing of navigation by the ice. We think the findings are justified by the evidence. It is contended that the authority of Sullivan to bind the firm was not shown, in that it appeared that the partnership existed for a transportation business only, and that he was therefore not authorized to purchase lumber or other material for trading purposes. There was, however, no evidence to the effect that the purchase was made for trading purposes, and it was certainly within the scope of the partnership business to purchase lumber for some purposes. The partnership operated three steamers upon the Yukon river, and handled a large amount of freight. The use of lumber for the construction of warehouses at terminal points or en route, for the housing of freight, or its use in the construction of barges, scows, or small boats, or in repairing the steamers, was

certainly within the scope of the business of such a partnership, and this material was, in fact, used to construct a warehouse at a terminal point. Sullivan was at St. Michaels looking after the business of the partnership, and considering the nature and scope of the business, as above stated, he as a partner, was a principal and had actual authority to purchase the lumber. He also had apparent authority to bind his partners. So far as third persons who deal with a partner without notice are concerned, the copartners are bound if the transaction be such as the public may reasonably conclude is directly and necessarily embraced within the partnership business as being incident or appropriate to such business according to the course and usage of conducting it. *Heirn v. McCaughan*, 32 Miss. 17, 66 Am. Dec. 588; *Pahlman v. Taylor*, 75 Ill. 629; *Todd v. Jackson*, 75 Ind. 272; *Seaman v. Ascherman*, 57 Wis. 547, 15 N. W. 788; 22 Am. & Eng. Enc. of Law (2d Ed.) 141, 142. In the case of *Alley v. Bowen-Merrill Company*, 76 Ark. 4, 88 S. W. 838, 113 Am. St. Rep. 73, it was held that a partner in a nontrading partnership may effectually bind his partners by an act apparently within the scope of the partnership. Whether the act of a partner is within the scope of his authority is a question of fact, to be determined by the court or jury trying the facts. *Dowling v. Exchange Bank of Boston*, 145 U. S. 512, 12 Sup. Ct. 928, 36 L. Ed. 795. The fact in this regard having been determined by the trial court against the partnership, and the evidence in the record being as we believe sufficient to sustain the finding, we shall not disturb it.

It is insisted that the court erred in admitting in evidence the declaration of Sullivan to the effect that he would use, and did use, the lumber to build the warehouse. It is true the authority of an agent is not established by proof of his own declarations, but in this case the fact of the partnership and the general nature of its business were admitted, and the declarations of the partner that he did a specific act, which act was clearly within the actual or apparent scope of the partnership business, was not a declaration as to his authority as an agent, but was the mere statement or admission of a fact concerning partnership transactions. As such the testimony was admissible against all the partners. 22 Am. & Eng. Enc. of Law (2d Ed.) 140; *Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380; *Coleman v. Pearce*, 26 Minn. 123, 1 N. W. 846.

Some contention is made that appellant was surprised by respondent's evidence tending to show the necessity for building the warehouse, and that the court erred in not granting the continuance at the trial for that reason. We think the point is not well taken. The trial was had in June, 1906, and appellant introduced in evidence the affidavit of Davis, one of the partners, which was, by

consent, used as a deposition. The affidavit was subscribed in March, nearly three months before the trial, and it denied that the lumber was used to erect a warehouse by authority of the partnership. It is therefore manifest that appellant anticipated that the question of the necessity for the warehouse would arise at the trial, and he was not in position to claim such surprise upon that subject as justified a continuance.

The judgment is affirmed.

FULLERTON, RUDKIN, CROW, MOUNT,
and DUNBAR, JJ., concur.

NICHOLS v. DOAK, Sheriff, et al. (two cases).
(Supreme Court of Washington. Feb. 13, 1908.)

1. EVIDENCE — JUDGMENT — COLLATERAL ATTACK.

In an action to restrain a sale of property under execution, evidence was inadmissible to impeach recitals in the judgment on which the executions were based that recovery was had because of fraud by the judgment defendant in fraudulently obtaining and retaining goods.

2. JUDGMENT — JURISDICTION OF DEFENDANT.

Where, in an action to recover goods fraudulently obtained, the complaint, summons, affidavit, and bond for return of the property were served upon defendant, who thereafter appeared by attorneys who filed motions to make the complaint more definite and certain, and to strike certain interrogatories which had been filed, and thereafter admitted service of notes of issue of such motions, and also admitted service of motion for default on account of failure of defendant to further appear and plead, the court in which the action was brought had jurisdiction of the person of defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 24; vol. 3, Appearance, §§ 79-90.]

3. SAME — FORM — ALTERNATIVE PROVISIONS — COLLATERAL PROCEEDINGS — GIVING JUDGMENT FULL CREDIT.

In an action to recover goods fraudulently obtained, a judgment which recited that it appeared from proof adduced to the satisfaction of the court that defendant was guilty of false and fraudulent representations in the procurement of the goods described, and that the title never passed to him as against the plaintiffs in the action, and which ordered that plaintiff recover specified amounts of damages on account of fraud and failure to return the property, was sufficient in form to sustain the judgment against attack by injunction against its enforcement, though not in the best form with respect to the alternative requirement of return of the property or recovery of damages, since in the injunction suit the judgment in the former action was entitled to full credit, and it would be presumed that the court must have found the return of the property impossible or impracticable, and therefore entered its judgment for damages.

4. BANKRUPTCY — DISCHARGE — DEBTS DISCHARGED — EFFECT OF FRAUD.

A judgment in an action to recover goods fraudulently obtained is within the exception of section 17 of the bankruptcy act of July 1, 1898 (30 Stat. 550, c. 541 [U. S. Comp. St. 1901, p. 3428]), providing that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as are judgments in actions for fraud or obtaining property by false pretenses or false representations.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Actions by Ben C. Nichols against Howard B. Doak, as sheriff of Spokane county, and others. From judgments for defendants, plaintiff appeals. Affirmed.

James Dawson and R. E. Porterfield, for appellant. Samuel R. Stern, for respondents.

HADLEY, C. J. This is an action to enjoin the sheriff of Spokane county from selling certain real estate under execution. In two previous causes in the superior court of Spokane county, in each of which the plaintiff in this action was the defendant, judgments were rendered against him as such defendant. Thereafter he was adjudged a bankrupt, and was discharged as such. Following the date of his said discharge he inherited from his mother the real estate above mentioned. The judgments have never been paid. The holders of them in no way participated in the bankruptcy proceedings, and, unless the discharge in bankruptcy had the legal effect to satisfy the judgments, they are upon their face liens upon the real estate. Proceeding upon the theory that the judgments are liens, the holders of them caused executions to issue, and directed the sheriff to levy upon said land and sell it to satisfy the judgments. This the sheriff was about to do when the judgment debtor brought actions to enjoin the sale and incidentally to have the judgments canceled. The two actions were heard together, with the same testimony applying to each, and the court denied the relief asked in each case. Judgment was entered dismissing the actions, and the plaintiff has appealed from both judgments.

The two cases will be treated on appeal as a consolidated cause, as they were treated by the trial court. Appellant contends that his discharge in bankruptcy had the effect to satisfy the judgments, and that they do not now constitute enforceable liens. Respondents, upon the other hand, maintain that the judgments were taken against appellant because of his fraud in obtaining certain property, and that by the terms of section 17 of the bankruptcy act of July 1, 1898 (30 Stat. 550, c. 541 [U. S. Comp. St. 1901, p. 3428]), appellant's discharge in bankruptcy did not release him from judgments or liabilities of that character. Appellant assigns as error the refusal of the court to permit him, at the trial of this cause, to introduce testimony to show that he did not fraudulently obtain and retain the goods for which said former suits were brought. The judgments themselves were in evidence, and they recited that the recovery against appellant was because of fraud in obtaining goods and the failure to return them, as alleged in the complaint. We think these recitals were conclusive against appellant. The judgments had stood for years unattacked by appeal or otherwise. To have admitted the testimony offered would

have allowed the contradiction of the terms of the judgments, and would have permitted in this action a trial of the former actions upon their merits. Such would have amounted to a collateral attack on the judgments. The relief sought was the restraint of execution sales, and, in order to effect that end, it was sought by the testimony to impeach the judgments which supported the executions in a particular wherein they were fair upon their face. It was not error to reject the testimony.

It is further contended, however, that the judgments were void for lack of jurisdiction; it being urged that there was no service of process upon appellant, and no authorized appearance in his behalf. The court found in this action that service was made upon this appellant as a defendant in the former actions; that the complaint and summons and the affidavit and bond for the return of the property were served upon him; and that he thereafter duly appeared in the actions by Henley, Kellam & Lindsley, his attorneys; that said firm of attorneys, in pursuance of being retained by appellant to defend in said causes, filed motions to make the complaints more definite and certain, which motions were denied by the court; that they also made motions to strike certain interrogatories which had been filed, and thereafter admitted service of notes of issue of said motions; that motions for default on account of failure to further appear and plead in the actions were made, and service thereof admitted by said attorneys; that said attorneys appeared no further in the actions because of a direction to that effect given to them by appellant. We think the above findings are all justified by the evidence. Particularly do we think the finding with reference to the authoritative appearance of appellant through counsel is abundantly supported by the testimony. The court, therefore, had jurisdiction of the person of appellant in the actions, and, inasmuch as it had undoubted jurisdiction of the subject-matter, it was authorized to proceed, and the judgments are not void.

Objection is made to the sufficiency of the form of the judgments entered in the former actions. The judgments definitely recited that it appeared from proof adduced to the satisfaction of the court that the defendant, this appellant, was guilty of false and fraudulent representation in the procurement of the goods described, and that the title never passed to him as against the plaintiffs in this action. It was ordered that the plaintiff should recover specified amounts of damages on account of the fraud and the failure to return the property. The judgments are not in the best form with respect to the alternative feature of requiring the return of the property or the recovery of damages. But in this hearing they are entitled to full credit, and it should be presumed that the court must have found the

return of the property impossible or impracticable and therefore entered its judgments for damages.

It follows from what has been said that the judgments are liens upon appellant's real estate, unless they have been discharged from the bankruptcy proceedings. Section 17 of the bankruptcy act of July 1, 1898 (30 Stat. 550, c. 541), provides among other things as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as * * * are judgments in actions for frauds or obtaining property by false pretenses or false representations. * * *" 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]. It is manifest that these judgments come within the above exception, and that they were not affected by the bankruptcy proceedings. They were in full force when appellant acquired the land in question, and they became liens thereon.

The court did not err in refusing to enjoin the execution sales, and the judgment is affirmed.

FULLERTON, MOUNT, CROW, DUNBAR, and ROOT, JJ., concur.

STATE ex rel. FUNKE v. BOARD OF COMRS OF PIERCE COUNTY et al.

(Supreme Court of Washington. Feb. 13, 1908.)

1. STATUTES—TITLE—SUFFICIENCY.

The title of an act of 1907 (Laws 1907, p. 351, c. 160), "An act changing the title of county surveyor to county engineer, relating to the election powers, and duties of such officer and repealing," etc., is sufficiently broad to comprehend the subject-matter of section 5, which fixes the officer's salary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 189-191.]

2. COUNTIES—COUNTY ENGINEER—COMPENSATION.

Laws 1907, p. 352, c. 160, changes the title of the county surveyor to county engineer; and, while such officers had theretofore received per diem compensation, section 5 provides for an annual salary in certain counties, which materially increases the compensation, but does not expressly state that it shall apply to existing officers. *Held*, that incumbents when the act was passed are not entitled to compensation thereunder, though the act increases the officers' duties, the new duties being within the proper scope of the office; it being assumed the Legislature intended to provide the new compensation subject to Const. art. 11, § 8, prohibiting an increase in county officers' salaries during their terms, and article 2, § 25, prohibiting an increase in any public officer's compensation during his term.

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Mandamus by state of Washington, on the relation of Adolph Funke, against the board of county commissioners of Pierce county and others. From a judgment denying the writ, plaintiff appeals. Affirmed.

A. R. Warren and A. H. Denman, for appellant. H. G. Rowland and Robert M. Davis, for respondents.

HADLEY, C. J. This is an action in mandamus to compel the payment of the salary of the county engineer of Pierce county in accordance with the statute as found in Sess. Laws 1907, p. 351, c. 100. The officer was elected and qualified, and was, at the time said statute became a law, discharging the duties of his office for the term for which he was elected. Prior to the law of 1907 the same office was designated as that of the "county surveyor," but in the new statute the designation was changed to that of "county engineer." The compensation provided by law for the county surveyor prior to the law of 1907 was \$5 per day for the time actually and necessarily spent in the discharge of his duties. Ballinger's Ann. Codes & St. §§ 1563-1594, inclusive. Under the terms of section 5 of the act of 1907 the salary of the county engineer in counties having a population of more than 10,000 is fixed at the same amount as that of the county auditor in such counties. It is conceded that, under that statute, the county engineer of Pierce county would be entitled to \$2,400 per annum, which is substantially more than he would be entitled to receive under the law in force at the time of his election and qualification. The trial court denied the writ of mandamus, and the officer has appealed.

The respondents urge that section 5 of the aforesaid act of 1907 is void by reason of the insufficiency of the title of the act. The section deals with the subject of the compensation, or salary of the county engineer. The title of the act is as follows: "An act changing the title of county surveyor to county engineer, relating to the election, powers, and duties of such officer and repealing sections 490 and 491 of Ballinger's Annotated Codes and Statutes of Washington." While it is true the subject of salary or compensation is not specifically mentioned in the title, yet we think the comprehensive nature of the title is sufficient to include that subject. One reading the title as relating to the "election, powers, and duties" of the county engineer would reasonably and very logically expect the subject of his compensation to be treated in an act so entitled. That subject is germane to the general scope of the title. Respondents cite upon this point *Anderson v. Whatcom County*, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137. The title of the act there in question was: "An act to provide for the economical management of county affairs." The act provided that the salary allowed to a justice of the peace should not exceed the amount of legal fees collected by such officer. It was held that such provision did not have the effect to repeal a prior act fixing salaries of justices of the peace in incorporated cities having more than five thousand inhabitants, for the reason that the subject was not embraced in the title. It is sufficient to say that the subject there was so far remote from

that suggested by the title that the ordinary reader would not have suspected a repeal of the statute above mentioned. The same comment in effect also applies to the recent decision of *State v. Merchant* (Wash.) 92 Pac. 890, also cited by respondents. We think the cases cited are not authorities against the sufficiency of the title now before us, and we decline to sustain respondents' contention that section 5 of the act in question is void.

The chief questions presented by the appeal are: (1) Did the Legislature intend the act of 1907 to apply to salaries of county engineers who had theretofore been elected and qualified? (2) If such was intended, is the act void with respect to its salary provisions so far as officers so elected and qualified are concerned? The act in most particulars was undoubtedly intended to have immediate application upon its becoming a law; but it contains no express statement that the salary provision was intended to have immediate force, and, in the absence of such, it should not be held that it was so intended if to do so would array the legislative intent against any constitutional provision. Would the immediate enforcement of the salary provision conflict with constitutional restrictions? Section 8, art. 11, of the state Constitution, is as follows: "The Legislature shall fix the compensation by salaries of all county officers, and of constables in cities having a population of five thousand and upwards, except that public administrators, surveyors, and coroners may or may not be salaried officers. The salary of any county, city, town, or municipal officer shall not be increased or diminished after his election or during his term of office, nor shall the term of any such officer be extended beyond the period for which he is elected or appointed." It is manifest from the section quoted that the salary of a county officer cannot be increased during the term of office for which he is elected. It is also manifest from the exception made in the section that the county surveyor may or may not be a salaried officer. It is for the Legislature to say whether surveyors, public administrators, and coroners shall be compensated by salary or otherwise. It is well known that such officers are frequently compensated by fees collected by themselves for specific acts or services. Our Legislature had, however, provided before the law of 1907 that the compensation of the county surveyor should be \$5 per day for the time actually and necessarily spent in the discharge of his duties, and payable from the public moneys. If that method of compensation is by salary, then it is plain from the foregoing section that it cannot be increased during the term for which the appellant was elected. Appellant contends that it is not a salary for the reason that it is payable only when services are rendered; while a salary, it is contended, is a fixed compensation payable without regard to the

amount of service rendered. Our Legislature has, in fact, designated the surveyor's compensation as a salary. Section 1564, Ballinger's Ann. Codes & St. After naming the different officers of the county of whom the surveyor is one, the section says: "The officers in the different counties in the state shall each receive the salary hereinafter set forth. * * *" The sections following then state the salaries of the officers in the several classes of counties in each of which the amount for the county surveyor is \$5 per day; and section 1594 limits the amount to officers paid a per diem to the time actually and necessarily spent in the discharge of their duties. We deem it unnecessary to pursue a discussion as to whether the Legislature properly designated such a compensation as a salary or not. It would be interesting to note the views of different courts as to what is technically a salary; but authorities upon that subject are not harmonious, and they are not material to the determination of this case, as will hereafter appear.

Another section of the Constitution must be considered in this connection. Section 25, art. 2, provides, among other things, as follows: "Nor shall the compensation of any public officer be increased or diminished during his term of office." The above provision is so comprehensive that interpretation seems wholly unnecessary. The proposition is so simple that the statement of it carries its own argument. This provision relates strictly to what the legislative department shall not do; and it is manifest that the two constitutional provisions must be read and construed together. If the term "salary" as used in the one as a more restricted meaning than "compensation" as used in the other, then the more comprehensive term which applies to "any public officer" must control here when we are considering what the Legislature may or may not do. The term "compensation," as used, seems to be broad enough to include any kind of remuneration from the public treasury for a public officer, whether by way of what is called "salary" or otherwise. Appellant, however, contends that this court has already held that the constitutional prohibitions do not apply to county officers who are not paid fixed sums as annual salaries, and he cites *State ex rel. Thurston County v. Grimes*, 7 Wash. 445, 35 Pac. 361. In that case the court was considering certain justices' and constables' fees. A fee bill materially reducing the fees was passed subsequent to the election, and the constitutional provision was invoked. It was held that the provision applies only to such officers as receive a fixed salary out of the public treasury, and that it does not apply to officers who receive specific fees for specific services. But one authority was cited (*Board of Supervisors v. Hackett*, 21 Wis. 620), and the reasoning of that case was adopted and followed by this court. From an examination of the Wisconsin opinion it is, we think,

manifest that the court found the distinction to be between that large class of officers who are paid by fees for specific services which they usually collect themselves and those officers who are paid from the public treasury sums specified by law. It is true the court used the term "fixed salary"; but it was evidently the intention to draw a distinction merely between officers paid by fees and those paid from the public treasury. Such, in any event, was all that was involved and decided in *State ex rel. v. Grimes*, supra. The county surveyor is not an officer paid by fees for specific services without regard to time. Under such a system, he might possibly realize \$20 for services rendered on a given day, and on other days it might be more or less than that sum. As it is, his compensation is a fixed sum with reference to a specified time, is not variable during the time that official duties require his services, and it is paid from the public treasury as that of other officers. To hold that such an officer and such compensation do not come within the constitutional prohibition would, we believe, do violence to the clear intent of the constitution makers.

Appellant further argues that he is entitled to the salary fixed by the new statute because by that law the duties of his office have been much increased, and beyond what he contends really comes within the reasonable scope of the office of county surveyor. We think the new duties are all reasonably within the scope of an office of that character. It is true the office is made one of record, and in counties of 10,000 or more population the officer must keep his office open at all times, as other county offices of record are kept open. The Legislature has, however, declared that these new duties belong to the office itself, and they are in every way properly incidental to the functions of such an office. Appellant cites the case of *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33 Pac. 428, as authority for holding that for increased duties an additional salary may be provided, to be paid even to an incumbent of an office theretofore elected and qualified. The statute under consideration in that case made the individual who should occupy the office of county treasurer the collector of city taxes, and a salary of \$500 was provided for that service. It was held that the duties for which the salary was provided did not belong to the county treasurer as such, but that they were imposed upon him in the way of collecting city taxes, and were entirely outside of his duties as county treasurer for which his previous salary was fixed. For the above reason only was it decided in that case that the constitutional prohibition did not apply. Again, in *Spokane County v. Allen*, 9 Wash. 229, 37 Pac. 428, 43 Am. St. Rep. 830, the court emphasized the above view, and refused to apply the rule of the former case to county attorneys whose duties had been much increased, but by new duties

within the scope of the office of county attorney itself. In the recent decisions of *State ex rel. Davis v. Clausen* (Wash.) 91 Pac. 1089, and *State ex rel. Ross v. Clausen* (Wash.) 92 Pac. 453, statutes materially increasing the duties of the offices were involved, but it was held that the constitutional prohibition was not removed as against office incumbents during the term for which they were theretofore elected. The increase of compensation by those statutes and also by the one now before us was no doubt in each instance a meritorious thing for the Legislature to do, having reference to future office incumbents. But the constitutional provision as to present incumbents must not be so construed in the interest of seeming expediency or even apparent necessity, as shall practically amount to an evasion of the organic law. That the constitutional provision exists is not only true, but it is also true that it is so clear and is founded upon such practical wisdom as calls for no elastic effort to construe it. In *State ex rel. Davis v. Clausen*, supra, we said: "This wise provision was no doubt intended to prevent pernicious activity on the part of the office holders of the state being brought to bear upon the members of the Legislature—a wise provision which must not be construed out of existence or evaded by legislative enactment."

For the foregoing reasons, we hold that appellant is not entitled to receive compensation in accordance with the new law; and, furthermore, that it was the intention of the Legislature to provide the new compensation subject to the constitutional restriction, and for officers thereafter elected only.

The superior court did not err in denying the writ; and the judgment is affirmed.

RUDKIN, CROW, MOUNT, DUNBAR, and FULLERTON, JJ., concur.

WELCH et al. v. BEACON PLACE CO.

(Supreme Court of Washington. Feb. 13, 1908.)

1. TAXATION—DELINQUENT TAXES—PROCEEDINGS FOR FORECLOSURE—NOTICE—DESCRIPTION OF PROPERTY—SUFFICIENCY.

On one page of a notice in delinquent tax foreclosure proceedings the words "Seattle Old Limits" appeared, and on the following page, under the heading "Syndicate Add.," with a dash after it, "P. Welch, lot 5, block 7." In the application for judgment under numerous heads the description appeared to be, "Syndicate Add., section or lot 5, township or block 7"; the name of no city or town being given. The description appeared differently in each instance in the decree, in the deed from the treasurer to the county, and in the notice of sale; the description in the treasurer's deed being approximately correct. Besides the "Syndicate addition," there were in the same county a "Kirkland Syndicate's First addition to Seattle," and another known as "Kirkland's Second Syndicate addition to Seattle." Held that, because of inaccuracy and indefiniteness, the description of the property in the foreclosure proceedings was not sufficient to charge the owners of the property with notice, so as to render the decree of

foreclosure valid; the sale being in 1902 for taxes of 1892, all the taxes since that time having been paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1305.]

2. SAME—PROCEEDINGS FOR SALE—NATURE OF PROCEEDING—REQUISITES.

A delinquent tax foreclosure proceeding is in the nature of a proceeding in rem; and hence the property sought to be affected must be described with reasonable accuracy in the proceedings by which it is sought to charge the owner with notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1305.]

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by Ella Welch and another against the Beacon Place Company to have certain tax proceedings declared invalid and title to the property involved quieted. From a decree for plaintiffs, defendant appeals. Affirmed.

L. T. Turner, for appellant. Austin E. Griffiths, for respondents.

ROOT, J. This action involves the ownership of lot 5 in block 7 of Syndicate addition to the city of Seattle, King county, Wash. Plaintiffs, respondents here, claim as sole heirs at law (widow and minor child) of Patrick Welch, who died April 14, 1903. The property was sold November 15, 1902, to King county, at the general county tax foreclosure sale for the taxes of 1892 and prior years. It was conveyed by deed to King county May 8, 1903. Thereafter the county sold and conveyed the property to one Allen, who subsequently conveyed it to appellant. Prior to the commencement of this action respondents tendered appellant the amount of taxes for which the property was sold, with interest to date, and demanded a conveyance of the property to them, which tender and demand were refused by appellant. Respondents brought this action in equity, and asked to have the tax proceedings declared invalid and title to the property quieted in themselves. From a decree in their favor, this appeal is prosecuted.

It appears that the property in question was at all times herein mentioned vacant, and that Patrick Welch had paid all of the taxes subsequent to 1892. Neither said Welch nor respondents appear to have received personal notice, or to have had any actual knowledge, of the delinquent taxes or foreclosure proceedings. Numerous grounds are assigned by respondents for their contention that the sale of the property under the foreclosure proceedings was void. It is urged that, by reason of the long delay of the county in bringing foreclosure proceedings, during which time the owner had annually paid his taxes without receiving any notice of the former taxes being unpaid, the county should be estopped from foreclosing for said former taxes; and it is also urged that under sections 5504-5506, Ballinger's Ann. Codes & St.,

the respondents acquired good title to this property as against the tax lien and those claiming under the foreclosure thereof, for the reason that they had continuously paid the taxes thereupon for more than seven years since 1892, and prior to the sale under the foreclosure proceedings.

Certain defects in the form of the summons are alleged; and it is also contended that the description of the property in the foreclosure proceedings was so erroneous and indefinite as to render the decree of foreclosure void. We think it necessary to discuss only the last contention. The notice and summons was headed: "The County of King, Plaintiff, v. Persons to Whom Assessed and All Persons Unknown, If Any, and All Persons Owning or Claiming to Own and Having or Claiming to Have an Interest in and to the Hereinafter Described Real Property, Defendant." The notice and summons then proceeds to notify all such persons that the county of King is owner and holder of the certificate of delinquency, and they were therein notified to appear within 60 days and pay the amount due or suffer judgment of foreclosure against the property. Then follows a description of a large amount of property, and on one page of the notice appear the words, "Seattle Old Limits," and on the following page, under the heading, "Syndicate Add.," with a dash after it, "P. Welch, lot 5, block 7." In the application for judgment, under numerous heads, the description appears to be about this: "Syndicate Add., section or lot 5, township or block 7." The name of no city or town is given. The description appears differently in each instance in the decree, in the deed from the treasurer to King county, and in the notice of sale by the county to Allen; the deed from the treasurer to the county being approximately correct. It is admitted by the parties that, besides this "Syndicate addition," there are in King county a "Kirkland Syndicate's First addition to Seattle," and another known as "Kirkland's Second Syndicate addition to Seattle." A tax foreclosure proceeding of this character is in the nature of a proceeding in rem; and under the rule governing such the property sought to be affected must be described with reasonable accuracy. The owners of this property appear to have paid their taxes regularly for many years. Why the matter was overlooked with reference to the taxes for which this foreclosure was brought we do not know. Doubtless it was a mistake or oversight of some character. The owners were living in the state during all of that time. To take respondents' property from them in payment of these old and evidently overlooked taxes would be a hardship which should not be visited upon them, unless the jurisdictional requirements in the foreclosure proceeding are shown to have been fully complied with. The description of a single lot among a vast number of descriptions might easily escape

an owner's notice, even if correct. If incorrect, the more easily could it be overlooked, even if the owner's attention was called to the list without suspecting that he had property mentioned therein. It is evident that the description under which this property was proceeded against was not the correct description of the property sought to be subjected to the tax lien, and we cannot say that this defect, considered together with the obscure place and form in which it appeared in the notice, was not sufficient to, or may not, have misled the respondents or him under whom they claim, and cannot say that it was published in a form and possessed that accuracy and definiteness which can be said as a matter of law to have been sufficient to bind them with notice.

The judgment of the superior court is therefore affirmed.

HADLEY, C. J., and CROW, DUNBAR, and MOUNT, JJ., concur. RUDKIN and FULLERTON, JJ., did not sit.

GREAT NORTHERN RY. CO. et al. v. SNOMISH COUNTY et al.

(Supreme Court of Washington. Feb. 13, 1908.)

1. TAXATION—LEVY AND ASSESSMENT—MODE OF ASSESSING CORPORATE PROPERTY—RAILROADS—TRACT—POLLING STOCK—STATUTES.

Const. art. 7, § 2, requires the Legislature to provide a uniform and equal rate of assessment and taxation on property according to its money value. Laws 1897, pp. 150, 151, c. 71, §§ 32, 34, require the main track and rolling stock of railroads to be listed and taxed in the several counties in the proportion that the mileage of main tracks in each county bears to the entire mileage within the state. *Held*, under these provisions, and under the direct provisions of Laws 1897, p. 153, c. 71, § 42, and Laws 1905, p. 225, c. 115, § 2, subd. 2, creating the state board of tax commissioners, that the main track and rolling stock of a railroad extending through several counties are an entirety for purposes of taxation; that the entire value thereof must be apportioned between the counties through which it passes in the proportion that the main track mileage in each county bears to the entire mileage; that they must be assessed at their true and fair value; that the assessment shall be equalized between the different counties; and that the state board of tax commissioners is given general supervision over assessors and county boards of equalization to that end.

2. SAME—EQUALIZATION OF ASSESSMENTS—STATE BOARD OF EQUALIZATION—POWERS.

Under Laws 1905, p. 225, c. 115, § 2, subd. 2, requiring the state board of tax commissioners to exercise "general supervision" over assessors and county boards of equalization, and the assessment of taxable property in order to secure equality in taxation, the commissioners do not act merely in an advisory capacity, but have power to classify intercounty railroads and fix the value thereof for purposes of taxation.

3. TAXATION—LEVY AND ASSESSMENT—RAILROADS—ASSESSMENT BY COUNTY ASSESSOR—EXCESS VALUATION—JUSTIFICATION.

Where the county assessor assessed plaintiffs' railroads at a higher valuation than that placed upon them by the state board of equaliza-

tion, it will not be presumed, to justify such excess assessment, that proportionally higher value was placed on all other property in the county.

4. WORDS AND PHRASES — "GENERAL SUPERVISION"—DEFINITION.

The words "general supervision" imply something more than a mere power to advise and suggest, and confer authority to oversee, and review the acts and to correct the errors of those over whom the right of supervision is granted.

5. STATUTES — CONSTRUCTION — LEGISLATIVE CONSTRUCTION—VALIDITY.

A Legislature has no power to construe a law enacted by its predecessor, so as to affect acts done under such preceding statute prior to the enactment of the construing act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 362.]

6. TAXATION — LEVY AND ASSESSMENT — EQUALIZATION OF ASSESSMENTS—EQUALIZATION BY STATE BOARD—EXCESS ASSESSMENT BY COUNTY OFFICERS—VALIDITY.

The state board of tax commissioners classified the railroad tracks of the state for purposes of taxation as "First Class," "First Class B," etc., designating a part of plaintiffs' tracks for the year 1906 as "First Class," and a part as "First Class B," and fixed the assessment at \$14,520 per mile for first-class track and \$3,168 per mile for the rolling stock thereon, and at \$10,560 per mile for first-class B track, and \$2,640 per mile for the rolling stock thereon. The assessor of S. county assessed its track designated as first class at \$25,900 per mile and the rolling stock thereon at \$3,960 per mile, and the first-class B track at \$19,000 per mile, and the rolling stock thereon at \$3,300 per mile, and refused to reduce the assessment. *Held*, that there was manifest inequality in the assessment of plaintiffs' properties; and the assessment thereof by the county officials, in disregard of the directions of the tax commissioners, was void.

Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Suit by the Great Northern Railway Company and other corporations against Snohomish county and William R. Booth, as treasurer, to enjoin defendants from collecting an alleged excess assessment. From a judgment on demurrer dismissing the complaint, plaintiffs appeal. Reversed, and demurrer directed to be overruled.

L. C. Gilman, B. O. Graham, and R. C. Saunders, for appellants. G. D. Eveland and Cooley & Horan, for respondents.

RUDKIN, J. The complaint in this action alleges substantially the following facts: That the plaintiff the St. Paul, Minneapolis & Manitoba Railway Company is a corporation organized and existing under the laws of the state of Minnesota, and is duly authorized to do business in the state of Washington; that said plaintiff is the owner of a line of railway extending from St. Paul, in the state of Minnesota, to the city of Everett, in Snohomish county, in the state of Washington; that of said line of railway there lies within said Snohomish county 43.92 miles of main track and 14.17 of side track; that the plaintiff Seattle & Montana Railway Company is a corporation organized and existing under the laws of the state of Washington; that said plaintiff is the owner of

a line of railway extending from the city of Seattle to the city of Blaine, in the state of Washington; that of said line of railway there lies in Snohomish county 43.04 miles of main track and 15.48 miles of side track; that all of said lines of railway belonging to the plaintiffs the St. Paul, Minneapolis & Manitoba Railway Company and the Seattle & Montana Railway Company are used, occupied, and operated by the plaintiff Great Northern Railway Company, a corporation organized and existing under the laws of the state of Minnesota, as a part of its general system of railway lines extending from the cities of St. Paul and Duluth, in the state of Minnesota, to the cities of Seattle and Blaine, in the state of Washington, under contracts and arrangements requiring said last-named company to pay the taxes assessed against said properties; that in the exercise of the power conferred upon it by law the state board of tax commissioners of the state of Washington, for the purposes of assessment and taxation for the year 1906, classified the different railroad properties owned and operated within the state, and by said classification the railroads above described were classified as follows: Main line tracks of the St. Paul, Minneapolis & Manitoba Railway Company as "First Class"; main line tracks of the Seattle & Montana Railway Company from its connection with the St. Paul, Minneapolis & Manitoba Railway Company near Everett Junction south to the county line of Snohomish county as "First Class"; main line tracks of the same company from Everett Junction north to the county line as "First Class B"—that said state board of tax commissioners fixed the assessment for said year for the purposes of taxation on railroad tracks of the first class at the sum of \$14,520 per mile, on rolling stock of railroads of the first class at \$3,168 per mile, on railroads of the first class B at \$10,560 per mile, and on the rolling stock thereon at \$2,640 per mile; that said valuation above mentioned was so fixed by said state board of tax commissioners in relation to and based upon the comparative value of all other lines of railway throughout the state, and proper directions and instructions were by said board made and given to the various county assessors in counties through which plaintiffs' said lines of railway extended in the state of Washington, including the assessor of said Snohomish county, so as to procure and secure equality and uniformity of assessment and taxation in the various counties of the state through which said lines of railroad extend, and to secure equality and uniformity in the valuation for assessment of the various lines of railroad throughout the respective counties of the state; that, in conformity with and in obedience to the directions and instructions of the state board of tax commissioners, the county assessors of all counties along the lines of said railroads, except the assessor of Snohomish county, assessed the property of

the plaintiffs on the classification and rate per mile thus fixed by the state board of tax commissioners; that the assessor of Snohomish county wrongfully and unlawfully assessed the tracks designated as first class at \$25,900 per mile, the rolling stock thereon at \$3,960 per mile, the tracks designated as "First Class B" at \$19,000 per mile, the rolling stock thereon at \$3,300 per mile, and therefore plaintiffs' said properties have been assessed for taxation for the year 1906 at a valuation disproportionate to all other railroad property in the state, and that a valuation relatively greater than the other railroad property in the state has been assessed for said year; that the board of equalization of Snohomish county wrongfully refused to reduce said assessment; that the taxes on said properties for the year 1906 on the valuation fixed by the assessor and board of equalization are \$26,108.32 in excess of the taxes based on the valuation of the state board of tax commissioners; that the plaintiffs have tendered and stand willing to pay all taxes and assessments against said property, less said excess of \$26,108.32, and that the treasurer of Snohomish county refuses to accept the same. The prayer of the complaint is for an injunction against the collection of such excess and for general relief. A demurrer to this complaint was sustained, and, the plaintiffs electing to stand on their pleading and refusing to plead further, a judgment of dismissal was entered from which this appeal is prosecuted.

Section 2 of article 7 of the Constitution provides that "the Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general laws as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his or her or its property." Section 32 of the revenue act of 1897 (Laws 1897, p. 150, c. 71) provides that "the value of the 'railroad track' shall be listed and taxed in the several counties in the proportion that the length of the main track in such county bears to the whole length of the road in the state, except the value of the side or second track, and all turnouts, and all station houses, depots, machine shops, or other buildings belonging to the road, which shall be taxed in the county in which the same are located." Section 34 provides that "the rolling stock shall be listed in the several counties in the proportion that the length of the main track used or operated in such county bears to the whole length of the road used or operated by such person, company or corporation, whether owned or leased by him or them in whole or in part." Section 42 provides that "all property shall be assessed at its true and fair value in money. In determining the true and fair value of real or personal property, the assessor shall not adopt a

lower or different standard of values because the same is to serve as a basis of taxation; nor shall he adopt as a criterion of value the price for which the said property would sell at auction, or at a forced sale, or in the aggregate with all the property in the town or district; but he shall value each article or description of property by itself, and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made. The true cash value of property shall be that value at which the property would be taken in payment of a just debt from a solvent debtor." The second subdivision of section 2 of the act creating the state board of tax commissioners (Laws 1905, p. 225, c. 115) provides that "the commissioners shall have power, and it shall be their duty: * * * Second. To exercise general supervision over assessors and county boards of equalization, and the determination and assessment of the taxable property in the several counties, cities and towns of the state, to the end that all taxable property in this state shall be placed upon the assessment rolls and equalized between persons, corporations and companies in the several counties of this state, and between the different municipalities and counties therein, so that equality of taxation shall be secured according to the provision of existing laws."

While these several provisions bear more or less directly on the question under consideration, the case turns principally on the meaning of the term "general supervision" in the act defining the powers and duties of the state board of tax commissioners. From these provisions, constitutional and statutory, we think it is manifest (1) that the main track and rolling stock of a railway extending through two or more counties in this state are an entirety for the purpose of assessment and taxation; (2) that the entire value of such main track and rolling stock must be apportioned between the several counties through which the road passes in the proportion that the mileage in each of such counties bears to the entire mileage in the state; (3) that such main track and rolling stock must be assessed at their true and fair value in money; (4) that the assessment shall be equalized as between the different counties, so that equality of taxation shall be secured according to the provisions of law; and (5) that the state board of tax commissioners is given general supervision over assessors and county boards of equalization to that end. Inequality in the assessment of the property of the appellant companies as between the different counties in the state is apparent on the face of this record. Counsel for respondent suggest that the assessor and taxing officers of Snohomish county may have placed a proportionately higher value on all other property in their county, and that the apparent inequality does not necessarily exist; but, in the face of the statute re-

quiring all property in all counties to be assessed at its true and fair value in money, we cannot indulge in any such speculations or presumptions. The state board of tax commissioners is given general supervision over assessors and county boards of equalization, to the end that all taxable property shall be placed on the assessment rolls and equalized as between the different counties and municipalities, so that equality of taxation shall be secured according to the provisions of law. What is meant by "general supervision"? Counsel for respondents contend that it means to confer with, to advise, and that the board acts in an advisory capacity only. We cannot believe that the Legislature went through the idle formality of creating a board thus impotent. Defining the term "general supervision" in *Vanton-geren v. Heffernan*, 5 Dak. 180, 38 N. W. 52, the court said: "The Secretary of the Interior, and, under his direction, the Commissioner of the General Land Office, has a general 'supervision over all public business relating to the public lands.' What is meant by 'supervision'? Webster says supervision means 'to oversee for direction; to superintend; to inspect; as to supervise the press for correction.' And, used in its general and accepted meaning, the Secretary has the power to oversee all the acts of the local officers for their direction, or, as illustrated by Mr. Webster, he has the power to supervise their acts for the purpose of correcting the same; and the same power is exercised by the Commissioner under the Secretary of the Interior. It is clear, then, that a fair construction of the statute gives the Secretary of the Interior, and, under his direction, the Commissioner of the General Land Office, the power to review all the acts of the local officers, and to correct, or direct a correction of, any errors committed by them. Any less power than this would make the 'supervision' an idle act—a mere overlooking without power of correction or suggestion." Defining the like term in *State v. F. E. & M. V. R. R. Co.*, 22 Neb. 313, 35 N. W. 118, the court said: "Webster defines the word 'supervision' to be 'the act of overseeing; inspection; superintending.' The board therefore is clothed with the power of overseeing, inspecting, and superintending the railways within the state, for the purpose of carrying into effect the provisions of this act, and they are clothed with the power to prevent unjust discrimination against either persons or places." It seems to us that the term "general supervision" is correctly defined in these cases. Certainly a person or officer who can only advise or suggest to another has no general supervision over him, his acts or his conduct. The respondents contend that such a construction will substantially do away with county assessors and county boards of equalization, but this conclusion does not follow. How far the state board of tax commissioners may interfere

with the local authorities in the valuation of local property for the purpose of local taxation, or how far the Legislature may authorize such interference, is not involved in this case.

It is lastly contended that the Legislature of 1907 has placed a legislative construction on the act of 1905, *supra*. In the first place, the Legislature of 1907 had no power to construe the act of its predecessor in so far as it related to past transactions; and, in the second place, we fail to find wherein such legislative construction has been given. The section of the act of 1905 above quoted is re-enacted without a change in 1907 (*Laws 1907*, p. 508, c. 220), and other provisions of the 1907 laws adopt an entirely new system for the assessment and taxation of railroad property. *Laws 1907*, p. 132, c. 78. But we fail to find in all this any legislative construction of the act of 1905.

On the record before us, we hold that there is a manifest inequality in the assessment of the properties of the appellant companies as between the different counties of the state for 1906, that the state board of tax commissioners acted within its jurisdiction when it fixed the value of intercounty railroads for the purpose of taxation, and that the acts of the Snohomish county officials in disregard of the lawful orders and directions of their superior officers were void, and of no effect.

The judgment of the court below is therefore reversed, with directions to overrule the demurrer.

HADLEY, C. J., and CROW, FULLERTON, ROOT, and MOUNT, JJ., concur.

SPOKANE FALLS & N. RY. CO. v. STEVENS COUNTY et al.

(Supreme Court of Washington. Feb. 13, 1908.)

Appeal from Superior Court, Stevens County; E. H. Sullivan, Judge.

Suit by the Spokane Falls & Northern Railway Company against Stevens county and Charles Adams, as treasurer of Stevens county, Wash., to enjoin defendants from collecting alleged excess in taxes. From a judgment dismissing the complaint, defendants appeal. Affirmed.

John D. Atkinson, J. A. Rochford, and John P. Judson, for appellants. M. J. Gordon and A. J. Langhon, for respondent.

PER CURIAM. The complaint in this case is in all material respects similar to the complaint considered by this court in *Great Northern Railway Company et al. v. Snohomish County et al.* (just decided) 93 Pac. 924. There the demurrer to the complaint was sustained, while in this case the demurrer was overruled. In that case the plain-

tiffs stood on their complaint, while in this case the defendants stood on their demurrer.

For the reasons stated in the opinion just filed, the judgment of the court below is affirmed.

STATE ex rel. HOLCOMB v. YAKKEY, Superior Court Judge.

(Supreme Court of Washington. Feb. 10, 1908.)

1. APPEAL—DECISIONS REVIEWABLE—PORTIONS OF DECREES.

Under the express provisions of Ballinger's Ann. Codes & St. § 6503, an appeal may be prosecuted from a portion only of a decree as well as from the whole decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 866.]

2. DIVORCE—ALIMONY—APPEAL—SUPERSEDEAS—RIGHT TO.

Under Hallinger's Ann. Codes & St. § 6506, providing for the form of bonds to stay proceedings pending appeal, a husband appealing from a decree in a divorce suit awarding alimony and directing him to surrender property to his wife is entitled to supersede the decree pending the appeal.

3. MANDAMUS—GROUNDS—FIXING SUPERSEDEAS BOND.

Upon refusal of the court to fix a superseas bond to which the applicant is entitled, a writ of mandamus will be granted to compel its issuance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 68.]

Mandamus by the state of Washington, on the relation of Augustus H. Holcomb, against John B. Yakkey, to compel respondent, as judge of the superior court of King county, Wash., to fix the amount of a bond to supersede a judgment. Peremptory writ issued against respondent.

Herbert E. Snook, for appellant. Bo Sweeney, for respondent.

PER CURIAM. On the 2d day of December, 1907, a decree of divorce was entered in a certain action then pending in the superior court of King county, wherein Eva Holcomb was plaintiff and the relator herein was defendant. The decree disposed of the property rights of the parties, and awarded to the plaintiff the sum of \$50 per month alimony, and the care and custody of a minor child. On the 20th day of December, 1907, the defendant gave written notice of appeal from the decree, excepting that portion thereof awarding a divorce to the plaintiff, and that portion awarding certain personal property to the defendant. He then applied to the trial court to fix the amount of the superseas bond pending the appeal in order to effect a stay of proceedings. The court re-

fused to fix the amount of the bond, or to supersede the judgment, and application was thereupon made to this court for a writ of mandamus requiring it so to do. The alternative writ issued, and the matter is now before us on the return thereto. The petition for the writ and the return are devoted largely to a discussion of the merits of the original case and to certain contempt proceedings instituted to enforce the payment of the alimony awarded by the original decree, but these questions are not now before us. The return further challenges the sufficiency of the notice of appeal, because the appeal is prosecuted from a portion of the decree only; but such an appeal is expressly authorized by statute. Ballinger's Ann. Codes & St. § 6503.

The only question we can consider at this time is, has an appellant a statutory right to supersede the judgment in a divorce action pending an appeal therefrom? Our statute, and the decisions of this court construing the same, would seem to leave no room for doubt on that question. In *State ex rel. Bank v. Superior Court*, 12 Wash. 677, 42 Pac. 123, this court said: "Our statute as to appeals in one section provides at length what judgments and orders may be appealed from, and in another section, in the same act, provides how proceedings on an order or judgment appealed from may be stayed, and, in our opinion, it is clear that the Legislature intended to give to the party prosecuting an appeal from any order or judgment the right to take advantage of the provisions for staying execution. There is no reason for holding that the provision as to stay bonds applies to one order or judgment mentioned in the preceding section and not to another, and as it must apply to some we feel compelled to hold that it applies to all, and since an order appointing a receiver is in express terms made appealable by the provisions of the act, it must be held that the provision as to stay of proceedings, in the same act, applies to an order of that kind." To the same effect see *State ex rel. Denham v. Superior Court*, 28 Wash. 590, 63 Pac. 1051, and cases there cited. In fact we have repeatedly held that prohibitory injunctions and other self-executing judgments are substantially the only ones that may not be superseded under section 6506, Ballinger's Ann. Codes & St.

A decree awarding alimony and directing one of the parties thereto to surrender property to the other falls clearly within the provisions of the superseas statute, and the peremptory writ will issue as prayed.

ROWEN v. ALLADIO et al.

(Supreme Court of Oregon. Feb. 25, 1908.)

1. MECHANICS' LIENS—NOTICE—NATURE OF WORK.

B. & C. Comp. § 5640, provides that every person performing labor on or furnishing material in the alteration or repair of any building shall have a lien thereon; and section 5644 requires the filing of a claim containing a true statement of the claimant's demand, together with certain other facts. *Held*, that a notice of a claim for lien for certain materials and labor furnished for S., to be used and which were used in alteration and repair of certain electric wiring and in making connections in and about the building, which was situated on the land described, should be construed to aver that the alteration, repair, and connections were made in and about the building, and was therefore sufficient to make a prima facie case for lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 234-236.]

2. SAME—RIGHT TO A LIEN—NATURE OF IMPROVEMENT—ELECTRIC WIRING.

Where electric wires are inserted in a building so as to indicate an intention to make them fixtures, they become the property of the owner of the building, and may therefore be the proper subject of a mechanic's lien, under B. & C. Comp. § 5640.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 36.]

Appeal from Circuit Court, Multnomah County: Arthur L. Frazer, Judge.

Suit by W. G. Rowen against P. Alladio and others to foreclose an alleged lien for material furnished and labor performed on a building owned by Louise E. Hamilton. From a judgment dismissing the suit, plaintiff appeals. Reversed and remanded.

H. Denlinger, for appellant. Wm. T. Muir, for respondent Hamilton.

MOORE, J. This is a suit by W. G. Rowen against P. Alladio, B. Sargousse, and Louise E. Hamilton, to foreclose an alleged lien for material furnished and labor performed in placing electric wires in a building owned by Mrs. Hamilton. A demurrer contesting the sufficiency of the lien notice, a copy of which is set forth in the complaint, having been sustained, the suit was dismissed, and the plaintiff appeals.

The part of the notification thus challenged is as follows: "That W. G. Rowen, by virtue of a direct contract heretofore made with P. Alladio and B. Sargousse, copartners, have furnished certain materials to and have performed certain labor for said P. Alladio and B. Sargousse, to be used and which were used by them in the alteration and repair of certain electric wiring and fixing and in making connections in and about the building which is situated on the land hereinafter described." The statute conferring the right to impose a charge upon specific property as security for the performance of an act is, so far as involved herein, as follows: "Every * * * person performing labor upon or furnishing material of any kind to be used in the

* * * alteration or repair * * * of any building * * * shall have a lien upon the same for the work or labor done * * * or material furnished at the instance of the owner of the building * * * or his agent." B. & C. Comp. § 5640. The person desiring to secure the benefits thus granted is required, within a stated time after the completion of his contract, to file with the county clerk of the county in which the building is situated "a claim containing a true statement of his demand, after deducting all just credits and offsets, with the name of the owner, or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with said lien, sufficient for identification, which claim shall be verified by the oath of himself or of some other person having knowledge of the facts." Id. § 5644.

Although the claim filed herein complies with all these necessary requirements, it is argued by defendants' counsel that the lien undertaken to be imposed on the property for material furnished and labor performed was not for the alteration or repair of a building, but of a certain electric wiring and fixing, and also in making connections in and about a building; that it is possible for electric wires to be run into a building and connections made without such wires being attached in any manner to the structure; that the lien notice herein embraces a claim for "the alteration and repair of certain electric wiring," and also for labor performed "in making connections in and about a building"; that, assuming such union was made on the building, the statute does not give a lien for the alteration or repair of electric wires, and as a nonlienable item is thus united in a lump sum with a lienable charge, from which it is incapable of segregation, the entire claim is unauthorized, and the court properly sustained the demurrer and dismissed the suit. Electricity is now generally used in all cities of any importance in civilized countries to illuminate buildings; but, before such artificial light can be employed for that purpose, wires for transmitting the current must be extended from the station where the electricity is generated to the places where it is to be put into requisition. The persons, firms, or corporations engaged in furnishing electricity usually at their own expense set poles and suspend wires thereon, with which connections are made by other wires, so that the current may be conducted into buildings and there used for illumination or for other purposes. The wires employed to distribute electricity to one or more rooms in a building, if attached in such manner as to indicate an intention to make them fixtures, become a part of the structure and are as necessary as conduits for gas or water. These connecting and distributing wires, when made fixtures, become the property of the owner of

the building in which they are placed, and the value of the material furnished and of the labor employed in making the improvements are burdens which, under a statute like ours, may be imposed on the land for the construction, alteration, or repair of any building. *Joyce, Electric Law* (2d Ed.) § 1015; *20 Am. & Eng. Ency. Law* (2d Ed.) 310; *27 Cyc.* 38; *Scannevin v. Consolidated Mineral Water Co.*, 25 R. I. 318, 55 Atl. 754. Applying this rule to the notice of lien, though the statement therein, "in the alteration and repair of certain electric wiring and fixing and in making connections in and about the building," etc., might be susceptible to the interpretation given by the defendants' counsel, a reasonable construction of the language employed tends to show a purpose to aver that the alteration, repair, and connection set forth were made in and about the building.

The notice herein makes a *prima facie* case, which, if uncontroverted, would, in our opinion, entitle the plaintiff to a decree of foreclosure; and, this being so, the decree is reversed, and the cause remanded, with directions to overrule the demurrer, and for such other proceedings as may be necessary, not inconsistent with this opinion.

OREGON ELECTRIC RY. CO. v. TERWIL- LIGER LAND CO. et al.

(Supreme Court of Oregon. Feb. 18, 1908.)

1. COSTS—COSTS ON APPEAL—TAXATION—OBJECTIONS—VERIFICATION.

Where on taxation of costs on appeal the right to recover a certain item is practically admitted, but the reasonableness of the amount is disputed, the amount not being fixed by law, it would seem that the objection should be verified; but, where the right to recover an entire item is disputed, the objection is in the nature of a demurrer, and is sufficient without verification.

2. SAME.

Where after judgment in condemnation proceedings plaintiff lost its right to appeal by paying the damages and taking possession of the premises, defendant, who had knowledge of such fact, and moved to dismiss the plaintiff's appeal therefor, was not entitled to recover costs of additional brief and abstract, incurred after such knowledge.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 13, *Costs*, § 972.]

Motion to retax costs.

For original hearing see 93 Pac. 334.

MOORE, J. This is a motion to retax costs. The appeals herein were dismissed, whereupon defendants' counsel filed a bill of the costs and disbursements, incurred by their clients in preparing for trial in this court. An objection to the items for printing an additional abstract and a brief, \$9.10 and \$78, respectively, having been sustained by our clerk, his action is sought to be reviewed in this summary manner. The defendants' counsel insist that, as the objections were not verified, the items mentioned were improperly rejected, and should now be allowed.

The rules of this court (35 Or. 587) were amended July 25, 1907, in respect to the taxation of costs, thereby changing in most particulars the decisions heretofore rendered on that subject. When the right to recover an item of disbursements is practically admitted by the adverse party who disputes the reasonableness of the charge, the objection interposed ought to state that not more than a specified sum of money should be allowed; and it would seem that in such case the objection should be verified, because the value or the measure, not being fixed by law, must be determined upon affidavits as a question of fact. When, however, an entire item is challenged on the ground that the charge is unwarranted, the exception is in the nature of a demurrer, which presents a legal question, and we are unable to perceive why the objection in such case should be verified. In the case at bar the objections contest the right of the defendants to collect any sum of money on account of the items charged, and, upon principle, are sufficient, without verification.

The transcript shows that it was filed in this court September 30, 1907, at which time the defendants knew that plaintiff had taken possession of the real property condemned, and built a railway thereon. If it were not for the rule firmly established by repeated adjudication of this court, that jurisdiction of the subject-matter cannot be waived by the parties, the filing of an additional abstract or a brief by a respondent should be deemed such a relinquishment of his right as to entitle an appellant to have his cause heard on the merits. Though this cannot be done under our practice, no party respondent should be permitted to recover any item of disbursement incurred after the trial of the cause in the lower court, when his motion to dismiss an appeal for want of jurisdiction is sustained. A few days after the transcript herein was filed, this court was in session, and could then have heard the motion to dismiss the appeal as well as at any other time. The defendants became liable for the expense of printing the abstract and the brief after they knew the existence of the facts which they successfully invoked to defeat the trial of the appeals; and, this being so, they are not entitled to recover the sums demanded therefor.

The action of the clerk in rejecting the items is approved.

WINTER v. UNION PACKING CO.

(Supreme Court of Oregon. Feb. 18, 1908.)

1. CORPORATIONS—ACTIONS—VENUE—TRANSITORY ACTIONS.

A transitory action must be brought against a domestic corporation either in the county where it has its principal office or place of business or in the county where the cause of action arose.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 12, *Corporations*, §§ 1935-1946.]

2. APPEARANCE—CHALLENGING JURISDICTION—EFFECT OF SPECIAL APPEARANCE.

A defendant may appear specially to challenge the jurisdiction of the court either by motion or by plea in abatement, where the want of jurisdiction does not appear on the face of the record, without subjecting himself to its jurisdiction for any other purpose; but, if jurisdiction is necessary to the granting of the relief sought, the appearance is general, regardless of the purpose or character of the appearance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, §§ 42-52.]

3. SAME—EFFECT OF FORTHCOMING BOND—MOTION TO DISMISS—PLEA IN ABATEMENT—BOND TO DISCHARGE ATTACHMENT.

The execution of a forthcoming bond in attachment, under B. & C. Comp. § 306, does not constitute a general appearance, neither does a special appearance to move for dismissal for want of jurisdiction, nor a subsequent plea in abatement setting up the same ground, although an application to the court to discharge an attachment on giving an undertaking conditioned to pay any judgment in the action is an acknowledgment of the court's jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, §§ 42-52.]

Appeal from Circuit Court, Multnomah County; Alfred F. Sears, Jr., Judge.

Action by Howard Winter against the Union Packing Company. Judgment for plaintiff, and defendant appeals. Reversed.

The defendant is a domestic corporation, having its principal office and place of business in Astoria, Clatsop county. On March 12, 1904, plaintiff commenced an action against it in the justice's court for Portland district, Multnomah county, on a cause of action arising in Clatsop county, and caused summons to be served upon defendant in the latter county. At the time the action was commenced a writ of attachment was issued and levied upon certain personal property belonging to defendant in Multnomah county. On March 14th defendant executed and delivered to the officer making the attachment a redelivery or forthcoming bond, with two sureties, conditioned as provided in section 306, B. & C. Comp., and the possession of the attached property was surrendered to it. Thereafter it appeared specially and moved to dismiss the action for want of jurisdiction, because defendant was a resident of Clatsop county, the cause of action arose in such county, and service was made upon it there. The motion was overruled, whereupon defendant filed a plea in abatement, alleging substantially the same state of facts. The plea was stricken out on motion, and defendant, declining to appear or plead further, judgment was rendered against it, as prayed for in the complaint. From this judgment it appealed to the circuit court, where the judgment of the justice's court was affirmed, and it now brings the case here for final determination.

A. M. Smith, for appellant. Wm. M. La Force, for respondent.

BEAN, C. J. (after stating the facts as above). It is clear that the judgment appeal-

ed from is erroneous, unless the defendant voluntarily submitted itself to the jurisdiction of the justice's court for Multnomah county. A transitory action must be brought against a domestic corporation either in the county where it has its principal office or place of business or in the county where the cause of action arose. *Holgate v. O. P. R. Co.*, 16 Or. 123, 17 Pac. 859; *Bailey v. Malheur Irrigation Co.*, 38 Or. 54, 57 Pac. 910. This rule is not disputed by plaintiff; but it is contended that defendant voluntarily submitted itself to the jurisdiction of the justice's court by appearing therein and moving to dismiss, and especially by giving a redelivery or forthcoming bond to secure possession of the attached property. The appearance of the defendant was for the sole purpose of challenging the jurisdiction of the court, and was not, therefore, a general appearance, or equivalent to the service of summons. A defendant may appear specially in an action for the purpose of taking advantage of a defect in the notice or service, or to question the jurisdiction of the court without subjecting himself to its jurisdiction for any other purpose. *Kinkade v. Myers*, 17 Or. 470, 21 Pac. 557; *Belknap v. Charlton*, 25 Or. 41, 34 Pac. 753. This he may do either by motion, or, where the want of jurisdiction does not appear on the face of the record, by plea in abatement. *Brown v. Webber & Trustees*, 6 Cush. (Mass.) 500; *Gregg v. Sumner*, 21 Ill. App. 110. But where a defendant appears and invokes the judgment of the court upon a matter, which presupposes jurisdiction, or asks relief which can only be granted after jurisdiction has attached, his appearance is general, and gives the court jurisdiction of the person whether limited to a special purpose or not. The character of the appearance does not depend upon the form of the motion or pleading, but upon its substance, and the relief sought. *Belknap v. Charlton*, supra.

The remaining question is the effect of the redelivery bond given by defendant to the officer serving the writ of attachment. There are two bonds provided by statute, by the giving of which a defendant may obtain possession of attached property. One is an undertaking, as provided in section 306, "to deliver it or pay the value thereof to the sheriff, to whom execution upon a judgment obtained by the plaintiff in the action may be issued"; and the other is by an application to the court for the discharge of the attachment upon executing and delivering to such court, or the judge thereof, an undertaking to the effect "that the sureties will pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action." Section 312, B. & C. Comp. There is, it will be noticed, a marked distinction between the method of procedure and the terms and effect of these two undertakings. The latter is given on an application to the court to discharge the attachment, and obligates

the sureties to pay such judgment as may be recovered in the action. Under many of the authorities it binds the defendant to enter an appearance, or be liable to be proceeded against as in case of personal service. *Drake on Attachment*, § 322; *Delano v. Kennedy*, 5 Ark. 457; *Childress v. Fowler*, 9 Ark. 159; *Ferguson v. Glidewell*, 48 Ark. 195, 2 S. W. 711; *Blyler v. Kline*, 64 Pa. 130; *Peebles v. Weir*, 60 Ala. 413; *Richard v. Mooney*, 39 Miss. 357; *Williams v. Gilkerson-Sloss Com. Co.*, 45 La. 1031, 13 South. 394; *Cheatham v. Morrison*, 37 S. C. 187, 15 S. E. 924; *New Albany Mfg. Co. v. Sulzer*, 29 Ind. App. 89, 63 N. E. 873. The former, however, requires no action of the court, runs to the sheriff, and is not for the payment of the judgment recovered in the action. It is merely an engagement to redeliver the attached property, or pay the value thereof, to the sheriff, to whom execution upon a judgment obtained by the plaintiff in the action may be issued, and authorizes the sheriff to surrender the actual possession of the property to defendant or other person claiming it, but does not dissolve the attachment, nor withdraw the property from the operation of the lien thereof. *Drake v. Sworts*, 24 Or. 198, 33 Pac. 563; *Coos Bay R. R. Co. v. Weider*, 26 Or. 453, 38 Pac. 838; *Dickson v. Back*, 32 Or. 217, 51 Pac. 727. It, therefore, cannot have the same effect as a bail bond or undertaking for the discharge of an attachment. It does not release the lien of the attachment, nor stand in the place of the attached property. The giving of such an undertaking is not an acknowledgment of the jurisdiction of the court or the validity of the attachment; and we have not been referred to, nor have we been able to find, any authorities holding that the giving of such a bond is an admission of jurisdiction over the person of the defendant. An application to the court to discharge an attachment on giving an undertaking, conditioned to pay any judgment that may be recovered in the action, may well be held to be an acknowledgment of the jurisdiction of the court over the person, and render a defendant liable to be proceeded against, as in case of personal service; but no such effect can be accorded a mere undertaking to redeliver the attached property or pay its value to the officer to whom execution upon the judgment recovered by the plaintiff in the action may issue. The one is an obligation to pay any judgment which may be recovered if the attachment is dissolved by the court, and the other is a mere engagement of the obligors to redeliver the property or pay its value to the officer, in case plaintiff should recover judgment and execution should be issued thereon, and does not affect the lien of the attachment. We are of the opinion, therefore, that the defendant did not submit itself to the jurisdiction of the court either by its motion to dismiss or plea in abatement or by giving the redelivery bond. Judgment of the court below is reversed.

(51 Or. 102)

IRELAND v. WARD.*

(Supreme Court of Oregon. Feb. 18, 1908.)

1. PLEADING—COMPLAINT—MOTION TO MAKE MORE DEFINITE—HUSBAND AND WIFE—ALIENATION OF AFFECTION.

It is not error to overrule a motion to make more specific a complaint alleging that defendant "seduced" plaintiff's wife and enticed her away, where plaintiff's counsel stated that he intended to charge adultery by defendant and plaintiff's wife, whereupon defendant's counsel remarked, "That is all I want to know," and the case was tried on the theory of the explanation given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1173-1193.]

2. WORDS AND PHRASES—"SEDUCE."

The word "seduce," when used to denote the conduct of a man toward a woman, is generally understood to mean the use of some influence, promise, arts, or means on his part by which she is induced to surrender her chastity and virtue to his embraces.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6388-6393.]

3. TRIAL—RECEPTION OF EVIDENCE—SHOWING GROUNDS FOR ADMISSION.

A witness, becoming ill during cross-examination, was excused for the time, and afterward her physician was asked, "What is her condition, and what is its cause, if you can tell?" Held that, as the question did not suggest the answer desired, and counsel did not state that he expected to show by the expected answer that her illness was real, and not simulated, in order to avoid further cross-examination, sustaining an objection to the question was not error.

4. APPEAL AND ERROR—RECORD—GROUNDS OF REVIEW.

Error, if any, in overruling an objection to remarks of counsel is not available, where the exceptions do not show that the remarks were not a proper answer to remarks by the opposing counsel.

5. HUSBAND AND WIFE—ALIENATING AFFECTIONS—MATTERS TO BE SHOWN.

To maintain an action for the alienation of the affections of plaintiff's wife, and enticing her away, it is not necessary to show that defendant had sexual intercourse with her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Husband and Wife, § 1118.]

Appeal from Circuit Court, Lane County; L. T. Harris, Judge.

Action by William H. Ireland against Albert J. Ward. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action by William H. Ireland against Albert J. Ward to recover damages for the alleged alienation of the affections of the plaintiff's wife. The complaint avers the marriage of the plaintiff and his wife; the existence of the connubial relation at all the times stated herein; that the spouses lived happily together until their domestic felicity was disturbed by the wrongful acts and conduct of the defendant, specifically setting them forth; that the defendant, by means of undue influence, and with intent to injure the plaintiff, maliciously seduced the latter's wife and alienated her affections from her husband; and that in May, 1905, the defendant, intending to deprive the plaintiff of the comfort, society, fellowship, and assistance of his wife, maliciously enticed her

*Rehearing denied March 17, 1908.

away from him. A motion to make the complaint more definite and certain having been overruled, an answer was filed denying generally each allegation of the complaint, on which issues the cause was tried; and a judgment having been rendered against the defendant for the sum of \$5,000, he appeals.

L. Bilyeu and A. C. Woodcock, for appellant. J. M. Williams, for respondent.

MOORE, J. (after stating the facts as above). It is contended by defendant's counsel that an error was committed in denying the motion to make the complaint more definite and certain. The bill of exceptions states that when this motion was argued the plaintiff's counsel admitted that he intended to charge in the complaint, by the use of the word "seduced," that the defendant had committed adultery with the plaintiff's wife, whereupon the defendant's counsel remarked: "That is all I want to know." Webster's International Dictionary defines the word "seduce" as follows: "To draw aside from the path of rectitude and duty in any manner." The word "seduce," however, when employed to denote the conduct of a man towards a woman, is generally understood to mean the use of some influence, promise, arts, or means on his part by which she is induced to surrender her chastity and virtue to his embraces. *Patterson v. Hayden*, 17 Or. 239, 21 Pac. 129, 3 L. R. A. 529, 11 Am. St. Rep. 822. The word under consideration is susceptible to two meanings; but as the plaintiff's counsel stated the sense in which he intended to employ the term, and his explanation being satisfactory, no error was committed in denying the motion. The cause was tried upon the averments of the complaint as though it specifically charged the defendant with alienating the affections of the plaintiff's wife by committing adultery with her, and also by unlawfully enticing her away from her husband.

Mrs. Ireland appeared at the trial herein as a witness for the defendant, but on her cross-examination she became ill, whereupon the plaintiff's counsel waived the right to obtain from her any further testimony. She was taken to a room in the courthouse, and Dr. J. W. Harris, a graduate of medicine, waited upon her, and thereafter, appearing as a witness for the defendant, he was interrogated, in relation to the patient, as follows: "What is her condition, and what is its cause, if you can tell?" An objection to the question, on the ground that it was immaterial and incompetent, having been sustained, an exception was allowed. It is maintained that an error was thus committed, the defendant's counsel arguing that the question was intended to show that the illness of the witness was real, and that her physical condition was not simulated in order to avoid cross-examination. If, from the form of a question propounded to a witness, the an-

swer is apparent, it is not necessary for counsel, when an objection is interposed, to state to the court what reply is reasonably expected to the interrogatory, for that is obvious. *Stanley v. Smith*, 15 Or. 505, 16 Pac. 174; *State v. Savage*, 36 Or. 191, 60 Pac. 610, 61 Pac. 1128; *Beers v. Aylsworth*, 41 Or. 251, 69 Pac. 1025. Where, however, the answer solicited is not manifest from an inspection of the question asked, and an objection to the inquiry is urged, it is incumbent upon counsel conducting the examination to state what reply he reasonably expects from the witness. *Kelley v. Highfield*, 15 Or. 277, 14 Pac. 744; *State v. Bartmess*, 33 Or. 110, 54 Pac. 167; *Jennings v. Oregon Land Co.*, 48 Or. 287, 86 Pac. 367. A statement by the physician of the nature of Mrs. Ireland's sudden illness, or of the causes that contributed to her indisposition, would not, in all probability, have disclosed the answer which it is now claimed by counsel that they desired to elicit from him. It is not to be supposed that her sickness was caused by nervous prostration, superinduced by the rigid cross-examination to which she was subjected, for, if such had been the case, the court would have undoubtedly permitted the question to have been answered. Testimony tending to show any other form of disease would have been immaterial; and, as no statement was made by defendant's counsel of the reply reasonably to be expected from the inquiry, and the question asked did not suggest the answer now desired, no error was committed in sustaining the objection.

The plaintiff's counsel, in his closing argument, stated to the jury that Mrs. Ireland's illness deprived him of an important right, and that, if he could have further cross-examined her, he might have been able to produce much testimony favorable to his client. An objection to this remark having been overruled, and an exception allowed, it is insisted that an error was committed. An attorney, in arguing a cause to a jury, ought to confine his remarks to the facts in evidence, and for any departure from this requirement it should be the duty of a court to interrupt the discourse, and particularly so, when attention is called thereto, and objection made on that ground. An attorney is entitled to advert to such reasonable inferences as he thinks are deducible from the evidence. A sense of fair treatment also prompts a court to permit, over objection and exception, a reply to be made to the argument which the opposing counsel have advanced. In civil actions, unless the remarks of an attorney are clearly without the legitimate range of the evidence, the bill of exceptions ought to show that the language complained of was not provoked. The reason for this rule is stated in a note to the text in 2 Ency. Pl. & Pr. 732, as follows: "Remarks which would not be primarily legitimate may under all the circumstances be entirely within bounds as answers to statements or argu-

ments of opposing counsel." The bill of exceptions does not show that the observations to which exceptions were taken were not instigated by adverse remarks. Whether or not the inference which plaintiff's counsel sought to establish from his preclusion of a complete cross-examination of Mrs. Ireland is a legitimate deduction which entitled him, in a civil action, to comment thereon before the jury, is not necessary to determine at this time, for the remarks are not, in our opinion, such a violation of the privilege of an attorney as, in the absence of the showing mentioned, would render the argument objectionable; and hence, if an error was committed, it has not been made available.

The court charged the jury, in effect, that, if they should find that the defendant, by his intentional acts or conduct, alienated the affections of Mrs. Ireland, or by such means caused her to remain away from her husband, it was not necessary to prove that the defendant had sexual intercourse with her to entitle the plaintiff to recover a judgment herein. An exception having been taken to this instruction, it is contended that an error was committed in giving it. It is argued that the gravamen of the charge, as explained by plaintiff's counsel when the motion to make the complaint more definite and certain was interposed, is the alleged violation by the defendant of the chastity of the plaintiff's wife; and, the cause having been tried on that theory, the jury were erroneously permitted to place their verdict on another ground. "The action for seducing the wife away from the husband," says a noted author, "is by no means confined to the case of improper and adulterous relations; but it extends to all cases of wrongful interference in the family affairs of others whereby the wife is induced to leave the husband, or to so conduct herself that the comfort of the married life is destroyed." Cooley, Torts (3d Ed.) *264. The gist of the action by a husband for enticing away his wife, without justifiable cause, is the loss of the comfort, society, and services of the wife (*Barnes v. Allen*, *40 N. Y. 390), and the allegation and proof of adultery are not necessary to the maintenance of such an action (*Higham v. Vanosdol*, 101 Ind. 160; *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 260). The gist of the complaint is not the commission of adultery, but the alienation of the wife's affections; and hence the instruction complained of was authorized, and no error was committed in giving it.

Other exceptions are noted, but, deeming them unimportant, the judgment is affirmed.

ANDERSON v. GRIFFITH et al.

(Supreme Court of Oregon. Feb. 25, 1908.)

1. USURY—DEFENSE—NECESSITY OF PLEA.

Plaintiff sued on a note for \$2,025, alleging a balance of \$625.95 due, with interest, etc. Two of the defendants answered, admitting the

execution of the note, and alleging that in addition to the indorsements admitted they had paid \$500, which plaintiff had neglected to credit, and prior to the action had tendered \$350.20 in full payment of the debt, when but \$100.89 was due. The reply denied the new matter pleaded, and on the trial plaintiff proved that the \$500 had been paid without any application, and that plaintiff had applied it to a debt of that amount which defendants had agreed to pay as extra compensation for plaintiff's agreement to extend payment until certain mining claims mortgaged to secure the debt had been sold. *Held*, that defendants were entitled to presume that the only question involved was the payment of the \$500 as alleged, so that they had no opportunity to plead usury prior to the raising of the issue at the trial, and were therefore not barred from such defense, because it was not pleaded.

2. PAYMENT—APPLICATION—NATURE OF DEBT.

Where a debtor owes more than one debt to a creditor, the creditor is bound to follow the debtor's directions as to application of payments, but in the absence of any direction, may apply the payment to any lawful demand, excluding a spurious or a pretended claim, an immoral one, a gambling contract, or usury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, §§ 104-114.]

3. USURY—AMOUNT OF INTEREST.

Under B. & C. Comp. § 4595, allowing a charge of 10 per cent. interest for the use of money, a payment of \$500 for the use of \$2,025 for 2 years, 5 months, and 19 days would not have been usury; but, the entire money not having been retained for that length of time, the charge became usurious.

4. INTEREST—MATURITY OF DEBT—RESCISSION OF USURIOUS CONTRACT.

Defendants agreed to pay plaintiff \$2,025 on or before five years from March 19, 1897, secured by a mortgage on certain mining claims, providing that on a sale of the premises the debt should be at once payable. The claims were sold August 25, 1903, when the obligation matured, and thereafter bore interest at 6 per cent. On March 19, 1902, it was orally agreed that in consideration of \$500 extra compensation the mortgage debt might be deferred until the claims were sold. Plaintiff sued for a balance of \$625.95, having applied a payment of \$500 on the extension agreement. Defendants deposited \$100.89, which they permitted plaintiff to recover. *Held*, that defendants' concession that the sum deposited was due to plaintiff was a rescission of the usurious agreement to pay \$500 for plaintiff's forbearance, and thereby entitled plaintiff to interest at 6 per cent. from March 19, 1902, when the note matured, instead of August 25, 1903, when the mining claims were sold.

5. TENDER—NONACCEPTANCE—KEEPING TENDER GOOD.

Where defendants made a written offer to pay plaintiff more than was due him, but only deposited with the clerk a sum less than plaintiff was entitled to recover, the tender was not kept good.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tender, §§ 55, 56.]

Appeal from Circuit Court, Lane County; L. T. Harris, Judge.

Suit by A. J. Anderson against William Griffith and others. Judgment for defendants, and plaintiff appeals. Modified and affirmed.

This is a suit by A. J. Anderson against William Griffith, J. W. Reed, and the Oregon Securities Company, a corporation, to foreclose a mortgage. It is alleged in the complaint: "That on March 19, 1897, Griffith and

Reed gave to the plaintiff their promissory note for \$2,025, due on or before five years, without interest, and to secure the payment thereof they executed to him a mortgage of an undivided one-fourth interest in three mining claims. That the mortgage provided that, in case of a sale of the premises within the time specified, the debt should at once become payable. That the claims were sold August 25, 1903, when the obligation matured, and the debt thereafter bore interest at the rate of 6 per cent. per year. That the following payments, and no others, have been made, to wit: August 26, 1903, \$1,000; September 4, 1904, \$250; and September 27, 1905, \$250; thus leaving due \$625.95, with interest thereon since the latter date. That \$65 is a reasonable sum as attorney's fees, as provided for in the note. That the interest of the Oregon Securities Company in the premises is subject to plaintiff's lien thereon. The defendants Griffith and Reed, answering, admit that their codefendant is a corporation, that they executed the mortgage mentioned, that the premises were sold August 25, 1903, that the debt thereafter bore interest at the legal rate, and that they made the payments stated, but deny all the other allegations of the complaint. For a separate defense they aver that, in addition to the indorsements specified, they paid on account of the note, November 13, 1905, \$500, which sum the plaintiff unlawfully neglected to credit thereon; that prior to the commencement of this suit they made a written tender to him of \$350.20 in full payment of the debt, when there was due thereon only \$160.89, which latter sum they deposited with the clerk of the court for him. The reply denies the allegations of new matter in the answer, and, the cause having been tried, the defendants were awarded their costs and disbursements, and the suit was dismissed, from which decree the plaintiff appeals.

W. W. Cardwell, for appellant. C. A. Hardy, for respondents.

MOORE, J. (after stating the facts as above). The testimony given at the trial shows that on March 19, 1897, the plaintiff was the owner of the specified interest in the several mining claims, which property he at that time sold and conveyed to Griffith and Reed for \$2,025, taking as security therefor a mortgage on the premises; that about March 19, 1902, when the note evidencing the debt matured, it was orally agreed that in consideration of \$500 extra compensation the payment of the mortgage debt might be deferred until the mining claims could be sold; that a sale thereof was effected August 25, 1903, and there was paid on account of the purchase price \$3,000, of which sum the plaintiff received and credited on the note \$1,000, and thereafter obtained the money evidenced by the other indorsements appearing on the negotiable instrument; that on November 13,

1905, the defendants sent a check for \$500 to the plaintiff, without indicating how the money represented thereby should be credited, whereupon he applied it in discharging their promise to pay for the indulgence. Griffith and Reed severally testified, and the court found, though denied by the plaintiff, that the stipulation to pay the extra remuneration was in lieu of interest, that the plaintiff agreed to wait for his money until it was received from the sale of the premises, and that at the time this suit was instituted the entire purchase price had not been paid.

It is contended by plaintiff's counsel that, as Griffith and Reed were indebted on the promissory note and on the oral agreement to pay for the delay, when they sent the \$500, without directions as to what account should be credited therewith, the plaintiff was entitled to apply the money in discharging their obligation for the postponement, and that the question of usury is not involved herein, because it is not made an issue by the pleadings. It is maintained by the defendants' counsel, however, that an agreement is usurious when a party seeks to obtain for a forbearance to enforce a legal remedy a greater compensation than is allowed by law for the use of money; that a creditor, in the absence of directions, cannot apply money received upon an illegal claim; and that the court properly devoted the sum specified in the check as a payment on account of the principal. The editors of the *Encyclopedia of Pleading and Practice*, in discussing the necessity of pleading usury as a defense, say: "As a general rule, both at law and in equity, where usury does not appear on the face of the plaintiff's pleadings, a defendant who desires to avail himself of that defense must plead it, or in some way give notice thereof to the adverse party; and this rule will be departed from only in exceptional cases, as, for instance, where the defendant has had no opportunity to plead." 22 *Ency. Pl. & Pr.* 421. In the case at bar the defense interposed is based on the alleged payment of \$500 made by the defendants November 13, 1905, for which sum they assert proper credit was not given; and the allegation is denied in the reply. From the issue thus framed the defendants had the right to suppose that the only question involved was the payment of the sum alleged. At the trial, however, the plaintiff admitted he received the money, but applied it on another account. The defendants, therefore, had no opportunity to plead usury; but, as an issue on that question was made by the evidence, it was proper for the court, as intimated in *Sujette v. Wilson*, 13 Or. 514, 518, 11 Pac. 267, to consider the matter.

The right of a debtor, at or prior to making a payment, to direct the application thereof to a particular debt, where he owes more than one, and the corresponding duty of a creditor to obey the command, are recognized

and fully established. *Montour v. Grand Lodge*, 38 Or. 47, 62 Pac. 524. In the absence of such direction, the creditor may apply the money or property received to any lawful demand he has against the debtor. *Trullinger v. Kofoed*, 7 Or. 228, 33 Am. Rep. 708. In *Greene v. Tyler*, 39 Pa. 361, the court, in speaking of the application of a payment, says: "It could not be made to a spurious or pretended claim; nor to an immoral one, like a gambling contract; nor to usury, for that is forbidden by statute." To the same effect, see *Real Estate Trust Co. v. Keech*, 7 Ill., 253; *Turner v. Turner*, 80 Va. 379; *Stone v. Talbot*, 4 Wis. 442, 468.

Ten per cent. interest per annum is the highest rate allowed by law in this state for the use of money. B. & C. Comp. § 4595. The payment of \$500 for the use of \$2,025 for 2 years, 5 months, and 19 days would have been no more than 10 per cent. interest for that time, and therefore not usurious. It will be remembered that the mortgage note matured March 19, 1902, and that the mining claims were sold August 25, 1903. For this extension of 1 year, 5 months, and 6 days \$500 was appropriated by the plaintiff, who, after the sale of the premises, charged 6 per cent. interest per annum for the use of the money. The plaintiff could have received \$500 for the use of the money for that time, and if he had thereafter permitted the defendants to retain the entire sum for 2 years, 7 months, and 2 days at 6 per cent. per annum, making in all 4 years and 8 days, the interest received would not have exceeded 10 per cent. per annum. The entire money was not retained for that length of time, and hence the sum sought to be recovered for the use of it would have been usurious.

Permitting the plaintiff to recover the sum deposited is tantamount to a rescission of the agreement to pay \$500 for the forbearance. In such case the parties should be placed in statu quo, thereby entitling the plaintiff to interest at 6 per cent. per annum from March 19, 1902, when the note matured, instead of August 25, 1903, when the mining claims were sold. Computing the interest at the legal rate from the maturity of the note, and deducting the payments as they were severally made, there remained due from the defendants to the plaintiff, February 13, 1906, when this suit was instituted, \$349.95, instead of the sum as found by the lower court. It will be remembered that the defendants made a written offer to pay the plaintiff \$350.-20, or 25 cents more than was due him; but they did not keep their offer good by depositing that sum with the clerk, and left with that officer only \$160.89.

The decree will therefore be modified, so as to allow the plaintiff the sum of \$349.95; but, as he refused that offer when it was made, we believe he is only entitled to the costs and disbursements incurred in this court, which are awarded him.

ABERNETHY et al. v. UHLMAN et al.
(Supreme Court of Oregon. Feb. 25, 1908.)

1. CHATTEL MORTGAGES — ADVANCES — BREACH OF CONTRACT — FORECLOSURE.

Where a chattel mortgagee agrees to advance a definite amount, but only a portion thereof is advanced, the mortgagee may nevertheless foreclose the mortgage for the amount due, subject to a set-off for any damages the mortgagor may have suffered by reason of the mortgagee's failure to advance the whole sum.

2. LANDLORD AND TENANT — CROPPING CONTRACT — NATURE OF RELATION.

A lessor and lessee under a cropping contract are tenants in common in the crop, and if the lessee mortgages his interest, the mortgagee is subrogated only to the lessee's rights and interest, and to the extent of his mortgage is a tenant in common with the lessor, so that, in order to claim as against the lessor, the mortgagee must fulfill the lessee's contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, *Landlord and Tenant*, § 1397.]

3. SAME — PRESERVATION — LIEN FOR ADVANCES.

Plaintiffs leased certain land to G. for hop culture for one-third of the crop, which it was G.'s duty to harvest and bale. G. mortgaged his two-thirds to defendants to secure \$1,500 advances to enable him to make the crop, but defendants, after advancing \$700, refused to advance further sums, and, G. being unable to procure pickers, plaintiffs procured and paid them under an agreement with defendants' agent to pay the pickers when the work was finished. *Held*, that plaintiffs were not compelled to care for the crop in fulfillment of G.'s agreement in the mortgage for defendants' benefit to do so, but were entitled to advance money to harvest the whole crop in order to protect their own interest, so that G.'s share was applicable, first, to the payment of the costs and disbursements of the suit; second, to plaintiff's claim for advances; and, third, to the payment of defendants' mortgage.

4. SAME — ENFORCEMENT — PLEADING — VARIANCE.

Where a complaint alleged that a tenant under a cropping contract delivered the crop to the landlords as a pledge to secure money advanced by the latter to harvest the crop, and also that the tenant was unable to procure the labor to care for the crop, and requested the landlords to assist him, and that they rendered services, hired laborers, and that defendants, mortgagees of the tenant's interest, directed and requested plaintiffs to cause the hops to be picked and baled, and agreed to pay the expenses, evidence that plaintiffs harvested the crop with the tenant's consent, and were holding the same accordingly, was not a variance.

5. SAME — CROPPING CONTRACT — MORTGAGES.

Where a tenant under a cropping contract mortgaged his share of the crop, and was thereafter unable to procure funds with which to harvest the crop, which funds were thereupon advanced by the landlords, the fact that the harvesting was done by the tenant would not defeat the landlords' right to priority for the amount so advanced as against the mortgagee.

Appeal from Circuit Court, Yamhill County; William Galloway, Judge.

Action by Charles H. Abernethy and others against S. Uhlman and others. From a decree directing that the proceeds of a portion of a crop belonging to defendant Go Sun be applied pro rata on the claims of plaintiffs and defendants Uhlman, both parties appeal. Reversed and rendered.

This is a suit commenced by cross-bill to an action pending as to the right to possess-

sion of 55 bales of hops; the conflict growing out of the following facts: The plaintiffs leased to defendant, Go Sun, a Chinaman, 19 acres of hops for a term of five years from February, 1902, plaintiffs to furnish him with team, tools, dryhouse, wood, poles, water, and dwelling, and to pay for one-half of the burlap and sulphur, Go Sun to cultivate, care for, harvest, cure, and bale the crop at his own expense, and when so harvested and baled, to deliver to plaintiffs one-third of such crop on the place, and on March 11, 1905, for the purpose of securing money with which to cultivate and harvest said crop under said lease for the year 1905, Go Sun made arrangements with defendants, S. and F. Uhlman, who were hop dealers, to advance to him \$1,500. To secure the said Uhlmans for such advancement as should be made, he executed to them a chattel mortgage on his two-thirds of such crop for that year; the reference in the mortgage to such advancements being in the following language: "That, whereas, the party of the first part expects to become indebted to the parties of the second part within six months from the date of this instrument, for advances and loans to be made by the parties of the second part to the party of the first part, to an amount not exceeding in the aggregate the sum of fifteen hundred (\$1,500) dollars, gold coin of the United States, for which loans and advances the party of the first part is to execute to the parties of the second part, one or more negotiable promissory notes, payable at such periods as may be agreed upon by the parties hereto, and bearing interest at the rate of 8 per cent per annum from the date of said notes and at the dates in schedule hereunto annexed."

To this is appended a schedule as follows:

"Schedule of dates when advances are to be made hereunder and notes given and amounts of each are as follows, about:

March 11, 1905, the sum of.....	\$ 100
April 15, 1905	50
June 1, 1905	150
September 1, 1905.....	600
On close of picking, bal.....	600

\$1,500"

It appears also from the testimony of Judge Woodward and M. H. Gilbertson that defendants promised to advance said sum to Go Sun for such purposes; that prior to September 1, 1905, defendants, the Uhlmans, had advanced to Go Sun, under the terms of said mortgage, the sum of \$700, and finally refused to advance any further sums; that on about September 1st Go Sun was unable to procure laborers to pick said hops on his own credit, and applied to the plaintiffs to employ them for him, assuring plaintiffs that the money therefor would be advanced by the Uhlmans; and on or prior to September 6th plaintiffs secured the laborers for Go Sun, and expended for such labor and other expenses in harvesting the crop, \$841.51. As security for the repayment thereof, Go Sun de-

livered the hops to them, whereupon the Uhlmans brought replevin to recover the hops under their mortgage, and plaintiffs brought this suit to establish their superior right to the hops to reimburse themselves for such advances. The lower court decreed that the liens of defendants S. and F. Uhlman and plaintiffs are equal, and that the proceeds of Go Sun's portion of the crop be applied pro rata upon the claims; and both parties appeal.

W. M. Kiser, for appellants. M. L. Pipes, for respondents.

EAKIN, J. (after stating the facts as above). The question involved is whether plaintiffs' claim for such advances is superior to defendants' mortgage. Chas. Abernethy testifies that Gilbertson, who was the agent for the defendants, S. and F. Uhlman, throughout this transaction, sent for him to come over to the Eldridge yard on September 6th, and while there Gilbertson gave him instructions to go ahead and gather the hops. He asked Gilbertson about picking money, and the latter said he would be on hand to pay the pickers when the work was finished. This is corroborated by Go Sun, who was present, and by Mrs. Eldridge, who had a conversation with Gilbertson on the morning of that day. Gilbertson admits part of the conversation with Abernethy, but does not remember any of the conversation with him as to picking money for his place, and claims that his talk with Go Sun and Mrs. Eldridge referred only to the Eldridge yard, which was also cropped by Go Sun. Gilbertson was undoubtedly anxious that the crop should be harvested, and used this plan to interest Abernethy; and we conclude from the evidence and circumstances that Gilbertson did on September 6th promise Abernethy and Go Sun that he would be on hand at the close of the picking to pay the hands, and requested Abernethy to assume the liability of the harvesting and he would repay him. The general rule as to the effect of a mortgage given to secure advances, even where the mortgagee agrees to advance a definite amount, if only a part of such amount is advanced, the mortgagee may nevertheless foreclose the mortgage for the amount due, subject to a set-off for any damages the mortgagor may have suffered by reason of the failure of the mortgagee to advance the whole sum. *Coleman v. Galbreath*, 53 Miss. 303; *Watts v. Bonner*, 66 Miss. 629, 6 South. 187. But there are additional elements involved here which preclude the application of that rule. This promised advancement was for the accomplishment of a particular thing, namely, cultivating and harvesting the crop covered by the mortgage.

Plaintiffs were interested in the crop to the amount of their one-third as rental, and the mortgagees were interested to the extent of Go Sun's two-thirds interest. Go Sun's

contract with the plaintiffs was to make a crop for plaintiffs' benefit, and defendants were aware of this duty and agreed to make the advance for that purpose, and in case of any default by Go Sun, if necessary for their own protection, they must take his place. Plaintiffs were not compelled to remain indifferent and see the crop lost. Nor were they compelled, for the purpose of protecting their interests, to care for the crop in fulfillment of Go Sun's agreement in the mortgage for the Uhlmanns' benefit. Even if the mortgagees were not under obligation to advance the money to harvest the crop, they had the right, upon the failure or inability of Go Sun, to furnish the money, in order to prevent waste, and thus protect their security; but, if they failed to do so, then plaintiffs, to save themselves, had a right to advance the money to care for the crop, and to be first reimbursed therefor out of the crop. The case is much stronger in plaintiffs' favor, by reason of the fact that the defendants, the mortgagees, were under obligation to do this, and had requested plaintiffs to incur the liability, and that they would reimburse them. Plaintiffs' interest was an undivided one, and could not be segregated until the crop was harvested, and to protect themselves they must care for the whole crop. It is the law in Oregon that the lessor and lessee are tenants in common in the crop (*Cooper v. McGrew*, 8 Or. 327; *Messinger v. Union Warehouse Co.*, 39 Or. 546, 65 Pac. 808); and, although the lessee may mortgage his interest, the mortgagee is subrogated only to the lessee's rights and interest; and, to the extent of his mortgage, is also a tenant in common with the lessor (*Sunol v. Molloy*, 63 Cal. 369; *McGee v. Fitzer*, 37 Tex. 27; *Jones, Chattel Mortgages*, § 47). To claim any interest under the mortgage as against the lessor the mortgagee must stand in the shoes of the lessee and fulfill his contract. The Abernethy's rights and remedies are the same against the mortgagee as against the lessee.

It appears from the testimony that Go Sun was unable to pick the hops without the money promised by defendants. He went to Portland to employ pickers, but came back without them, saying to Chas. Abernethy that he was unable to get pickers. They would not come for him, so he asked Abernethy to go and get them, with the assurance that defendants were to advance the money to pay them. Plaintiffs did go to Portland and got pickers pursuant to this request, viz., about 45, and brought them to the yard on or before September 6th. When Chas. Abernethy came over to the Eldredge yard upon the request of Gilbertson, the latter gave him instructions about picking the hops and looking after the books, saying that he would be on hand to pay the pickers when harvesting was completed. He instructed Abernethy not to let the tickets go out of the yard, that he, Abernethy, should have money on hand to take care of them in the meantime, thus

clearly recognizing that Abernethy was in charge of the harvesting. Abernethy himself says that plaintiffs did the picking, that they employed the pickers, worked in the yard, and paid the help. It does not appear that Go Sun had anything to do with the harvesting. When asked how he got possession of the hops, Abernethy said that after they were baled they were put in the storeroom and stayed there; that they did not separate their third, but all were put in together; and that he kept them. When asked what Go Sun said as to Abernethy taking charge of the hops and having a lien upon them, the latter says that it was with his consent; thus showing that the plaintiffs understood that they themselves had charge of the crop during the harvesting, and that Go Sun so recognized it. In *Hughes v. Johnson*, 33 Ark. 285, 296, it is said: "It is further a well-settled principle in equity that one who has an interest in a security may advance what is fairly necessary to its preservation, and may retain the advances out of the proceeds before crediting any portion of his debt. There can, at least, be no doubt of that where such advances are made by the consent of all parties interested in the property or fund. * * *

This is not upon the idea that the security of the mortgage is thereby extended to other advances, but rather upon the consideration that the proceeds of the property have been diminished by the expenses of preservation." That was a case of a chattel mortgage upon a growing cotton crop; a suit being brought by the mortgagor to compel an accounting of the crop and a cancellation of the mortgage, without payment of the advances to harvest it. *Wheat v. Watson*, 57 Ala. 581, was a case where the landlord had a lien by statute for the rental. The defendant Watson had a cropper's lien for \$500 advanced to the tenants to enable them to make the crop. In July the tenants abandoned the crop. The landlord offered to permit the defendant to take the place of the tenants and to complete the crop, which he declined to do. The landlord then took charge of the crop and harvested it; and the question was whether the landlord was entitled to be reimbursed from the crop for such expenses, in preference to the defendant's lien for prior advances to the tenants.

It is held that if the defendant, when given the opportunity, fails to cultivate and gather the crop, he relinquishes to the landlord the whole crop, and, if he has any remedy, it is only for the surplus after the landlord is fully paid for the expenses of making the crop. It is held in *Caldwell v. Hall*, 49 Ark. 508, 1 S. W. 62, 4 Am. St. Rep. 64, that it is a well-settled principle in equity that one who has a lien on a growing crop may advance what is fairly necessary to prevent waste or destruction of the security, and may retain the advances thus made out of the proceeds of the sale before crediting any portion of his debt. That was the claim of a mort-

gagee of a growing crop made for advances to care for and harvest the crop. We conclude, therefore, that plaintiffs were justified in taking care of the crop for their own protection, and may hold the crop for their expenses thus incurred.

It is insisted by defendants that, by the allegations of the complaint, Go Sun was in possession of the hops and yard at the time of the picking and baling, and that plaintiffs cannot now claim that they were in possession during the harvesting. The complaint does allege that after the picking Go Sun delivered the hops to the plaintiffs as a pledge to secure the repayment of the money so advanced and expended by them; but it is also alleged that Go Sun was unable to procure the labor required to take care of the crop, and requested plaintiffs to assist him, and that plaintiffs rendered their services, hired and employed the laborers to pick and care for the crop, and that defendants directed and requested plaintiffs to cause the hops to be picked and baled, and they would pay the expenses therefor. In view of these allegations, we do not deem it a variance from the pleading for plaintiffs to prove that they harvested the crop with Go Sun's consent, and are holding the crop accordingly. However, if the harvesting was done by Go Sun, that fact could not defeat plaintiffs' rights where it is alleged and proved that it was necessary for plaintiffs to advance the money to preserve the crop for the safety of their own interest therein.

Therefore the decree is reversed, and a decree rendered here that the proceeds of Go Sun's share of the crop be applied, first, in the payment of the costs and disbursements of this suit; and, secondly, to the payment of the claim of the plaintiffs, \$841.51; and, thirdly, to the payment of the mortgage debt of defendants, S. and F. Uhlman; and that the said Uhlmans have judgment against Go Sun for any balance remaining unpaid.

PARNELL v. DAVENPORT et al.

(Supreme Court of Montana. Feb. 25, 1908.)

1. BILLS AND NOTES—DUEBILLS—SUFFICIENT FUNDS—DEFENSES.

Defendant was assignee of money to be earned on certain contracts entered into by the assignor. Plaintiff procured from the assignor an order for the payment of money for services rendered, drawn on defendant, and on presentation the defendant paid part in money and issued a duebill for the balance. *Held*, in an action on the duebill, that it was no defense that the duebill was issued on condition of defendant having sufficient funds of the assignor to pay the duebill, since, under Civ. Code, §§ 1350, 1351, relating to things in action and the transfer thereof, the transaction amounted to an assignment of a chose in action.

2. SAME—CONSIDERATION.

A duebill, issued to the holder of an order for the payment of money for his services by the drawee of the order in part payment thereof, is supported by sufficient consideration, under Civ. Code, §§ 2160, 2161, relating to "good consideration," since, the transaction amounting

to an assignment of the order, the payee of the order lost his right to a statutory lien for his services, and the drawee (the maker of the duebill) gained the benefit of its waiver.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 166-212.]

3. APPEAL—REVIEW—QUESTIONS OF FACT—CONFLICTING EVIDENCE.

A finding on conflicting evidence will not be reviewed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

4. SAME—WAIVER OF ERRORS—JOINT DEFENDANTS.

Where two joint defendants jointly moved for a new trial, and the notice of appeal from the refusal to grant the new trial is a joint one, and the evidence is sufficient to sustain the verdict as against one of the defendants, whether the evidence is sufficient as against the other, need not be considered.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

Action by Samuel Parnell against J. R. Davenport and another on a duebill. From an order denying defendants' motion for a new trial, they appeal. Affirmed.

John A. Smith, for appellants. T. F. Nolan, for respondent.

HOLLOWAY, J. In 1905 F. W. Warnock had a contract with the Original Mining Company to supply certain mining timbers, which he procured in Jefferson county and shipped to the company in Butte. In order to prosecute his work Warnock borrowed money from the appellant, the Davenport Company, and as partial security for such loan assigned to the Davenport Company the moneys due him each month for timber sold to the Original Mining Company. Parnell, the plaintiff and respondent, was employed by Warnock in cutting and preparing these mining timbers. On December 12, 1905, Warnock executed and delivered to Parnell the following order: "Warnock's Camp, Dec. 12, 1905. J. R. Davenport: Please pay to Samuel Parnell the sum of one hundred and twenty-seven and $\frac{58}{100}$ (\$127.58) dollars, in full payment to date, and charge the same to my account, and greatly oblige. F. W. Warnock." This order Parnell took to the Davenport Company, and received from the company \$75 in cash and the following duebill: "December 14, 1905. Due Sam Parnell \$52.58 on Warnock account, to be paid in January. J. R. Davenport." Demand having been made for the payment of the amount represented by this duebill, and payment having been refused, Parnell commenced this action to enforce payment as for a balance due on an account assigned to J. R. Davenport and the Davenport Company. The joint answer of the defendants admits the execution, delivery, and presentation of the Warnock order, and the payment by the Davenport Company of \$75, but alleges that the promise to pay the balance was made upon condition that sufficient funds from Warnock should come into the hands of Davenport or the Davenport Company; and it is further

alleged that there were not any funds whatever from Warnock received by either of the defendants from which such payment could be made. An attempt was also made to plead a counterclaim; but the allegations are insufficient for that purpose, and there is not any contention made here with reference to that so-called counterclaim. The case was commenced in a justice of the peace court, where plaintiff had judgment. The defendants appealed to the district court, where the case was tried to the court sitting with a jury. A verdict was returned in favor of the plaintiff, and a judgment rendered and entered thereon. From an order denying defendants a new trial, this appeal was taken.

We think the liability of the defendant Davenport Company was properly fixed by the judgment in this case. Taking the defendants' own theory of the transaction, as disclosed by the testimony of J. R. Davenport, a witness for the defendants, and it seems to us that a different conclusion could scarcely be reached. That testimony discloses the business relations between Warnock and the Davenport Company. It further discloses that, when Parnell presented the Warnock order, an assignment of all moneys due from Warnock was taken by the Davenport Company, \$75 paid in cash, and the duebill representing the balance given. It is entirely immaterial, then, what particular designation be given to the Warnock order, since it is manifest that the transaction between Parnell and the Davenport Company amounted to an assignment of a chose in action by Parnell to that company. Civ. Code, §§ 1350, 1351.

But it is said that there was not any consideration for the promise on the part of the Davenport Company to pay the balance represented by the duebill. With this we do not agree. Other matters aside, it is apparent that Parnell by such assignment waived his right to a statutory lien, while the Davenport Company gained the advantage of having such lien out of the way of asserting its claim to moneys which would accrue to Warnock from the sale of mining timbers prepared by Parnell, and which moneys the Davenport Company could claim under its assignment from Warnock, provided a lien upon the timbers was not asserted. Under these circumstances we deem the consideration sufficient. Civ. Code, §§ 2160, 2161.

There is some conflict in the evidence as to whether the promise to pay the balance represented by the duebill was an absolute or a conditional promise; but by the general verdict that controversy was settled in favor of plaintiff's contention that it was an absolute one.

Whether the evidence is sufficient to sustain the verdict as against J. R. Davenport need not be considered. The motion for new trial was a joint motion, and the notice of appeal was a joint notice. In 1 Spelling on New Trial and Appellate Procedure, § 372, it is

said: "A party having ground for a new trial may lose the benefit of it by proceeding jointly with a party not so favorably situated with reference to the proceeding; and, where there is any doubt as to the identity of relation or equality of rights therein, a separate notice should be given, though they be represented by the same attorney." *Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994.

The order from which this appeal is taken is affirmed.

Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

BIRSCH v. CITIZENS' ELECTRIC CO.

(Supreme Court of Montana. Feb. 25, 1908.)

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ACTIONS—PLEADING—NECESSITY.

The defense of contributory negligence, in order to be available to defendant, must be specially pleaded, unless such contributory negligence appears from the allegations of the complaint, or unless the plaintiff's case raises a presumption of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 195-216.]

2. SAME.

In an action to recover for personal injuries, an allegation in the answer that plaintiff's injury was wholly due to his own negligence and was not in any way due to the negligence of defendant is insufficient to raise the defense of contributory negligence, since contributory negligence on the part of plaintiff presupposes negligence on the part of defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 195-197.]

3. ELECTRICITY — INJURIES — PRESUMPTIONS — CONTRIBUTORY NEGLIGENCE.

In an action for damages for personal injuries, it appeared that plaintiff was working as a hod carrier in the construction of a building, and while working on a high scaffold in the rain stepped on a wet mortar board and slipped. He threw out his hands, and one struck defendant's heavily charged electric wire, burning him badly, rendering him insensible, and causing him to fall to the ground, whereby he sustained further injuries. *Held*, that there could be no inference of negligence on plaintiff's part, as it was a fair inference that the throwing out of his arms was involuntary.

4. NEGLIGENCE—"NEGLIGENCE" DEFINED.

"Negligence" is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances would not have done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 1-6, 354-377.

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4764; vol. 8, pp. 7729-7731.]

5. SAME — ACTIONS — EVIDENCE — BURDEN OF PROOF.

In an action for damages for personal injuries, where contributory negligence is properly pleaded as a defense, the burden of proof to establish it is on defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 217-234.]

6. ELECTRICITY—TRIAL—QUESTIONS FOR JURY.

In an action against an electric company for injuries sustained by plaintiff, a hod carrier, by slipping on a wet scaffold and striking

one of defendant's wires, the question whether defendant was negligent in not insulating the wire was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 11.]

7. SAME—ORDINARY CARE.

Under Code Civ. Proc. § 8266, subd. 4, it is presumed "that a person takes ordinary care of his own concern," and hence, where a workman slips on a wet scaffold and throws out his arm, so as to come in contact with defendant's live wire, and is injured, the slipping cannot be said to be negligence per se on his part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, §§ 10, 11.]

8. NEGLIGENCE—"PROXIMATE CAUSE."

Where the cause of an injury is a pure accident, and without fault of the injured party, if the negligent act of the defendant is a co-operating or culminating cause of the injury, or if the accident would not have resulted in the injury, except for the negligent act, the negligence is the "proximate cause" of the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 74, 75, 378-381.

For other definitions, see Words and Phrases, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

Action by Joseph Birsch against the Citizens' Electric Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Rudolf Von Tobel and M. S. Gunn, for appellant. Frank E. Smith and J. C. Huntoon, for respondent.

HOLLOWAY, J. This is an action for damages for personal injuries. The plaintiff was employed as a hod carrier and mason's helper in the construction of a building for the Bank of Fergus County. At the time the plaintiff received his injuries, one wall of the building had been erected to a height of more than 20 feet. Scaffoldings were built against this wall for the use of the workmen; the second of these scaffolds being about 20 to 22 feet above the ground. The defendant electric company had certain wires strung on poles within 3 or 4 feet of this wall; the topmost wire being about 2 feet above the second scaffold, which scaffold was about 2½ feet wide. This topmost wire carried an electro-motive force of about 6,000 volts. On the day of the injury the plaintiff was directed by a mason to move certain mortar from a mortar board at one end of the second scaffold to a mortar board at the other end of the same scaffold. It was raining, and the scaffold, boards, and tools were wet. In the act of performing his work the plaintiff stepped upon the mortar board and slipped. Apparently he involuntarily threw out his hands to save himself or restore his equilibrium, when his left forearm came in contact with the heavily charged wire. He became at once insensible and fell to the ground and upon a pile of rock. The result of his contact with the wire was a burn on his left arm and a shock to his nervous system. His fall upon the pile of rock resulted in broken ribs, an injured shoulder, and other wounds and bruises. He commenced this action to

recover damages, and charged the defendant electric company with negligence in maintaining the wire in close proximity to the building without having it sufficiently insulated, and with having it charged with a high and dangerous current of electricity. The answer consists of a denial of most of the material allegations of the complaint. It also contains the following paragraph: "(6) That if plaintiff was injured at the time alleged, or at any other time, by coming in contact with one of the defendant's wires charged with electricity, such injury was wholly due to plaintiff's own neglect, and was not in any way due to any negligence on the part of defendant, or of any of its officers." To the affirmative allegations of the answer the plaintiff replied. The cause was tried to the court sitting with a jury. A verdict was returned in favor of the plaintiff, and judgment was rendered and entered thereon, from which judgment, and an order denying it a new trial, the defendant appeals.

The appellant makes three assignments of error, but in the opening paragraph of its brief its counsel tersely say: "The first contention of appellant is that the negligence complained of was not the proximate cause of the injuries sustained by plaintiff. All the errors specified are based upon this contention, and the contention that plaintiff was guilty of contributory negligence." We have, then, for consideration, as counsel have outlined, but two questions, and these, stated in the reverse order, are: (1) Was the plaintiff guilty of contributory negligence? and (2) was the negligence of the defendant the proximate cause of plaintiff's injuries?

1. Objection is made to a consideration of the first question, upon the ground that the defense of contributory negligence is not pleaded in the answer. It is a rule, now well established in this state, that the defense of contributory negligence, in order to be available to the defendant, must be specially pleaded (*Pryor v. City of Walkerville*, 31 Mont. 618, 79 Pac. 240; *Orient Insurance Co. v. Northern Pac. Ry. Co.*, 31 Mont. 502, 78 Pac. 1036, and cases cited), unless such contributory negligence appears from the allegations of the complaint (*Nord v. Boston & Mont. Con. C. & S. Min. Co.*, 33 Mont. 464, 84 Pac. 1116, 89 Pac. 647), or unless the plaintiff's own case raises a presumption of contributory negligence (*Nelson v. Boston & Mont. Con. C. & S. Min. Co.*, 35 Mont. 223, 88 Pac. 785). The only attempt made to plead contributory negligence is found in the paragraph of the answer quoted above, and that the allegations of that paragraph are insufficient is apparent. In the paragraph it is alleged that plaintiff's injury was wholly due to his own negligence, and was not in any way due to the negligence of the defendant. Contributory negligence on the part of plaintiff presupposes negligence on the part of the defendant. *Beach on Contributory Negligence* (2d Ed.) § 64; *Wastl v.*

Montana Union Ry. Co., 24 Mont. 159, 61 Pac. 9. "Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." 7 Am. & Eng. Ency. Law (2d Ed.) 371. This definition is approved in *Moakler v. Willamette V. R. Co.*, 18 Or. 189, 22 Pac. 948, 6 L. R. A. 656, 17 Am. St. Rep. 717, and *Montgomery G. L. Co. v. Montgomery & E. Ry. Co.*, 86 Ala. 372, 5 South. 735. In *Washington v. B. & O. R. R. Co.*, 17 W. Va. 190, it is said: "Properly speaking, contributory negligence, as the very words import, arises when the plaintiff as well as the defendant has done some act negligently, or has omitted through negligence to do some act, which it was their respective duty to do, and the combined negligence of the two parties has directly produced the injury."

It goes without saying, then, that an answer which denies any negligence on the part of the defendant, and alleges that the injury resulted wholly from plaintiff's negligence, does not plead contributory negligence; and the defendant, having failed to plead contributory negligence, cannot rely upon it, unless this case falls within one of the two exceptions noted above. It does not fall within the first exception, for the complaint alleges: "That the said injuries complained of herein were caused by the gross negligence of the defendant, its agents and servants; that the said plaintiff was entirely without negligence on his part." Does the case, then, fall within the second exception, or, in other words, did the plaintiff's own case raise a presumption of contributory negligence? In their brief counsel for appellant say: "The evidence conclusively establishes the fact that the plaintiff was guilty of contributory negligence. He fell onto the wire by reason of his own heedlessness and carelessness." The testimony tends to show that the plaintiff stepped on the mortar board and slipped; that he threw his hands out, and in so doing his left arm came in contact with the wire. The only fair inference deducible would seem to be that his slipping was an accident, and the throwing out of his arms a purely involuntary act. In *Baltimore, etc., R. R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506, negligence is defined as follows: "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done." We approve this definition, and under its terms we cannot see how it can be said that the plaintiff's case raised a presumption of his negligence.

Appellant's counsel cite *Bessey v. Newich-awanic Co.*, 94 Me. 61, 46 Atl. 806. Just how this case was tried does not appear clearly

from the report, but the opinion is prefaced with this observation: "The essential facts in this case are not really in dispute, but only the inferences to be fairly deduced therefrom. To the court, by agreement of the parties, is left the decision of the case upon both the law and the fact." Counsel quote the concluding paragraph of the opinion, as follows: "We feel forced, above all else, to the conclusion that whether defendant was or not in any fault, actual or theoretical merely, the case fails to show that the plaintiff's own heedlessness was not the great cause of the accident." This would seem to indicate that a rule prevails in Maine different from that recognized here. In a case of this character the plaintiff does not assume the burden of proving the negative; that is, he is not called upon to show that his own heedlessness was not the cause of his injury. On the contrary, the burden is upon the defendant to show the affirmative; that is, that the injury resulted from plaintiff's heedlessness as a contributing cause, where contributory negligence is properly pleaded. The authority cited above would be applicable if this case belonged to the class of which *Kenyon v. Glimmer*, 4 Mont. 433, 2 Pac. 21, is an example; but it does not.

2. Was the negligence of the defendant the proximate cause of plaintiff's injury? We are not prepared to say that appellant is not correct in contending that "the only injury resulting from the wire was the burn on the wrist and a shock. The broken shoulder blade, broken ribs, and other injuries are attributable to the fall on the rocks. It is difficult to determine from the record whether the plaintiff would have fallen to the ground in any event, whether he came in contact with the wire or not. But it is a fact that he came in contact with the wire, was rendered insensible and helpless, and that he did fall to the ground and upon the pile of rock. The trial court had the witnesses before it, observed their demeanor, and apparently had the advantage of seeing the illustrations made by the plaintiff as to his situation when he came in contact with the wire, which we have not; and it may be that, if the defendant had requested the trial court to withdraw from the consideration of the jury all testimony relating to the injury resulting from his coming in contact with the pile of rock, the request would have been granted; but such a request was not made, and it is not contended that the verdict is excessive. In order to coincide with appellant's view, we would have to say that the plaintiff was not entitled to recover anything, and this we cannot do. So far as the injuries received by plaintiff from coming in contact with the wire directly are concerned, we think it is a fair inference from the evidence that the negligence of the defendant was the proximate cause thereof. At least, we are satisfied that it was a matter properly submitted to the

jury for its determination. This is the holding of the Supreme Court of Massachusetts in *Griffin v. United Electric Light Co.*, 164 Mass. 402, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477, a case somewhat similar in its facts. Certainly it cannot be said that plaintiff's accidental slipping was per se negligence on his part. In this state the law presumes that the plaintiff exercised ordinary care. Code Civ. Proc. § 3266, subd. 4.

We think it may be said to be the general rule, sustained by the great weight of authority, that "where the primary cause of an injury is a pure accident, occasioned without fault of the injured party, if the negligent act of the defendant is a co-operating or culminating cause of the injury, or if the accident would not have resulted in the injury excepting for the negligent act, the negligence is the proximate cause of the injury, for which damages may be recovered." *Goe v. Northern Pac. Ry. Co.*, 30 Wash. 654, 71 Pac. 182. This doctrine has been directly recognized and applied in this state. *Lundeen v. Livingston E. L. Co.*, 17 Mont. 32, 41 Pac. 995; *Cannon v. Lewis*, 18 Mont. 402, 45 Pac. 572. In *Melsner v. City of Dillon*, 29 Mont. 116, 74 Pac. 130, the same rule is stated as follows: "Where two causes contribute to an injury, one of which is directly traceable to the defendant's negligence, and for the other of which neither party is responsible, the defendant will be held liable, provided the injury would not have been sustained but for such negligence." Counsel for appellant cite *Elliott v. Allegheny Light Co.*, 204 Pa. 568, 54 Atl. 278, which seems to be somewhat in conflict with the rule just stated; but we do not see any reason for departing from the former holdings of this court.

The judgment and order are affirmed.
Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

RUSH v. LEWIS AND CLARK COUNTY et al.

(Supreme Court of Montana. Feb. 18, 1908.)

1. TAXATION—TAX TITLES—TAX DEEDS—RECITALS—SALES—COMPETITIVE BIDDER OF COUNTY—EFFECT.

Pol. Code, § 3882, provides that property sold for taxes may be struck off to the county as purchaser where there was no other purchaser. Land belonging to plaintiff's grantor was sold for taxes, and defendant county became the purchaser thereof, the tax deed reciting that at the sale the county was the bidder willing to take the lowest quantity sufficient to pay the taxes, etc. *Held*, that the statute prohibited the county from becoming a competitive bidder at a tax sale, and the deed, showing that defendant county was a competitive bidder, was void on its face.

2. SAME.

The recitals in a tax deed of land sold to a county must show affirmatively the right of the county to take the land, and that it was not a competitive bidder at the tax sale.

3. SAME—SALE OF LAND FOR TAXES—POWER TO SELL—STATUTORY PROVISIONS—CONSTRUCTION.

A county cannot purchase land at a tax sale unless expressly authorized to do so, and a strict compliance with the statute is necessary in order to divest the owner of title thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1357-1362.]

4. SAME—PRESUMPTIONS AS TO VALIDITY—CONFLICTING PRESUMPTIONS.

Where a tax deed for land purchased by a county showed affirmatively that the county was a competitive bidder at the sale in violation of the statute, the purchaser thereof will not be protected by a presumption of regularity in the proceeding, or by Pol. Code, § 3897, making tax deeds prima facie evidence of certain matters, since a tax deed is construed most strongly against the grantee thereunder, and, where two presumptions are admissible from a deed, that must be indulged most favorable to the owner.

Appeal from District Court, Lewis and Clark County; Henry C. Smith, Judge.

Suit by T. C. Rush against Lewis and Clark county and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

McConnell & McConnell, for appellants.
Massena Bullard and Edward Horskey, for respondent.

WINSTON, District Judge. This action was commenced for the purpose of having canceled and set aside two tax deeds, issued to Lewis and Clark county, for 160 acres of land situated in said county, each deed being for 80 acres, and also a deed from Lewis and Clark county to the defendant O. W. McConnell, and a deed from the said McConnell and his wife, Annie S. McConnell, to the defendant E. N. Hart, for the same property. The lands described in them were assessed to Samuel E. Richardson, the owner, for the year 1900. The tax not having been paid, publication was duly made that the lands would be sold by the county treasurer to satisfy the delinquency, with costs, penalties, etc., and on January 25, 1901, they were sold and struck off to the defendant the county of Lewis and Clark. At the expiration of the three-year period of redemption the county caused to be executed to it two deeds, one of said deeds being to the lands in section 5, and the other to the lands in section 8. Subsequently the county, at public auction, sold the same to the defendant O. W. McConnell, who conveyed to E. N. Hart. The action was instituted by Catherine Richardson, who had received a deed from Samuel E. Richardson, her husband, on March 11, 1905. Catherine Richardson subsequently deeded the property to T. C. Rush, the respondent herein, who was afterwards substituted as plaintiff in the action. There was tendered with the complaint a sum sufficient to pay all the demands which the defendants, or any of them, might have against the property on account of taxes, penalties, interest, and charges paid thereon.

It is alleged that both the tax deeds are void for a number of reasons growing out of the proceedings had by the treasurer, the principal one of which may be stated as follows: That each of the deeds is void on its face, for that it appears from the recitals therein that at the sale of lands for taxes delinquent for the year 1900, had by the treasurer of Lewis and Clark county on January 25, 1901, the county of Lewis and Clark became the purchaser of the lands in controversy as a competitive bidder; whereas, under the provisions of law applicable, it could not become a purchaser at all, but could only take them by having them struck off to it by the treasurer after they had been offered for sale at auction on successive days and there was no bona fide bidder for them. The court found the issues for the plaintiff, adjudged the tax deeds and the subsequent conveyances void, and directed that they be canceled of record. The defendants have appealed from the judgment and an order denying them a new trial. Many assignments of error are made in appellants' brief, but these do not require notice, for the reason that we are of the opinion that the tax deeds are void because of the recitals referred to, and that the judgment of the district court must therefore be affirmed.

The deeds are identical in every respect, except in the description of the property. The deed for the lands in section 5 recites: "That at said auction Lewis and Clark county was the bidder who was willing to take the least quantity or the smallest portion of the said land and pay the taxes, costs, and charges due thereon, which taxes, costs, and charges amounted to the sum of seven and $\frac{32}{100}$ dollars; that the said least quantity or smallest portion of the said land, lying and being within the said county of Lewis and Clark, state of Montana, described as follows, to wit, land S. W. $\frac{1}{4}$ S. E., $\frac{1}{4}$ S. E., $\frac{1}{4}$ S. W. $\frac{1}{4}$, 80 acres in sec. 5, Tp. 12 N., R. 5 W., was by the said William Steele, as county treasurer aforesaid, struck off to the said Lewis and Clark county, who paid the full amount of the said taxes, costs, and charges, and thereby became the purchaser of the last described piece or parcel of land," etc.

Section 3882 of the Political Code provides, among other things, how the county may acquire property "struck off" to it for delinquent taxes, as follows: " * * * But in case there is no purchaser in good faith for the same, as provided in this chapter, on the first day that the property is offered for sale, then when the property is offered thereafter for sale and there is no purchaser in good faith for the same, the whole amount of the property assessed must be struck off to the county as the purchaser, and the duplicate certificate delivered to the county treasurer and filed by him in his office." This section prohibits the county from becoming a competitive bidder at the sale of property for delinquent taxes, and it can only acquire it when

there is no other purchaser in good faith; and the recitals in the deed must show the right of the county to take the property, and that it did not enter the lists as a competitive bidder for the same. Unless the recitals of the deed show these things, or if the deed recites, as does the deed in question, matters showing that the county was a competitive bidder at the sale, the deed on its face is void. *Norton v. Friend*, 13 Kan. 532; *Magill v. Martin*, 14 Kan. 67; *Babbitt v. Johnson*, 15 Kan. 252; *Larkin v. Wilson*, 28 Kan. 513; *Hanenkratt v. Hamill*, 10 Okl. 219, 61 Pac. 1050; *Keller v. Hawk* (Okl.) 91 Pac. 778. The county cannot purchase lands at a tax sale unless authorized to do so by statute, and a strict compliance with the statute must be had before the title of the owner can be divested, and the conduct of those vested with the power to sell lands for delinquent taxes must be closely scrutinized, in order that there may be some security for property rights. The officer who makes the sale sells that which he does not own. The proceedings are to a large extent ex parte. The owner is an unwilling party, is seldom, if ever, present at the sale, is generally ignorant of it, and the tax almost always bears a very small proportion to the value of the property sold. Upon these considerations it has generally been held that proceedings on tax sales should strictly comply with the statute; and this is the construction of the law recently applied by this court in the case of *North Real Estate L. & T. Co. v. Billings L. & T. Co.*, 36 Mont. —, 93 Pac. 40.

Counsel for appellants contend that the presumption that official duty has been regularly performed and that the law has been obeyed, as well as the provisions of section 3897 of the Political Code, making tax deeds prima facie evidence of certain matters, should protect the purchaser at a tax sale. But they cannot prevail against the presumption which must be drawn from the wording of the deed; and, where two presumptions may be drawn therefrom, that one must be indulged which is most favorable to the owner of the property. A tax deed must be construed most strongly against him who claims under it, and, if one of two constructions will support the claim of the citizen, the deed must be held invalid. When we look at the recitals of the deeds before us, and apply to them this rule of construction, it is apparent that the county became a competitive bidder, and that each of them is void on the face. The tax deeds, the foundation of defendant Hart's title, being void, it necessarily follows that the subsequent conveyances under which he claims title are also void.

For these reasons, we think the judgment of the lower court should be affirmed; and it is so ordered.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

STATE v. NORTHERN PAC. RY. CO.

(Supreme Court of Montana. Feb. 25, 1908.)

1. COMMERCE—SUBJECTS OF REGULATION—RAILROADS.

Act Feb. 5, 1907 (Laws 1907, p. 6, c. 5), providing that those employed in running or operating locomotive engines or railroad trains in this state shall not be required to work more than a certain number of hours without rest, and prescribing penalties for its violation, is not unconstitutional as being a regulation of interstate commerce, in the absence of federal legislation on the subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 8.]

2. STATUTES—REPEAL—IMPLIED REPEAL BY ACT RELATING TO SAME SUBJECT—RETROACTIVE OPERATION.

Act Feb. 5, 1907 (Laws 1907, p. 6, c. 5), regulating the time a railroad may require its employes to work, is not made ineffective by the passage of Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1907, p. 913], similar in substance, but not to become operative till March 4, 1908, since legislation is not effective for any purpose until it becomes operative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 365-369.]

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Action by the state of Montana against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. Wallace, Jr., John G. Brown, and R. F. Gaines, for appellant. Albert J. Galen, Atty. Gen., E. M. Hall, Ass't. Atty. Gen., for the State.

BRANTLY, C. J. The defendant is a corporation, organized under the laws of the state of Wisconsin, and is engaged in operating a line of railroad from a point on the shore of Lake Superior, through Montana and other states, to a point on the shore of Puget Sound. In the conduct of its business as a common carrier it transports passengers and freight from points without to points within the state of Montana, from point to point within the state, and from points within to points without the state. On January 9, 1908, the Attorney General filed an information in the district court of Lewis and Clark county, charging, in substance, that on or about December 30, 1907, the defendant, while engaged in the transportation of freight in the usual course of its business in said county, did willfully, intentionally, and unlawfully permit and require certain of its employes, being its engine and train crews in charge of one of its freight trains, to labor in the operation thereof for more than 16 consecutive hours, to wit, for 23 consecutive hours, there being no particular occasion by reason of accident, storm, wreck, washout, unavoidable delay, or other like cause, permitting or requiring said employes to so labor. The charge was preferred under the provisions of the act of the Tenth legislative assembly, approved February 5, 1907 (Laws

1907, p. 6, c. 5) entitled, "An act to regulate the hours of labor of locomotive engineers, locomotive firemen, conductors, trainmen, operators and agents acting as operators, and to provide penalties and civil liabilities for the violation thereof." To the information the defendant interposed a general demurrer. This having been disallowed, it entered its plea of not guilty. At the trial counsel submitted an agreed statement of facts, embodying substantially the allegations in the information. The defendant was found guilty, and was sentenced to pay a fine. It has appealed from the judgment and an order denying it a new trial.

It is not questioned that the information is sufficient, in form and substance, to state an offense, if the statute is a valid exercise of legislative power. The contention is that the judgment cannot be sustained because the legislation is invalid, in that (1) it is an attempt to regulate interstate commerce, the power to do which is vested by the federal Constitution, exclusively in the Congress of the United States; and (2), even though it was a valid exercise of power at the time of its enactment, it became invalid and inoperative upon the passage of the act of Congress, approved March 4, 1907, dealing with the same subject. 34 Stat. 1415, c. 2939 [U. S. Comp. St. Supp. 1907, p. 913]. Section 1 of the act declares: "On all lines of steam railroads or railways operated in whole or in part within this state the time of labor of locomotive engineers, locomotive firemen, conductors, trainmen, operators and agents acting as operators, employed in running or operating the locomotive engines or trains or over such railroads or railways in this state, shall not at any time exceed sixteen (16) consecutive hours or to be on duty for more than sixteen (16) hours in the aggregate in any twenty-four (24) hour period. At least eight (8) hours shall be allowed them off duty before said engineers, firemen, conductors, trainmen, operators and agents acting as operators, are again ordered or required to go on duty; provided, however that nothing in this section shall be construed to allow any engineer, fireman, conductor or trainman to desert his locomotive or train in case of accident, storms, wrecks, washouts, snow blockade or any unavoidable delay arising from like causes, or to allow said engineer, fireman, conductor or trainman to tie up any passenger or mail train between terminals." Section 2 prescribes penalties and imposes civil liabilities for violations of these provisions. Section 4 (page 7) repeals conflicting legislation, and section 5 declares the act immediately operative.

1. Upon the first proposition the argument is that the grant of power to Congress under the federal Constitution "to regulate commerce * * * among the several states * * *" is exclusive; and since the defendant is, and at the time the alleged offense was committed was, engaged in interstate

commerce, and the act in question assumes to impose burdens and restrictions upon it in the transaction of its business in this connection, as well as upon that done exclusively between points within the state, the act is the result of an unwarranted assumption of power by the Legislature. The purpose of the Legislature in the enactment of this statute was to secure better service at the hands of all persons operating lines of railroad within or through this state, and at the same time to promote the safety of the lives and property entrusted to them. It is apparent to every one that a continuance beyond a reasonable time each day in the performance of the exacting duties incident to an employment that is always attended with danger tends to impair both the health and efficiency of employes, and should not be permitted except in cases of necessity. The Legislature was seeking, then, by an exercise of the police power of the state, not only to serve the general welfare of the public, but also to preserve the lives and health of all persons employed in, or having direct connection with, the running of trains. Now, the police power is inherent in the several states. It remains with them notwithstanding the grant of power by them to the federal government, and may be exercised by their several Legislatures upon all matters coming within its purview, without limitation or restriction. *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; 22 Am. & Eng. Ency. Law (2d Ed.) 919. When, however, the state undertakes to legislate upon the general subject of commerce, the distinction between what is local and what is national in character must be kept in mind.

In *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 209, 14 Sup. Ct. 1087, 38 L. Ed. 962, the Supreme Court of the United States distinguishes the subjects of legislation in this connection into three classes: (1) Those over which the power of the state is exclusive; (2) those in which the state may act in the absence of legislation by Congress; and (3) those over which the power of Congress is exclusive, and the state cannot interfere at all. It is pointed out that in the first class fall many subjects of legislation which may affect interstate commerce indirectly, but their bearing upon it is of a local character so remote that they cannot be deemed in any just sense an interference. In the second class are embraced laws for the regulation of pilots employed upon navigable rivers over which the federal government has jurisdiction; quarantine and inspection laws and the policing of harbors; the improvement of navigable channels; the regulation of wharfs, piers, and docks; the construction of dams and bridges across navigable streams and the establishment of ferries. Citing and quoting with approval from the decision in *Cooley v.*

Philadelphia Port Wardens, 53 U. S. 299, 13 L. Ed. 993, the conclusion is announced that on all these subjects the states are free to legislate, so long as the effect is to control matters local in character only, until Congress chooses to act, though such legislation indirectly affects commerce with foreign nations and between the states. In the third class fall all those subjects of legislation which are not local in their nature, and do not affect interstate commerce incidentally only, but are national in their character. Over all such subjects Congress has exclusive power, and, in so far as it refrains from acting upon them, it indicates its will that in these respects commerce shall be free from regulation. In the case of *Cooley v. Philadelphia Port Wardens*, one of the questions decided was whether an act of the Legislature of Pennsylvania, regulating pilots and pilotage, was repugnant to the commerce clause of the Constitution. It was held that, though Congress had the power to deal with the subject, the mere grant of the power did not amount to a denial of it to the state, and hence that the act was valid until it should be superseded by an act of Congress. Statutes like the one before us have often been drawn in question before the courts, and they have invariably been held valid by the highest court of last resort, except when they were clearly unreasonable interferences with interstate commerce. Cases holding such laws valid are collected by Mr. Justice Brown, in *Cleveland, C., C. & St. L. Ry. Co. v. People of the State of Illinois*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868, who makes the following summary: "We have recently applied this doctrine to state laws requiring locomotive engineers to be examined and licensed by the state authorities (*Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508); requiring such engineers to be examined from time to time with respect to their ability to distinguish colors (*Nashville, etc., Railway v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352); requiring telegraph companies to receive dispatches and to transmit and deliver them with due diligence, as applied to messages from outside the state (*Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105); forbidding the running of freight trains on Sunday (*Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166); requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations (*Railway Company v. Fuller*, 17 Wall. 590, 21 L. Ed. 710); forbidding the consolidation of parallel or competing lines of railway (*Louisville & Nashville Railroad v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849); regulating the heating of passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto (*N. Y., N. H., etc., Railroad*

Company v. New York, 165 U. S. 623, 17 Sup. Ct. 418, 41 L. Ed. 853); providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers which would have existed if no contract had been made (Chicago, Milwaukee, etc., Railway v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688); and declaring that, when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent (Richmond & Allegheny Railroad v. Patterson Tobacco Co., 169 U. S. 311, 18 Sup. Ct. 835, 42 L. Ed. 759. In none of these cases was it thought that the regulations were unreasonable, or operated in any just sense as a restriction upon interstate commerce." In the Illinois case, a statute requiring railway companies to stop all trains at all county seats was held to be direct interference with interstate commerce, and therefore unconstitutional, but the Ohio case (Lake Shore & Michigan Southern Ry. Co. v. Ohio, supra) is distinguished and the result approved. Among the numerous decisions by this court some are found which seem to be out of line with others, but generally the rule has been observed that upon all such subjects, if Congress has not acted, the states are free to legislate, so long as they seek to promote the public safety and convenience, and do not undertake to hamper unnecessarily or substantially control the agencies of interstate commerce in the conduct of their business. In Lake Shore v. Michigan Southern Ry. Co. v. Ohio, supra, a statute of Ohio requiring each railway company to stop three of its trains, going each way, daily except Sundays, at all stations, cities, or villages containing over three thousand inhabitants, to receive and let off passengers, was upheld on the ground that it was a proper exercise of police power by the state, and, though the decision was by a divided court, the doctrine of the cases cited by Mr. Justice Brown, in Cleveland, O., C. & St. L. Ry. Co. v. People of Illinois, was approved. In this connection the case of *Henington v. Georgia* is also in point, though it is disapproved by the dissenting justices in the Ohio case.

On principle we cannot distinguish between the effect of a statute such as that of the state of Alabama, which was considered in *Smith v. Alabama*, 124 U. S. 472, 8 Sup. Ct. 564, 31 L. Ed. 512, and the one here involved. In that case, in order to secure the maximum of efficiency in railroad engineers, they were required to submit themselves to an examination to test their mechanical skill and knowledge, and to be licensed by a competent board of examiners, before they could be employed

by any railway company. An additional requirement was that they must be men of careful and temperate habits. The statute in question applied generally to the business of railroads, without making any distinction between that which was strictly interstate commerce, and that which was commerce within the state exclusively. So in *Nashville, O. & St. L. Ry. Co. v. Alabama*, 128 U. S. 98, 9 Sup. Ct. 28, 32 L. Ed. 352, and for the same reason, all employees having charge of or directly connected with the operation of trains were required to submit themselves from time to time to examination to test their ability to distinguish color signals, and to obtain a license certifying to their efficiency in this regard, before they could enter or continue in the service of any railroad operating in the state. The mechanical efficiency or personal habits of engineers, or their capacity or that of other railway employees to distinguish colors, and hence their greater efficiency in the business of handling trains, does not more nearly concern the public safety than does the necessity for sleep and rest, in order that they may have full possession of their mental powers and physical strength to aid them in the performance of their responsible duties. Nor does the requirement in the one case more seriously interfere with or restrain commerce than in the other. In all such cases an additional burden is imposed upon the railroad corporation, and to the extent of this additional burden there is an interference with the conduct of its business. The cases cited, it seems to us, are conclusive; and, while we think it properly conceded that the subject, so far as it affects interstate commerce, falls within the power of federal legislation under the Constitution, yet, in the absence of such legislation on the subject, it is a matter for state control, under the exercise of its police power, to provide for the public safety and also for the health and lives of railroad employees themselves.

2. It remains to inquire whether the law is still operative, notwithstanding the act of Congress, referred to above, deals with the same subject. The state statute became a law on February 5, 1907. The federal statute does not by its own terms become operative until March 4, 1908. This being the situation, did it upon its approval invalidate the state statute, on the theory that it is a direct utterance of Congress under its constitutional power upon the same subject? The two acts embody substantially the same provisions, and it is clear that it was the intention of Congress to assume control of the subject, so far as it concerns companies engaged in interstate commerce. Counsel for appellant cite no authority in support of their contention, nor do we know of any directly in point. It seems to us, however, that in the absence of some declaration on the subject in the act itself, indicating the intention to supersede at once existing state legislation,

there is no foundation in reason for the assertion that an act, to take effect in the future, has that effect. In *Smith v. Alabama*, supra, it is said: "But for the provisions on the subject found in the local law of each state, there would be no legal obligation on the part of the carrier, whether ex contractu or ex delicto, to those who employed him, or, if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular state does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which until displaced covers the subject." While the above quotation is not directly in point, it seems to lend support to the notion that, until legislation by Congress upon any subject upon which the state has concurrent jurisdiction becomes operative, the existing state legislation is not displaced, but in the interim remains in full force, especially so in the absence of any declaration by Congress on that subject. The case of *Sherlock v. Ailing*, 93 U. S. 99, 23 L. Ed. 819, seems also to support this conclusion. We do not see how an act which does not by its own terms become a rule of conduct until a future time can be said to displace another existing rule on the same subject during the interval between the time of its enactment and the time it becomes operative, even though the existing rule be inconsistent with it, in the absence of some express or implied declaration of a purpose that such shall be the result. Legislation is not effective for any purpose until it becomes operative. In a given case the effective operation of a statute requiring expensive preparation, or a change in the mode of conducting business on the part of those whom it is intended to affect, may very properly be deferred to a future time. So far as it provides for such adjustment and changes, it may be said to have a quasi operative effect; but even in such cases the existing law must be regarded as remaining in force until it is actually displaced by the new one. The act of Congress contains no such declaration, and we hold that the state statute, which was valid and in force at the time of its passage, remains in force until the act of Congress becomes effective.

We are of the opinion that there is no merit in either of the contentions made by the ap-

pellant. Consequently the judgment and order denying a new trial must be affirmed.

Affirmed.

HOLLOWAY and SMITH, JJ., concur.

(36 Mont. 545)

RILEY v. NORTHERN PAC. RY. CO.

(Supreme Court of Montana. Feb. 17, 1908.)

1. RAILROADS — INJURIES TO PERSONS AT CROSSINGS—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

Whether decedent, who was killed by a switch engine, was guilty of contributory negligence in being at the crossing, and whether the railroad was negligent in not properly guarding the crossing while the engine was passing over it, *held*, under the evidence, to be questions for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1156-1159, 1166-1186.]

2. EVIDENCE—WEIGHT—POSITIVE AND NEGATIVE EVIDENCE.

When one witness testifies positively that a certain thing existed or happened, and another witness, with equal means of knowing, testifies that the thing did not exist or happen, the so-called negative testimony is so far positive in its character that a court cannot say that it is entitled to less weight than the affirmative testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2432-2435.]

3. RAILROADS — INJURIES TO PERSONS AT CROSSINGS—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action for the death of one struck by an engine while crossing defendant's tracks, there was evidence for defendant that the bell was ringing and a headlight burning. Plaintiff's witnesses testified that they did not hear any bell or see any light. Defendant's witnesses swore that they did not see the deceased at all, although the engineer claimed he was looking toward the very spot where the accident happened. *Held*, that the court properly refused to charge that it was proved by the uncontradicted evidence that the bell was ringing and the headlight burning, that the ringing and the light were a sufficient warning, and that, if no other negligence was shown, the verdict must be for defendant.

4. SAME.

In an action for the death of one struck by an engine while crossing defendant's tracks, where it was alleged that the speed of the engine exceeded six miles per hour, but the evidence showed positively that the speed was not so great, it was not prejudicial to defendant to refuse to charge that the evidence uncontradictedly showed that the speed of the engine was less than six miles per hour, that the speed could not be considered as a ground of recovery, and that, if no other negligence were shown, the verdict must be for defendant, where the court did not otherwise tell the jury that they should consider the speed of the engine in arriving at a verdict, and did give an instruction limiting the jury to a consideration of the faults proven by the evidence.

5. SAME.

In an action for the death of one struck by an engine while crossing defendant's tracks, where it was alleged that defendant violated an ordinance relating to flagmen, it was not error to refuse a charge that the ordinance had no application to crossing where the accident occurred, that there was no duty to have a flagman at that crossing, and that, if no other negligence were shown, the verdict must be for de-

defendant, even though the evidence showed that the ordinance was not violated, since the absence of an ordinance requiring a flagman at that crossing was not conclusive upon the question of the necessity for one there.

6. APPEAL—REVIEW—HARMLESS ERROR—ADMISSIBILITY OF EVIDENCE.

In an action for the death of one struck by a switch engine while crossing defendant's tracks, where it was shown that there was a gate at each side of the crossing, but that on account of the lessened travel between the hours of 12 o'clock midnight and 6 o'clock in the morning the gates were not used, and that the deceased was killed during such hours, and further that the mayor had never designated the crossing as one where a flagman was required, it was not prejudicial to defendant to admit in evidence an ordinance requiring a railroad to keep a flagman at such crossings unprotected by gates as may be designated by the mayor from time to time, since the jury must have known that the mayor had never required a flagman at the crossing in question, and therefore they could not have considered that the company was negligent in failing to provide a flagman at such crossing on account of the fact that the mayor had designated it as one of the crossings where a flagman should be employed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

7. RAILROADS—ACCIDENTS AT CROSSINGS—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

In an action for the death of one struck by an engine while crossing defendant's tracks, where witnesses who were approaching the tracks testified that they saw the switch engine moving, it was not error to refuse a charge that, in determining whether a reasonable person coming along the street toward the crossing would have seen the engine, the jury might consider what other persons coming after the deceased along the same track did see in that regard, such matter being argumentative, and for attorneys to suggest.

8. SAME—INSTRUCTIONS.

In an action for the death of one struck by an engine while on defendant's crossing and attempting to get out of the way of a coming passenger train, there being no evidence that the deceased assumed a position of known danger, or that his situation was not apparently a place of safety when he went into it, it was not error to refuse to charge that, if in passing the second track south of the main line on which the passenger train was approaching, the deceased could have seen the conditions in time to take a position of safety with regard to the two tracks immediately south of the main line, it was his duty in the exercise of ordinary care to have done so, and that, knowing that the passenger train was approaching, he was bound to so conduct himself as to that train as not to put himself in a known place of danger while it was passing; the proposed instructions having no reference to defendant's duty to exercise ordinary care to protect the deceased in the position in which he was.

9. SAME.

In an action for the death of one struck by an engine while crossing defendant's tracks and attempting to get out of the way of a coming passenger train, there was no error in refusing to charge that in any event, if the deceased was at fault in putting himself in a position where a movement to avoid the dust of the passenger train would bring him within striking distance of the switch engine, there could be no recovery on the ground of the speed of the passenger train, since the instruction omitted the element of defendant's duty to take reasonable care to avoid injuring the deceased in the position in which he placed himself.

10. SAME.

In an action for the death of one struck by an engine while crossing defendant's tracks, the accident occurring between the hours of 2 and 4 o'clock a. m., there was no error in refusing to charge that there was nothing in the evidence showing any traffic conditions at the crossing in question between such hours of any day requiring the operation of crossing gates, independently of law, ordinance, or regulation, since the instruction would have withdrawn from the jury evidence on the particular question they were to decide—whether defendant exercised ordinary care in moving the switch engine across the street under all the circumstances disclosed.

11. SAME—QUESTIONS FOR JURY.

In an action for the death of one struck by an engine while crossing defendant's tracks, whether defendant, in the exercise of ordinary care, might have discovered the position of the deceased in time to have avoided injuring him, held a question for the jury, irrespective of whether or not the deceased had exercised ordinary care in going into the place where he was.

12. SAME—CARE REQUIRED OF RAILROAD.

Upon a railroad company is imposed the duty of using all reasonable efforts to avoid injury to one who has accidentally placed himself in a position of danger, if the peril is known, or, by the exercise of reasonable care, might have been known.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 981-987.]

13. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE—INSTRUCTIONS—ARGUMENT OF COUNSEL—CONFORMITY TO ISSUES.

Where all the testimony relating to the last clear chance to avoid the injury went in without objection under the issues made by the complaint and answer, the doctrine of the last clear chance was a legitimate subject for argument to the jury, and of instructions by the court, though no such issue was raised by the reply to the plea of contributory negligence.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

Action by Esther L. Riley, as administratrix, against the Northern Pacific Railway Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Wallace & Donnelly, for appellant. Geo. W. Farr and Fred H. Hathhorn, for respondent.

SMITH, J. Between 2 and 3 o'clock on the morning of July 18, 1905, two men, named Reuben A. Riley and George Cresap, were struck and instantly killed by a switch engine of the Northern Pacific Railway Company on the Twenty-Seventh street crossing of the tracks of that company in Billings, Mont. This action was begun by the plaintiff, the widow and administratrix of the estate of Reuben A. Riley, to recover damages for his death, on the ground that it was due to the negligence of the railway company and its employés. Foster L. Skillman, the engineer in charge of the switch engine, was joined with the railway company as defendant; but no verdict was returned or judgment entered against him. The railway company appeals from a judgment against it, founded upon a verdict for \$12,600, and from an order denying its motion for a new trial.

As is well said in the brief of counsel for the appellant, the negligence relied on by the plaintiff is set forth in the complaint with a degree of fullness seldom found in cases of this character. The tracks of the defendant company extend east and west through the city of Billings. The streets immediately north and south, and running parallel with them, are, respectively, Montana avenue and Minnesota avenue. A number of streets cross the tracks at right angles from north to south, among them Twenty-Seventh street. This last-named street is the first street east of the depot of the defendant, and is one of the streets most used in passing to and fro between Montana and Minnesota avenues. At the time of the accident the defendant had seven tracks constructed and in use across Twenty-Seventh street. Starting with the most northerly track, and numbering them as they lay, track No. 2, or the first track south of the most northerly track, was the main line, tracks Nos. 1, 3, 4, 5, 6, and 7 being sidings. The distance from the south rail of the main line to the north rail of track No. 3 was 10.4 feet. Sidewalks 12 feet wide extend north and south along each side of Twenty-Seventh street. The street is 80 feet in width, including the sidewalks, and 56 feet in width between the sidewalks. The planking of the walk is practically level with the rails of the track. Between tracks 1 and 2, and a little to the east of the east sidewalk, there is a watchtower from which crossing gates are raised by a man stationed there. A watchman was kept in the tower from 7 a. m. until midnight. From about 9 or 10 o'clock in the evening of July 17th until shortly before he was killed the deceased was at the Topic Saloon or Theater on Minnesota avenue, about 250 feet east of the east walk of Twenty-Seventh street, and was expecting to meet his wife, the plaintiff, who was coming to Billings from Miles City on train No. 3, due to arrive in Billings at 2:05 a. m., and which did arrive at 2:23 a. m. All that is known of the manner in which deceased was killed is what was told on the stand by plaintiff's witness Mueller. The witnesses Hayden and Rex were with Mueller at the time, but neither would believe that a man had been struck when Mueller affirmed that he had observed the fact. The testimony of Mueller was, in substance, as follows: Just before the accident Mueller, Hayden, and Rex were together on Minnesota avenue, west of Twenty-Seventh street. Hayden was to leave for the west on train No. 3, and Mueller and Rex were going to see him off. They heard the train whistle, and the three men came together to the southwest corner of Minnesota avenue and Twenty-Seventh street, and crossed diagonally to the northeast corner, striking the east sidewalk of Twenty-Seventh street near the south corner of a woolhouse there situated, and then walking north on the east walk of Twenty-Seventh street. As they crossed to the wool-

house corner, Mueller noticed two men right ahead. The crossing gates were up, and the witness saw no one in the tower. When he first saw the two men, they may have been on track 3 or track 4, and were going north on the east sidewalk. By the time witness had walked probably 50 feet on the east sidewalk the two men ahead stopped. The witness did not know who they were or why they stopped, though the passenger train was going across Twenty-Seventh street just then, and they stopped on the south side of the passenger train. He estimated that the passenger train, which was on the main line going west, was running fully 20 miles an hour until it struck the Twenty-Seventh street crossing, and was going very fast across the street. As this train No. 3 was crossing the street he noticed a switch engine backing up from the west side of Twenty-Seventh street on track No. 3, the first track south of the main line. It had been standing on the west side of the street, and when he saw it start to back up train No. 3 was in motion across Twenty-Seventh street. The train and the engine passed at the same time, train No. 3 moving west, and the switch engine backing east across that street. When the switch engine crossed the east walk, the witness and his two friends stopped to let it pass. He thought that he and his friends were then on or just north of track No. 4, within 6 or 8 feet of the switch engine. Just as he stopped he saw the men he had noticed in front of him. One of them stepped back, and witness saw him fall. As the passenger train was coming in the witness saw a cloud of dust roll up beneath the train. He could not say to what extent it rolled up, any more than that he saw the dust. It was sufficient so that he could see it from where he stood. He could not say for sure whether the man who, as he had said, stepped back, had really stepped back, or whether he had faced the other way and stepped forward, but, whichever it was, the movement was made just as the passenger train was alongside where this man stood. The witness thought the man was standing between track No. 2 and track No. 3, on which the switch engine was moving when he made this backward movement. On seeing the man fall, witness said to his friends: "There was a man run over." After the switch engine had passed they saw a corpse lying 20 feet away. The witness went to send in an alarm to the police station, and his friends ran east to notify the switching crew. A little east of the point where lay the first body a second body was found. The bodies were those of Reuben A. Riley and George Cresap. The foregoing is a summary of Mueller's testimony, substantially as set forth in the brief of appellant.

Now as to the pleadings. The plaintiff charged in her complaint that the negligence of the defendant consisted in the following: (1) Failure to lower the crossing gates before the deceased started across the tracks;

(2) excessive speed of train No. 3 in crossing Twenty-Seventh street; (3) excessive speed of the switch engine in backing across Twenty-Seventh street; (4) failure of the employees in charge of the switch engine to give any warning, or ring a bell, or blow a whistle, in backing across the street; (5) negligence in moving the switch engine across the street while the passenger train was coming in to the depot; (6) failure to have a switchman at the rear end of the switch engine while it was backing across the street; (7) failure to have any light or signal at the rear end of the switch engine to warn persons of its approach; (8) failure of the engineer and fireman of the switch engine to keep a lookout for persons on the street while they were backing across it; and (9) failure to have a flagman at the crossing to warn people of the approach of trains, by waving a red flag, as required by the city ordinances. The defendant railway company denied negligence on its part, or that of its servants, and alleged that the death of Riley was caused by his contributing fault and carelessness.

The first error complained of is the refusal of the court to direct a verdict for the defendant at the close of plaintiff's case. We are of opinion that the court was right in refusing to grant this motion. The specifications of negligence set forth in the complaint, numbered from 3 to 9, comprehend, in substance, the proposition that the railroad company was negligent in not properly guarding this crossing while the switch engine was passing over it. Whether the company was or was not negligent in this regard was a proper question to be submitted to the jury under the testimony of Mueller, as herein recited. We think the question of contributory negligence on the part of the deceased was also properly submitted. We cannot say that different minds might not properly reach different conclusions relative to both of these questions under the evidence.

The second contention is that the court erred in giving instruction No. 1 to the jury. This instruction is very long, and it is unnecessary to repeat it here. It is, in effect, a statement of the matters set forth in plaintiff's complaint, including the various reasons assigned by the plaintiff as a basis for her averment that the defendant was negligent. This instruction embodies the language of the complaint almost literally, and, regarding it as merely a statement of the issues made by the pleadings, we find no error in it, but think the jury must have understood that it was simply a statement of what the plaintiff claimed and what the defendant relied upon as a defense. In this connection it is claimed by the defendant that the reason the giving of instruction No. 1 may have been prejudicial was because it contained a recital of claims made by the plaintiff which were not afterwards substantiated by testimony, and that the court refused to give certain oth-

er instructions eliminating from the consideration of the jury those alleged acts of negligence which were unproven.

The next instruction complained of is No. 9, which reads as follows: "The complaint in this action sets forth the particular respects in which the plaintiff claims there was a breach of duty. The plaintiff, having detailed thus the features of claimed negligence, must be limited to those specifically, and you have no right to consider in this case any other alleged grounds of negligence than those enumerated in the fifth paragraph of the complaint, and it is your duty as jurymen to limit your deliberations to those and to those only in so far as the alleged fault of the defendant railway is concerned." This instruction is so palpably in favor of the defendant that it cannot be complained of except in this regard—that the court, having limited the matters to be considered by the jury to the specific acts of negligence set forth in the complaint, should have gone further and given other instructions, taking from the jury's consideration accusations of negligence which the defendant claims were not proven. We shall consider this later.

It is contended that the court erred in refusing to give defendant's requested instructions Nos. 33, 34, 35, and 36. Those tendered instructions read as follows: "(33) As to the alleged ground of negligence set forth in subdivision B of said paragraph of the complaint, which claims that the switch engine was moved without a light, or any warning by bell, or otherwise, I advise you that, though it was proven that there was no switchman or other person on the rear of such switch engine as it moved backward, yet it is proved by the uncontradicted evidence that the bell was ringing, and that there was a headlight upon the rear end of the switch engine, lit, and shining in the direction towards which the engine was moving, that the ringing of the bell and the presence of the headlight were a sufficient warning, and that the law did not impose upon the defendant any duty in addition to have any person upon the footboard of the rear of the engine to give additional warning, and that, therefore, the averments of this subdivision are unproven, and that the absence of a switchman or other person at the rear of said engine would not be a ground of recovery in this case, and, if there were no other negligence proven, your verdict must be for the defendant railway. (34) As to the alleged negligence set forth in subdivision C of said paragraph of the complaint, the alleged failure to ring the bell or blow the whistle while the switch engine was crossing Twenty-Seventh street, and the averment that its speed then was greater than six miles per hour, I advise you that the evidence uncontradictedly shows that the bell was rung, and that the rate of speed of the switch engine was less than six miles per hour, and that this alleged ground of negligence is not only

unproven, but is disproved, and you cannot consider it as a ground of recovery, and, if no other negligence were proven, your verdict must be for the defendant. (35) As to the alleged ground of negligence set forth in subdivision F of paragraph 5 of the complaint, viz., the allegation that defendant's engineer did not ring the bell as required by the provisions of section 2 of the same article of the Billings ordinances, I advise you that the ringing of the bell by the fireman of the locomotive would be a compliance with this ordinance. I further advise you that the evidence uncontradictedly discloses that the bell was rung as required by this ordinance, and that you cannot consider this question as a ground of recovery, because no breach of any duty in this respect has been proven. (36) As to the specifications of the alleged fault of the defendant company contained in subdivision G of the fifth paragraph of the complaint, the violation of section 3 of article 2 of chapter 12 of the Billings ordinances, dealing with flagmen, I instruct you that that ordinance has no application to this case, and that, while it was read in evidence, and it appeared that there was no flagman at this crossing, there was no duty to have a flagman at this crossing, and the failure to have a flagman at this crossing cannot be considered by you as a ground of recovery, and, if no other alleged negligence than this were proven, your verdict must be for the defendant railway."

Appellant affirms that it was proven by the uncontradicted evidence that the bell was ringing and that there was a headlight upon the rear of the switch engine. On the part of the defendant there was positive testimony that the bell was ringing and the light burning. The plaintiff's witnesses simply testified that they did not hear any bell or see any light. Appellant argues that this negative testimony is of no weight, in view of the positive testimony opposed to it. Ordinarily, when one witness testifies positively that a certain thing existed or happened, and another witness, with equal means of knowing, testifies that the thing did not exist or happen, the so-called negative testimony is so far positive in its character that a court could not say that it was entitled to less weight than the affirmative testimony. *State v. McLeod*, 35 Mont. 372, 89 Pac. 831. But the appellant says that in this case the testimony that the witnesses did not hear the bell rung or see the light burning is in no sense a statement that the bell was not rung or the light not burning, and consequently the positive statements are uncontradicted. But, in passing upon the weight to be given to this testimony, the jury had a right to take into consideration all of the surrounding circumstances, including the fact that defendant's witnesses, who were its employees, swore that they did not see the deceased at all, although, if the light had been burning, as these witnesses testify it was, it

seems almost impossible that the engineer, who claims he was looking toward the very spot where the travelers were, should not have seen them. In view of this situation, it is equally clear to us that the jury had a right to take into consideration the testimony regarding the headlight in determining whether or not the defendant's witnesses were entitled to credit in testifying that the bell was ringing. This being the case, the court properly refused to give proposed instruction No. 33 to the jury.

What is said last above partly covers the action of the court in refusing to give proposed instruction No. 34. In addition to that, however, there is incorporated in this proposed instruction the feature that the evidence uncontradictedly shows that the rate of speed of the switch engine was less than six miles per hour; and defendant argues that for this reason the court should have taken from the jury the right to consider the speed of the switch engine in determining their verdict. Let it be remembered that instruction No. 1 is simply a recital of the issues made by the pleadings, and nowhere in the instructions did the court tell the jury that they should consider the speed at which the switch engine was going in arriving at a verdict. The error complained of is the refusal of the court to tell the jury that they must not consider the matter at all, for the reason that the evidence wholly fails to substantiate this allegation of negligence. It is true that the evidence does show positively that the switch engine was not moving at a rate of speed exceeding six miles an hour. How can it possibly be conceived that the jury determined that the engine was exceeding six miles per hour and considered that fact in arriving at a verdict? This jury, of course, knew that there was no testimony whatsoever warranting them predicated negligence upon the speed of the switch engine. They must have known it; therefore they could not have given any consideration to the subject in determining the liability of the defendant. It would have been proper for the court to withdraw this matter from the jury's consideration peremptorily, and we do not desire to be understood as holding that, in a proper case, the court should not do so. In this case, however, we are satisfied, in view of the state of the testimony, that no prejudice resulted to the defendant from the refusal of the court. Note, also, the following instruction given by the court, limiting the jury to a consideration of those "faults * * * proven by the evidence": "If you fail to find fault on the part of the defendants in the respect in which you are told above that under this complaint you may consider whether they are at fault, you will proceed no further in the case, but stop your deliberations, and return a verdict for the defendants. If you should find that fault in a respect which I have told you would entitle the plaintiff to recover, and which has been proven by the

evidence, then you will next proceed to consider the question as to whether the deceased (Riley) himself was guilty of any fault contributing to his own death."

So far as proposed instruction No. 36 is concerned, it may be said, generally, that the question of the negligence of a railroad company in failing to provide a flagman at a crossing cannot alone be determined by ascertaining whether or not a city has by ordinance required that a flagman should be employed. It is oftentimes a question of fact, to be determined by the jury, whether, in the exercise of that degree of care with which the defendant is charged, it should or should not maintain a flagman. The existence of an ordinance requiring a flagman may be some evidence of the necessity for one, but the absence of such an ordinance is not conclusive upon the question.

The defendant also contends that the court erred in admitting in evidence, over its objection, section 3 of article 2, c. 12, of the Ordinances of the city of Billings, providing that a railroad company shall be required to keep a flagman at such crossings, not protected by gates, as may be designated by the mayor from time to time, "whose duty it shall be to warn people of the approach of engines or trains by the waving of a red flag, so as to fully protect the public as to their persons and property." The testimony shows that there was a gate on each side of this Twenty-Seventh street crossing, but that on account of the lessened travel between the hours of 12 o'clock midnight and 6 o'clock in the morning the gates were not used. It is argued by counsel for the railroad company that no flagman was required at this crossing, because it was a crossing where gates were used, and, in addition to that, that the mayor had never designated this crossing as one where a flagman was required. The testimony shows this latter contention to be true. But we do not think it was prejudicial error on the part of the court to admit this evidence over the defendant's objection, because the jury must have known that the mayor had never designated a flagman at this crossing, and therefore could not possibly have been misled to the prejudice of the defendant by this evidence, and could not have considered that the company was negligent in failing to provide a flagman at this crossing on account of the fact that the mayor had designated it as one of the crossings where a flagman should be employed.

Again, it is said that the court erred in refusing this tendered instruction: "In determining whether a reasonable person so going along Twenty-Seventh street would have seen the switch engine you may consider what other persons coming after the deceased along the same walk and line of travel did see in that regard." The refusal of the court was not error. The testimony of what others saw was in the record. It was a proper subject of argument to the jury. It had not

been withdrawn from their consideration. The presumption is that, as reasonable men, they gave this testimony the same consideration, as jurors, that, as men, they would give it in deciding an important question outside of the jury room. How could they overlook the fact that others saw the switch engine moving? The writer of this opinion thinks it is a reflection upon a juror's intelligence to assume that he will overlook testimony unless it is specifically pointed out to him by the court, or will neglect to consider it unless told to do so. It is the duty of the attorneys to suggest these argumentative matters to the jury, not of the court.

Defendant requested the trial court to give two instructions, as follows: "(7) If in passing track No. 4, the second track south of the main line track, on which train No. 3 was approaching, the deceased, Riley, could have seen the conditions in time to have taken a position of safety with regard to track No. 3 as well as track No. 4, it was his duty, in the exercise of ordinary care, to have done this, and, if he did not, and his failure to do so caused his death, the plaintiff cannot recover in this action. (8) Knowing that train No. 3 was approaching the passenger depot, and would cross the Twenty-Seventh street crossing, he was bound to so conduct himself as to that train as not to put himself in a known place of danger while it was passing, and, if reasonable prudence had required him to take a position to the southward of track No. 3 because of the slight space between it and the track on which the passenger train was coming, and he did not do so, and his failure to do this resulted in his being struck and killed, this of itself and alone would constitute contributory negligence, and demand a verdict for the defendant railway." The fault of these instructions lies in the fact that they are not applicable to the evidence in the case. There is no evidence that the deceased assumed a position of known danger, or that the place where he was was not a place of safety, apparently, when he went into it. These proposed instructions omit any reference to the duty of the defendant to exercise ordinary care to protect the deceased in the position in which he was. The court fully covered the question of contributory negligence in other instructions.

Instruction No. 26, proposed by the defendant, reads as follows: "In any event, if Riley was at fault in putting himself in a position where a movement to avoid the dust of train 3 would bring him within striking distance of the switch engine, there could be no recovery on the ground of the speed of train No. 3." The court refused to give the instruction, and the action is assigned as error. This instruction also omits the element of defendant's duty to take reasonable care to avoid injuring Riley in the position in which he placed himself.

It is insisted that the court erred in refusing to give defendant's instruction No.

29, which reads as follows: "I further instruct you that there is nothing in the evidence showing any traffic conditions or travel conditions between the hours of 2 a. m. and 4 a. m. of any day at the said Twenty-Seventh street crossing requiring the operation of said gates during that time independently at [of?] law, ordinance, or regulation." If this instruction had been given, it would have withdrawn from the consideration of the jury a part of the evidence on the very question they were to decide, that is, whether the defendant exercised ordinary care in moving the switch engine across Twenty-Seventh street, under the circumstances disclosed by the record. The question of what precautions were necessary to be observed in the exercise of reasonable care, under the circumstances was for the jury to decide.

It is contended by the respondent that the deceased was justified in assuming that the crossing was safe because the gates were up; while the defendant claims that the fact of the gates being up is immaterial, because the deceased knew that No. 3 was about to cross the street. It is unnecessary to decide this point, because the jury had a right to consider that the gates were up, in deciding whether or not the defendant exercised ordinary care in moving the switch engine under the circumstances that the gates were up and there was no watchman in the tower.

It was a question for the jury to decide whether the defendant, in the exercise of ordinary care, might have discovered the position of the deceased in time to have avoided injuring him, and this, whether the deceased had exercised ordinary care in going into the place where he was, or not. Upon a railroad company is imposed the duty of using all reasonable efforts to avoid injury to one who has accidentally placed himself in a position of danger, if the peril is known, or, under certain circumstances, by the exercise of reasonable care, might have been known. See 1 Thompson on Negligence, § 239; 2 Thompson on Negligence, § 596.

But it is claimed by the appellant that the doctrine, if such it may be termed, of the last clear chance, cannot be invoked or relied upon by the plaintiff, because no such issue was raised by the reply. Counsel cite the case of *Orient Ins. Co. v. Northern Pacific Ry. Co.*, 31 Mont. 502, 78 Pac. 1036, in which this court held that in that particular case the defense of contributory negligence could not be relied upon as a basis for proposed instructions, because not pleaded in the answer. There may be cases where the claim that the defendant had the last clear chance to avoid the injury, being relied upon by the plaintiff as a basis for affirmative testimony in rebuttal, must be set forth in a reply in answer to defendant's plea of contributory negligence. But in this case no such necessity arose. The only rebuttal testimony offered related to the deceased's condition, whether he was under the influence of liquor. All of

the testimony relating to the last clear chance went in under the issues made by the complaint and answer, without objection. Under these circumstances the plaintiff could rely upon the so-called doctrine. It was a legitimate subject for argument to the jury, and of instruction by the court. See *Nelson v. Boston & Mont. Con. C. & S. M. Co.*, 35 Mont. 223, 88 Pac. 785. Not only that, but we think the claim that defendant had the last clear chance is comprehended within the specific allegations of the complaint, and that an inference in support of it may be gathered from all of the testimony.

We find no error in this case of which the defendant can complain. Conceding that technical errors were committed during the hurry of the trial, we find no prejudice to the defendant. Indeed, it seems to us that the learned trial judge was particularly careful and painstaking in the conduct of the trial, and, reading all of the instructions together, we do not feel that the defendant has reason to complain of any action of the court below. Affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

IDAHO PLACER MINING CO., Limited, v. GREEN.

(Supreme Court of Idaho. Feb. 7, 1908.)

1. REPLEVIN—PLEADING—SPECIFIC DENIAL—MATTERS PUT IN ISSUE.

In an action for claim and delivery, a specific denial puts in issue all the essential averments of the complaint, and puts the burden of proving them upon the plaintiff.

2. SAME.

In an action for claim and delivery, under a specific denial of the allegations of the complaint, the defendant may offer evidence, (1) to controvert plaintiff's evidence, (2) to disprove his allegations, and (3) to prove other and inconsistent facts. Under the general denial the defendant may prove his right to possession, or that he, as an officer, levied on the property at the suit of a creditor of him from whom the plaintiff obtained it in fraud of creditors, or he may show title in a stranger, and may also show his own right to possession by virtue of a lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, §§ 272-275.]

3. SAME.

In an action for claim and delivery, where the defendant files a specific denial, it is not error to sustain a demurrer to a further answer and defense which sets up facts which may be proven under such specific denial.

4. SAME.

In an action for claim and delivery, where the defendant files a specific denial, it is error for the court to exclude any evidence which tends to defeat the plaintiff's right to possession by showing the right to possession to be in the defendant or in a third party.

5. SAME.

In an action for claim and delivery, the real question at issue is the right of possession of the property in controversy, and, this being so, it is competent for the defendant to offer any evidence which may tend to show that the plaintiff did not have the right of possession at the time the action was commenced, as the

plaintiff's right to recover depends wholly upon his right to possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 289.]

6. WITNESSES — IMPEACHMENT — EXPLANATION OF IMPEACHING EVIDENCE.

Where a written document is offered in evidence for the purpose of impeaching or contradicting a witness, it is error for the court to refuse such witness an opportunity to explain such written document or evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1281.]

(Syllabus by the Court.)

Appeal from District Court, Washington County; Ed. L. Bryan, Judge.

Action by the Idaho Placer Mining Company, Limited, against Charles Green. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Lot L. Feltham, for appellant. Ed. R. Coulter, for respondent.

STEWART, J. This is an action in claim and delivery. The complaint is in the ordinary form, and alleges ownership and a right of possession in the plaintiff to certain personal property. The defendant (appellant in this court) denied specifically the allegations of the complaint, and then filed what is denominated "a further answer and defense." In this further answer and defense the defendant set up: The organization of the Idaho Placer Mining Company, and an effort made to dissolve said company and reincorporate under the title of the "Idaho Placer Mining Company, Limited." That during the existence of the old corporation the defendant herein became the owner of 397,000 shares of capital stock of said company, and is still the owner of 169,000 shares. That the defendant sold 225,000 shares for \$10,000 to one John W. Waltz, and agreed with said John W. Waltz that said sum of \$10,000 should be used by the defendant for the purpose of building a dredge for the said Idaho Placer Mining Company, and that, in accordance with said agreement, the defendant planned and constructed a mining dredge, expending therein \$10,000, and by reason of said sum not being sufficient to finish said dredge this defendant incurred personal obligations and expended his own funds in the sum of \$285.82, and performed personal services in the planning and constructing of the same of the value of \$5 per day, amounting to \$1,825, which with the \$10,000 made the total cost of the dredge \$12,110.82. That in order to raise funds for the purpose of paying the outstanding indebtedness of the Idaho Placer Mining Company to this defendant and other persons a meeting of the stockholders of said company was held, in which there was represented 482,000 shares of the capital stock of said company, at which meeting it was attempted to reorganize and reincorporate said company under the name of the Idaho Placer Mining Company, Limited, for the purpose of adjusting all out-

standing claims against the Idaho Placer Mining Company, and to take whatever other action was necessary pertaining to the affairs of the company. That at the time of the meeting of said stockholders it was found that the Idaho Placer Mining Company had no funds with which to carry out the object of the organization, and at which time this defendant entered into an agreement with the stockholders, directors, and officers of the corporation to convey, as president of the company, the mining dredge (the property in controversy) to a new corporation, to be known as the "Idaho Placer Mining Company, Limited," in consideration of the stockholders, directors, and officers reorganizing said company and raising funds sufficient to pay the indebtedness against said mining dredge, including the services of this defendant in planning and constructing the same, and that, in accordance with said understanding, the stockholders and directors of said company prepared and filed the articles of incorporation of the Idaho Placer Mining Company, Limited, and elected a board of directors, and that this defendant executed and delivered, as president of the said Idaho Placer Mining Company, a deed for all the real property of said company, and a bill of sale for the dredge plant to the Idaho Placer Mining Company, Limited, and performed on his part all his obligations agreed upon between him and the stockholders and officers of the two companies, and that at said time it was also agreed between the defendant and the stockholders and directors and officers of said companies that the defendant should be issued in lieu of stock held by him in the Idaho Placer Mining Company, to wit, 169,000 shares, a like number of shares in the new company. That the new company and its officers have failed to keep or perform their part of said agreement, and have failed to comply with the conditions of said agreement, and have neglected to pay to the defendant the amount laid out by him in the construction of said dredging plant in excess of the moneys received by the sale of his stocks in said company to John W. Waltz, or to pay the defendant for his services any sum whatever. That at the time the agreement aforesaid was made it was also agreed that this defendant should be employed as the general manager of the dredging plant at a fixed salary, which was a part of the consideration to the defendant for his executing and delivering to the plaintiffs a bill of sale for the said dredging plant. That the plaintiff is indebted to him for his services in planning and constructing the dredge, and for moneys expended by him in the construction of the same, in the sum of \$2,110.82, which is due and unpaid, and that plaintiff never was entitled to an accounting for the money spent in the construction of said dredge plant, and never had any interest in or title to the said dredging plant, after the bill of sale

was made, and that the defendant executed the bill of sale, and trusted to the honesty of the Idaho Placer Mining Company, Limited, its directors and officers, but that said bill of sale was without consideration, and that the consideration has never been paid by the plaintiffs as agreed upon. That the monies expended by the defendant in excess of the sums received by him from John W. Waltz, and the labor expended by him upon the planning and construction of said dredge, were expended and laid out for the improvement and completion of said plant while the same was in his possession, and that he has a special lien upon said plant for said monies and for his services in the sum of \$2,110.82, no part of which has been paid. To this further answer and defense the plaintiff interposed a general demurrer on the ground that the same did not state facts sufficient to constitute a defense to the complaint. The court sustained the demurrer. The cause was tried to a jury, and a verdict returned in favor of the plaintiff, and judgment rendered accordingly. A statement of the case was prepared and settled, upon which defendant moved for a new trial, which was overruled by the court. The appeal is from the judgment and the order overruling the motion for a new trial.

The first error assigned and argued in this court was the sustaining of the demurrer to the further answer and defense. The court committed no error in sustaining this demurrer. All the facts attempted to be pleaded by this further answer and defense, in so far as the same was competent and constituted a defense, could be proved under the special denial. In the case of *Gallick v. Bordeaux*, 22 Mont. 470, 56 Pac. 961, the Supreme Court of Montana quotes with approval from Mr. Phillips on Code Pleading, as follows: "A general denial puts in issue all the essential averments of the complaint, puts the burden of proving them upon the plaintiff, and admits evidence by the defendant (1) to controvert plaintiff's evidence, (2) to disprove his allegations, and (3) to prove other and inconsistent facts. Under such denial the defendant may prove his right to possession, or that he, as an officer, levied on the property at the suit of a creditor of him from whom the plaintiff obtained it in fraud of creditors, or he may show title in a stranger." To the same effect are *Lindsay v. Wyatt*, 1 Idaho, 738; *Cornwall v. Mix*, 3 Hasb. (Idaho) 687, 34 Pac. 803; *Jones v. McQueen*, 13 Utah, 178, 45 Pac. 202; *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 76 Pac. 243. Under the general denial the defendant may show his right to possession by virtue of a lien. *Lindsay v. Wyatt*, 1 Idaho, 738; *Williams v. Ashe*, 111 Cal. 180, 43 Pac. 595; *Sutton v. Stephan*, 101 Cal. 545, 36 Pac. 106. General denial as used in these cases means the same as a special denial under the statute of this state where the complaint is verified.

Upon the trial of the cause one Edward C.

Cleaver, the general manager of the Idaho Placer Mining Company, Limited, testified on behalf of the plaintiff. In the course of his testimony he produced, and it was admitted in evidence, his appointment as agent and general manager of said company. He testified to a demand made upon the defendant for the property in controversy in this case. He also produced a bill of sale from the Idaho Placer Mining Company to the Idaho Placer Mining Company, Limited, signed by the defendant, as president of the Idaho Placer Mining Company, and O. M. Harvey, secretary, conveying to the plaintiff from the Idaho Placer Mining Company the property in dispute in this case. On cross-examination he testified that he was present when the bill of sale was prepared and signed; and he also testified that the consideration named in the bill of sale had been paid, except that part of the consideration wherein it was provided that the Idaho Placer Mining Company, Limited, would issue to each stockholder of the Idaho Placer Mining Company the same number of shares as held in the original company. He testified also that at the time of making the bill of sale, and simultaneous with it, a deed was made by the original company to the new company, and that the deed recited certain conditions under which the transfers were made from the old company to the new, whereupon he was asked by counsel for defendant this question, "You will produce it, please?" to which question the plaintiff objects as being "irrelevant and immaterial and not proper cross-examination," and the objection was sustained by the court, and the defendant excepts. This was clearly error, as under the issues in the case the defendant might show any facts from which the court or jury might conclude that the plaintiff was not entitled to the possession of the property in controversy, or that the defendant had the right to this possession by virtue of a lien or otherwise, or that the right of possession remained in a third party. In other words, this witness, having produced the bill of sale, and having testified that a deed to the real property was made at the same time and that it contained the recital of certain conditions upon which the sale was made, it was certainly competent for the defendant to inquire what those conditions were, in order that the court or jury might determine whether the plaintiff was entitled to the possession of the property in dispute.

The defendant, having been called as a witness in his own behalf, on direct examination, was asked by his counsel this question: "While you were president and general manager of this company, what was done with the stock of the company?" This question was preliminary, and, in aid of the record testimony, might have a tendency to show whether or not the money with which the property in controversy was constructed and created was obtained by the sale of the stock belonging to

the old company, or to this defendant. The defendant was also asked by his counsel this question: "Whose money was it that constructed that dredge?" The plaintiff objected to this question, and the court sustained the objection, and the defendant excepted. The defendant certainly had a right to show whether or not the property in controversy was created or purchased with his own money or with the money of the old company. The right of possession might turn on the question as to whom the dredge belonged. Its ownership might depend upon whose money purchased it. If so, this evidence might be very material in determining the right to the possession. This evidence should have been allowed, and the trial court erred in sustaining the objection to these two questions. Later on in the evidence of this witness, after he had testified to his possession of this property, he testified as follows: "They always contended the boat was mine until I got paid for it. It was my money that bought the boat, and my stock that got the money." On motion of the plaintiff, the court struck this answer out, and defendant excepted. This was clearly error. Whose money purchased the boat, and to whom the dredge belonged, was material and competent for the purpose of aiding the jury and court to determine the right of possession to the dredge.

It appears from the evidence that in another action in the district court of Washington county wherein the Idaho Placer Mining Company, Limited, was plaintiff, and the plaintiff herein was defendant, in a cross-complaint filed in said action certain allegations and statements were made which the plaintiff in this action claims contradicted the defendant's testimony, and the plaintiff offered such cross-complaint in evidence for the purpose of impeaching and contradicting the defendant's testimony in this action. Upon re-examination of the defendant by his counsel as to the statements made in his cross-complaint, and why they were so made, he was asked to explain the same, to which plaintiff objected, and the court sustained the objection, and the defendant excepted. This was clearly error. Where a writing of a witness is offered in evidence which seems to impeach or contradict such witness, it is always the privilege of the witness to explain such statements if he can, and to detail the circumstances under which the same were made, and then the jury or court may determine the truth or falsity of his evidence. *Douglas v. Douglas*, 4 Idaho, 293, 38 Pac. 934.

Upon the trial the defendant called as a witness on his behalf O. M. Harvey, who was secretary of the Idaho Placer Mining Company at the time the bill of sale and deed referred to in this opinion were made; and counsel for defendant asked him to produce the by-laws of the company, and offered in evidence article 9 of such by-laws for the

purpose of showing that the meeting held, which resulted in the making of the bill of sale and deed, was not called in accordance with the by-laws of said company. This was not error. The old company was making no objection to said transfer, and was not seeking to avoid the same, and the defendant is not in a position to make such claim for said company, especially in view of the fact that he signed the bill of sale as president, and, so far as the old company is concerned, it surrendered the right of possession under said transfer to the plaintiff herein. In an action in claim and delivery, the real question at issue is the right of possession of the property in controversy, and, this being the issue, it is competent for the defendant to offer any evidence which may tend to show that the plaintiff did not have the right of possession at the time the action was commenced, as the plaintiff's right to recover depends wholly upon its right to possession. The court in this case should have admitted all evidence offered by the defendant which in any way challenged or contradicted the plaintiff's right to possession at the time the action was commenced.

The judgment in this case will be reversed, and a new trial granted, and the cause remanded. Costs awarded to the appellant.

AILSHIE, C. J., and SULLIVAN, J., concur.

TARR v. OREGON SHORT LINE R. CO. (Supreme Court of Idaho. Jan. 31, 1908.)

1. CARRIERS—CARRIAGE OF PASSENGERS—PASSENGERS' EFFECTS—CHECKS—RIGHT TO—STATUTORY PROVISIONS.

Under the provisions of section 2674, Rev. St. 1887, a railroad corporation doing business in this state is required to affix a check to every parcel of baggage received by it, and to deliver a duplicate thereof to the passenger or person delivering the same, and, if such check is refused on demand therefor, the railroad company is liable in the sum of \$20 to such person, and, in addition thereto, cannot collect any fare or toll from such passenger.

2. SAME.

Where a railroad company has no night agent at a station to receive and check baggage, but stops its train at such station, and takes on a passenger and his baggage, and after the passenger boards the train and demands a check for his baggage, and declines to pay his fare or deliver up his ticket until he receives such check, and the employes of the company in charge of the train neglect and refuse to deliver a baggage check, and, on the contrary, eject the passenger from the train, the railroad company will be held liable in damages for the tort so committed.

3. SAME.

Where a passenger purchases a ticket, and on the arrival of the train at the station points out to the conductor and brakeman his baggage, and they receive the same and take it on board the train, and the passenger boards the same train for the purposes of transportation to another station on the line of the company's road, and demands of the conductor on the train a baggage check, he is entitled to receive such check before delivering up his ticket or paying

his fare, and, on failure to receive such baggage check and refusal to pay his fare until he does receive it, he does not thereby become a trespasser on such train, and the employes of the company have no right to eject him from the train until they have either delivered to him his baggage check, or until he has reached the station to which he notified the employes receiving the baggage that he desired the same checked.

4. SAME.

Under the provisions of section 2674, Rev. St. 1887, the liability to furnish the passenger free transportation to the point of his destination in case of refusal to deliver him a check for his baggage is as much a part of the penalty for refusal to check the baggage as is the \$20 cash penalty named therein.

5. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—REGULATION OF CARRIERS.

The requirements of section 2674, Rev. St. 1887, that a railroad company shall not collect toll or fare from a passenger when it fails, neglects, or refuses to deliver the passenger a check for his baggage, is valid and binding upon such company as a part of the penalty for its failure and neglect to comply with the statute, and is in no sense a taking of property without due process of law within the inhibition of the fourteenth amendment to the Constitution of the United States.

6. TRIAL—INSTRUCTIONS—CONFORMITY TO PLEADING AND PROOF.

The instruction "that every particular phase of the injury may enter into the consideration of the jury in estimating compensation, loss of time with reference to the injured party's condition and ability to earn money, his loss from permanent impairment of faculties, mental and physical pain, suffering and disfigurement, are all elements to be considered by the jury in estimating plaintiff's damages," while correct as a general principle of law, is erroneous in a case where there is no allegation of loss of time, and no evidence has been introduced showing the loss of any particular or specified time or the value thereof or amount of damage sustained by reason of loss of time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587-595.]

7. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where the court has instructed the jury that they must be governed by the evidence in assessing damages, and that they must find the data therefor within the evidence, and the entire record in the case discloses that no claim has been made for damages on account of loss of time, and no evidence has been introduced thereon, and it is reasonably clear from the record that the jury did not consider such element in assessing damages, an erroneous instruction to the effect that loss of time is a proper element to be considered in such cases is not within itself such error as will cause a reversal of the judgment.

8. DAMAGES—PAIN AND HUMILIATION—NECESSITY OF EVIDENCE OF.

It is unnecessary to submit any evidence as to a proper and just compensation to be awarded for wounded feelings and physical and mental pain and suffering and humiliation, but the compensation to be allowed therefor is a matter addressed to the judgment and good sense of the jury, and to be determined by them in view of all the evidence submitted in the case as to the wrongs and injuries inflicted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 100-105.]

9. TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

All the instructions given in a case must be read and considered together as a whole, and where they are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to

the instructions as a whole rather than to an isolated portion thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

(Syllabus by the Court.)

Appeal from District Court, Bingham County; J. M. Stevens, Judge.

Action by Jacob E. Tarr against the Oregon Short Line Railroad Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

P. L. Williams and D. Worth Clark, for appellant. G. F. Hansbrough, for respondent.

AILSHIE, O. J. This is an appeal from the judgment and order denying a motion for a new trial. The appellant recovered judgment in the lower court against the defendant for the sum of \$1,000 damages on account of the agents and employes of the defendant company wrongfully and unlawfully ejecting him from one of its railway trains. The respondent, Jacob E. Tarr, was on the 23d day of December, 1905, residing with his family at Shelley, Idaho, and on the evening of that day purchased from the ticket agent at that place three tickets to Pocatello. It seems that the railway company had no night agent at Shelley, and that it was the practice of the company to take on baggage without the same being checked on the passenger's pointing out his baggage to the conductor or brakeman or other employe of the company. About 2 o'clock on the morning of the 24th the south-bound passenger arrived at the station, where respondent, together with his wife and daughter, was waiting to board the train. When the train stopped, the respondent pointed out to the conductor and brakeman a trunk and roll of bedding he had on the platform, and told them that he wanted to take that baggage with him to Pocatello. When the respondent asked them to put the baggage on board, they made some profane remarks concerning it, but put the trunk on the baggage car, and left the roll of bedding. No question is raised here concerning the roll of bedding that was left on the platform. Respondent helped his wife and daughter on the train. After the train pulled out, the conductor came through taking up tickets and collecting fare, and, when he came to respondent, the respondent gave him one ticket and told him that he had a trunk on board, for which he wanted a baggage check. He also told the conductor that, when he got his check for his trunk, he would give him the other two tickets. The conductor insisted on his surrendering up the tickets, but the respondent declined to do so. This demand for the tickets was made two or three times; the conductor telling him that, if he did not surrender them, he would put him off the train. Finally, when the train was about a mile out of the station of Blackfoot, the conductor came to respondent and told him, if he did not surrender the tickets, he was going to put

him off. Respondent replied that he would not do so unless the conductor gave him a check for his trunk. Thereupon the conductor called the brakeman, and the two of them proceeded to eject the respondent from the train. Before they had completely ejected him, he told the conductor that he would not give up the tickets, but that, if he would let him ride to Pocatello, he would pay the fare in cash. They disregarded this offer, however, and put him off the train. It seems to be generally agreed by all the witnesses that the train did not fully stop, but "slowed up," as the witnesses put it. As the last coach passed respondent swung on to the platform, and, as he did so, he encountered the brakeman, who kicked him off, and in his endeavor to do so injured and bruised respondent's hands and dislocated a thumb. When he was kicked off the train, he was either struck by the brakeman one blow on the back over the lungs and another over the kidneys, which made bad bruises, or else he received those injuries when he fell from the moving train. Respondent was under the care of a physician for a couple of weeks, and the physician testified that he had a bad bruise over his lung and also over his kidneys, and that he had incipient pneumonia, which might have been caused by the blow over the lungs.

The respondent contends that under the provisions of section 2674 of the Revised Statutes of 1887 he was entitled to demand and receive a check for his baggage before surrendering his transportation, and that he was entitled to remain on appellant's train until such time as he received a check for his baggage, or until he reached his destination. Appellant, on the other hand, contends that, while the company would have been liable for the penalty prescribed in section 2674 for failing and neglecting to furnish the baggage check, notwithstanding that, respondent was not entitled to ride on the train without paying his fare or surrendering up his ticket. Section 2674 provides as follows: "A check must be affixed to every package or parcel of baggage when taken for transportation by any agent or employé of a railroad corporation, and a duplicate thereof given to the passenger or person delivering the same in his behalf; and if such check is refused on demand, the railroad corporation must pay to such passenger the sum of twenty dollars to be recovered in an action for damages; and no fare or toll must be collected or received from such passenger, and if such passenger has paid his fare the same must be returned by the conductor in charge of the train; and on producing the check, if his baggage is not delivered to him by the agent or employé of the railroad corporation, he may recover the value thereof from the corporation." It will be seen from the foregoing provision of the statute that it is made the duty of the railway corporation to affix

a check to every parcel of baggage and deliver a duplicate thereof to the owner. In this case the company, having no night agent at the station, received baggage on its being pointed out by the passenger, and was in the habit of attaching a check on the train, and delivering the duplicate to the passenger. Our decision on this point turns upon the question as to whether the railway company had a right to demand the fare from respondent as a condition precedent to furnishing him with a check for his baggage. Was defendant justified in ejecting him from the train upon his refusal to surrender up his ticket or pay his fare? There can be no question but that he rightfully boarded the train. He had bought his ticket, had caused his baggage to be placed upon the train, and he had a lawful right to board appellant's railway train. The question is, then: Did he, after entering the car, do any act that converted him into a trespasser? The primary duty devolving upon the passenger is to pay his fare, and on the railway company to carry the passenger. In addition to carrying the passenger, the company agrees to carry a certain amount of baggage with each passenger. In this case the company received the respondent's baggage, and, under the provisions of the statute above quoted, was clearly liable to check the same and furnish a duplicate to the passenger. A failure to do so subjected the company to a certain penalty: First, to pay the sum of \$20 as damages for the neglect and failure; and, in addition thereto, defendant was prohibited from collecting or receiving any "fare or toll" from the passenger. Clearly, then, the passenger's transportation is made as much a part of the penalty as is the \$20. Upon failure to furnish the passenger with his baggage check, it was not only liable to pay a \$20 penalty, but it was also liable to carry the passenger free of "fare or toll" until such time as it should furnish such check or until he reached his destination—the point to which he had requested a check for his baggage. We do not think this statute is capable of any other reasonable construction. We therefore conclude that the respondent was rightfully upon the appellant's railway train, and his ejection by the company's agents and employés was wrongful and unlawful, and in violation of his rights. If it was unlawful for them to eject him, it was unlawful for them to keep him off the train. If he was rightfully on the train, and they put him off, he had a clear right to return to the train, and their using force and violence in keeping him off was as much of a wrong and trespass upon his rights as it would have been for them to have used that violence on him in the first instance. This case, it must be remembered, involves transportation exclusively within the confines of this state, and is purely a domestic transaction.

Counsel for appellant have argued that the

company in the discharge of its duty has a right to establish certain rules and regulations to facilitate business, and that, among other things, it was the duty of the passenger to pay his fare or surrender his ticket before demanding his baggage checked. The law does not say which act shall be performed first, but they are clearly concurrent duties; one resting upon the passenger and the other upon the transportation company. The passenger had an undoubted right to demand his baggage check. The company's agent in this case did not give him any assurance that they would ever furnish him a check for his baggage. The only assurance he ever had was that the conductor said to him: "You give me your tickets, and, if your baggage is lost, I think we can locate it for you later." This was far from an assurance that the conductor would discharge his duty under the statute and secure the passenger a check for his baggage before reaching his destination. We think the doctrine is correct as stated by 2 Hutchinson on Carriers (3d Ed.) § 1036, cited by appellant, to the effect that passengers are required to show their tickets to the conductor at reasonable times and be subject to the reasonable requirements of the company. In this case the company had already received the passenger's baggage on its train, and had complete charge and control thereof, and the conductor had received from the passenger one ticket, and knew that he had two other tickets in his possession on the same train. A somewhat different rule would apply, we apprehend, where a prospective passenger takes his baggage to the depot, and demands that it be checked. In such case he would have to produce a ticket, and, if required, deliver it to the agent for the purpose of being punched.

Counsel for appellant insist that the statute (section 2674, *supra*) should not receive the construction we are placing on it, for the reason that such a construction would be in violation of the fourteenth amendment to the Constitution of the United States, in that it would deprive the railroad company of property without due process of law. Counsel admit that the company would be liable for the \$20 penalty under the statute on a failure to furnish the passenger with a baggage check, but say it would be taking its property without due process of law to allow a passenger to ride without paying his fare. Such an argument is unsound, for the reason that free transportation under the condition named in the statute is no more a taking of property without due process of law than the collection of the \$20 penalty. Indeed, we think one is as much a part of the penalty as the other. In the matter of transportation the statute says the company shall not collect fare unless the check is furnished. As to the payment of the \$20 penalty, the company might do that without action, or, if it fails to do so, it is liable to an action for the recovery of the same. In this case, how-

ever, the company refused to carry the passenger as required to do by section 2674, and proceeded to eject him from the train. In doing so, it committed a tort for which it is liable in this action. This, it should be observed, is not an action for breach of the contract, but an action in tort to recover for the wrongs committed. The passenger is not endeavoring to collect the \$20 penalty prescribed by the statute, but insists that he was rightfully on the appellant's train, and that he had a right to remain there until he reached his destination, and that, under such circumstances, the employees of the railroad company committed a tort for which this action has been prosecuted. This case is not parallel with, or subject to, the same rule that governs cases where a passenger goes upon a railway train, and refuses to pay fare or surrender his ticket until he is furnished a seat. In those cases it is held that, if he remains on the train, he must pay his fare, but that, on the other hand, he may leave the train at the first opportunity and sue for a breach of the contract and recover his damages. *Memphis, etc., R. R. Co. v. Benson*, 85 Tenn. 627, 4 S. W. 5, 4 Am. St. Rep. 776; *Pittsburg R. R. Co. v. Van Houten*, 48 Ind. 90; *St. Louis, etc., R. R. Co. v. Leigh*, 45 Ark. 368, 55 Am. Rep. 558; *Davis v. Kansas City, etc., R. R. Co.*, 53 Mo. 317, 14 Am. Rep. 457.

On the trial of this case, defendant's counsel objected to the introduction of evidence showing that the passenger, when being ejected from the train, offered to pay his fare if the employees of the company would permit him to continue on his journey. If it be conceded that it is a correct principle of law that a passenger after refusing to surrender his ticket or pay fare, and the employees of the company have commenced to eject him, cannot then offer to pay fare and reinstate himself in the right to continue on the train, then, of course, such evidence as was offered in this case would be immaterial and was improperly admitted. When it came to giving the instructions, however, to the jury, the court adopted the appellant's theory of the law, and gave an instruction on its request, to the effect that a "passenger who refuses to pay his fare or furnish and deliver up a ticket good for such transportation, and on account of such refusal the train is stopped for the purpose of ejecting him, he cannot then by a tender of his fare, or an offer to deliver up his ticket, reimpose upon the carrier the duty of carrying him." In the case at bar this question became entirely immaterial, and evidently did not enter into the consideration of the jury in making up their verdict for the reason that the passenger was rightfully on the train, and the company had no right to eject him in the first instance.

The next and most serious question that arises on this appeal is directed against the instructions given by the court to the jury. The objectionable instruction is plaintiff's re-

quest No. 3, which is as follows: "The jury is instructed that every particular phase of the injury may enter into the consideration of the jury in estimating compensation, loss of time with reference to the injured party's condition, and ability to earn money in business or calling. His loss from permanent impairment of faculties, mental and physical pain, suffering and disfigurement, are all elements to be considered by the jury in estimating plaintiff's damage, if you find from the evidence that plaintiff is entitled to recover." The causes and injuries for which plaintiff demanded damages in his complaint are in substance as follows: "A bad bruise on the back over the left lung; a bad bruise over the left kidney; his right hand badly bruised and sprained, and two bruises on both legs and hands, and by reason of the insult, humiliation, and the bodily and mental suffering of the plaintiff, caused by the said unlawful acts of the defendant in forcibly, violently, and unlawfully assaulting, bruising, and ejecting the plaintiff from its said train of cars." Damages were claimed for these injuries in the sum of \$1,975. On the trial no evidence whatever was introduced showing any particular or specific loss of time nor the value of any time lost, nor was there any evidence introduced showing the amount paid out for medical attention or for any other item of loss, damage, or injury, and no evidence whatever was given placing an estimate as to a just compensation for the injuries sustained. The court also instructed the jury that for mental and physical injury and suffering and for humiliation and wounding a man's feelings the measure of damages was a question entirely for the jury to determine as nearly as possible from the evidence in the case. The court also instructed the jury that they must be governed by the evidence, and that, if they should find for the plaintiff, they could only assess such damages as they found him entitled to from the evidence.

Defendant's requested instruction No. 17 was given by the court, and that instruction also advised the jury that, if they found in favor of the plaintiff, the only damage they could assess was such as was within the evidence and justified thereby, and that they must secure their data from the evidence itself upon which they calculated and assessed the damages. It must be conceded in the outset that the plaintiff's requested instruction No. 3, as given by the court, while entirely correct as a general principle of law, was improper and erroneous in this particular case, for the reason that no claim appears to have been made on account of loss of time, and that no evidence was given showing the loss of any particular or specific amount of time or the value thereof. It is well settled that, as to mental and physical pain and suffering and humiliation, it is unnecessary to submit any evidence as to the value there-

of and the amount of damages to compensate therefor, but that the same is a question entirely and exclusively for the jury. *North Chicago St. Ry. Co. v. Fitzgibbon*, 180 Ill. 466, 54 N. E. 483; *Springfield Consol. Ry. Co. v. Hoeffner*, 175 Ill. 642, 51 N. E. 885; *Sutherland on Damages* (3d Ed.) § 1243; *Hughes' Instructions to Juries*, §§ 652, 653. On the other hand, it is equally well settled that, where the party claims special damages for loss of time, he must prove both the amount of time lost and the value thereof, and that the jury must be governed by the evidence in relation thereto. *Western Union Tel. Co. v. Morris*, 83 Fed. 992, 28 C.C.A. 56; *Platt v. City of Ottumwa* (Iowa) 113 N. W. 831; *Barron v. N. P. Ry. Co.* (N. D.) 113 N. W. 102; *Gardner v. B., C. R. & N. R. Co.*, 88 Iowa, 588, 27 N. W. 768; *So. Ry. Co. v. Hawkins*, 89 S. W. 258, 28 Ky. Law Rep. 367.

It will be seen, however, on an examination of the authorities, that, where a case has been reversed on account of such an instruction, it has been where there was either evidence of loss of time and no evidence of its value, or where the court had told the jury that they might assess the damages for loss of time without any evidence as to its value or without reference to such evidence if any had been given. The latter condition is peculiarly noticeable and prominent in *Platt v. City of Ottumwa*, supra. In the case at bar there is no evidence of any particular or specific loss of time, and the most that could be said in that regard would be that it contained a mere inference of the loss of some period of time less than two weeks while respondent was receiving medical treatment, and no evidence whatever as to the value of any time lost. The record is convincing from the complaint to the last word of evidence and instruction in the case that the real cause for which the plaintiff was seeking to recover damages, and against which the defendant was waging its defense, was the physical and mental suffering, pain, and humiliation as the direct and immediate result of the wrongful acts of the railway company in ejecting plaintiff from its train. The record nowhere contains any suggestion or intimation that the jury was asked to give the plaintiff any special damages on account of loss of time. The question, then, arises whether the error committed in giving plaintiff's instruction No. 3 was, under the facts and circumstances of this case, and in view of the evidence produced, and of the other instructions given, such an error as prejudiced any substantial right of the defendant for which this court would be justified in reversing the judgment under the purview of section 4231, Rev. St. 1887. In the first place, we must assume that the jury were reasonable and fair-minded men and limited their finding as to the plaintiff's damages to that shown by the evidence in the case as they were instructed by the court. In the second

place, there is nothing in the record that indicates that the jury were acting under any sense of passion, prejudice, or bias. The evidence is abundant to justify the verdict without taking into consideration any loss of time whatever, or any other element of damages, except that of physical and mental pain and suffering, and the humiliation consequent upon plaintiff's unlawful ejection from the train. Indeed, we think the appellant company were under the facts and circumstances of this case exceedingly fortunate in reducing plaintiff's demand to the sum allowed by the jury. In the third place, there is nothing in the record that suggests or intimates that the jury took into consideration loss of time in estimating damages or any other matter than that entirely proper for their consideration.

Lastly, instruction No. 3 is a correct general principle of law, and, although there was no allegation in the complaint and no evidence in the case claiming damage for the one element, namely, loss of time mentioned in this instruction, we think it would be far-fetched and illogical for an appellate court to hold that under such facts and circumstances the judgment should be reversed, and thereby assume that the jury went outside of the pleadings and proofs under such an instruction as this in order to render an unjust verdict against the defendant. There is no doubt but that the court should not give an instruction on a question of law that is not involved in the pleadings or proofs, but we are equally satisfied in this case that the appellant has not been prejudiced or injured or damaged on account of the instruction, and we are unwilling to reverse the judgment for that reason. Again, we have repeatedly held that all the instructions given in a case must be read and considered together as a whole, and that, where they are not inconsistent but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole instruction rather than to an isolated portion thereof. *Lufkins v. Collins*, 2 Hasb. (Idaho) 256, 10 Pac. 300; *State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034; *Hansen v. Haley*, 11 Idaho, 293, 81 Pac. 935; *State v. Bond*, 12 Idaho, 424, 86 Pac. 43; *State v. Niel* (Idaho) 90 Pac. 860.

The other instructions given by the court we think correctly stated the law, and the assignments of error in reference thereto are without merit. All of the defendant's requested instructions that correctly stated the law were given, either literally or in substance by the court. Those rejected were clearly erroneous, and properly refused by the court. We think the judgment in this case is a just one, and that no sufficient grounds have been shown why it should be reversed.

Judgment is affirmed, with costs in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

HALL v. JENSEN et al.

(Supreme Court of Idaho. Jan. 28, 1908.)

1. APPEAL—RECORD—AUTHENTICATION AND CERTIFICATION—AFFIDAVIT ON MOTION FOR NEW TRIAL.

A motion to strike from the transcript the affidavit on motion for new trial, on the ground that it is not identified or certified by the trial judge as having been considered on the hearing of the motion for a new trial, will not be granted, where such affidavit is stipulated by counsel for the respective parties as having been used on the hearing of the motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2714, 2715.]

2. SAME.

On the question of the certification of papers or documents used on the hearing of a motion, the case of *Crowley v. Ceresus Mining Co.*, 12 Idaho, 530, 86 Pac. 536, is expressly overruled, in so far as it applies to civil cases.

3. SAME.

Under the provisions of section 4821, Rev. St. 1887, the copies of the papers provided for by sections 4818-4820, Rev. St. 1887, to be used on appeal, may be certified or identified by the clerk, or by stipulation of attorneys, or may be certified and identified by the judge.

4. SAME—BILL OF EXCEPTIONS—NECESSITY.

Under the provisions of section 4427, Rev. St. 1887, the papers used on the hearing of a motion, which are made a part of the records and files in the action, need not be embodied in a bill of exceptions, and, if the same appear in the records or files, they may be reviewed upon appeal as though settled in a bill of exceptions, if certified or identified as provided by law.

5. SAME—DISCRETION OF COURT—REOPENING TRIAL.

The granting of a motion to reopen the trial of a case, and to permit the introduction of rebuttal testimony, is in the legal discretion of the court, and its action thereon will not be reversed, unless it appears that such discretion has been abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3849-3857.]

6. NEW TRIAL—PROCEEDINGS TO PROCURE—AFFIDAVITS AS TO ACCIDENT OR SURPRISE.

Under the provisions of paragraph 3, of section 4439, where application is made upon affidavit for a new trial on the ground of accident or surprise, which ordinary prudence could not have guarded against, the facts constituting such accident or surprise must be set forth in the affidavit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 303-305.]

7. SAME.

Where the application for a new trial is made under the provisions of the fourth paragraph of said section 4439, the newly discovered evidence must be set forth, and it must also appear from the affidavit that the party could not, with reasonable diligence, have discovered the same, and produced it at the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 307-311.]

8. SAME—GROUNDS—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

Newly discovered evidence, which is merely cumulative, or designed to contradict witnesses, is not sufficient to warrant the granting of a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 218-220.]

9. SAME—DISCRETION OF COURT.

The granting or denying of a new trial is in the sound discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 9, 10.]

(Syllabus by the Court.)

Appeal from District Court, Canyon County; Frank J. Smith, Judge.

Action by M. F. Hall against J. M. Jensen and others. From a judgment for defendants, and an order denying a new trial, plaintiff appeals, and defendants move to strike from the transcript a certain affidavit used on motion for a new trial. Motion to strike denied. Judgment affirmed.

Rice & Thompson, for appellant. Stone & MacLane, for respondents.

SULLIVAN, J. This action was brought in the district court to set aside a judgment entered by a justice of the peace, on the ground that the alias summons issued by the justice was not served on the defendant in that action, which was an action by J. M. Jensen and another, under the firm name of the "Bank of Brigham City," as plaintiffs, v. M. F. Hall, defendant, to recover a money judgment. The cause was tried by the court without a jury, and judgment was entered in favor of the respondents, who are the defendants in this action. A motion for a new trial was overruled, and the appeal is from the judgment and order denying a new trial.

A motion has been made to strike from the transcript the affidavit of M. F. Hall on motion for a new trial, on the ground that said affidavit is not identified or certified by the trial judge as having been used or considered on the hearing of the motion for a new trial. To the transcript is attached the following stipulation, signed by the respective attorneys: "It is hereby stipulated and agreed by and between the attorneys for the respective parties that the foregoing transcript contains full, true, and correct copies of the judgment roll, notice of motion for a new trial, statement and affidavit used on motion for a new trial, order denying motion for a new trial, and notice of appeal herein, and that an undertaking in due form has been filed herein." It will be observed that counsel stipulated that the affidavit referred to was used on motion for a new trial; but it is contended by counsel for respondent under the decision of this court in *Crowley v. Cræsus Mining Co.*, 12 Idaho, 530, 86 Pac. 536, wherein it was held that the certificate of the clerk of the district court, to the effect that certain affidavits were used on the hearing of a motion for a new trial, was not sufficient to authorize this court to consider the affidavits, and that such certificate must be made by the trial judge, or that such affidavits must be contained in an authenticated record, certified by the judge, showing that such affidavits were used on the hearing. That decision is clearly wrong, and contrary to the statute and former decisions of this

court. On examination of that case we find that that decision was based on the decision of this court in *State v. Larkin*, 5 Idaho, 200, 47 Pac. 945. That was a criminal case, and the decision was rendered under the provisions of sections 7940 to 7946, inclusive, of the Penal Code of 1887, which provisions apply to appeals in criminal cases only. The decision in the *Crowley* Case upon the point under consideration is hereby expressly overruled, as applied to civil cases.

And it is contended that the stipulation of attorneys in that regard can have no greater effect than the certificate of the clerk, and for that reason said affidavit should be stricken from the transcript. It is also contended that no one but the judge can identify or certify the papers considered by him on the hearing of such motion. This question was under consideration by this court in the case of *Simmons Hdw. Co. v. Alturas Com. Co.*, 4 Idaho, 386, 39 Pac. 553. The opinion in that case was prepared by Chief Justice Morgan, and is quite exhaustive on the question here under consideration; and, after reviewing a number of California authorities upon this question, the learned Chief Justice said: "As to the decisions of the California Supreme Court, which we are requested to follow, we must respectfully say that the path is too devious." And further on it is said: "We think a fair construction of section 4821 would authorize the clerk of the district court or attorneys to certify, as in this case, that the transcript contains full, true, and correct copies of all the papers used on the hearing of the motion of defendant in the court below, or as the case may be. This certificate, if incorrect, would be subject to correction by either party upon a suggestion of diminution of the record." Said section 4821 is as follows: "The copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys, and must be accompanied with a certificate of the clerk, or attorneys, that an undertaking on appeal, in due form, has been properly filed or a stipulation of the parties waiving an undertaking." Sections 4818-4820, Rev. St. 1887, referred to in said section 4821, provide what papers the transcript must contain on the appeals mentioned therein. No other papers have any place in such transcripts, and the copies of the papers included in such transcripts, under the provisions of section 4821, may be certified to be correct by the clerk or the attorneys for the respective parties, and this court is authorized, on appeal, to consider affidavits or other papers used on the hearing of a motion for a new trial so certified or stipulated to be correct by the respective counsel.

In *Village of Sandpoint v. Doyle*, 9 Idaho, 236, 74 Pac. 861, in considering the effect to be given to the provisions of said section 4821, the court said: "A bill of exceptions is not necessary in such cases; but the papers used upon the hearing in the court be-

low must be identified by certificate from the judge, clerk or attorneys, so that this court may know that it is passing upon the same facts which were before the district judge." As bearing on the question under consideration, see *Steve v. Bonner Ferry Lumber Co.* (Idaho) 92 Pac. 363. Under the provisions of section 4427, Rev. St. 1887, it is provided that certain decisions and orders are deemed excepted to, and that, where such order or decision, and the papers upon which they were made, are a part of the records and files in the action, they need not be embodied in a bill of exceptions, and, if the same appear in the records or files, they may be reviewed upon appeal as though settled in a bill of exceptions. It is clear from the provisions of that section that all the motions or orders mentioned in said section which are made a part of the files and records may be used upon the appeal the same as if saved in a bill of exceptions, and said section 4821 provides the manner and method of identifying such papers when not saved in a bill of exceptions or identified by the court or judge. In the case at bar the attorneys have stipulated that the affidavit referred to was used on the motion for a new trial, and that stipulation is sufficient to warrant this court in considering it on this appeal. The motion to strike the same from the transcript must therefore be denied.

The action of the court in denying a motion to reopen the case and permit J. U. Hammond to testify as a witness for appellant in rebuttal is assigned as error. It appears from the transcript that this cause was tried on the 16th day of November, 1906, and an adjournment of the court was taken until the following morning, and on the convening of the court counsel for plaintiff moved to reopen the case and permit the plaintiff to call in rebuttal the witness, J. U. Hammond, and to permit him to testify in said cause, which motion was denied by the court. After the appellant had submitted his evidence and rested, the respondent Monroe testified that he served said alias summons on the appellant on the 18th day of September, 1905, at a time when appellant called at his (Monroe's) office to pay a certain note referred to as the Ludrick note. On rebuttal appellant's attention was called to that testimony, and he denied that said summons was served on him at that time. Both sides then rested, and we infer from the record that the court then took the case under advisement. On the following morning appellant asked to have the case reopened and to permit him to introduce another witness, one Hammond, who was present during the trial on the previous day, and who, appellant alleges, was present at Monroe's office at the time the Ludrick note was paid. It appears from the affidavits used on the hearing of said motion that said witness would testify, in substance, as follows: That at the time the appellant went

to the office of Monroe to pay the Ludrick note said witness was present, and that no papers were served on the appellant at that time; that said witness was in the courtroom at the time this action was tried, but did not tell appellant's attorney of the fact of his presence at Monroe's office until after the adjournment of the court, for the reason that he did not know that he had the right to say anything. An affidavit of the appellant was also presented on that motion, in which the appellant deposed that he had no knowledge until the trial that Monroe claimed that he had served a summons on him at the time of the payment of said Ludrick note, and that it did not occur to him that the said witness Hammond was present when he paid the note, and that said witness reminded him of that fact after the adjournment of court on the previous evening. It is clear that the testimony of the witness Hammond would have been proper rebuttal testimony, had it been offered on the trial. It was testimony tending to corroborate that of the appellant, and we think it was in the sound discretion of the court to reopen the case after it had once been taken under advisement, and permit the introduction of that testimony; but we do not think it was an abuse of such discretion for the court to refuse to do so, and for that reason the action of the court in that matter is not error. The fact that said witness Hammond was present at the time said Ludrick note was paid, and would testify that he did not see Monroe hand the appellant the summons referred to, would tend to corroborate the evidence of the appellant on that point. But the court on the hearing of said motion to open the case no doubt considered that matter, and concluded that, even if that evidence were admitted, it would not change the finding of the court upon the question as to whether said summons had been served or not. The court, perhaps, took that view of it, and concluded that the evidence offered would make no difference with the court's decision, and hence declined to reopen the case.

The next error assigned is that the court erred in overruling appellant's motion for a new trial. Motion for a new trial was heard upon a statement of the case containing the evidence introduced on the trial, and the affidavits used on the motion to reopen the case and permit the appellant to introduce rebuttal testimony, and the affidavit of the appellant, which is in words and figures, as follows: "M. F. Hall, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that on the 4th day of October, 1905, affiant paid to said Finley Monroe, at Finley Monroe's law office at Emmett, Idaho, the note held by said Finley Monroe for collection in favor of one Edward Ludrick against affiant. That at the time said affiant paid said note to said Finley Monroe he wrote the date of the pay-

ment of said note upon the face thereof, in red ink, in words, as follows: 'Paid Oct. 4, 1905, Edward Ludrick by Finley Monroe'—and delivered said note so written upon to this affiant, a copy of which is hereto attached, marked "Exhibit A," and made a part hereof. That said note was not paid on the 18th of September, 1905, as was testified by said Finley Monroe at the trial of the above-entitled cause in the district court of the Seventh judicial district of the state of Idaho, in and for the county of Canyon, but was paid on the date above stated—October 4, 1905. That said note of Edward Ludrick is the only note held by any one by the name of Ludrick which the affiant has ever paid through said Finley Monroe. That said note is the one referred to in the testimony of said Finley Monroe in said trial as the Ludrick note paid by affiant to said Finley Monroe for Ludrick." It appears from the transcript that Finley Monroe testified that he served the summons in the action in the justice's court on M. F. Hall on the date that said Hall had appeared at the latter's office in Emmett and paid to said Monroe the amount due on a certain promissory note in favor of Edward Ludrick, and the effect of said affidavit is to show that the payment of said note was made on the 4th day of October, 1905, some nine days after the judgment in the justice's court was entered, and about 15 days after the date that Monroe testified that he served said summons on the appellant Hall. That evidence would simply contradict the testimony given by Monroe on a collateral fact, and newly discovered evidence that is cumulative and contradictory on collateral facts is not sufficient to warrant the granting of a new trial, and it does not appear from the affidavit whether the appellant relies on surprise or on newly discovered evidence. If, on surprise, the affidavit should show of what the surprise consisted, as he certainly knew at the time of the trial that he had paid said Ludrick note, and until it appears otherwise, the presumption would be that said note was in his possession. If the appellant contends that this is newly discovered evidence, the statute requires that it must be made to appear that such evidence could not, with reasonable diligence, have been discovered and produced at the trial. Section 4439, Rev. St. 1887. It is clear from the provisions of said section that the accident or surprise therein referred to, and diligence in attempting to obtain the evidence desired, must appear from the affidavit. As bearing upon this question, see *Schellhaus v. Ball*, 20 Cal. 605; *Baker v. Joseph*, 16 Cal. 173; *Mowry v. Raabe*, 89 Cal. 606, 27 Pac. 157.

The issue was whether the summons was served by Monroe on the appellant. The facts disclosed by the combined statement and affidavit are as follows: The appellant testified that the summons had not been served

on him. The defendant Monroe then testified to service of summons at a time when the appellant paid said Ludrick note. Appellant, in rebuttal, denied that Monroe had served the summons on him at the time he paid the Ludrick note. Both parties rested, and the case was closed. At the opening of the court on the following morning a motion was made to reopen the case for the purpose of introducing further rebuttal and to permit the witness Hammond to testify that he was present at the time the Ludrick note was paid and no summons was served on the appellant at that time. It further appears that said Hammond was present during the trial, and was not called as a witness by the appellant, apparently for the reason that he had forgotten that Hammond was present when he paid the Ludrick note. By the affidavit on motion for a new trial it appears that the Ludrick note states on its face that it was paid some days after the alleged service of summons, and there is nothing in the affidavit to show that the appellant did not have the possession of that note at the time of the trial, at least, there is nothing in the affidavit to indicate that with ordinary prudence or reasonable diligence the appellant could not have produced said promissory note on the trial. If appellant was surprised at Monroe's testimony to the effect that he had served said summons at the time appellant paid the Ludrick note, he ought then and there to have asked for a postponement of the trial until he could procure said note, and not rested his case as he did. The court, no doubt, on reasonable application, would have given appellant time to produce said note.

In such affidavits diligence must appear, and, if one relies on newly discovered evidence, such evidence must not be merely cumulative or tending to impeach or contradict a witness. *Wood v. Moulton*, 146 Cal. 317, 80 Pac. 92. The showing in this case is insufficient to warrant an order granting a new trial, in this: (1) No diligence is shown; and (2) the evidence tends merely to impeach the respondent Finley Monroe. The granting of a new trial is largely in the discretion of the court. The judgment is affirmed, with costs in favor of the respondent.

AILSHIE, C. J., and STEWART, J., concur.

KESSLER v. PRUITT et al.

(Supreme Court of Idaho. Jan. 31, 1908. On Rehearing, Feb. 24, 1908.)

1. VENDOR AND PURCHASER — SALE DISTINGUISHED FROM OTHER TRANSACTIONS — OPTION.

An agreement for the sale of real property, in which A. agrees to sell and B. agrees to buy, to be performed in the future, and, if fulfilled, resulting in a sale, is a contract to sell real property, and not a mere option.

2. SAME—CONSTRUCTION OF CONTRACT—DEPENDENT STIPULATIONS.

The stipulations in a contract for the sale of real property, whereby A. agrees to furnish to B. an abstract of title to the premises, showing a good and clear title upon the payment of the balance of the purchase price, are mutual, dependent, and concurrent stipulations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 88, 89.]

3. SAME—PERFORMANCE—DEPENDENT STIPULATIONS.

Where the stipulations in a contract for the sale of real property are mutual and dependent, an actual tender and demand by one party is necessary to put the other party in default or to cut off his right to treat the agreement as still subsisting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 285–295, 343.]

4. SAME.

In all contracts for the sale of real property, where the time of payment by the vendee is essential, and not simply material, the vendor is required to make tender and offer to comply with the stipulations to be by him performed before the vendee can be put in default.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 290–295, 344–348.]

5. SAME.

Where a contract for the sale of real property provides that the seller will furnish an abstract of title upon the payment of the balance of the purchase price, the acts of the parties are to be considered as concurrent; the purchaser to pay the money, the seller to deliver an abstract of title, and neither party can put the other in default without tendering performance.

6. SAME.

Where the contract does not provide for a forfeiture of that part of the purchase money paid, upon failure to make payment of the balance, and where time is not made of the essence of the contract, by its terms time will not be considered as of the essence of the contract, unless it clearly appears from the character of the property, or the acts of the parties indicate that they considered and treated the contract as if time was of the essence thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 121–124.]

7. SAME.

Where the purchaser tenders to the bank holding a deed in escrow a check for the balance of the purchase money, which the bank offers to cash and pay cash in lieu of the check, the tender is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 345.]

8. SAME.

Where the vendor insists that the vendee is in default to such an extent as to entitle him to have the contract rescinded, he must allege and prove that he has made tender as provided by the contract, and demanded of the vendee a performance of the same, and notified the vendee that the contract would be rescinded unless the vendee complied with the stipulations in the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 162, 290–295.]

9. SAME.

The mere failure to pay the purchase money according to the terms of an agreement to sell real property will not be held a repudiation of the contract so as to authorize a suit by the vendor to have it rescinded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 153, 154.]

10. SAME.

Where both parties to a contract for the sale of real property have treated the same as in force after the time limit fixed in the contract, before either party is in a position to declare the contract at an end and put the other in default, it is necessary for such party to make tender as stipulated in the contract and notify the other party to comply with the stipulations, or the contract will be rescinded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 290–295, 344–348.]

11. SPECIFIC PERFORMANCE—EVIDENCE—ADMISSIBILITY.

Under a contract for the sale of real property, where one of the parties recognized the contract after the time limit, and makes an effort to comply therewith, it is error to refuse a question asking such party to explain his acts with reference to such matter.

On Petition for Rehearing.

12. SAME.

Held, that the contract sued on was only an option to purchase, and not a contract. Conclusion reached in the original decision adhered to.

Stewart, J., dissenting in part.

(Syllabus by the Court.)

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Specific performance by Harry S. Kessler against Moses Elmer Pruitt and another. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Reversed, and remanded with directions.

Harry S. Kessler, pro se, and R. B. Scatterday, for appellant. Finley Monroe and Stone & MacLane, for respondents.

STEWART, J. This action was brought for the specific enforcement of a contract for the conveyance of certain land situated in Canyon county, Idaho. Judgment was rendered for the defendants—respondents on this appeal. The appeal is from the judgment and order denying a new trial. The appellant alleges as error the action of the trial court in denying the plaintiff's motion for judgment on the pleadings. The motion for judgment on the pleadings is in the record, but there is nothing in the record to show that the court ever passed upon this motion. The record of the alleged error is not such that this court can review the same. The appellant specifies as error the insufficiency of the evidence to justify the decision of the court, and that the decision is contrary to law; that the court erred in the following findings: First, "That time was of the essence of the agreement, and the same was to terminate absolutely in case the balance of the purchase price was not paid or tendered on or before March 1, 1906." Second, "That the stipulation for an abstract of title to be furnished by the defendants was not concurrent with, but was dependent upon, the payment of the purchase price." Third, "That the plaintiff did not, either in person or by his agent, or at any time within the period of time described by the extend-

ed agreement, nor afterwards, nor at all, ever pay or tender the balance of the purchase price to the defendants or the First National Bank of Emmett, nor to any person for the defendants." Fourth. "Nor has any excuse been shown by the plaintiff for his failure to make such payment or tender." Fifth. "Neither was said tender waived by the defendants."

The specifications of errors of law occurring at the trial and excepted to by the appellant are as follows: First. "The court erred in denying plaintiff's motion for judgment on the pleadings." Second. "The court erred in refusing to allow plaintiff's witness John F. Kessler to show the intention of the parties as to the meaning of the word 'upon,' used in the contract regarding the payment of the balance of the purchase price." Third. "The court erred in refusing to admit in evidence plaintiff's Exhibits D and E." Fourth. "The court erred in refusing to allow M. E. Pruitt, on cross-examination, to explain why he got the abstract completed and forwarded to the plaintiff after March 14th and not before."

On December 21, 1903, John F. Kessler, the father of the appellant, made a contract with the respondents for the purchase of the property described in the complaint, and paid \$50 on the purchase price of \$3,500, for which the respondents gave a written receipt. Afterwards, on the 10th day of January, 1906, Harry S. Kessler, the appellant, having succeeded to the interests of John F. Kessler, entered into a contract with the respondents, and paid thereon the sum of \$100. The controversy turns upon the construction to be placed upon the agreement entered into by the appellant and respondents on the 10th day of January, 1906, and the modification thereof thereafter made.

The agreement of January 10, 1906, omitting the formal part thereof and the description of the land, reads as follows: "Witnesseth, that whereas parties of the first part have this day agreed to sell and convey, according to the terms and conditions herein-after specified, certain lands situate and being in Canyon county, Idaho, and more particularly described as follows: * * * And the said parties of the first part for and in consideration of the sum of one hundred fifty dollars (\$150.00), cash to them in hand paid by the said Harry S. Kessler as part of the purchase price for said land, having this day executed a warranty deed for said land, it is hereby agreed by the parties hereto that the said warranty deed, together with a copy of this contract, shall be placed in escrow with the First National Bank of Emmett, Idaho, to be delivered by said bank to the said Harry S. Kessler, his heirs or assigns, upon the balance of the purchase price, to wit: The sum of three thousand three hundred fifty dollars (\$3,350.00) being paid on or before March 1, 1906. And it is further agreed that if said Harry S. Kessler

fail to pay the balance of said purchase price (\$3,350.00) on or prior to March 1, 1906, the said bank shall deliver said deed to the said parties of the first part. The said parties of the first part further agree to furnish to the said second party upon the payment of the balance of the purchase price aforesaid, an abstract of title of the said premises showing a good and legal title to the said premises showing that the said premises are free and clear from all incumbrances. M. E. Pruitt, Anna Pruitt, Harry S. Kessler." Afterwards, to wit, on the 27th day of February, the respondents executed and delivered to the First National Bank of Emmett the following authority: "To First National Bank of Emmett—We have this day agreed to extend the time for the final payment on our land contract with Harry S. Kessler, dated January 10, 1906, from March 1st to March 15th, 1906, and you are hereby authorized to hold the deed now held in escrow for him until that date. Dated at Falk's Store, Idaho, this 27th day of February, 1906. M. E. Pruitt, Anna Pruitt." There is some dispute in the evidence as to just what took place between the appellant and respondents after the extension of time to March 15th, but it sufficiently appears from the evidence that there was a mortgage on the property covered by the agreement, and that the plaintiff requested the defendants to release this mortgage and have an abstract of title made. On the 14th day of April, 1906, the plaintiff received the following letter: "Emmett, Idaho, April 14, 1906. Mr. H. S. Kessler, Boise, Idaho—Dear Sir: I herewith inclose Pruitt abstract. Have not yet received the deed to the other 40 from the Varners. Mr. Pruitt says to send the money to the First National Bank here. Yours very truly, Finley Monroe." This letter was received in Boise on the 14th day of April, at 11 p. m., and was delivered to the plaintiff on the 15th of April. The abstract accompanying this letter showed that a certain mortgage, executed by Elmer Pruitt and Anna L. Pruitt to John Smerage, was released on the records of said county on the 9th day of April, 1907, and on the same day the abstract was certified to by the abstractor. On the 16th day of April the plaintiff sent his father, John F. Kessler, to the First National Bank of Emmett, Idaho, to make payment of the balance due on the purchase price of said property, and demand the deed, and when he reached the bank he found that on the 16th day of April, before he arrived there, the respondents had applied to the bank and received the deed placed in escrow, as provided by the contract of January 10th. The plaintiff then called on the defendants and offered to make payment of the balance due on the contract, and the defendants refused to receive the same; likewise the bank refused to receive such payment. The questions are: Was "time of the essence of the contract"? Was "the contract to terminate absolutely in

case the balance of the purchase price was not paid or tendered on or before March 1, 1906"? Was the "stipulation for an abstract of title to be furnished by defendants concurrent with the payment of the purchase price by the plaintiff"?

An examination of the contract of January 10, 1906, shows that the respondents agreed to sell and convey to the appellant for \$3,450 the property described in the contract. At the same time the respondents made and executed a deed to the appellant, and deposited the same with the First National Bank of Emmett, to be delivered to the appellant upon his paying the balance of the purchase price, to wit, \$3,350; \$100 having been paid at the date of the execution of the contract. The contract provided that if the appellant failed to pay the balance of the purchase price on or prior to March 1st the bank should deliver the deed to the respondents. It was further agreed that the respondents should furnish to the appellant upon the payment of the balance of the purchase price an abstract of title to said premises, showing a good and clear title to the same, free and clear from all incumbrances. The time for final payment was thereafter extended to March 15th. The contract of January 10th contains mutual, concurrent, and dependent provisions. The appellant was to pay the respondents \$3,350 on or before March 1st, and the respondents were to furnish the appellant an abstract of title showing a good and legal title, free and clear of all incumbrances. The contract does not provide for a forfeiture of that part of the purchase money paid upon failure to make payment of the balance; neither was time made of the essence of the contract by the terms of the contract; neither do the acts of the parties indicate that they considered time of the essence of the contract. This contract was a contract for the sale of real property, and not a mere option as contended by respondents. The seller agreed to sell, and the purchaser agreed to buy. It was to be performed in the future, and, if fulfilled, results in a sale. The contract was fully executed, in that the contract to sell is completed. *Am. & Eng. Ency. of Law*, vol. 21, p. 924; *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17; *Benson v. Shotwell*, 87 Cal. 49, 25 Pac. 249; *Newell v. Lamping* (Wash.) 88 Pac. 194.

It is admitted that there was a mortgage on the premises, which was not released until April 9, 1906. It is also admitted that the respondents did not furnish the appellant with an abstract of title until the 14th day of April, 1906, which reached the appellant on the 15th day of April, 1906, which was Sunday. On the following day the appellant offered to pay to the bank, and also the respondents, the balance of the amount due, to wit, \$3,350. Appellant urges that "time was not of the essence of the contract," and that the stipulations of contract were mutual, con-

current, and dependent; that the furnishing of the abstract of title showing a good and clear title, free from incumbrances, was to be concurrent with the payment of the balance of the purchase money; that the appellant would not be in default in making such payment until the respondents had tendered abstract of title showing a good and clear title, free and clear from all incumbrances; that, so long as neither party makes tender—the appellant the purchase money, and the respondents an abstract of title, showing a good and clear title free from all incumbrances—neither party is in default, and that the respondents could not treat the agreement as at an end until they had made a tender of the abstract and returned the part of the purchase price paid; that, until default, the appellant was entitled to have the contract regarded as still in force, and have it specifically enforced any time within the period of the statute of limitation.

Mr. Pomeroy on Specific Performance, at sections 361 and 362, points out the distinction between granting specific performance of contracts when time is, and when not, made essential. He says: "Where the stipulations are mutual and dependent—that is, where the deed is to be delivered upon the payment of the price, either on a day named or without any day being specified—an actual tender and demand by one party is absolutely necessary to put the other in default, and to cut off his right to treat the agreement as still subsisting. So long as neither party makes such tender—of the deed by the vendor, and of the price or security by the vendee—neither party is in default; the contract remains in force, and either party may make a proper tender or offer and sue, until barred by the statute of limitations. This rule, however, does not apply to those contracts in which the time of performance has been made essential, and the agreement itself is to be regarded as void or rescinded if the vendee fails to make his payments on the stipulated day. In all those contracts where the time of payment by the vendee is essential, and not simply material, and a fortiori in those where, if the vendee's payments are not made upon the exact day named, the vendor may treat the agreement as at an end, the vendee must make an actual tender of the price and a demand of the deed at the specified time, as a condition precedent to his maintaining a suit. The same is true of the vendor when the time of his conveyance is made essential. This rule is involved in the very notion of time being of the essence of the contract." When, therefore, the stipulations of the contract are mutual, concurrent, and dependent, and time only material, but not essential, so long as both parties have taken no steps to assert their respective rights or demands for a completion, and so long as the vendor has made no tender or offer of deed or demand on the vendee, and the vendee has made no tender of the

price or demand on the vendor, the contract continues to subsist until barred by limitation; so, too, when time is of the essence, yet if neither party has exercised his right to declare an end to the contract, or where the one party has remained silent and inactive, or has otherwise done something amounting to a waiver, or has treated the contract as still subsisting, he cannot, when the stipulations of the contract are mutual, dependent, and concurrent, legally place the other party in default until he himself has tendered performance, or offered to perform. In such cases, in order that he may terminate the contract, the vendor must make tender or offer of the deed, and account for the purchase money paid. *Roberts v. Braffett* (Utah) 92 Pac. 789.

In the case at bar, the time for final payment was fixed first on March 1st, and afterward extended to March 15th, and as the respondents agreed that they would furnish an abstract of title showing a clear title with said premises, free and clear from all incumbrances, they were not in a position to enforce payment or declare forfeiture until they tendered the abstract of title showing clear title. The contract was considered to be, and was treated by both parties, as in force up to and including April 16, 1906. Respondents say they were willing to take the money at any time up until the deed was withdrawn on April 16th. On April 14th the respondents, through Finley Monroe, sent an abstract of title to the appellant. The latter had a reasonable time thereafter to make payment under said contract. On the 16th he called at the bank to make payment and take up the deed. There is some dispute about the respondents employing Mr. Monroe to secure the abstract and send it to the appellant, but it sufficiently appears that Mr. Monroe was to get the abstract and forward it to the appellant. Mr. Pruitt testifies: "He had only spoken to Mr. Monroe about the abstract. I had him order it for me. I wanted Mr. Monroe to get the abstract, but don't remember when it was, but approximately along in April. I wanted this abstract to give to you [the appellant]. That was some time in April. I called the deal off on April 16th. I did not call it off on the 15th of March, not if the money came around. I employed Mr. Monroe to get the abstract. I did not tell him what to do with it. I think I told him he could send it to you. I suppose he had the authority to send it. I wanted him to mail the abstract. I expected the money to be at the bank Monday, and went up several times and asked for it." It appears clearly from this evidence that the contract was not rescinded, but was extended, at least, until the 16th day of April. The respondents were not then in a position, under the authorities, to rescind the contract or terminate it without a reasonable notice to the appellant and an opportunity given him to make payment. It

appears from the contract that the right of the respondents to the purchase money was conditioned upon the delivery to the appellant of an abstract of title showing clear title free from incumbrance. No other construction can be placed upon this contract. It is not reasonable to suppose that a party purchasing real property, where the contract provides for an abstract of title, would be required to pay the purchase money, and depend thereafter upon the seller discharging the incumbrances and procuring and delivering to him abstract of title. The acts of the parties were to be concurrent, the seller to deliver an abstract showing clear title free from incumbrances, and the purchaser to pay the money; and neither party could put the other in default without tendering performance. In order for the respondents to put the appellant in default, it was incumbent upon them to tender an abstract of title showing clear title free from incumbrances, and demand payment of purchase price. This they did not do. *Penn. Min. Co. v. Thomas*, 204 Pa. 325, 54 Atl. 101. "As a general rule, a party who asks for the rescission of a contract for the sale of real estate must be himself without fault; and when, as in this case, the payment of the purchase money, and the making or tender of the deed, are to occur simultaneously, they are regarded as mutual and concurrent acts, which disable either party from putting an end to the contract, without performance or a valid offer to perform on his part, and, so far as the question of time is concerned, both parties, after the day provided for the consummation, may be considered equally in default; and neither can hold himself discharged from the obligation of complete performance until he has tendered performance on his own side, and demanded it on the other." *Frink v. Thomas*, 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239. "When the vendor insists that the vendee is in default, to such an extent as to entitle him to have the contract rescinded, he must allege and prove that he has tendered to the vendee a deed conveying to him all the land according to the terms of the agreement and demanded performance on the part of the vendee, and must have notified him that the contract would be rescinded unless purchase money was paid within a reasonable time. The mere failure to pay the purchase money according to the terms of the agreement will not be held a repudiation of the contract so as to authorize a suit by the vendor to have it rescinded." *Frink v. Thomas*, supra.

So, in the case at bar, both parties having treated the contract in force after the time limit fixed in the contract, and time not being of the essence of the contract, before the respondents were in a position to declare the contract at an end, and to put the appellant in default, it was necessary for the respondents to tender an abstract of title showing clear title, and notify the appellants to make

payment within a reasonable time, or the contract would be rescinded by the respondents. The obligation of the appellant to pay the purchase money depended upon the duty of the respondents to tender to the appellant an abstract of title showing clear title. It is not claimed on the part of the respondents that they ever offered to perform the contract on their part with reference to tendering an abstract of title showing clear title to the property sold, and without such offer they are not in a position to rescind the contract and defeat the plaintiff's action to compel a specific performance thereof.

The evidence as to a tender shows that on the 16th day of April, 1906, John F. Kessler, the agent of the plaintiff, went to the First National Bank of Emmett, the place where the deed had been left in escrow, with a check for \$3,350 on the Bank of Commerce at Boise, and he asked the cashier whether he would accept this check as legal tender and in lieu of the funds, and he said he would consider it as currency. The cashier testifies, also, that J. F. Kessler came to the bank and offered him a check for \$3,350 on the Bank of Commerce, and asked him if he would take it for a tender, and was told that the deed was gone, that he could not take it, but told Mr. Kessler that he would cash the check for him if he wanted it. This took place after the respondents had withdrawn the deed from the bank, and, as the respondent testified, "He had declared the deed off." It sufficiently appears that the defendant was ready, willing, and had the ability, and would have paid the balance of the purchase money on the 16th day of April, had the deed been at the bank, or had the respondents been willing to accept the money therefor. Certainly the respondents were not in a position to rescind or end this contract and put the appellant in default without giving the appellant a reasonable opportunity to comply with the contract after the abstract was furnished, and at the earliest moment possible for the appellant to reach the bank he did so, and found the deed withdrawn, and was met by a statement of the respondents that the deal was off. The tender was sufficient.

The fourth, fifth, and sixth findings of fact, and the conclusions of law thereon, are clearly erroneous, and call for a reversal of the case. Appellant also contends that the court erred in refusing to allow the witness John F. Kessler to testify as to the meaning of the word "upon" as used in the contract regarding the payment of the balance of the purchase money. This was not error. The word "upon," as used in the contract, did not call for any explanation by the witness. Its meaning clearly appears from the contract itself, and is that the payment of the purchase price was to be made upon the furnishing of the abstract of title—that is, the two acts were to be simultaneous, and each de-

pendent upon the other. Counsel for appellant also contends that the court erred in refusing to admit in evidence Exhibits D and E. Exhibit D was a letter written by the appellant to Finley Monroe after the receipt of the abstract from him and the withdrawal of the deed by the respondents from the bank. This letter was written after the transaction had been closed, and could throw no light upon the contract or the acts of the parties complying therewith. Exhibit E was a letter written by the appellant to the respondents on the 17th day of April, and is of the same general character as Exhibit D, and was written after the transaction was closed, and was immaterial, and could throw no light upon the transaction. It was not error for the court to refuse to admit either of these exhibits. The appellant also alleges as error the refusal of the court to allow M. E. Pruitt, on cross-examination, to explain why he got the abstract completed and forwarded to plaintiff after March 14th, and not before. This was clearly error, and the question should have been answered. It was perfectly proper for the appellant to inquire into the acts of the respondents in relation to the contract while said contract was still in existence, and before the same had been terminated. The judgment in this case is reversed, and the order denying a new trial is overruled, and the cause remanded, and the trial court is directed to make findings of fact and conclusions of law and enter judgment in accordance with this opinion. Costs awarded to appellant.

AILSHIE, C. J., and SULLIVAN, J., concur.

On Rehearing.

SULLIVAN, J. A petition for a rehearing has been filed in this case, and it is contended that the court misconstrued the contract when it held as follows, to wit: "That the contract on which the action was based bound the appellant to purchase the property which is the subject of the action." The contention of counsel for the petitioner is that the contract was only an option and could not be enforced against the purchaser. We have carefully considered said contract, and the majority of the court finds no provision in said contract whereby appellant agrees to purchase said real estate. By one provision of said contract the respondents agree to sell and convey to appellant, according to the terms and conditions of said contract, the real estate described therein. Another provision is that, if the appellant fails to pay the balance of the purchase price on or prior to March 1, 1906, the said bank shall deliver the deed to the respondents; and there is a further provision in the contract whereby the respondents agree to furnish to the appellant an abstract of the title to said premises showing a good and legal title to the same. It is stipulated in said contract to the effect that the result of the failure of the appel-

lant to pay the balance of the purchase price shall be the return to them of the deed placed in escrow. It contains no agreement on the part of the appellant to purchase said premises. This contract, then, is only an option to purchase. It was a right acquired by appellant under said contract to purchase said real estate within a certain time, upon the payment of the balance of the purchase price upon respondent's furnishing a proper abstract of title. The appellant had the option to purchase, but did not make the purchase at the time said agreement was entered into. An option is not a sale. An option to purchase does not become a contract to purchase until the privilege given by the option has been exercised by an acceptance. *Hopwood v. McCausland*, 120 Iowa, 218, 94 N. W. 469; 21 Am. & Eng. Enc. of Law (2d Ed.) 924.

The majority of the court now holds that the court erred in its former opinion in holding that said contract bound the appellant to purchase said real estate, and holds that said contract was a contract to sell and an option given to the would-be purchaser and could not have been enforced against him. The court is, however, unanimously agreed upon the question that, whether said contract be considered an option or a contract to purchase that could be enforced against the appellant, the same conclusion must be reached in either case, and that is, that the judgment must be reversed. The appellant had done and performed everything required to be done and performed by him, and the seller had failed to furnish an abstract of the title to said real estate as soon as he expected to do so, or as contemplated by said contract, and for that reason he was in default, while the other party was not in default. The seller could not evade the liability imposed by his contract by failing to comply with its terms on his part. A rehearing is therefore denied.

AILSHIE, C. J., concurs.

STEWART, J., concurs in conclusion, but dissents from that part of this opinion on petition for a rehearing which holds the contract sued on to be an option.

GREEN v. WILHITE et al.

(Supreme Court of Idaho. Feb. 7, 1908.)

1. PUBLIC LANDS—RESERVATIONS TO UNITED STATES—RIGHT OF WAY FOR IRRIGATION CANALS.

Under the provisions of Sundry Civil Appropriation Act Cong. Aug. 30, 1890, c. 837, 26 Stat. 391 [U. S. Comp. St. 1901, p. 1570], which provides "that in all patents for lands hereafter taken up under any of the land laws of the United States, or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the land in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States,"

the word "constructed," as there used, has a general reference and application to ditches or canals constructed by the authority of the United States, without reference to the time of such construction.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 2, p. 1468.]

2. SAME.

Under the provisions of the act above quoted, it was the evident intention of Congress to reserve perpetually to the government an easement and right of way through and over any and all lands west of the one hundredth meridian that the government might grant to settlers and purchasers subsequent to the passage of the act, and to thereby reserve the easement and right of way for the construction, maintenance, and operation of any ditches and canals the government may construct at any time in the future for the irrigation and reclamation of arid lands.

(Syllabus by the Court.)

Appeal from District Court, Canyon County; Frank J. Smith, Judge.

Action by Kate Green against Charles Wilhite and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with direction.

Action by the plaintiff, as the owner of certain lands described in her complaint, to obtain an injunction restraining the defendants, as contractors under the United States, from trespassing upon plaintiff's land and doing excavation and constructing a canal across the same. The plaintiff alleged that she was the owner of a certain tract of land, which she acquired from the United States on or about the 7th day of December, 1893, and subsequent to the act of Congress approved August 30, 1890; that the defendants are contractors under the government of the United States for the construction of a portion of an irrigation canal known as the "Boise-Payette Government Irrigation Project"; and that as such contractors they had, without the permission or consent of the plaintiff, entered upon her lands and done certain work and excavation, and threatened to continue the same, to her injury and damage, etc. It was also alleged in the complaint that the defendants claimed the right to enter upon the plaintiff's lands by authority of the act of Congress approved August 30, 1890 (26 Stat. 391, c. 837 [U. S. Comp. St. 1901, p. 1570]), wherein and whereby it was and is provided "that all patents for lands hereafter taken up under any of the land laws of the United States, or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the land in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States." It was further alleged that the plaintiff's lands were entered and patented under the desert land laws of the United States, and that the entry and patent were subsequent to the approval of the act of August 30, 1890. Defendants demurred to the complaint, and the demurrer was overruled. They declined to answer, and judgment was

accordingly entered against them. This appeal is from the judgment.

N. M. Ruick, for appellant. Edgar Wilson, for respondent.

AILLSHIE, C. J. (after stating the facts as above). The only question to be determined in this case is as to the true meaning and intent of the proviso found in the Sundry Civil Appropriation Act of Congress of August 30, 1890 (26 Stat. 391, c. 837, 6 Fed. St. Ann. 508 [U. S. Comp. St. 1901, p. 1570]), which reads as follows: "That in all patents for lands hereafter taken up under any of the land laws of the United States, or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the land in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States." The determination must rest upon the meaning of the word "constructed," as used in the foregoing statute, and the significance it bears in that connection. Has it been used in this connection with reference to time, or independent of time altogether? Counsel for appellant contends that it should be understood in the general sense of ditches or canals constructed by authority of the United States, without any reference to time whatever. Taking the sentence as it stands alone, without reference to any extraneous facts or circumstances, it is perhaps equally liable to either construction claimed for it. When we consider, however, the previous legislation by Congress on the same and kindred subjects, and the policy that the Congress was then outlining with reference to the irrigation and the reclamation of arid lands, we get an insight into the purpose of this legislation, which it does not so clearly bear on its face. By Act Oct. 2, 1888, c. 1069, 25 Stat. 526 [U. S. Comp. St. 1901, p. 1552], Congress enacted a law "for the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation and segregation of the irrigable lands in said arid region and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows." By the terms of that act it was provided that "all lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes, and all the lands made susceptible of irrigation by such reservoirs, ditches, or canals, are from this time henceforth, hereafter reserved from sale as the property of the United States and shall not be subject after the passage of this act to entry, settlement or occupation until further provided by law." Under the foregoing provisions of the statute the Secretary of the Interior, on the advice of the Attorney General (Opinion of the Attorney General, May

27, 1890), held that no entry of any kind could be made upon any land west of the one hundredth meridian until irrigable lands had been determined and the proclamation of the President had been made opening the lands to settlement. The interpretation and construction of the Attorney General and the Secretary of the Interior placed upon the act of 1888 aroused the Congress, and especially the Senate, to take immediate steps toward the repeal of that portion of the act of 1888 reserving unselected reservoir, ditch, and canal sites from settlement. An examination of the Congressional Record (volume 21, pp. 7269 to 7987 and 8270 to 9156) discloses various views on the subject and amendments offered with a view to correcting the vices and evils in the act of 1888. The Senate and House failed to agree upon the amendment, and something like a dozen conferences seem to have been held, and the statute as it now exists was a compromise finally agreed upon by the House and Senate conference committee. In presenting the conference report to the House of Representatives, Mr. Sayers, of the committee, said: "One further concession was obtained from the Senate conference—that in the issuance of all patents by the government of the United States to any person whomsoever, under the operation of this law, there should be reserved in the arid land district the right of easement over lands embraced in the patents for irrigating ditches for public use."

In speaking of the same report in the Senate on August 26, 1890, Senator Reagan said: "It seems to me that it is so important to the settlement of that country, to the interests of the people who are to occupy that country, that monopoly of the water should not be had by private persons or by corporations, that it would have been wise in the committee to agree that all reservoir sites and places for canals and ditches should be reserved. I see that they have done the equivalent in reserving places for canals and ditches by requiring that those who obtain lands, in their patents, should have a clause inserted that the right of way for canals and ditches shall be reserved. * * * However much may be said about the House of Representatives in resisting that, they, in my judgment, are entitled to the profound gratitude of the American people for saving to them the little that they have saved in this conference report." Senator Dolph, who was very bitterly opposed to the act of 1888 as construed by the Attorney General, in speaking upon the proposed amendment which was afterward adopted and became the act of August 30, 1890, said: "But now it appears that this provision will legalize and intrench in the statutes of the United States the withdrawal from the operations of the public land laws of tracts within a single state larger than the entire area of some of the states of the Union on the pretense that they are need-

ed for reservoirs. Not only that, Mr. President, but by the last clause of the amendment proposed by the committee there is to be perpetuated a portion of the evil of this act of 1888 in every muniment of title that shall issue from the government of the United States for an acre of land west of the one hundredth meridian. It is provided that it shall be expressed in every patent issued for public land west of this meridian 'that there is reserved from the land in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.' This provision, while it will be of no practicable value to any one, will be a cloud or incumbrance on every man's title who secures a portion of the public domain."

It will be seen, from an examination of all the reports and debates had in reference to the proposed amendments, and the amendment itself as finally passed on August 30, 1890, that the members of Congress, both those favoring and those opposing the act, believed and understood that it would have the effect of reserving a perpetual easement and right of way to the government for ditches and canals that might thereafter be constructed by authority of the government over lands which should be entered and patented subsequent to the passage of the act. It is further worthy of notice that prior to that time the government had not entered upon the construction of irrigation works, ditches, and canals, and had never authorized the construction of any such works, except in Indian and military reservations. The first intimation of such a scheme as a national project was contained in the act of October 2, 1888. The act authorized the irrigation surveys, and was made in the nature of a provision for obtaining accurate information concerning arid lands and the feasibility of the construction of reservoirs, dams, and canals and the amount of lands that could be irrigated thereby. This policy had more fully developed in the minds of the members of Congress when the act of Congress of August 30, 1890, was passed, and at that time a national irrigation policy seems to have been at least anticipated by some of the members. It is clear that in the adoption of this proviso it was intended to reserve to the government easements and rights of way over the lands it might subsequently grant for any ditches or canals that it might construct in the future. Congress had made no provision for constructing any canals or ditches by the government, and, if it should be held that the act only applied to ditches or canals that had been constructed at the time patent issued, it would in effect amount to a holding that the proviso had no meaning or effect whatever. Without subsequent legislation authorizing the government to construct ditches and canals, it would have been impossible for any ditches or canals to have been constructed by the government prior to the is-

suance of patents to any one, and the proviso would have been meaningless. The Congress was taking this precautionary measure for the protection of a right of way to the government in the event it should later adopt a reclamation policy and enter upon such works. It intended thereby to save the government from the expense of purchasing and condemning rights of way when it got ready to construct any canal or ditch. Early in the history of this Western country, Congress enacted sections 2339 and 2340, Rev. St. [U. S. Comp. St. 1901, p. 1437], recognizing and granting rights of way across public lands for ditches and canals "used for mining, agriculture, manufacturing, or other purposes," and provided that all patents thereafter issued should be subject to such easements and rights of way for ditches previously constructed. These provisions, however, had no reference to ditches or canals constructed by the government itself, for the obvious reason that the government was not at that time in the business of constructing ditches and canals. So far as we have been able to discover, there was no act of Congress prior to the act of August 30, 1890, which made any provision whatever for a reservation of easement or right of way to the government for or on account of ditches and canals constructed by its authority over any of the public lands.

In view of the foregoing considerations, we turn to the statute, and at once observe that it is necessary to read this statute with certain words implied which have been omitted, in order to arrive at either conclusion contended for on this appeal. First, if it be held that the statute intended only to reserve the right of way for ditches or canals that had been constructed across the lands prior to the entry of the lands or the issuance of patent, it would be necessary to supply the words, so as to make the statute read, "for ditches or canals that have been constructed by the authority of the United States." If it means to include those that may hereafter be constructed, then the statute would read, "for ditches or canals that may hereafter be constructed by the authority of the United States." The construction would be no more strained in the one instance than the other. In view of this condition of the statute, we should be governed by the legislative intent as gathered from the debates and discussions had at the time of the passage of the act, as well as the history of legislation leading up to it, and of the contemplated legislation which this act was intended to aid and facilitate. So far as we are advised, the statute has never been passed upon by any court prior to this case, except on October 31, 1906, in the case of Richard E. Green, Administrator, v. Charles Wilhite et al. (in the Circuit Court of the United States for the District of Idaho) 160 Fed. 755. In that case District Judge Beatty, in passing on a demurrer to the complaint, considered this

statute, and among other things said: "The only serious contention by counsel is concerning the word 'constructed,' as used in the latter part of the clause above quoted from the act of 1890, to wit: 'A right of way thereon for ditches or canals constructed by authority of the United States.' The complainant contends that it refers only to ditches or canals already constructed in connection with the irrigation reclamation service under the direct control of the government. But for the doubts suggested by counsel, none would have occurred to me as to the meaning of this word from a reading of the entire paragraph or the statute in which it is used. The acts referred to show that the Congress had been contemplating a system of government irrigation of the arid lands of the West, which would require reservoirs and a canal system, and which would be under the direct management and control of the government. We know that often in such matters the government moves slowly, and takes its preliminary steps and discussions long before it finally puts the chief work into operation. In the legislation referred to it was providing for preliminary surveys and investigations. Up to this time it never had entered upon any system of irrigation for the interest or benefit of the general public, although it may have had some small irrigating schemes on government reservations, where it owned or controlled all the lands, and which were not open to settlement by its citizens. * * * I cannot doubt that this word 'constructed' is used in the statute in a general sense, and applies to ditches or canals constructed by the authority of the government without reference to time."

This being a federal statute, and the foregoing decision, being from a federal court, although not the court of last resort, is necessarily strong persuasive authority in a state court. Notwithstanding that, however, we are satisfied that the statute should be construed as above suggested. We hold, therefore, that the demurrer in this case should have been sustained.

The judgment of the trial court is reversed, and the cause remanded, with direction to sustain the demurrer. Costs awarded in favor of the appellant.

SULLIVAN and STEWART, JJ., concur.

Ex parte CAIN.

(Supreme Court of Oklahoma. Feb. 3, 1908.)

1. WORDS AND PHRASES—"IMPRISONMENT."

The word "imprisonment," in its ordinary sense, contemplates and means within the common jail, rather than in the penitentiary.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3445-3447.]

2. INTOXICATING LIQUORS—VIOLATION OF PROHIBITORY LAW—MISDEMEANOR.

The offense of manufacturing, selling, bartering, giving away, or otherwise furnishing any intoxicating liquor of any kind, including beer,

ale, and wine, contrary to the provisions of the prohibition article of the Constitution, is a misdemeanor.

3. SAME—PUNISHMENT.

The maximum punishment for said offense is by imprisonment in the county jail not exceeding one year, and by fine not exceeding \$500.

4. SAME.

The prohibition provision in the Constitution prohibiting the manufacture, sale, barter or giving away of any intoxicating liquors, including ale, beer, and wine, contrary to said provisions is valid and self-executing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 21-23.]

(Syllabus by the Court.)

Petition by Jim Cain for writ of habeas corpus. Writ denied.

F. E. Riddle, for petitioner. W. C. Reeves, Asst. Atty. Gen., and J. D. Carmichael, Asst. Co. Atty., for respondent.

WILLIAMS, C. J. The petitioner in this case was tried in the county court of Grady county, sitting as such and exercising the jurisdiction of a county court of the state of Oklahoma, on the 11th day of January, 1908, and adjudged guilty of the crime of selling intoxicating liquor, and is now confined in the jail of said county in the custody of M. B. Louthan, sheriff of said county, under a commitment duly issued out of said court by virtue of said adjudication. The information made against said petitioner, and on which he was convicted, is in due form, and charges that the said petitioner "at and within said county and state on the 23d day of November, 1907, then and there being, did then and there willfully and unlawfully sell to one Emmett Ades intoxicating liquors, to wit, one-half pint of whisky, for a price unknown to the affiant, contrary to the form of the statute," etc. This cause is now properly before this court on writ of habeas corpus; the petitioner contending that said county court was without jurisdiction to try said cause or to sentence said petitioner under said conviction, and for the reason of said want of jurisdiction that he is now unlawfully restrained of his liberty by said sheriff.

"Any person, individual or corporation who shall manufacture, sell, barter, give away or otherwise furnish intoxicating liquor of any kind, including beer, ale, and wine, contrary to the provisions of this section * * * shall be punished on conviction thereof, by a fine not less than fifty dollars and by imprisonment not less than thirty days for each offense. * * * Upon the admission of this state into the Union, these provisions shall be immediately enforceable in the courts of the state. * * * Prohibition article of the Constitution. Counsel for petitioner earnestly contends that the offense charged is a felony, and that, the county court having no jurisdiction of felonies, the judgment rendered in said court adjudging said defendant guilty of said charge is absolutely void. The retail liquor traffic is a mere privilege, and, in defining the extent

to which the privilege goes, the law should be strictly construed against the traffic. *Schmidt v. State*, 14 Mo. 137. That the state in the exercise of its police powers has the right to prohibit the manufacture and sale of intoxicating liquors is no longer an open question. *Bartemeyer v. Iowa*, 85 U. S. 129, 21 L. Ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 33, 24 L. Ed. 992; *Foster v. Kansas*, 112 U. S. 205, 5 Sup. Ct. 8, 97, 28 L. Ed. 629; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

But is said provision self-executing? If not, the statutes of Oklahoma Territory relative to the licensing of the liquor traffic are still in force, and will so remain until statutory provisions are enacted to make said prohibition provision effective. *C. & F. R. Co. v. Trout*, 32 Ark. 17; *Lamb v. Lane*, 4 Ohio St. 167; *Doddridge v. Stout*, 9 W. Va. 703; *Chahoon v. Commonwealth*, 20 Grat. (Va.) 733. The doctrine is well settled that, as a rule, negative or prohibitory clauses in a Constitution are self-executing. *Law v. People*, 87 Ill. 385; *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3; *De Turk v. Commonwealth*, 129 Pa. 151, 18 Atl. 757, 5 L. R. A. 853, 15 Am. St. Rep. 705; *State v. Woodward*, 89 Ind. 110, 46 Am. Rep. 160. If it supplies the rule for enforcement and fixes the penalty for violation, there can be no doubt as to its character; but a provision may sometimes be both prohibitive and mandatory, and not self-executing; hence in such cases it always becomes a question of intention, and to determine the intent the rule is courts will consider the language used, the object to be accomplished by the provision, and the surrounding circumstances, and to determine these questions from which the intention is to be gathered courts will utilize extrinsic matters when it becomes necessary. Even though there may be no penalty attached for violations of constitutional provisions, it does not necessarily imply that the provision is not self-executing. The want of a penalty, however, is a circumstance which should be given great weight in determining as to whether or not the same is self-executing, though it is not conclusive. The proper rule is that prohibitive and restrictive provisions are self-executing when they may be enforced by the courts independent of statutory enactments.

The next thing to determine is whether or not a penalty has been prescribed for such violation. Was it the intention that the words "shall be punished on conviction thereof by fine of not less than fifty dollars and by imprisonment of not less than thirty days for each offense," should be a limitation upon the action of the Legislature, or prescribe a penalty that was immediately enforceable in the courts? The same provision states: "Upon the admission of this state into the Union this provision shall be immediately enforceable in the courts of the state." The

rules of construction should be so applied to written Constitutions as to give effect, if possible, to the intent of the framers and of the people who have adopted it, and to promote the objects for which the same was framed and adopted. But it may be contended, if we adopt the literal words of this provision, that, whilst it is stated that the same shall be immediately enforceable, yet we find no maximum punishment provided, and that consequently the same is not a complete criminal statute without such definite provision, and that, therefore, it is not enforceable without additional legislation to give it effect. A statute providing a minimum, without fixing the maximum, punishment, is neither invalid as being in violation of section 9, art. 2, of our Constitution, nor as being too vague and indefinite to be enforced, at least as to the minimum punishment which is valid without additional enactments. *State v. Fackler*, 91 Wis. 419, 64 N. W. 1029; *State v. Williams*, 77 Mo. 310. Hence it is not necessary, in considering as to whether or not said provision is self-executing, to determine as to whether or not punishment in excess of 30 days' imprisonment and \$50 fine under said prohibition provision incorporated in our Constitution, without further legislation, could be imposed; for, having determined that said prohibitory provision prescribed an enforceable minimum punishment, we necessarily conclude that said provision, as it appears in said Constitution, is self-executing. Section 13 of the enabling act provides as follows: "That said state, when admitted as aforesaid, shall constitute * * *; and that the laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof." Also section 2 of the schedule of the Constitution reads as follows: "All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union which are not repugnant to this Constitution and which are not locally inapplicable shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law." Section 1935, Wilson's Rev. & Ann. St. Okl. T. 1903, being section 14, art. 1, c. 25, is as follows: "Except in cases where a different punishment is prescribed by this Code or by some existing provisions of law, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding one year and by a fine not exceeding five hundred dollars or both such fine and imprisonment. * * *"

The question now arises as to whether or not said section 1935 is in conflict with the prohibition provision of the Constitution heretofore referred to. In said section 1935 it is stated that, except in cases where definite punishment is prescribed by the Code or by some existing provision of law, every offense declared to be a misdemeanor is punishable

by imprisonment in the county jail not exceeding one year or by a fine not exceeding \$500, or by both such fine and imprisonment. Said section is in conflict or inapplicable to the penalty in said prohibition provision only in one respect; and that is where it provides that said misdemeanor may be punished by imprisonment not to exceed one year in the county jail or by a fine not exceeding \$500, but that otherwise it is applicable; and hence we reach the conclusion that the maximum punishment for the offense of which the relator stands convicted is punishable by not exceeding one year's imprisonment and also a fine not exceeding \$500, provided the charge is a misdemeanor.

A felony at common law is an offense which occasions a total forfeiture of either lands or goods or both and to which capital or other punishment may be superadded according to the degree of guilt. 1 Russell on Crimes, c. 4, p. 77. "By the early common law in England felonies were those crimes punishable capitally, or by forfeiture of land, or goods, or both, but the term was not one of settled meaning, and by some authorities the test was the liability to forfeiture rather than the liability to capital punishment. * * * In statutes creating or defining offenses, the language usually expressly indicates whether the offense is to be deemed a felony or misdemeanor, and for practical purposes it may be said that those crimes which, by the common law, were punishable capitally, or which are expressly made felonies by statute, are now to be considered of that class, while all other criminal offenses are to be deemed misdemeanors, and no offense is to be deemed a felony unless it comes within this description. But, if the offense has been a felony, the mere reduction of the punishment will not of itself change it to a misdemeanor." 1 McClain on Criminal Law, § 18. "An offense shall never be made felony by the construction of any doubtful and ambiguous words of a statute; and therefore, if it be prohibited under 'a pain of forfeiting all that a man has,' or of 'forfeiting body and goods,' it shall amount to no more than a high misdemeanor. * * * The word 'misdemeanor,' in its usual acceptance, is applied to all those crimes and offenses for which the law has not provided a particular name; and they may be punished according to the degree of the offense, by fine or imprisonment, or both. A misdemeanor is, in truth, any crime less than a felony; and the word is generally used in contradistinction to felony, misdemeanors comprehending all indictable offenses which do not amount to felony." 1 Russell on Crimes (9th Ed.) c. 4, p. 78. The selling of intoxicating liquors at common law was not a felony, not even a crime. So, when it is made a crime, and the statute does not expressly state as to whether it is a felony or misdemeanor, the presumption is that it is a misdemeanor. State v.

Hill, 91 N. C. 561; U. S. v. Belvin (C. C.) 46 Fed. 385. Constitutions being instruments in the nature of re-enactments of approved systems and principles coeval with, and a part of, the common law, itself a subject of judicial interpretation, though there is exception, it necessarily follows that the definitions of the terms used in Constitutions are, to a great extent, to be found in the common law. People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677; State v. Noble, 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. Rep. 143; Durham v. State, 117 Ind. 477, 19 N. E. 327; People v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; People v. Draper, 15 N. Y. 532; Cooley on Constitutional Limitations (6th Ed.) 75; 10 Century Digest, tit. "Constitutional Law," § 13; Fox v. McDonald, 101 Ala. 51, 13 South. 416, 21 L. R. A. 429, 46 Am. St. Rep. 98; English v. State, 31 Fla. 340, 12 South. 689; Flavell's Case, 8 Watts & S. (Pa.) 197; State v. Barker, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50; 8 Cyc. p. 740-1. Section 1931 of Wilson's Revised & Annotated Statutes of Oklahoma Territory of 1903 is as follows: "The rule of the common law that penal statutes are to be strictly construed, has no application to this Code. All of its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice." This section has no application to the interpretation or construction of the Constitution, for the Legislature has the power to repeal or amend this section. And, whilst it is a fact that the Legislature has the power to repeal or amend certain sections in the Constitution, yet they are specifically designated therein, and if the relator's contention that said section 1931 applies to the interpretation of the Constitution, the Legislature would have it within its power to hereafter change the Constitution by providing as to the interpretation or construction of the same. Such a proposition is without merit.

Hence we come to the proposition as to the meaning of "imprisonment" in the section under consideration; that is, whether it means imprisonment within a jail, or state prison or penitentiary. The word "imprisonment" means imprisonment in the county jail or local prison unless expressed to be in the penitentiary. Cheaney v. State, 36 Ark. 75; State v. McNeill, 75 N. C. 15; Hockheimer on Crimes and Criminal Procedure, §§ 112, 345. There is a distinction in law between the gaol, or jail, and penitentiary. Black's Law Dictionary; Anderson's Law Dictionary; Bouvier's Law Dictionary. Under the statute imposing as to certain offenses a punishment by imprisonment not more than one year, which is silent as to the place of imprisonment, a sentence inflicting punishment by imprisonment in the penitentiary for one year, is error, and must be reversed. Horner v. State, 1 Or. 268. A person convicted

of conspiracy to defraud under a section of the Colorado Code which did not prescribe the place of imprisonment was illegally sentenced and sent to penitentiary in place of the county jail, holding that, where two statutes are susceptible of the same construction, that is to be preferred which is most favorable to defendant. *Brooks v. People*, 14 Colo. 413, 24 Pac. 553. Section 18 of article 7 of the Constitution limits the jurisdiction of justices of the peace to misdemeanors in which the punishment may not exceed a fine of \$200 or imprisonment in the county jail not exceeding 30 days, or both such fine and imprisonment. Section 12 of article 7 also provides that the county court shall have jurisdiction concurrent with justices of the peace in misdemeanor cases, and exclusive jurisdiction in all misdemeanor cases in which the justices of the peace have no jurisdiction. The relator having been convicted of a misdemeanor for which the maximum punishment is more than 30 days in jail or a fine of \$200 or both the county court has exclusive jurisdiction in his case.

For these reasons, we overrule relator's demurrer to the sheriff's return herein, and remand the relator to the custody of the sheriff of Grady county, with directions that he be recommitted to the jail of said county, pursuant to the judgment of said county court.

Writ of habeas corpus denied. All the Justices concurring.

(20 Okl. 133)

T. & H. SMITH & CO. v. THESMANN.
(Supreme Court of Oklahoma. Feb. 3, 1908.)

1. EVIDENCE—PAROL—TO EXPLAIN CONTRACT—ADMISSIBILITY.

In the absence of misrepresentation, fraud, or deceit, a party to a transaction is bound by the writing evidencing the agreement, though he was in fact ignorant of its contents; but, where the signature to the agreement is induced by the misrepresentations of the other party as to its contents, and the signer was ignorant thereof, he may introduce parol evidence of contemporaneous acts, declarations, and conversations to show the true nature of the agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2007-2020.]

2. GUARANTY — CONSTRUCTION — OFFER OF GUARANTY.

An indorsement, reading as follows: "For value received, and for the purpose of inducing S. & Co. to approve of this contract, I hereby guarantee to said S. & Co. the payment in lawful money of all claims arising and of any notes taken under within contract and hereby waive demand, notice of non-payment and protest and consent that S. & Co. may vary in any way the time of payment or method of settling accounts arising under within contract without affecting my liability as guarantor,"—where made and executed by F. T. upon an order for merchandise from D. H. to S. & Co., which order contained a condition that it should not be a complete and binding contract until approved by S. & Co., and where said order was not approved by S. & Co. until six days after the execution of said indorsement, held, in legal effect, to be an offer of guaranty, and not an absolute guaranty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Guaranty, § 8.]

3. SAME—ACCEPTANCE—NOTICE.

An offer or proposal of guaranty does not become a binding obligation upon the guarantor until such offer or proposal has been accepted by the guarantee, and notice of his acceptance given the guarantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Guaranty, §§ 8, 9.]

(Syllabus by the Court.)

Error from District Court, Garfield County; James K. Beauchamp, Judge.

Action by T. & H. Smith & Co. against Frank Thesmann. Judgment for defendant, and plaintiff brings error. Affirmed.

J. M. Dodson and Guy S. Manatt, for plaintiff in error.

HAYES, J. On July 29, 1899, D. H. Tessman, who then resided at Henderson, Neb., made, executed, and delivered to plaintiff, T. & H. Smith & Co., a corporation, with its place of business at Pekin, Ill., a certain written order and contract for goods, which order was delivered to R. C. Stephens, the agent of the plaintiff, and which order is as follows:

"Henderson, Neb. 9-29-1899.

"T. & H. Smith & Co., Pekin, Ill.:

"Please ship at once, or as soon thereafter as possible, the following goods:

No. of Jobs	Size	Depth of Box	Tire	Style Brake	Price
20	3 1/4	2 1/2	B	B	
25 Slip tops & boxes.		1 1/2	F. O. B. Pekin.		\$45.50 1.50

"Remarks:

"A cash discount of \$3.00 is to be given on each wagon paid for in cash.

"Conditions on back hereof accepted as part of this contract.

"Undersigned agrees to remit New York or Chicago Exchange within four months from date of invoice for above goods at prices specified unless settled for within thirty days from date of invoice by his or their notes payable in 3-6 and 9 months, with exchange and collection charges and interest at 8 per cent. per annum from date.

"[Signed] D. H. Tessman.

"Approved August 5, 99.

"[Signed] T. & H. Smith & Co., by H. V.

"Order taken by C. R. Stephens."

On the back of this contract are nine conditions referred to in the contract. The fifth of these conditions is as follows: "This order does not become a complete and binding contract until it has been approved at the office of T. & H. Smith & Co., in Pekin, Ill., and no allowance or credits of any nature will be made in settlement, except by T. & H. Smith & Co. at its office in Pekin, Ill." Indorsed on this contract is the following agreement signed by Frank Thesmann, a brother of D. H. Tessman: "Guaranty. For value received and for the purpose of inducing T. & H. Smith & Co. to approve of this contract, I hereby guarantee to said T. & H.

Smith & Co. the payment in lawful money of all claims arising and of any notes taken under within contract and hereby waive demand, notice of non-payment and protest and consent that T. & H. Smith & Co. may vary in any way the time of payment or method of settling accounts arising under within contract without affecting my liability as guarantor." Under the above order plaintiff shipped to the defendant, D. H. Tessman, goods, wares, and merchandise, and for a part of the same D. H. Tessman on August 20, 1900, executed to the plaintiff in error three promissory notes, each for the sum of \$325, payable at different dates, and bearing interest at the rate of 10 per cent. per annum, leaving the sum of \$10.50 due on open account by said defendant in error, for which amounts plaintiff in error brought this suit against D. H. Tessman on the contract, notes, and open account and against the defendant in error, Frank Thesmann, on said alleged guaranty. The facts set out above are substantially as alleged in the plaintiff's petition. Defendant, Frank Thesmann, filed his separate answer to the plaintiff's petition, and denied all of the allegations contained in said petition, and further answered that on the 29th day of July, 1899, plaintiff, through its agent, R. C. Stephens, requested him to sign the written statement, the contents of which the said R. C. Stephens represented and stated were that D. H. Tessman was a business man, worthy of credit, and the defendant in error further plead in his answer that R. C. Stephens made other false and fraudulent representations to him to induce him to sign said statement; that he, the defendant in error, is a German, unacquainted with the English language, and cannot understand or comprehend an ordinary conversation unless it is in the German language, and that of this the said R. C. Stephens had knowledge at the time; and that by said divers false representations said R. C. Stephens obtained his signature to the alleged contract of guaranty set out in plaintiff's petition. Defendant pleads several other matters in defense of plaintiff's action; but it is not necessary to our consideration of this case to repeat them here. Plaintiff filed a general and special demurrer to the separate answer of the defendant, Frank Thesmann, and also a motion to strike out certain paragraphs of said answer, both of which were overruled by the court. Thereupon a jury was waived by both parties, and the cause was tried before the court. The court rendered judgment in favor of the defendant.

Plaintiff in error makes eight assignments of error. Of these only the third, fourth, and fifth assignments have sufficient merit to demand the consideration of this court.

The third assignment of error is that the court erred in admitting parol testimony to contradict and vary the terms of the alleged written guaranty. One of the defenses plead by defendant in his answer was that he was

unable to read the English language, and that he signed the alleged guaranty on the representations of the plaintiff in error made by R. C. Stephens, its agent, that said alleged guaranty was for the purpose of recommending to the plaintiff the character and reputation of D. H. Tessman, and was not for the purpose of creating any liability or obligation against him, and that he relied upon said false and fraudulent representations made by said R. C. Stephens, and was induced thereby to sign said alleged guaranty. It is a general rule of evidence that parol testimony is not admissible to contradict or vary the terms of a written contract, but parol testimony is always admissible for the purpose of invalidating a written instrument, the execution of which was secured by fraud, or by misrepresentations as to the contents thereof upon which the party injured thereby had a right to rely. 17 Cyc. 695; Bank of Gunterville v. Webb & Butler, 108 Ala. 132, 19 South. 14; McKesson v. Sherman et al., 51 Wis. 303, 8 N. W. 200. Since defendant in error had plead in his answer that he had been induced by fraud and fraudulent representations to execute said alleged guaranty, the court did not commit error in admitting parol testimony for the purpose of proving whether such misrepresentations as to the contents of said contract were made by the plaintiff in order to induce the execution of the same by the defendant, Frank Thesmann.

The substance of the fourth, fifth, and sixth assignments of error is that the court erred in holding that the contract of guaranty did not become binding upon the guarantor, Frank Thesmann, without notice of the acceptance thereof to him by the plaintiff in error, and in rendering judgment in favor of the defendant in error. The defendant in error has filed no brief, and nothing in the record discloses upon what theory the trial court rendered judgment for the defendant in error other than is set out in the fifth and sixth assignments of error, and in the brief of the plaintiff in error. In those assignments of error and in the brief of the plaintiff in error it is complained that the court held that, before the plaintiff could recover in the action, it had to prove that Frank Thesmann was notified that plaintiff accepted his guaranty on the order of D. H. Tessman. The uncontradicted evidence in the case is that on the day that D. H. Tessman signed the order to T. & H. Smith & Co. he and R. C. Stephens, the agent of the said company, went to the farm of defendant, Frank Thesmann, near the town of Henderson, Neb., and defendant was asked by them to sign the guaranty indorsed on said contract. The evidence establishes that Frank Thesmann is a German, unable to read the English language or to write, and that his use of the English language is very broken; and there is some evidence that misrepresentations were made to him by the said R. C. Stephens to procure

his signature to the contract of guaranty; but the testimony about the circumstances under which the contract was signed and the conversation at the time is very brief. The only evidence relative thereto is the testimony of the defendant, Frank Thesmann. He testified that his brother and Stephens came to his place on that day and asked him to sign the paper; that no explanation was made, except that it had to be signed by him, so that his brother, David, could handle goods. There is no evidence in the record that Stephens represented that, if defendant signed said guaranty, the goods would be shipped in accordance with the order, nor is there any evidence that Stephens had authority to make any contract for plaintiff with said D. H. Tessman or the defendant, Frank Thesmann. There is no evidence that the plaintiff in error, through Stephens or any one else, had stated to D. H. Tessman or to Frank Thesmann that the goods described in said order would be shipped to D. H. Tessman in accordance with said order upon the receipt of the guaranty of the defendant in error, or that, upon the receipt of such guaranty, said order would be approved; but it clearly appears from the conditions recited in said order that such was not the understanding between Stephens and D. H. Tessman and Frank Thesmann, for the reason that the order contains the provision that it should not be binding until approved by T. & H. Smith & Co., and the guaranty signed by Frank Thesmann states specifically that it is made for the purpose of inducing the plaintiff to approve said contract.

It is a settled rule of law of the Supreme Court of the United States that, before a guarantor is bound by any offer of guaranty, the guarantee must have accepted the offer of guaranty, and the guarantor received notice of such acceptance; and the same rule prevails in nearly all of the state courts. There is no little confusion and what appears to be contradiction in the decisions of many of the state courts, but most of this confusion, and what appears to be conflict of authorities, result from the courts construing very similar instruments in some cases to be offers of guaranty and in other instances as being absolute guaranties, or completed guaranty contracts. The Supreme Court of the United States, in construing an instrument similar to the alleged guaranty in this case, in the case of *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480, summed up the rules of law governing that court as follows: "A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual

assent is proved, and the delivery of the guaranty to him or for his use completes the contract; but if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract." There is no contention in the case at bar, and can be none under the facts disclosed by the testimony, that there was any mutual assent of the parties to the alleged guaranty at the time of the execution of the same by the defendant, Frank Thesmann. There is no evidence that any valuable consideration passed from the plaintiff to Frank Thesmann at the time of its execution. The instrument itself acknowledged no receipt by the guarantor of any valuable consideration from the guarantee. It is true that in said alleged guaranty the words "for value received" appear; but it is not stated from whom such valuable consideration is received, and, as held by the court in *Davis Sewing Machine Co. v. Richards*, supra, this phrase is as susceptible of the construction that such valuable consideration was received by the guarantor, Frank Thesmann, from D. H. Tessman, the principal debtor, as it is of the construction that the consideration was received from the guarantee. There is no evidence that plaintiff agreed at the time of the execution by Frank Thesmann of the guaranty that it would accept the order of D. H. Tessman on the guaranty of Frank Thesmann. The conditions of the contract and the terms of the guaranty, on the other hand, clearly indicate and establish, in the absence of contrary evidence, that no such agreement was made at that time, for the reason that the order contains the condition that it was subject to the approval of the plaintiff; and upon the order, which was introduced in evidence in the case, is the approval of the plaintiff, dated several days after the execution of the guaranty of the guarantor; and in the guaranty is the recital that one of the purposes of the guarantor's executing the same was to induce the plaintiff to approve the contract. The guaranty was not made in consideration of past advances to the principal debtor; but in consideration of future advances to be made to him under the contract or order. It is contended by plaintiff in error, however, that such guaranty was signed by the guarantor, Frank Thesmann, upon the request of the plaintiff in error, and therefore no notice of acceptance was necessary. There is no evidence in the record that plaintiff in error requested the guarantor to sign the instrument, except the testimony of the defendant, Frank Thesmann, to the effect that on the day the order was executed by his brother, D. H. Tessman, his brother and R. C. Stephens came to his place and re-

quested him to sign the instrument, stating that it was necessary for him to do so in order that his brother could have credit and do business.

Defendant in his answer pleads as a defense to the action that plaintiff, through its agent, R. C. Stephens, requested him to sign the written statement, the contents of which were misrepresented to him by the agent of the plaintiff, and that the request of the plaintiff to sign said statement was not for the purpose of creating any liability or obligation to answer for the obligations of D. H. Tessman, and that by said false and fraudulent representations he was induced to sign the statement without knowing the contents thereof. This clause of the defendant's answer, in our opinion, is not susceptible of the construction that defendant, Frank Thesmann, thereby admits he signed the agreement of guaranty involved in this action upon such a request of the plaintiff as would imply plaintiff's assent to the contract. The language of the order, and of the guaranty, and the uncontradicted testimony of Frank Thesmann in the trial of the case, all go to establish that the transaction between Stephens and Thesmann was that Stephens, as agent of the plaintiff in error, procured the order from D. H. Tessman, and accompanied D. H. Tessman to the home of Frank Thesmann, and sought to procure this guaranty for the purpose of inducing the ultimate acceptance of the order by plaintiff, without knowing whether plaintiff would accept it or not. The legal effect of the guaranty signed by defendant was, therefore, an offer or proposal of guaranty on the part of Frank Thesmann as guarantor, and notice of the acceptance thereof by the plaintiff to Frank Thesmann was necessary to his becoming bound as guarantor. All of the evidence is to the effect that no such notice was given or received by him.

It is therefore the opinion of this court that the action of the trial court in rendering judgment for the defendant, Frank Thesmann, was not error; and it is ordered by this court that the judgment of the lower court be affirmed.

WILLIAMS, DUNN, TURNER, and KANE, JJ., concur.

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In re THOMAS et al.

(Supreme Court of Oklahoma. Feb. 4, 1908.)

1. BAIL — APPLICATION FOR — BURDEN OF PROOF.

Upon an application to the Supreme Court for bail, by writ of habeas corpus, after commitment for a capital offense by a justice of the peace, the burden is upon the petitioner to show that he is illegally deprived of his liberty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Bail, § 199.]

2. SAME—CAPITAL OFFENSE.

If, after hearing the whole evidence, introduced on the application for bail, it is in-

sufficient to generate in the mind of the court a reasonable doubt whether the accused committed the act charged, and in doing so they were guilty of a capital offense, bail should be refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Bail, §§ 200, 201.]

3. SAME—REASONABLE DOUBT.

It is not all conflicting exculpatory evidence that will have the effect to raise a reasonable doubt of guilt, and destroy or impair the force of "evident proof" made by inculpatory evidence. It is for the judge or court who hears the testimony to consider the evidence as a whole, and if by the entire evidence a reasonable doubt of the applicant's guilt of a capital offense is not generated the proof is evident and bail should be denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Bail, §§ 148, 200, 201.]

Williams, C. J., and Hayes, J., dissenting in part.

(Syllabus by the Court.)

Application of John F. Thomas and Will Thomas for writ of habeas corpus. Bail refused.

T. J. McMurray, Al J. Jennings, and John H. Burford, for petitioners. Charles West, Atty. Gen., W. C. Reeves, Asst. Atty. Gen., S. M. Cunningham, Fain & Young, and W. Polindexter, for the State.

KANE, J. This cause is here on a petition for writ of habeas corpus by John F. Thomas and Will Thomas, in which they contend they are unlawfully imprisoned and restrained at Lawton in the common jail of Comanche county, state of Oklahoma, by Rufe Le Fors, sheriff of said county, and one Julian, jailer of said Comanche county jail; that the cause of restraint, according to their best knowledge and belief, is that they have been committed to said Comanche county jail for the crime of murder, without bail, by a justice of the peace sitting as an examining magistrate. Said petitioners further allege that they are innocent of the crime of murder and that the proof, as shown by the record of this cause in the examining trial under which they were committed, shows that the proof against them is not evident nor the presumption thereof great. On this petition a writ of habeas corpus was issued. For his return to the writ Rufe Le Fors, sheriff of Comanche county, state of Oklahoma, shows to the court that he holds the petitioners in his custody and restrains them of their liberty by virtue of a writ of commitment issued by S. Armstrong, justice of the peace in and for the city of Lawton, Comanche county, state of Oklahoma, to him issued and delivered on the 22d day of January, 1908, upon hearing before said S. Armstrong, justice of the peace, in a preliminary trial in said court, charging the petitioners with the crime of murder; that the petitioners were committed to the common jail of Comanche county, Okl., and are being held by him as the duly qualified and acting sheriff of Comanche county, under and by virtue of said commitment; and that he now produces said

petitioners in person in this court in obedience to said writ of habeas corpus.

Upon agreement of counsel the case was heard in this court upon the record and testimony introduced at the preliminary examination before Hon. S. Armstrong, justice of the peace within and for the city of Lawton, Comanche county, Okl. The question, then, before the court, is: Are the petitioners entitled to bail upon the showing made at the preliminary examination before the committing magistrate, under section 8, art. 2, of the Bill of Rights of the state of Oklahoma? which reads: "All persons shall be bailable by sufficient sureties, except for capital offenses when the proof of guilt is evident, or the presumption thereof is great."

The first appearance of the above terms in American statutory or constitutional law seems to have been in a part of article 2 of an Ordinance for the Government of the Territories of the United States North of the River Ohio, which reads as follows: "The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury, of a proportionate representation of the people in the Legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great." 1 Stat. 52. From this original this language has been copied into most of the state Constitutions and statutes. With the exception that some Constitutions contain only provisions as to "excessive bail," and that others use the words "before conviction," or words of like import, or the words "murder" and "treason," instead of the words "capital offenses," and other slight changes, the language used above is substantially that of all the Constitutions.

The only use of the term, "when the proof is evident or the presumption great," independent of statute or Constitution, we have been able to find in the Reports is in *Territory v. Benoit*, 1 Mart. (O. S.) 141, by the Supreme Court of Louisiana. The indictment was for a capital offense, and the motion was to have the defendant bailed. The court said: "It cannot be done. Bail is never allowed in offenses punishable by death, when the proof is evident or the presumption great." In *Hight v. United States*, reported in *Morris* (Iowa) 407, 43 Am. Dec. 111, Mr. Chief Justice Mason, speaking of this provision as it appears in the Ordinance of 1787, says: "The Ordinance of 1787, the benefits of which have been transmitted to us, declares that 'all persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great.' This is no new provision, but is in express terms incorporated into the Constitutions of at least one-half of the states of the Union, and is the rule of action in all the rest. It is merely

declaratory of the common law of the United States."

By the common law all offenses, including treason, murder, and other felonies, were bailable before indictment found. Certain restrictions were, however, imposed upon justices of the peace concerning their right to let to bail; but in the Court of King's Bench bail was not a matter of right in capital felonies, being limited by judicial discretion exercised according to the degree of proof of guilt. *Rex v. Marks*, 3 East, 157; *Ex parte Baronett*, 16 Eng. L. & Eq. 361; 2 Hale, P. C. 129. These principles of the common law are materially modified, in all except capital offenses, by our constitutional provision quoted above, and now, instead of all cases being bailable in the discretion of the court and not as a matter of right, under section 17 of the Bill of Rights all persons shall be bailable by sufficient sureties, as a matter of right, except for capital offenses when the proof of guilt is evident or the presumption thereof is great. "If the offense is not shown by evident proof or great presumption to be one for the commission of which the law inflicts capital punishment, bail is not a matter of mere discretion with the court, but of right to the prisoner." *Ex parte Bryant*, 34 Ala. 270.

The policy pervading our jurisprudence is to commit as little as possible to judicial discretion, presuming that "that system of laws is best which confides as little as possible to the discretion of the judge—that judge is best who relies as little as possible upon his own opinion." In pursuance to this policy, ever since the provision "that all persons shall be bailable by sufficient sureties except for capital offenses, where the proof of guilt is evident or the presumption thereof is great," became a part of the settled constitutional and statutory law of nearly all the states of the Union, the courts have endeavored, with more or less success, to formulate some stable rule to guide their judgment in cases like the one at bar. Thus it was said by the court of common pleas of Philadelphia county in an early case, construing exactly the same provision in the Pennsylvania Constitution: "It is a safe rule, where malicious homicide is charged, to refuse bail in all cases where a judge would sustain a capital conviction if pronounced by a jury on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail." *Com. v. Keeper of Prison*, 2 Ashm. (Pa.) 227.

This doctrine is approved in a per curiam opinion in the *Matter of Salvador Troia on Habeas Corpus*, 64 Cal. 152, 28 Pac. 231, where the court adopts the above excerpt from the Pennsylvania case as part of its syllabus. *Simrall, J.*, in *Street v. State*, 43 Miss. 1, cites the rule laid down in the same case approvingly, saying: "There is much force in the words of the Pennsylvania court

in the case of *Commonwealth v. Keeper of Prison*, 1 Ashm. (Pa.) 234." *Street v. State*, supra, was in the Supreme Court on a writ of error issued to the district court of Yazoo county, and Justice Simrall stated as a reason for adopting the Pennsylvania rule that: "It would be going very far in the appellate court to reverse the judgment of the court who saw, heard, and observed the witnesses." Ohio, in *State v. Summons*, 19 Ohio, 139, Indiana, in *Lumm v. State*, 3 Ind. 293, California, in the *Matter of Salvador Troia on Habeas Corpus*, 64 Cal. 152, 28 Pac. 231, Texas, in *Re Foster*, 5 Tex. App. 625, 32 Am. Rep. 577, and possibly one or two other cases, refer to the Pennsylvania case approvingly. But most of these cases were in the Supreme Courts on appeal, and in others of them the rule has since been disapproved by the highest courts of the same states.

Another line of decisions hold that the terms, "when the proof of guilt is evident, or the presumption thereof is great," are as definite to the legal mind as any words of explanation could make them. In the states where this rule prevails the courts, when they refuse bail, do so with the statement "that bail should be refused where the proof of guilt is evident or the presumption thereof is great"; and when bail is granted, by the statement, "that where the proof of guilt is not evident, nor the presumption thereof great, bail should be allowed in capital cases." Thus in California, in *Ex parte Walpole*, 85 Cal. 362, 24 Pac. 657, Fox, J., without commenting on the rule laid down in the *Matter of Salvador Troia*, supra, says: "On the question of admission to bail, the offense charged is punishable with death, unless the jury fix it at imprisonment for life. The defendant, therefore, cannot be admitted to bail if the proof of his guilt is evident or the presumption thereof great." Colorado, Kansas, Kentucky, and Texas in several cases have followed this rule.

This court does not look with favor on either of the above rules. The first one seems to us to be unmindful of the inherent right to life, liberty, and the pursuit of happiness of the citizen, and casts burdens upon those charged with capital offenses not contemplated by the law. The second is too general to be useful as a guide to the judgment of the court in weighing the evidence when the liberty of the citizen is in the balance. Primarily a person charged with a capital offense cannot demand bail as a matter of right, since, upon ascertaining the character of the charge against the accused, the next question would be as to the degree of proof and the nature of the presumption of guilt. Upon an application to the Supreme Court for bail, by writ of habeas corpus, after commitment for a capital offense by a justice of the peace, the burden is upon the petitioner to show that he is illegally deprived of his liberty. *Ex parte Hammock*, 78 Ala. 414; *Ex*

parte Rhear, 77 Ala. 92; *Ex parte Vaughan*, 44 Ala. 417. On this question there is little conflict in the authorities. Alabama, California, Florida, Indiana, Nevada, New Jersey, New York, Utah, and Wyoming all support the proposition. Texas seems to be the only state placing the burden of proof upon the state to show that the offense is a capital one and that the proof is evident; but even there the doctrine of the text prevailed until it was upset in the case of *Ex parte Bud Newman*, 38 Tex. Cr. R. 164, 41 S. W. 628, 70 Am. St. Rep. 740.

We believe that, with the burden of proof on the petitioners, if, after hearing the whole evidence introduced on the application for bail, it is insufficient to generate in the mind of the court a reasonable doubt whether the accused committed the act charged, and in doing so they were guilty of a capital offense, bail should be refused. But we do not wish to be understood as laying this down as a hard and fast rule, to which there may be no exceptions. There may be exceptional circumstances, such as the serious and probably fatal injury to health, or unusual and protracted delay upon the part of the state in bringing the prisoner to trial, that may warrant the court hearing all the evidence to admit to bail, when the proof of guilt is evident or the presumption thereof is great. The admission to bail, however, under these circumstances, is not a constitutional right, but a matter resting in the sound judicial discretion of the trial judge, who should not grant it save under extraordinary circumstances. The rule herein laid down is supported by an array of well-settled cases. Those we particularly rely on are *Ex parte McAnally*, 53 Ala. 495, 25 Am. Rep. 646; *Ex parte Bridewell*, 57 Miss. 39; *Ex parte Tom Smith, Jr.*, 23 Tex. App. 100, 5 S. W. 99. In *Ex parte McAnally*, Brickell, C. J., states the rule thus: "If the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offense has been committed, that the accused is the guilty agent, and that he would probably be punished capitally if the law is administered, bail is not a matter of right." In *Ex parte Bridewell*, Chalmers, J., states the rule as follows: "Upon an application for bail by writ of habeas corpus, the burden is upon the relator to show that he is illegally deprived of his liberty. * * * If, upon the whole testimony adduced, the court entertains a reasonable doubt whether the relator committed the act, or whether in so doing he was guilty of a capital crime, he should admit him to bail in such sum and with such sureties as will in his opinion certainly insure his appearance."

We wish here to quote with approval the language of Chalmers, J., in rejecting the Pennsylvania rule laid down in *Com. v. Keeper of Prison*, 2 Ashm. (Pa.) 227: "The error of the Pennsylvania rule is in failing to give

due effect to a verdict of conviction, or in overlooking the vast change it effects in the attitude of the party. By it the legal presumption of innocence is overthrown, all doubtful questions of fact are resolved in favor of the state, and the credibility or noncredibility of witnesses is conclusively established. A verdict of conviction where no error of law has intervened will never be set aside unless manifestly wrong, or, as is sometimes said, if there be any evidence to support it. To say that bail will only be granted where there is no evidence showing guilt, or where the proof of guilt is so slight upon the whole testimony that a conviction would be manifestly wrong, is plainly inconsistent with the constitutional requirement that it shall be granted in all cases except where the proof is evident or the presumption great." Both of the foregoing cases were reviewed in *Ex parte Tom Smith, Jr.*, supra. Mr. Justice Willson, speaking of the rule laid down in the *Case of McNally*, supra, said: "With regard to the second rule, it is not, as we can perceive, objectionable. It is, as we understand it, in harmony with the constitutional requirement that bail shall be granted unless the proof is evident. It is, in effect, the same rule stated as a correct one in the *Bridewell Case*, supra, but in different language."

We approve the Alabama rule, as stated in the *McNally Case*, in the main; but we believe that the part reading, "and that he would probably be punished capitally if the law is administered," is a little more liberal in favor of the accused than a fair construction of the provision under discussion warrants. Under the statutes of Oklahoma the jury have the power in all cases of murder to determine whether the punishment shall be death or imprisonment for life; but this does not make the offense less capital. It would seem to us that a rule that would require the court to speculate as to what punishment a jury might probably inflict upon any given state of facts would be more harmful than helpful. Speaking of the rule of the *Pennsylvania case*, supra, Justice Willson, in *Ex parte Tom Smith, Jr.*, said: "With respect to the first rule, we are convinced that it is wrong and should no longer be recognized as a guide. It is ably and justly criticised in the *Bridewell Case*, 57 Miss. 39."

And the doctrine of this case is not without support from the courts where the common-law rule prevails. The law is laid down to the same effect in 4 Bl. Com. 299; and in *Rex v. Marks*, 3 East, 163, the rule is advanced in these cautious and qualified terms: "The court will bail whenever there is any doubt on the law or the facts in the case." And again in *New York*, a state following the common-law rule, we find the following in relation to a case similar to the one at bar: "If there be no reasonable doubt of the prisoner's guilt, he ought not to be bailed." *Ex parte Tayloe*, 5 Cow. 39. The same

doctrine is sanctioned in *State v. McNab*, 20 N. H. 160, and *State v. Rockafellow*, 6 N. J. Law, 332. The rule is practically the same in the federal courts: "On testimony given in court on the return of a writ of habeas corpus, if it is clear to the mind of the judge that a conviction for murder should not take place, he will order the prisoner to give bail for his appearance." *U. S. v. Marshal of Dist. of Col.*, Fed. Cas. No. 15,725a.

The point is made that, as there is a conflict in the testimony adduced at the hearing, the proof of guilt cannot be said to be evident or the presumption thereof great. This contention cannot be sustained. "To the mind of the tribunal passing upon the evidence the guilt of the applicant of a capital offense may be evident—that is, clear, strong, not admitting of a reasonable doubt—and yet there may be evidence in conflict with such inculpatory evidence. It is not all conflicting exculpatory evidence that will have the effect to raise a reasonable doubt of guilt and destroy or impair the force of 'evident proof' made by inculpatory evidence. It is for the judge or court who hears the testimony to consider the evidence as a whole, and if by the entire evidence a reasonable doubt of the applicant's guilt of a capital offense is not generated the proof is evident and bail should be denied." *Ex parte Tom Smith, Jr.*, 23 Tex. App. 127, 5 S. W. 102.

We will not comment upon the evidence. lest our comments should influence the final trial. To decline to do so seems to be the uniform practice, as it has always obtained in such cases. We will only say that, applying the rules herein enunciated to the facts as shown by all the evidence before us, we are of the opinion that the proof of guilt is evident and the presumption thereof is great. We do not wish to be understood as saying that the petitioners are guilty of murder, or that their innocence of the offense charged or of a lower degree of homicide may not be made to appear most fully upon their final trial. We are only passing upon the sufficiency of the evidence exhibited in this record, and upon it alone is our opinion predicated.

It follows that bail must be refused.

DUNN and TURNER, JJ., concur. HAYES, J., concurs in the reasoning and the rules enunciated, but dissents from the conclusion refusing bail to petitioner John F. Thomas. WILLIAMS, C. J., dissents from some of the reasoning and some of the rules enunciated, but concurs in the conclusion refusing bail.

NATIONAL LIVE STOCK COMMISSION
CO. et al. v. TALIAFERRO et al.

(Supreme Court of Oklahoma. Feb. 4, 1908.)

1. STATUTES—ADOPTION FROM ANOTHER STATE—CONSTRUCTION.

It will be presumed that Congress, in adopting the statutes of Arkansas for the Indian

Territory, adopted them with the construction and interpretation that had been placed on them by the Supreme Court of Arkansas prior to their adoption by Congress.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 307.]

2. CHATTEL MORTGAGES — COMMISSION OF MORTGAGED PROPERTY—ACTION BY MORTGAGEE.

An action for conversion under the statutes of Arkansas on mortgages, put in force in the Indian Territory, will not lie in favor of the mortgagee under a mortgage against the purchaser of the mortgaged property, where the mortgage was filed, but not recorded, and where such action is not begun until after the lapse of one year from the filing of such mortgage, unless such mortgage has been extended as required by statute, although the purchaser purchased the mortgaged property before the expiration of one year from the filing of the mortgage. (Syllabus by the Court.)

Appeal from the United States Court for the Southern District of the Indian Territory; before Justice Hosea Townsend.

Action by the National Live Stock Commission Company and R. H. McNatt, trustee, against W. N. Taliaferro and D. B. Taliaferro. Judgment for defendants, and plaintiffs appeal. Affirmed.

This action was instituted on the 12th day of August, 1903, in the United States Court for the Southern District of the Indian Territory, at Tishomingo, by the National Live Stock Commission Company and R. H. McNatt, trustee, against W. N. Taliaferro and D. B. Taliaferro. The portion of the plaintiffs' complaint that attempts to allege a cause of action against the defendants is as follows: "For cause of action plaintiffs state that on April 26, 1900, one Sam Loughmiller, of Grayson county, Tex., for a valid consideration executed to R. H. McNatt, trustee for the National Live Stock Commission Co., a deed of trust covering 135 head of steer yearlings and 30 cows, branded L on left side, and located in Hume pasture, near Woodville, Ind. T.; a certified copy of said deed of trust being attached hereto and made a part hereof, and marked 'Exhibit A.' That said deed of trust was properly indorsed and filed with the United States clerk at Ardmore, Ind. T., on May 5, 1900. That in the month of November or December, 1900, while said deed of trust was in full force and effect, and without the consent or knowledge of these plaintiffs, or either of them, the said Sam Loughmiller sold said cattle to the defendants herein, W. N. Taliaferro and D. B. Taliaferro, who converted same to their own use and benefit; but plaintiff alleges that said mortgage was not extended by filing an extension affidavit as required by the statute, and that when this suit was filed the same was not properly recorded or filed for record. That by the terms of said deed of trust these plaintiffs had a special property interest in said cattle at time of said conversion by said defendants, and at time of said conversion said cattle were of the reasonable value of \$1,500." A copy of the deed of trust attached to said complaint fully confirms

the allegations set out in plaintiffs' complaint as to the facts alleged therein relative to said deed of trust. To plaintiffs' complaint defendants filed a demurrer, which was sustained by the court. Plaintiffs thereupon refused to plead further, and the court rendered judgment dismissing the action and taxing the case against plaintiffs. Whereupon the case was appealed by the plaintiffs to the United States Court of Appeals for the Indian Territory, where it was pending at the time of the admission of Oklahoma as a state, and comes to this court under the provisions of the enabling act.

Herbert, Walker & Cannon, for appellants. Cruce, Cruce & Bleakmore and Henshaw & Faulkner, for appellees.

HAYES, J. (after stating the facts as above). Appellants make two assignments of error, both of which go to the action of the court in sustaining appellees' demurrer to the complaint and in dismissing said cause from the docket of the trial court and taxing costs against the appellants. On May 2, 1890, Congress by an act extended over and put in force in the Indian Territory certain chapters of Mansfield's Digest of the Statutes of Arkansas, published in 1884. Among the chapters of said digest put in force in the Indian Territory was chapter 110, on "Mortgages," which contained, among other sections, the following sections:

"Sec. 4742. All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded—if for lands, in the county or counties in which the lands lie, and, if for personal property, in the county in which the mortgagor resides.

"Sec. 4743. Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

"Sec. 4750. Whenever any mortgage or conveyance, intended to operate as a mortgage of personal property or any deed of trust upon personal property, shall be filed with any recorder in this state upon which is indorsed the following words: 'This instrument is to be filed but not recorded'—and which indorsement is signed by the mortgagee, his agent or attorney, the said instrument, when so received, shall be marked 'Filed' by the recorder, with the time of filing, upon the back of such instrument; and he shall file the same in his office and it shall be a lien on the property therein described from the time of filing, and the same shall be kept there for the inspection of all persons interested; and said instrument shall be thenceforth notice to all

the world of the contents thereof without further record, except as hereinafter provided.

"Sec. 4751. Every mortgage so indorsed and filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless within thirty days next preceding the expiration of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit exhibiting the interest of the mortgagee at the time last aforesaid claimed by virtue of such mortgage, and, if said mortgage is to secure the payment of money, the amount yet due and unpaid; such affidavit shall be attached to and filed with the instrument or copy on file to which it relates." Ind. T. Ann. St. 1899, §§ 3053, 3054, 3061, 3062.

On February 3, 1897 (29 Stat. 510, c. 136), an act of Congress, amending section 4742 of Mansfield's Digest of the Statutes of Arkansas [Ind. T. Ann. St. 1899, § 3053], above set out, was approved, which amendment, omitting the caption, was as follows: "Provided, that if the mortgagor is a nonresident of the Indian Territory, the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated."

In the deed of trust attached to the complaint of plaintiffs as an exhibit it is stated that Sam Loughmiller, the mortgagor, was at the time of the execution of the same a resident of Grayson county, Chickasaw Nation, Indian Territory, which was a part of the Southern district of the Indian Territory. The proper place, then, for recording said deed of trust was in the office of the clerk of the United States Court at Ardmore, Ind. T., where it was filed, but not recorded, on the 5th day of May, 1900. Therefore, under the pleadings in the trial court and the assignments of error in this court, there is but one question presented to this court for its consideration and answer, to wit: Could a trustee, joined by the beneficiary, under a deed of trust conveying personal property which had been filed as by law provided, maintain an action for conversion against one who had purchased the mortgaged property prior to the expiration of 12 months from the date of the filing of the deed of trust, when no affidavit for a renewal or extension of said deed of trust was filed within 30 days next preceding the expiration of 1 year from the date of the filing of the deed of trust, when such suit for conversion was not instituted until after the expiration of said period of 1 year from the filing of said deed of trust?

The Supreme Court of Arkansas, in the case of McKennon v. May, 39 Ark. 442, prior to the act of Congress extending in force in

the Indian Territory said chapter on mortgages, construed said section 4751 [section 3062], and held that a chattel mortgage which had been filed, but not recorded, and which had not been extended as provided and required by section 4751, becomes void as to creditors, subsequent mortgagees, and purchasers of the mortgaged property after the lapse of 1 year from the filing. In that case, the plaintiff had taken a mortgage on a crop of cotton and filed his mortgage as provided by law. Subsequently, and prior to the expiration of 1 year from such filing of the mortgage by plaintiff, the defendant had taken a mortgage upon the same crop of cotton. After the expiration of 1 year plaintiff, without having filed an affidavit within 30 days next preceding the expiration of 1 year from the filing of his mortgage, instituted a replevin suit against the defendant, May, who was the mortgagee under the second mortgage, and who had taken possession of the crop of cotton mortgaged. The court held that plaintiff's mortgage lost its superiority upon his failure to file the extension affidavit as required by the statute, and that his mortgage, as to the defendant's mortgage, had expired and was of no force and effect. The Supreme Court of Arkansas, in the case of Crawford v. Trigg et al., 15 S. W. 185, not without some criticism thereon, adhered to the ruling of the court in the case of McKennon v. May. The case of Crawford v. Trigg, however, was rendered by the court subsequent to the act of Congress extending said laws of Arkansas over the Indian Territory, and it alone would have no binding force upon the trial court or upon this court in the case at bar; but we call attention to same for the reason that the decision of the court therein clearly shows that there is no misunderstanding in that court about the rule laid down in McKennon v. May.

Was the construction of the statute made by the Supreme Court of Arkansas in McKennon v. May binding upon the trial court? Counsel for appellants, relying upon the case of Evans-Snider-Buel Co. v. McFadden, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900, which case was affirmed by the Supreme Court of the United States (185 U. S. 505, 22 Sup. Ct. 758, 46 L. Ed. 1012), contend in their brief that the trial court was not bound by the decision of the Supreme Court of Arkansas in the case of McKennon v. May. The facts in the case of Evans-Snider-Buel Co. v. McFadden were that in the months of April and May, 1896, one John R. Blocker executed to Evans-Snider-Buel Company two deeds of trust in the nature of mortgages, whereby he conveyed to the said Evans-Snider-Buel Company something like 6,000 head of cattle. At the time of the execution of the mortgage Blocker was a resident of the state of Texas, and the cattle were located in a pasture in the Creek Nation of the Indian Territory. Both deeds of trust were recorded in the office of the clerk of the United States Court

for the Northern District of the Indian Territory a day or two after the execution of the same. At the time of the execution and filing of said mortgages sections 4742 and 4743 [sections 3053 and 3054], supra, were in force in the Indian Territory; but the act of Congress of February 3, 1897, amending section 4742, had not been enacted. On January 29, 1897, McFadden & Son brought suit in the United States Court for the Northern District of the Indian Territory upon a judgment theretofore recovered by them against Blocker in Jefferson county, Tex., and sued out a writ of attachment, and caused the cattle covered by the two mortgages of Evans-Snyder-Buel Company to be attached. It was the contention of McFadden & Son in that case that under sections 4742 and 4743 [sections 3053, 3054], supra, said mortgages constituted no lien upon the property as against them, the attaching creditors, for the reason they were not filed in the county where the mortgagor resided at the time of the execution of the same. Evans-Snyder-Buel Company contended that the act of Congress of February 3, 1897, which was enacted a few days before the trial of the case in the trial court of the Northern District of the Indian Territory, cured the defects in the chapter on mortgages extended in force in the Indian Territory, and validated their mortgages. A careful examination of the decisions of the Circuit Court of Appeals and of the Supreme Court of the United States in this case will disclose that the question decided in both courts was whether or not the act of Congress of February 3, 1897, cured the defects of the mortgage laws extended in force in the Indian Territory and validated the mortgages of appellants. A careful examination of the decisions rendered by both courts will disclose that neither of them decided, or attempted to decide, whether the courts of the Indian Territory were bound by the construction of the statutes put in force in the Indian Territory which had been given to said statutes by the Supreme Court of Arkansas prior to the extension in force of such laws in the Indian Territory. It appears that the Circuit Court of Appeals, in its opinion in the case, endeavored to prevent creating any such impression by using the following language: "Learned counsel for the interpleader have argued at some length that the United States Courts in the Indian Territory were and are under no obligation to construe sections 4742 and 4743 of the chapter concerning mortgages as they were construed in *Main v. Alexander*, supra, because that decision is in conflict with other decisions of the Supreme Court of Arkansas on kindred questions, and because it has been discredited by judicial criticism in the state of Arkansas, and cannot be regarded as settling the true construction of the statute in controversy, even in the state where it originated. They also claim that the attachment writ only operated upon such interest in the cattle as the mortgagor had at

the time the writ was levied, and that this interest was a mere equity of redemption; the mortgage being, in any event, good as against the mortgagor. Some other propositions are also advanced, all of which have been noticed; but, without expressing an opinion thereon, we prefer to rest our decision on the ground, heretofore stated, that the act of Congress operated to validate the interpleader's mortgage."

The question of what weight the United States Courts in the Indian Territory should give to the construction of statutes (extended in force in the Indian Territory) by the Supreme Court of Arkansas prior to the extension of such statutes in force was presented directly to and passed upon by the Circuit Court of Appeals in the case of *Sanger v. Flow*, 48 Fed. 152, 1 C. C. A. 56. The Circuit Court of Appeals in that case held that in adopting the Arkansas statutes for the Indian Territory it would be presumed they were adopted with the construction and interpretation placed upon them by the Supreme Court of Arkansas prior to their adoption by Congress. In the case of *Appolos et al. v. Brady et al.*, 49 Fed. 401, 1 C. C. A. 290, the Circuit Court of Appeals of the Eighth Circuit, without referring to *Sanger v. Flow*, announced the same rule as announced in that case, and that rule was followed and adopted by the United States Court of Appeals in the Indian Territory in the case of *Zufall v. United States*, 1 Ind. T. 639, 43 S. W. 760; and this rule of construction, while never passed upon so far as we know by the Supreme Court of the United States in any case arising in the Indian Territory, has been announced as the rule of that court in similar cases. *Henrietta Mining & Milling Co. v. Gardner*, 173 U. S. 123, 19 Sup. Ct. 327, 43 L. Ed. 637; *Edward M. Willis v. Eastern Trust & Banking Co.*, 169 U. S. 295, 18 Sup. Ct. 347, 42 L. Ed. 752.

The facts alleged in plaintiffs' complaint do not constitute a cause of action against defendants, and the action of the court in sustaining defendants' demurrer and dismissing the cause was not error.

The facts in this case suggest this further question to this court: Since plaintiffs were nonresidents of the Indian Territory at the time of the execution of the mortgage to them, would the filing of their mortgage with the clerk of the United States Court at Ardmore, without recording the same, be a sufficient compliance with said chapter on mortgages as amended by the act of Congress of February 3, 1897, to constitute a notice of the existence of such mortgage to all persons? This court has not undertaken to decide this question, for the reason that the same was not presented in the brief of either of the parties to the action, and it does not appear from the record that this question was raised in the trial court, and whatever decision this court might reach upon the same could not change the judgment of this court.

It is therefore ordered that the judgment of the trial court be affirmed.

WILLIAMS, DUNN, TURNER, and KANE, JJ., concur.

LUND v. BOOTH, Judge.

(Supreme Court of Utah. Jan. 29, 1908.)

JUSTICES OF THE PEACE—JUDGMENT—ABSTRACT—DOCKETING IN DISTRICT COURT—VACATING—JURISDICTION OF DISTRICT COURT.

Rev. St. 1898, § 3733, provides that the justice, on the demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment. Section 3734 provides that the abstract may be filed with the clerk of the district court of any county, and must be docketed in the judgment docket of such court. Section 3735 provides that from the time of the docketing execution may be issued thereon as on a judgment of the district court. Section 3736 makes a judgment when so docketed a lien on the real property of the judgment debtor in such county. The statute does not require the abstract to recite that the justice had jurisdiction, nor the means by which he obtained such jurisdiction. *Held* that, when an abstract of a judgment, complying with the requirements of the statute is filed and docketed, the district court of the county where so filed and docketed was not authorized on motion to strike the abstract from the record on the ground that the justice court had not acquired jurisdiction of defendant, such fact not appearing on the face of the abstract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 608.]

Original application by L. P. Lund for a writ of certiorari against John E. Booth, judge of the Fourth judicial district court, to review the proceedings of the district court in the case of L. P. Lund against Ellen Ivers. Order of district court annulled.

E. A. Walton, for petitioner. A. L. Booth, for respondent.

STRAUP, J. On application made to us a writ of certiorari was issued to review the proceedings of the court of the Fourth judicial district, in the case of L. P. Lund v. Ellen Ivers. A transcript of the proceedings sent to us shows that on the 15th day of September, 1906, Lund obtained a judgment against Ivers in the justice court of Murray precinct, Salt Lake county, Utah; that on the 3d day of October, 1906, an abstract of the judgment was filed in the office of the clerk of the district court of Utah county, and was docketed in the judgment docket of the district court of that county. Thereafter Ivers appeared, by motion, before the district court for Utah county, and moved the court to cancel and set aside the docketing of the judgment, on the grounds that she had not been served with summons or process from the justice court, and had no knowledge that the plaintiff had obtained a judgment against her until the docketing of the abstract in Utah county; that she never had any business transaction with the plaintiff, and was not indebted to him, and never contracted any

obligation, payable in Salt Lake county, and within the jurisdiction of the justice at Murray precinct. Notice of the motion was served upon plaintiff. On the day set for the hearing of the motion the defendant appeared, but the plaintiff failed to appear. The transcript of the proceedings recites that testimony was taken by the court in support of the motion, and that it was made to appear that the defendant was not served with summons out of the justice court, and that she had no knowledge of the judgment until it was docketed in Utah county. Thereupon the court ordered the docketing of the judgment annulled and vacated, the apparent lien upon the defendant's property in Utah county removed, and directed the clerk to vacate the docketing of the judgment.

The point presented for decision involves the question whether the district court, in such a proceeding as was had before it, was authorized to go behind the face of the abstract and inquire into the matters presented to it, on a mere motion. The statute provides that the justice, on the demand of a party in whose favor judgment is entered, must give him an abstract of the judgment in the form which is fully set forth in the statute. This form requires the abstract to recite the title of the court and cause, stating the names of the plaintiff and the defendant, the name of the justice court, the precinct or city, the date when the judgment was entered, and the amount of the judgment. The foregoing matters are required to be certified to by the justice. It is further provided that the abstract may be filed in the office of the clerk of the district court of any county in the state, and must be docketed in the judgment docket of the district court thereof; that from the time of the docketing in the office of the clerk of any district court execution may be issued thereon in the same manner and with like effect as if issued on a judgment of the district court; that when so filed and docketed the judgment is a lien upon the real property of the judgment debtor, not exempt from execution, situate in such county. Section 3733 et seq., Rev. St. 1898.

The abstract of the judgment filed and docketed in Utah county was an exact copy, as prescribed by the statute, with the necessary blanks filled in. It in every particular complied with the statute. No irregularity or voidness appeared upon its face. It did not appear thereon that the justice court did not have jurisdiction of the subject-matter of the action, or of the person of the defendant. The abstract did not affirmatively recite that the justice had jurisdiction of the person of the defendant, nor the facts or means by which the justice obtained such jurisdiction. But the statute does not require the abstract to recite or set forth such fact. The Legislature has expressly provided what the abstract shall contain, and that, when such an abstract is made and certified to by the justice, and it is filed in the office of the

clerk of the district court of any county, and there docketed, an execution may issue thereon, and a lien on the real property of the judgment debtor is created. When such an abstract of a judgment is filed and docketed, the district court of the county where filed and docketed cannot, on motion, vacate the judgment so transferred and docketed, and strike the abstract from the record, unless it appears on the face of the abstract that the judgment is void. The docketing of the judgment in the office of the clerk of Utah county did not give the district court of that county jurisdiction of the action in which such judgment was rendered. The docketing of the judgment was for the purpose of creating a lien upon the real estate of the judgment debtor, and enforcing the same by execution. If an execution is issued which does not follow the judgment as docketed, the court undoubtedly has power, on motion, to recall or quash it. But such motion would not reach any defect in the judgment not shown upon the face of the record. The court, however, was not authorized to go behind the face of the abstract and to determine whether the justice rendering the judgment had jurisdiction of the person of the defendant, or to inquire into the merits of the cause. If the judgment rendered in the justice court is erroneous or void for want of jurisdiction, not appearing on the face of the abstract, relief therefrom must be obtained in some other manner authorized by law or equity.

We are therefore of the opinion that the district court was not authorized, on motion, to inquire into the matters presented to it, or to strike the abstract from the record. The following cases fully support the views herein expressed and the conclusion reached by us: 23 Cyc. p. 893; *Garlock v. Calkins*, 14 S. D. 90, 84 N. W. 393; *Birdsey v. Harris*, 68 N. C. 92; *Whitehurst v. Transportation Co.* 109 N. C. 342, 13 S. E. 937; *Lacock v. White* 19 Pa. 495; *Littster v. Littster*, 151 Pa. 474 25 Atl. 117.

The order of the district court canceling and vacating the docketing of the abstract of judgment is therefore annulled, and the docketing of the abstract restored. No costs are allowed against the district judge; but, inasmuch as the defendant, Ellen Ivers, applied for the order canceling the docketing of the abstract, maintained and prosecuted her motion therefor before the district court, and defended the same in this court, the plaintiff is entitled to costs of this proceeding to be taxed against her.

MCCARTY, C. J., and FRICK, J., concur.

WINNOVICH v. EMERY.

(Supreme Court of Utah. Feb. 3, 1908.)

1. HABEAS CORPUS—NATURE OF PROCEEDING—(CIVIL OR CRIMINAL.)

Habeas corpus proceedings are civil, and not criminal.

2. SAME—SPECIAL PROCEEDINGS.

Habeas corpus belongs to what, under the Code, are termed "special proceedings."

3. SAME—APPEAL.

Rev. St. 1898, § 3627, provides that a party prosecuting a special proceeding may be known as plaintiff, and the adverse party as defendant. Section 3303 provides that any party to a judgment may appeal therefrom, and that the party appealing shall be known as appellant, and the adverse party as respondent. *Held*, that a proceeding in habeas corpus being civil, the applicant is the plaintiff and the party who restrains the applicant is the defendant, and therefore an appeal by defendant is not an attempted appeal by the state.

4. APPEAL AND ERROR—DECISIONS REVIEWABLE—"FINALITY OF JUDGMENT."

The test of finality for the purpose of an appeal is not necessarily whether the whole matter involved in the action is concluded, but whether the particular proceeding or action is terminated by the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 426-443.]

For other definitions, see Words and Phrases, vol. 3, p. 2777; vol. 8, p. 7663.]

5. HABEAS CORPUS—APPEAL—DECISIONS REVIEWABLE—"FINALITY."

In a habeas corpus proceeding, the judgment of the court which either remands or discharges the petitioner is a final judgment, notwithstanding the fact that another similar proceeding may be commenced by the petitioner if he elects to do so.¹

6. SAME—EFFECT—STAY OF PROCEEDING.

Without an express statutory provision to that effect, an appeal does not of its own force suspend the judgment in a habeas corpus proceeding.

7. SAME—GROUNDS FOR RELIEF.

Where the common law is in force or under statutes which are in effect merely declaratory of the common law, courts, on habeas corpus, may not extend the investigation beyond jurisdictional matters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 23.]

8. SAME—REVIEW OR EVIDENCE.

There is no statutory authority in this state whereby a court or judge on habeas corpus may review the evidence adduced before a magistrate in support of a criminal charge for the purpose of determining whether the evidence was either competent or sufficient to warrant the magistrate in holding the accused for trial to the district court and in committing him for that purpose.

9. SAME.

If the accused should allege and offer to prove that the magistrate did not in fact hear any evidence in support of the charge, and the accused did not waive examination, and that the record showing the proceedings of the magistrate is false, then the court or judge in habeas corpus proceedings should hear the evidence in that regard; and, if it is found that there was no preliminary examination by the magistrate, the accused should be discharged.

Appeal from District Court, Third District; Geo. G. Armstrong, Judge.

Habeas corpus by Emil Winnovich against C. Frank Emery. From a judgment discharging petitioner, defendant appeals. Reversed.

Willard Hanson and Thos. Marloneaux, for appellant. P. P. Christensen, for respondent.

¹ *Mead v. Metcalf*, 7 Utah, 103, 25 Pac. 729; *In re Clasby*, 3 Utah, 183, 1 Pac. 852; *Honerline M. & M. Co. v. Tallerdar Steel P. & T. Co.*, 30 Utah, 449, 85 Pac. 626.

FRICK, J. On the 15th day of June, 1907, a complaint in due form was filed before Joseph J. Williams, a justice of the peace of Salt Lake county, charging Emil Winnovich, the respondent in this appeal, with the crime of murder. He was duly arrested upon a warrant, and taken before said justice, who regularly proceeded to examine into the charge, and on the 18th day of June, 1907, after hearing the evidence adduced thereon, found that there was probable cause to believe that the accused, Emil Winnovich, had committed the crime of murder, and entered an order or judgment requiring the accused to appear before the district court of Salt Lake county, and to that end issued a mittimus or commitment directed to the sheriff of Salt Lake county, the appellant herein, to safely keep said accused and bring him before the district court of Salt Lake county to be dealt with according to law. The appellant accordingly held the respondent in custody in the common jail of Salt Lake county by virtue of said commitment. On the 26th day of June, 1907, the respondent presented his petition to George G. Armstrong, one of the district judges of Salt Lake county, wherein he alleged that he was unlawfully restrained of his liberty, and prayed that a writ of habeas corpus issue requiring appellant to show cause why he detained the respondent and restrained him of his liberty. Appellant duly produced the respondent in court as directed by said writ, and for cause of detention produced the commitment issued as aforesaid. On the 29th day of June following the petition was submitted to said district judge, sitting as a court, without argument. The evidence adduced at the hearing before the justice, duly certified to by him, was submitted to the court, together with the return of appellant as aforesaid. On the 9th day of July, 1907, the court granted the petition of respondent, upon the sole ground, as appears from the record, that "it does not appear to the court that there is sufficient evidence in the record to warrant the holding of defendant." The court accordingly entered an order or judgment discharging the respondent from the custody of appellant, and restored respondent to liberty. From the order or judgment, Emery appeals.

A motion to dismiss the appeal is interposed by respondent upon the grounds (1) that this is in effect an appeal by the state, and that the state has not the right to appeal in such a proceeding; (2) that, in any event, no appeal lies from habeas corpus proceedings in this state because the order or judgment of discharge is not a final judgment.

We will first examine into the first ground urged why this appeal should be dismissed, namely, that an appeal in this case is an appeal by the state. This brings up the question whether the proceedings are civil or criminal. We think there is little, if any, room for doubt, in view of the authorities, that the proceedings are civil, and not crim-

inal. The purpose is to protect or vindicate a civil right. The person is restrained of his liberty, and the purpose of the whole proceeding is to have that liberty restored to him at the earliest possible moment. When liberty is restored, the proceeding has accomplished its purpose, and no other or further consequences follow. That habeas corpus proceedings are civil, and the reasons why they are so, are well stated by Mr. Chief Justice Waite in *Ex parte Tom Tong*, 108 U. S. 359, 2 Sup. Ct. 872, 27 L. Ed. 826, where he says: "The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right which he claims, as against those who are holding him in custody under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offense; but, if he succeeds, he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime." In *Cross v. Burke*, 146 U. S. 88, 13 Sup. Ct. 24, 36 L. Ed. 896, Mr. Chief Justice Fuller, in passing upon the question, says: "It is well settled that a proceeding in habeas corpus is a civil, and not a criminal, proceeding." In support of this, he cites *Farnsworth v. Montana*, 129 U. S. 104, 9 Sup. Ct. 253, 32 L. Ed. 616; *Kurtz v. Moffitt*, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458, and the *Tong* case, above quoted from. We desire also to call special attention to the case of *Ex rel. Durner v. Huegin*, 110 Wis. 189, 85 N. W. 1046. In the case last referred to, as in this, the sheriff took the proceedings to the Supreme Court for review from an order or judgment by the lower court discharging the prisoner. That case is one of the best considered cases we can find upon the subject, and, as it so completely covers the whole ground with regard to habeas corpus proceedings, we refer the reader to that case. In *re Foye*, 21 Wash. 250, 57 Pac. 825, in *re Baker*, 21 Wash. 259, 57 Pac. 827, and in *re Sylvester*, 21 Wash. 263, 57 Pac. 829, are also cases in which the nature of the proceedings, the right of appeal, and kindred questions are discussed. Moreover, section 4510, Rev. St. 1898, defines a criminal action thus: "The proceedings by which a person charged with a public

offense is accused and brought to trial and punishment, is known as a criminal action." The section following provides that such actions shall be prosecuted in the name of the state of Utah as a party against the person charged with the offense, who, the next section provides, shall be designated as defendant. The person charged, therefore, is prosecuted by and in the name of the state. While in some proceedings, in their nature civil, the name of the state may also be used, this in habeas corpus proceedings, as we hope to make clear, is wholly unnecessary and of no importance.

Having thus established that a proceeding in habeas corpus is civil, what is its character under our system of procedure? Is it a suit, an action, or may it be classed as a special proceeding? It seems to us that there can be no doubt that it belongs to what, under the Code, are termed "special proceedings." This is also the conclusion reached by the courts who decided the cases above cited, as well as the conclusion reached by many other courts. The conclusion is reinforced by the fact that the writ of habeas corpus, well known to the common law, did not receive the respect from the common-law courts its importance merited, and for that reason it was made more effective in the reign of Charles II by what is known as the "Habeas Corpus Act." Since then, to a large extent, it has been and now is regulated by statute. 21 Cyc. 283. In modern times habeas corpus may, therefore, be considered as a statutory proceeding, although it had its origin in the common law. Under the statute it may well be classed as a special proceeding. If it is, who are the parties to such a proceeding? In referring to our Code we find that section 3027, Rev. St. 1898, provides as follows: "The party prosecuting a special proceeding may be known as the plaintiff, and the adverse party as the defendant." Who prosecutes in a habeas corpus proceeding? It is either the person restrained of his liberty, or some one in his behalf. He institutes the proceeding the same as he does any other, without leave from any one. Against whom is it directed? Against the person alone who deprives the applicant of his liberty. We thus have one who complains of some illegal act or acts attributed to another. We thus have a plaintiff. The person against whom the illegal acts are alleged is the defendant. The terms "plaintiff" and "defendant," therefore, are as proper and as applicable in a habeas corpus proceeding as they are in any other special proceeding. The plaintiff seeks to vindicate a legal right. The defendant opposes plaintiff's claims. That both claim under a special law cannot affect the matter one way or another. By section 3303, Rev. St. 1898, it is provided that any party to a judgment may appeal therefrom; that on appeal the party appealing shall be known as appellant

and the adverse party as respondent. It also provides that the title of the action or proceeding is not changed by an appeal. From all this it seems clear to us that a proceeding in habeas corpus is civil, that the applicant is the plaintiff and the party who restrains the applicant is the defendant, and that, on appeal, the one who appeals is the appellant, and the other the respondent. From this it follows that in this case no appeal is attempted by the state, but the appeal is taken and prosecuted by the sheriff. C. Frank Emery, the appellant, who, it was claimed in the petition for a writ of habeas corpus, unlawfully restrained the respondent of his liberty. The appeal, therefore, should not be dismissed upon the first ground.

Can the appeal stand as against the second ground urged? It is asserted that the decisions of this court in *Mead v. Metcalf*, 7 Utah, 103, 25 Pac. 729, and *In re Clasby*, 3 Utah, 183, 1 Pac. 852, are decisive of this question. It is true that in *Mead v. Metcalf* this court held that an order or judgment discharging a prisoner upon habeas corpus is not a final judgment from which an appeal will lie; and it was further held in both cases referred to that no appeal is permissible in any event in habeas corpus proceedings. Since those cases were decided the territorial government has been merged into a state government, and the right of an appeal is fixed in the Constitution of the state, which, so far as material here, is found in section 9 of article 8, which provides: "From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below, and under such regulations as may be provided by law." The right of appeal, therefore, is a constitutional right, which cannot be interfered with by the Legislature. Under the law in force when the two Utah cases above referred to were decided the statute likewise permitted an appeal from final judgments. If, therefore, a judgment in a certain proceeding was not final under the territorial statute, it would seem that, for the same reasons, it will not be final under the Constitution. In view that the territorial court has directly passed upon the question, and for the reason that the authorities are in hopeless conflict upon the question, we should not, under ordinary circumstances, be inclined to reconsider the question, but would feel constrained to abide by the decisions of the territorial Supreme Court of which this court is the successor. The ruling, however, that a judgment in a habeas corpus proceeding is not final is based in those cases upon the ground that such a judgment is not *res adjudicata*, and hence does not prevent a further proceeding of the same character in the same court or before the same judge, or in another court, or before another judge having jurisdiction of the subject-matter. This may all

be granted; and yet it does not follow that a judgment which does not finally estop a party to it from proceeding again in the same manner is not, for the purpose of an appeal, a final judgment. This has been decided so often that it has become elementary. This court, in a later decision entitled *Honerine M. & M. Co. v. Tallerday Steel P. & T. Co.*, 30 Utah, 449, 85 Pac. 626, has so held. Mr. Justice Straup, at page 451 of 30 Utah, page 626 of 85 Pac., states the rule in this regard tersely and correctly in the following language: "It is the termination of the particular action which marks the finality of the judgment. A decision which terminates the suit, or puts the case out of court without an adjudication on the merits, is nevertheless a final judgment." This doctrine is supported by many cases, some of which are cited by Mr. Justice Straup and need not again be cited here. If this were not so, it would not be permitted to appeal from a judgment granting an involuntary nonsuit, because the judgment in such a case does not estop the plaintiff from prosecuting another action for the same cause of action. The test of finality for the purpose of an appeal, therefore, is not necessarily whether the whole matter involved in the action is concluded, but whether the particular proceeding or action is terminated by the judgment. If it is, and, in order to proceed farther with regard to the same subject-matter, a new action or proceeding must be commenced, then, as a general rule, the judgment which ends the particular action or proceeding is final for the purposes of an appeal, if an appeal is permissible at all. Both of the Utah cases referred to have thus been greatly weakened with regard to the doctrine of finality of judgments by what is said in the *Honerine Case*. Nor can the doctrine, as it is stated to be in the *Honerine Case*, be successfully assailed. We are constrained to hold therefore that in a habeas corpus proceeding the judgment of the court which either remands or discharges the petitioner is a final judgment, notwithstanding the fact that another similar proceeding may be commenced by the petitioner if he elects to do so. If this conclusion be sound, then it would seem logically to follow that, under our Constitution, where the right of appeal is given from all final judgments, this court has no power to deny the right, but must permit the exercise thereof in all cases and proceedings.

It is argued that, although the language of a constitutional provision or a statute be such as would authorize or confer the right of appeal generally, in view that the policy of the law with regard to appeals in habeas corpus proceedings is opposed to the exercise of the right, therefore appeals in such proceedings should not be permitted by the courts under general provisions, but only when the right to an appeal is given by a

special statute or by constitutional provision. This argument is based upon the theory that to permit appeals in habeas corpus proceedings destroys the effectiveness of the remedy; that it may delay the party in obtaining his liberty, the very thing that by habeas corpus was intended to be speedily restored to him. It is urged that, if appeals are permitted, then the judgment of the court discharging the prisoner must be suspended, and the very purpose of the writ is defeated. This argument or conclusion, to our minds, assumes that to follow which does not follow. Without an express statutory provision to that effect, an appeal does not of its own force suspend the judgment in a habeas corpus proceeding. 21 Cyc. pp. 338-341. Even in those states where an express right of an appeal is given by statute, the courts have held that the taking of an appeal does not suspend the judgment. *State v. Kirkpatrick*, 54 Iowa, 373, 6 N. W. 588.

But this question is not involved in this case, and we therefore express no opinion upon it, except to suggest that such a result does not necessarily follow from the allowance of an appeal, and therefore that it is not a conclusive reason or argument against the allowance of appeals in such proceedings. Nor is the further reason that a habeas corpus proceeding may be commenced in this court and thus make an appeal unnecessary of much force. If this reason applies to habeas corpus proceedings, it should also apply to proceedings of mandamus, prohibition, certiorari, and quo warranto, all of which may be originally commenced in this court. We think no one would seriously contend that for that reason no appeal should be permitted to this court from the judgment of the district court entered in any one of the special proceedings referred to. But let us examine a little farther into the assumption that an appeal in effect would destroy the effectiveness of the writ of habeas corpus under our law as it is now in force. For this purpose, it must be conceded that, if a judgment of discharge is not final, then a judgment refusing a discharge and remanding the prisoner cannot be so. What, then, would be the result, in view of our present law upon the subject of habeas corpus proceedings? This law has been materially changed since the decisions of *Mead v. Metcalf* and *In re Clabby* were announced. Section 1069, Rev. St. 1898, which took effect on January 1, 1898, with regard to what the petition in a habeas corpus proceeding must contain, in substance provides that it must state the name of the person who detains the petitioner and the place where detained; the cause of restraint, and that it is illegal; that the legality of the imprisonment has not already been adjudged upon a prior proceeding of the same character, and whether the application for the writ has been before made to and refused by any court or judge, and, if so, to attach a

copy of the petition and the reasons of the refusal to the petition. Section 1077 provides that any court or judge disallowing a writ must append his reasons therefor to the petition, and return both to the applicant. The petition must be verified. The statements that the legality of the petition has not been already adjudicated and the refusal of a former application are both essential, and without them the petition does not contain the necessary statements authorizing the issuance of the writ. If this be so, what is the natural effect of such statements? As it seems to us, it naturally must result in imposing restrictions upon petitioner in making successive applications. Is it not manifest that, if a petition is presented to one court or judge which shows upon its face that another court or judge of the same or higher grade has already passed upon the identical questions involved, in nine out of ten cases the court or judge would therefore decline to issue a new writ, or, if he did, would likely follow the judgment in the prior case unless something new was made to appear? This in its practical effect, in most cases, would result in but one application. If no right of appeal is given, we would thus have the very thing which, in the minds of some of the courts, has been in the way of an appeal also stand in the way of successive applications. But there are still other reasons. Suppose a person applies for a writ which is allowed, and a hearing had upon it. Upon the hearing the court refuses a discharge from the restraint, regardless of what the cause of such restraint may be. To this the court in the case of *Mead v. Metcalf* and some of the other courts make answer that the applicant for the writ can apply again; that he may even come to this court and make a new application, and he may continue this until he finds some court or judge who feels more favorably inclined to grant his request. But such an applicant and all of his witnesses may be hundreds of miles distant from this court, and, in view of our judicial districts being large, may be a great distance from any other judge or court. Moreover, he may have presented his whole case in which the facts are entirely undisputed, and the whole question may be one of law merely. Must he, then, in order to obtain the judgment of this court upon the law, institute a new proceeding somewhere, and produce all of his witnesses or take their testimony by the expensive and often unsatisfactory method of depositions, when he already has it in another form. May not the inconvenience and costs thus entailed upon him result in preventing another application upon the same state of facts when by a simple appeal with a bill of exceptions containing the evidence and ruling of the court he can obtain the judgment of this court with respect to the legality of his detention? This, it seems to us, is strictly in furtherance of the policy of the law which

aims to make the writ effective, and the final result to be gained by it as speedy as possible. Upon the other hand, let us assume a case where the person charged with a crime makes the application and is given a hearing on which the district court discharges him upon a point of law. The officer having him in charge may have in his custody a number of persons charged or contemplated to be charged with the same or some other crime, but all involving the same question of law. He thinks the district court erred in his decision in discharging the first applicant. If there is no appeal, the judgment of the district court granting the discharge certainly is final so far as that charge is concerned, and the officer of the law cannot proceed farther with that or any other case involving the same legal questions, unless he could have the law distinctly and authoritatively settled by the highest court. If this court agrees with the district court, no one is or can be harmed. If, upon the other hand, it does not so agree, and holds that, under the law, the detention was just and proper, then, again, no one is legally injured. It needs no argument that it is just as important to enforce the laws against criminals as it is to enforce them in favor of liberty and against illegal restraint. It is by a strict enforcement of all the laws that liberty is best protected. In view of the foregoing, is it not reasonably certain that the exercise of the right of appeal is not against the policy of the law which aims at making the writ of habeas corpus effective? And it in no way retards the speedy determination of the application. The argument or reason, therefore, fails that an appeal should not be allowed in such proceedings. If an appeal is in harmony with the ultimate object and purpose of the writ, and tends to facilitate, rather than hinder, both the applicant and the officers of the law in establishing legal rights, is there any reason left why a court should resort to nice distinctions and strained constructions to avoid appeals in such proceedings? In what we have said we do not wish to be understood as holding that an appeal lies from a mere refusal to grant the writ. Many courts where the right of appeal is expressly given by statute deny the right of an appeal from a mere refusal to issue a writ. But upon this question, like upon nearly all others in habeas corpus proceedings, the courts differ. 21 Cyc. 340, notes 31, 33. As the question is not involved in this case, however, we express no opinion upon it. We think the question with regard to appeals in habeas corpus proceedings, in view of the provisions of law in force in this state, should be treated precisely as such a question would be treated with respect to all other actions or proceedings. In view of what we have said, and for the reasons that a departure from the doctrine announced in *Mead v. Metcalf* and *In re Clasby* will in no way interfere with, or in any

way involve, property rights, nor disturb any rights that could have been acquired thereunder, we have less hesitancy in overruling those cases in so far as the conclusions herein reached are in conflict with them. It follows, therefore, that the motion to dismiss must be denied.

This brings us to the merits of the case. It appears from the record and judgment of the district court that the respondent was discharged upon the sole ground that, in the opinion of the court, the evidence adduced at the preliminary hearing was insufficient to show probable cause to believe that respondent was guilty of the crime charged. It is clear, therefore that the district court undertook to determine from the evidence whether there was probable cause or not. Did the court have the legal right to do this in a habeas corpus proceeding? Upon this question, again, the courts are not in harmony. As a general rule, the courts hold that on habeas corpus, in the absence of a statute conferring the right, the courts cannot go into the evidence adduced before the magistrate, but must confine the inquiry to questions of jurisdiction, and, if it be found that the magistrate had jurisdiction of the subject-matter and the person of the defendant, that the complaint stated an offense and a hearing was had upon the charge and the mittimus under which the accused is held is regular, and that the magistrate acted within his jurisdiction, then the court may not discharge the prisoner. Some courts, under statutory provisions, have held that the court may, on habeas corpus, determine whether the accused should be held upon the evidence, and may even hear additional evidence. A distinction is also made with regard to the time an application for the writ of habeas corpus is made. If made before an indictment is returned, the powers of the court to examine into the evidence are greater than after indictment found. 21 Cyc. pp. 324-327, where the authorities are collected, and the different views of the courts stated in the notes. The diversity of opinion is, however, more apparent than real. It arises out of the different statutory provisions applicable to habeas corpus proceedings. In habeas corpus proceedings instituted for the purpose of voiding a commitment issued by an examining magistrate many states have enacted statutes which enlarge the powers of the judges or courts in passing upon the legality of the commitment. It is under such statutes that courts sometimes examine into the facts adduced before the magistrate and the preliminary examination held by him for the purpose of determining whether the evidence is sufficient to warrant the holding of the accused who has been committed by the magistrate into the custody of the officer. In the absence of such special statutes, however, the courts on habeas corpus have not the power to review the evidence heard by the magis-

trate, and pass upon its sufficiency to authorize the holding of the accused. The controlling principles are well stated by Judge Cooley in his excellent work on Constitutional Limitations (7th Ed.) p. 495, where he says: "In the great anxiety on the part of our Legislatures to make the most ample provisions for speedy relief from unlawful confinement, authority to issue the writ of habeas corpus has been conferred upon inferior judicial officers, who make use of it sometimes as if it were a writ of error, under which they might correct the errors and irregularities of other judges and courts, whatever their relative jurisdiction and dignity. Any such employment of the writ is an abuse. Where a party who is in confinement under judicial process is brought up on habeas corpus, the court or judge before whom he is returned will inquire: (1) Whether the court or officer issuing the process under which he is detained had jurisdiction of the case, and has acted within that jurisdiction in issuing such process. If so, mere irregularities or errors of judgment in the exercise of that jurisdiction must be disregarded on this writ, and must be corrected either by the court issuing the process, or on regular appellate proceedings. (2) If the process is not void for want of jurisdiction, the further inquiry will be made, whether, by law, the case is bailable, and, if so, bail will be taken if the party offers it; otherwise he will be remanded to the proper custody." The writ of habeas corpus cannot be made to serve the purpose of an appeal or writ of review, unless some statute specially authorizes this to be done. But, even when authorized by statute, such review must be strictly limited to the special proceeding to which the statute applies. This is well illustrated by the decisions emanating from the same courts in habeas corpus proceedings. In California, where there is a special statute authorizing the courts on habeas corpus to determine whether or not there is probable cause to commit the accused on preliminary hearing by the magistrate, the Supreme Court of California hold that the courts on habeas corpus may examine into the facts to determine whether there is any evidence that justifies the findings of probable cause by the magistrate. *People v. Smith*, 1 Cal. 9. Similar holdings based upon similar statutes are found in *State v. Hayden*, 35 Minn. 283, 28 N. W. 659, and other cases; but the authority to do this comes from the statute, and, where there is no statutory provision, the courts do not extend the scope of the investigation on habeas corpus so as to make the proceeding in effect one of review. This is again illustrated by the decisions of the same courts, to which we have already referred, in the following cases: *State v. Kinmore*, 54 Minn. 135, 55 N. W. 830, 40 Am. St. Rep. 305; *Ex parte Miller*, 82 Cal. 454, 22 Pac. 1113. Where the common law is in force, or under statutes which are in effect merely

declaratory of the common law, the courts, on habeas corpus, may not extend the investigation beyond jurisdictional matters. The following cases, among a large number that might be cited, clearly state the rule: *Turner v. Conkey*, 132 Ind. 248, 31 N. E. 777, 17 L. R. A. 509, 32 Am. St. Rep. 251; *State v. Kinmore*, 54 Minn. 135, 55 N. W. 830, 40 Am. St. Rep. 305; *Smith v. Clausmeyer*, 136 Ind. 105, 35 N. E. 904, 43 Am. St. Rep. 311; *Hornor v. United States*, 143 U. S. 570-578, 12 Sup. Ct. 522, 36 L. Ed. 266; *Young v. Fain*, 121 Ga. 737, 49 S. E. 731; *Ex parte Perdue*, 58 Ark. 285, 24 S. W. 423; *Merriman v. Morgan*, 7 Or. 69. There is no statutory authority in this state whereby a court or judge, on habeas corpus, may review the evidence adduced before a magistrate in support of a criminal charge for the purpose of determining whether the evidence was either competent or sufficient to warrant the magistrate in holding the accused for trial to the district court and in committing him for that purpose. The proceedings had before the magistrate in this case are not attacked upon jurisdictional grounds. There was a proper complaint which charged an offense. The magistrate had jurisdiction of the subject-matter and of the person of the accused. A hearing was had. Witnesses were sworn, and testified both for the state and the accused, and their testimony was reduced to writing. All this was in compliance with the law of this state. The commitment papers are not attacked. In addition to the foregoing, the transcript of all the proceedings had before the magistrate discloses that the law had been complied with in every particular. This being so, the district court who heard the habeas corpus proceeding had no authority to review the evidence heard by the magistrate for the purpose of determining its sufficiency to support the judgment or order entered by him in holding the accused to answer to the district court. In order to justify the district court to so review the evidence would require that the writ of habeas corpus be transformed to a writ of review, which, as Judge Cooley well says, would be an abuse of the writ. It is not the province of a court or judge, on habeas corpus, to determine whether in his judgment the evidence is sufficient to warrant the binding over of the accused or not. The only question in such a proceeding is: Is the accused illegally restrained of his liberty? The magistrate may err in his judgment both with regard to the competency and the sufficiency of the evidence, but this alone does not make the restraint illegal. It would at most make it erroneous. Errors must be cured by an appeal or in proceedings provided by law and instituted for that purpose.

But the district court in this proceeding went beyond what the authorities justify even in those states where there are special statutes permitting courts on habeas corpus to review the findings of the magistrate made

on preliminary examinations. In those states the general rule is that the court or judge on habeas corpus may examine into the evidence for the purpose only of determining whether there is any legal evidence which fairly tends to support the findings and order of the magistrate. *State v. Hayden*, supra; *United States v. Greene* (D. C.) 108 Fed. 816; *In re Henry*, 13 Misc. Rep. 734, 35 N. Y. Supp. 210; *State v. Beaverstad*, 12 N. D. 527, 97 N. W. 548; *Ex parte Becker*, 86 Cal. 402, 25 Pac. 9. The evidence in the record directly and positively connects the respondent with the shooting which it is claimed resulted in the death of the person named in the complaint filed with the magistrate. This being so, the district court was not authorized to pass upon the competency of the evidence in a habeas corpus proceeding. In view of the statutes of this state governing preliminary examinations and the fundamental principles underlying proceedings in habeas corpus, we are constrained to hold that where the record, certified to by the magistrate, affirmatively shows what we have stated the record in this case discloses, and there is no attack upon the truthfulness of the facts recited in the record, the court is powerless to go behind the judgment of the magistrate. If, however, the accused should allege and offer to prove that the magistrate did not in fact hear any evidence in support of the charge, and the accused did not, with the consent of the state, waive an examination, and that the record showing the proceedings of the magistrate is false, then the court or judge, on habeas corpus proceeding, should hear the evidence in that regard; and, if he finds that there was no preliminary examination or hearing by the magistrate, the accused should be discharged.

The order or judgment of the district court discharging the respondent therefore should be, and accordingly is, reversed.

MCCARTY, C. J., and STRAUP, J., concur.

JONES v. BLYTHE.

(Supreme Court of Utah. Jan. 30, 1908.)

1. ANIMALS—RUNNING AT LARGE—FENCE LAWS.

Though under Rev. St. 1898, § 20, providing that if sheep, etc., shall trespass on the premises of any person, except where such premises are not inclosed by a lawful fence in counties in which a fence is required by law, the party aggrieved may recover damages by action or by distraining, as therein provided, an owner of sheep is not liable for damages resulting from an unintentional trespass on uninclosed lands in a county in which a fence law is in force, yet he is liable where he intentionally drives his sheep on such land.

2. SAME—TRESPASSING ANIMALS—EVIDENCE—SUFFICIENCY.

Evidence in an action for damages caused by sheep trespassing on premises held to show that the owner of the sheep, after being notified to keep them off the premises, willfully drove

them thereon and kept them there till they had eaten and destroyed much of the grass.*

Appeal from District Court, Box Elder County; W. W. Maughan, Judge.

Action by William Jones against John Blythe. Judgment for plaintiff, and defendant appeals. Affirmed.

Maginnis & Corn, for appellant. J. D. Call, for respondent.

MCCARTY, J. This is an appeal by the defendant from a judgment rendered in the district court of Box Elder county in favor of plaintiff for damages alleged to have been caused by defendant's sheep trespassing upon and eating off and destroying the grass and herbage upon certain lands of plaintiff situated in the northwestern part of Box Elder county, this state. The land is described in the complaint as follows: "All of sections 29, 30, 31, and 32, township 14 N., of range 17 W., Salt Lake Meridian"—and is situated in what is known as "Cotton Thomas Basin." This basin has an area of about 25 or 30 square miles, and is surrounded by mountains. At the time of the alleged trespass the land was partly inclosed by a fence, which extended along the eastern and northern boundary thereof. A few rods south of the southern boundary there was a line of fence posts extending east and west along the south side of the premises. There was no fence along the western line or boundary of the land. The premises were covered with different kinds of grass, brush, and herbage, upon which cattle and other animals fed and browsed. This land was used by plaintiff for grazing purposes, and during the summer season of each year he pastured thereon several hundred head of cattle. The complaint contains two causes of action. In the first cause of action it is alleged that the damage was caused between the 1st day of June and the 11th day of July, 1906; and in the second cause of action it is alleged that the trespass complained of was committed between the 1st day of June and the 15th day of July, 1905. The particular acts of trespass relied on for recovery in the first cause of action are alleged in the complaint as follows: "That at divers times, and upon each and every day between the dates herein alleged, the defendant, his agents, and employes, willfully trespassed upon said land by driving in and upon said land a large number of sheep, to wit, about 6,000 head, and maintained camps and sheep beds, and herded said sheep thereon for and during all of said period of time, * * * and as a result thereof the said sheep ate, browsed, killed, and destroyed the grass, verdure, underbrush, and a large number of small trees growing on said land." It is further alleged that "plaintiff warned said defendant against driving and herding his said sheep upon said real estate, or permitting them to go thereon,

and that defendant has threatened and still threatens to and will use force and violence against plaintiff if he attempts to keep said sheep from said premises." The allegations describing the alleged trespass are substantially the same in both causes of action. Defendant answered, and specifically denied each and every material allegation of the complaint, and as a further defense pleaded an ordinance entitled "An ordinance defining a lawful fence in Box Elder county, state of Utah," which ordinance, the record shows, was duly and regularly passed by the board of county commissioners of Box Elder county, and was at the time of the alleged trespass in full force and effect.

The evidence, without conflict, shows that plaintiff, long prior to the alleged trespass, notified defendant to keep off the land in question, and not to herd or bed his sheep thereon. On this point defendant testified in part as follows: "I remember a conversation with Mr. Jones [plaintiff and respondent herein]. It was about five or six years ago. He came and told me the sheep were on his land, and wanted me to keep them off. * * * He asked me if I would keep them off. I said, 'No,' that I would not; that he was trying to control too much country; that I did not believe he could take up the land in the shape he said he was doing." And again the defendant testified: "At the time charged that my sheep were upon this land I had no means of knowing where the sections were, except by the posts and what fencing there was there." That the trespass was willful and intentional is shown by the testimony of defendant's witness R. C. Reid, who testified in part as follows: "I have been Mr. Blythe's [defendant's] foreman for two years. Mr. Rice, Mr. Bronson, and Jess Jones came to the camp and asked me if I intended to run on those four sections of Jones'. * * * I told them that I intended to run upon the basin there. They asked me if I did not know what Jones claimed, and I said I knew he claimed inside of the posts, and that I was going to run in there, leaving a place for his horses. * * * Mr. Blythe told me to run in the basin there; * * * that he didn't think Jones had any land in there; and that he intended to feed in there." On cross-examination the witness stated that he was on the four sections of land in question with defendant's sheep in June, July, and August of 1905; that on one occasion two camps or beds were maintained there continuously for six days; and that the sheep could "go over in two days and take all the feed off pretty close." To the question, "You went on intentionally, did you?" he answered, "I undoubtedly did, because I told the men to let the sheep feed up through there." As to the effect the herding and bedding of the sheep on the premises had on the grass and other vegetation growing thereon, Mr. Rice, who had charge of plaintiff's cattle and the land in question at the time of the trespass—

*Buford v. Houts, 5 Utah, 591, 13 Pac. 633.

complained of, testified (and his testimony is not denied): "They [referring to defendant's sheep] were on the biggest part of the four sections. * * * Before they went on, the grass was good; and when they went off, the roots were all trampled down. * * * The whole country there, for at least three-quarters of a mile square, looked as though it had been harrowed when they left." The undisputed evidence also shows that cattle will not graze or feed on the same range where sheep in large numbers are kept and herded, and that when defendant drove his sheep on the land in question many of plaintiff's cattle left the premises. As stated by some of the witnesses: "The cattle commenced leaving just as soon as the sheep went on."

Appellant assigns as error the refusal of the court to give the following instruction: "It appears by the uncontradicted testimony in the case that at the time of the alleged trespass plaintiff's land was not inclosed by a lawful fence under the statutes of this state, and the jury are instructed to find the issues for the defendant." Error is also alleged because of the court's refusal to give other instructions asked for by appellant. As these additional requests involved only the same questions (presented in a different form) as are involved in the instruction above set out, we deem it unnecessary to further refer to them. The decisive question in the case is: Can an owner of live stock, in localities where there is a fence law in force, deliberately and intentionally invade the uninclosed lands of another, knowing such lands to belong to another, and pasture his stock thereon, without incurring liability for the damage caused thereby? Section 20, Rev. St. 1898, so far as material here, provides: "If any neat cattle, * * * sheep or swine shall trespass or do damage upon the premises of any person, except in cases where such premises are not inclosed by a lawful fence in counties where a fence is required by law, the party aggrieved, whether he be the owner or the occupant of such premises, may recover damages by an action at law against the owner of the trespassing animals, or by distraining and impounding said animals in the manner provided herein."

We think it is plain that the Legislature, by this statute, intended to take away all remedy by suit or impounding for damages caused by the stock of one party straying upon the uninclosed lands of another in counties where a fence law is required; and while it is true that, under the statute referred to, appellant would not have been liable for damages caused by an involuntary or inadvertent intrusion of his sheep upon the lands in question, the statute gave him no right to deliberately and intentionally drive his sheep, or to so direct their movement as to cause them to go, upon the lands in question, and keep them there against the will of the respondent. In other words, while the statute withholds from the owner of uninclosed lands,

in counties where there is a fence law in force, the right to impound and hold for damages animals trespassing upon such lands, it certainly does not deprive the owner of the right to remove the trespassing animals therefrom; hence it necessarily follows that the owner may, by suit, collect damages for a willful and malicious trespass, such as the evidence conclusively shows was committed in this case. This same question was involved in the case of *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. 477, 38 L. Ed. 363. The court, in construing a Texas statute similar to the statute under consideration, said: "The object of the statute above cited is manifest. As there are, or were, in the state of Texas, as well as in the newer states of the West generally, vast areas of land over which, so long as the government owned them, cattle had been permitted to roam at will for pasturage, it was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular, and oblige cattle owners to incur the heavy expense of fencing their land, or be held as trespassers by reason of their cattle accidentally straying upon the land of others. It could never have been intended, however, to authorize cattle owners deliberately to take possession of such lands and pasture their cattle upon them without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. In other words, the trespass authorized, or condoned, was an accidental trespass caused by straying cattle." In the course of the opinion the court quotes with approval the case of *St. Louis Cattle Co. v. Vaught*, 1 Tex. Civ. App. 388, 390, 20 S. W. 855, 856, wherein it is said: "This doctrine, however, does not authorize the owner of cattle by affirmative conduct on his part to appropriate the use of such lands to his own benefit. He will not be permitted thus to ignore the truth that every one is entitled to the exclusive enjoyment of his own property. * * * The use and enjoyment of the property under such circumstances [by the wrongdoer] imports necessarily the idea of liability." In 2 Cyc. 398, the rule is tersely, and, as we think, correctly, stated in the following language: "The owner of cattle who willfully turns them onto land of another without his consent is liable, without regard to the question of fences." The following authorities also declare the same doctrine: 12 A. & E. Ency. Law (2d Ed.) 1045; *Harrison v. Admanson*, 76 Iowa, 337, 41 N. W. 34; *Delaney v. Errickson*, 11 Neb. 533, 10 N. W. 451; *Powers v. Kindt*, 13 Kan. 74; *Logan v. Gedney*, 38 Cal. 579; *Norton v. Young*, 6 Colo. App. 187, 40 Pac. 156.

The contention that the trespasses complained of were not willful and intentional is not tenable, for the evidence shows conclusively that respondent and his employees

on several occasions before the trespasses were committed notified appellant to keep his sheep off the premises in question, and that appellant in utter disregard of the notices so given him willfully and purposely drove his sheep on said premises, and kept, bedded, and pastured them there until they had eaten and destroyed much of the grass and herbage growing thereon. In fact, we think it may be fairly said that because of these willful and intentional intrusions by appellant with his sheep respondent was thereby, in effect, temporarily dispossessed of a large portion of his land. Hence it is idle for counsel to contend that the trespasses were accidental or in any sense involuntary.

Appellant cites and relies upon the case of *Buford et al. v. Houtz et al.*, 5 Utah, 591, 18 Pac. 633; *Id.*, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618, in support of his contention that respondent, under the facts as disclosed by the record, is not entitled to recover, and that the judgment appealed from should be reversed. In that case the plaintiffs brought suit to enjoin the defendants from grazing their sheep on certain sections of arid land, barren, unimproved, and uninclosed, which plaintiffs had purchased from the Central Pacific Railroad Company. The Supreme Court of the United States, in its statement of facts in the case, observes: "These lands were alternate sections of odd numbers according to the congressional grant to the railroad company, and they with the other tracts mentioned in the plaintiffs' bill are said to amount to over 350,000 acres. * * * If we look at the condition of the ownership of these lands, on which the plaintiffs rely for relief, we are still more impressed with the injustice of this attempt. A calculation of the area from which it is proposed to exclude the defendants by this injunction, under the allegation that it is 40 miles in one direction and 36 in another, shows that it embraces 1,440 square miles, or 921,000 acres, all of which, as averred by the bill, is uninclosed and unoccupied, except for grazing purposes. Of this 921,000 acres of land the plaintiffs only assert title to 350,000 acres; that is to say, being the owners of one-third of this entire body of land, which ownership attaches to different sections and quarter sections scattered through the whole body of it, they propose, by excluding the defendants to obtain a monopoly of the whole tract, while two-thirds of it is public land belonging to the United States, in which the right of all parties to use it for grazing purposes, if any such right exists, is equal. The equity of this proceeding is something which we are not able to perceive. It seems to be founded upon the proposition that while they, as the owners of the 350,000 acres thus scattered through the whole area, are to be permitted for that reason to exercise the right of grazing their own cattle upon all the land embraced within these 1,440 square miles, the defendants cannot be permitted to use even the lands belonging to the United States, be-

cause in doing this their cattle will trespass upon the uninclosed lands of plaintiffs."

It will thus be observed that there is a radical difference between the facts in that case and the facts in the case at bar. The land described in the complaint in this action is in one tract, and the respondent, by excluding the sheep and cattle of other parties therefrom, does not acquire a monopoly of the use of the public lands adjacent thereto for grazing purposes; nor does he thereby deter or in any way hinder other parties from pasturing their flocks and herds upon the public domain surrounding and in the vicinity of the premises in question. Therefore this case presents an entirely different question of law from the one involved in the case of *Buford et al. v. Houtz et al.*, *supra*, and hence is not governed by the rule announced in that case.

The judgment of the court below is affirmed, with costs.

STRAUP and FRICK, JJ., concur.

(30 Nev. 164)

In re BREEN. (No. 1,739.)

(Supreme Court of Nevada. Feb. 19, 1908.)

1. CONTEMPT — PUBLICATIONS RELATING TO COURTS—CRITICISMS OF OPINIONS.

One may criticize an opinion of a court, take issue with it on its conclusions of law, or question its conception of the facts, so long as his criticisms are made in good faith and in ordinarily respectful language, and when not designed to willfully or maliciously misrepresent the position of the court, or tend to bring it into disrepute, or lessen the respect due the authority to which a court is entitled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 14.]

2. ATTORNEY AND CLIENT—OBLIGATION OF ATTORNEYS.

It is the duty of an attorney to observe the rules of courteous demeanor in open court, and to abstain out of court from all insulting language and offensive conduct towards the judges personally for their judicial acts, and for a breach of this duty an attorney may be suspended or disbarred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 59, 60.]

3. SAME—POWER OF COURTS.

Under Comp. Laws, § 2625, authorizing the removal of an attorney by the Supreme Court for misconduct in office, etc., as well as independent of the statute, the Supreme Court has control over attorneys, and may suspend or disbar them for good cause shown, and, where an attorney of the Supreme Court unwarrantedly and without legal cause maligns a court of the state, the Supreme Court on proper showing may disbar him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 49.]

4. SAME.

The language of an attorney while acting in his capacity as district judge, but not made in any judicial proceeding pending before him, that a statement in an opinion of the Supreme Court that the evidence in a homicide case showed that accused at the time he killed decedent intended to kill another was like other assertions made in an "abnormally strange document" (referring to the opinion), and was neither fair to the prosecuting attorney nor to the district court, and whether or not it was made for the purpose of bolstering up a decision

which was neither founded on law nor supported by fact, and was a palpable reversal of a case which for 40 years had been the accepted law in the state, it was "highly reprehensible for its author or authors to have made it * * * reprehensible if the court knew what it was doing, pitiful if it did not" was not within the province of legitimate criticism, but was an unwarranted attack on the court, warranting the disbarment of the attorney, though he claimed that he did not intend any disrespect to the court, and though he claimed that he was not aware that the prosecuting attorney in his argument in the Supreme Court had stated that the evidence in the case showed that accused at the time of the killing of decedent intended to kill another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Attorney and Client, §§ 59, 60.]

Proceedings for the disbarment of Peter Breen, an attorney. Judgment of disbarment awarded.

R. C. Stoddard, Atty. Gen., for the State. Campbell, Metson & Brown, Campbell, Metson, Drew, Oatman & MacKenzie, W. B. Pittman, Key Pittman, Charles Lewers, and Bartlett & Thatcher, for respondent.

PER CURIAM. In the case of the State of Nevada v. Patrick Dwyer, 29 Nev. —, 91 Pac. 305, on appeal to this court from a conviction of murder in the first degree and sentence of death, the judgment and order denying a motion for a new trial were reversed on the 12th day of August, 1907. The reversal was upon the sole ground that the trial court erred in not granting defendant's motion for a change of venue. The opinion was a lengthy one, written for the court by Norcross, J.; the full bench concurring. During the course of the opinion the following statement was made: "The theory of the state, if we understand it, was that the defendant killed Williams by mistake, thinking the latter was one O'Brien, a man with whom defendant had had trouble during the day over a prostitute." It will appear from an examination of the opinion in the case that this statement quoted was only an incidental observation of what this court understood was the fact, and was not the statement of anything in any way deemed essential to the determination of the question upon which the case was decided. The statement quoted, however, was in strict accordance with the position taken in the brief of the Attorney General and in the oral argument of A. J. Maestretti, district attorney of Lander county, upon the hearing of the appeal; it being contended in this court that certain testimony, objected to by defendant's counsel, was admissible upon this theory. The testimony itself, introduced by District Attorney Maestretti in the state's case in chief, showing the quarrel between Dwyer and O'Brien on the same day and just before the killing of Williams, and that Dwyer and O'Brien threatened to kill each other on sight, was such as to suggest the theory of mistake, even if such theory had not been argued to this court, and apparently was admissible on the state's case in chief only on this hypothesis as tend-

ing to show the motive and purpose of the shooting. The record in the Dwyer Case, however, does not show that counsel in the district court declared it to be the theory of the state that Dwyer killed Williams through mistake, and the answer of District Attorney Maestretti sets up that that was not his theory at the trial, that he offered evidence as to the trouble with O'Brien to show the state of mind of defendant at the time, although as a matter of fact he admits that the only inference to be drawn from the record is that Dwyer killed Williams by mistake, which is in accordance with his own belief. In the oral argument in this court on the appeal in the case of State v. Dwyer, following the point made by the Attorney General in his brief, District Attorney Maestretti made the following statement: "There is one point I did not intend to touch upon, but I have been requested to do so, and in examining the record the court will find, and I suppose that is the reason the objection is taken, that the feeling or intent to take life was not as to Williams, but as to O'Brien, and, that the killing of Williams, it will be discovered by this court, must have been an accident, that Dwyer meant to get O'Brien, and not Williams, and upon that point we have collected a few authorities which we wish to call to the attention of this court. Jackson v. State, 106 Ala. 12, 17 South. 333; McGehee v. State, 62 Miss. 772, 52 Am. Rep. 209; People v. Torres, 38 Cal. 141; 21 Am. Encyc. of Law, 104, 105." After the time had elapsed for the filing of a petition for a rehearing, and no such petition being filed, remittitur was issued. On the 13th day of September, 1907, the defendant was brought before the trial court, and the order of this court directing a change of venue, for the purpose of a new trial, carried out. After the order for a change of venue had been made, the said A. J. Maestretti, Esq., district attorney of Lander county, made the following statement in open court: "If it pleases the court at this time, I wish to rise to the question of privilege in relation to a statement made in the disposition of this case, wherein it was reversed in the Supreme Court, and that is this: In its decision the Supreme Court has stated in substance that the theory of the prosecution in this case was that Dwyer killed Williams through mistake, while looking for a man named O'Brien, with whom the defendant had had trouble during the day over a prostitute. I wish to state at this time that that is absolutely not the fact; further, that there is nothing in the records from the first page to the last which suggests or would warrant the Supreme Court in making such a statement in its decision, and where anything is shown on that record upon which the Supreme Court renders such a decision is beyond my understanding." Upon the conclusion of the foregoing statement of A. J. Maestretti, Esq., the District Judge, respondent herein, made the following statement and order: "I heartily commend you, Mr. Dis-

trict Attorney, for the steps you have taken to set yourself right with the public in a matter so closely connected with your onerous official duties. The statement in the decision of the Supreme Court which you contradict I also know to be absolutely without foundation. You were alone in the case for the state, and you did not conduct its prosecution upon the theory of mistake, nor is there anything in the records to so indicate. The Supreme Court, being the tribunal under our judicial system to which has been given, so to say, the last word, that tribunal, it seems to me, should be exceptionally careful to make no statement having a tendency to unjustly reflect upon or misstate the position of any officer, witness, or person connected with the trial of a cause. So far as it appears to me by the stenographic record of the case on file, the statement in the opinion as written by Judge Norcross, to which objection has been made like some other assertions in the same, abnormally strange document, in my opinion, is neither fair to you as prosecuting officer, nor to this court, and whether or not it was made for the purpose of bolstering up a decision, which, to my mind, is neither founded on law nor supported by fact, and is a palpable reversal of the Millain Case, which for 40 years has been the accepted law in this state pertaining to a change of venue in a criminal case, it was highly reprehensible for its author, or authors, to have made it. I say reprehensible, as a modification I shall say—reprehensible if the court knew what it was doing, pitiful if it did not. Mr. Clerk, you will enter in your minutes the statement of the district attorney side by side with the remarks of the court." The statements of respondent and of A. J. Maestretti so entered in the minutes of the Third judicial district court in and for the county of Lander were published in the press of Lander county and widely copied throughout the state. The attention of this court having been directed to the published account of the proceedings had in the said district court, an order was made directing the Attorney General to investigate the matter, and, if he found the same to be as published in the press reports, to present the facts to this court in the form of an affidavit. Pursuant to such order, the Attorney General filed an affidavit setting forth all of the facts, and upon which affidavit this court ordered citations issued, and directed to respondent herein and to the said A. J. Maestretti to appear and show cause, if any they have, why they should not be adjudged guilty of contempt of this court and punished accordingly, and, further, that they show cause, if any they have, why they should not be adjudged guilty of conduct unbecoming members of the bar of the state and be disbarred.

Respondent appeared in response to the citation, and filed an answer to the affidavit of the Attorney General. The answer ad-

mits that respondent made the statement and order heretofore quoted. As justification therefor, he avers that he was not aware that the Attorney General and said District Attorney Maestretti had taken the position in this court that Dwyer killed Williams by mistake, thinking the latter was one O'Brien, until he was served with a copy of the affidavit of the Attorney General; that, when the district attorney made the statement in the district court copied into the minutes, respondent understood and believed that no such theory had ever been mooted by the prosecution, as none such was ever urged or adopted in said district court; that at said time respondent understood that this court in rendering its opinion and decision, and in using the language therein relative to the theory of the state, referred solely to the proceedings in the district court during the trial of the said Patrick Dwyer, and not to the proceedings in the Supreme Court; that, when said case was on trial in the said district court, respondent believed the case of *State v. Millain*, 3 Nev. 400, to be the leading authority in this state upon the question of change of venue in a criminal case, and an authority upon the qualification of jurors; that respondent considered his court bound by the Millain Case, and believed that this court had overruled said Millain Case without so stating; that respondent, believing that this court in its opinion "was stating matters and things that happened at the trial in said district court and criticising wrongfully and unjustly the district attorney in his conduct of said trial and the ruling of respondent therein, and being without any information whatsoever of even the word 'mistake' having been uttered in connection with the homicide in the argument before the said Supreme Court, as it had not been before the district court, respondent made the statements and caused them to be entered in the minutes of the district court of Lander county; that, had respondent known of the question of mistake having been mentioned when the remarks of respondent objected to were being made, he would have modified or omitted altogether the last paragraph of said remarks, and now stands ready to obey the order of the court in that respect, not that mistake was ever relied on at the trial in the district court, for such is not the fact, but because the reference to mistake by the Attorney General before the Supreme Court might have misled said court in its ruling; that when defendant read in the opinion of the Supreme Court of the state of Nevada the following language, to wit: "The theory of the state, if we understand it, was that the defendant killed Williams by mistake"—he, the said defendant, felt not only aggrieved, but that an unjust reflection had been cast upon his court, for the reason that under such a theory it would have been the duty of said district court to have given an instruction to the jury upon

the law as to what degree of crime, if any, a homicide committed by mistake belonged to, and, as no such instruction was given or asked for, the said defendant, for the time being at least, believed certain of his rulings were not fully considered by said Supreme Court. Defendant with all possible deference claims the right at all times to differ in opinion with the Supreme Court, state, or national, or any of the judges thereof, or their opinions on matters of law, if in his judgment they are fairly the subject of comment, but he does not believe and never has in criticising unfairly any court, judge, or opinion, and will not do so, and defendant denies emphatically that in any action or word of his it was his intention to impugn the integrity, honor, or dignity of the Supreme Court of the state of Nevada or any of its honorable members; and defendant is surprised and disappointed that the affidavit of the Attorney General should contain aught tending to question the respect of defendant for said Supreme Court and the members thereof. Defendant deeply regrets the happening of the incident which has given rise to these proceedings, and regrets that his language used as aforesaid should have received the construction given it in the said affidavit of the honorable Attorney General, for such was not the intention of defendant at the time, and never has been."

The question is presented for determination whether or not the language and order of respondent in question, in view of respondent's answer, is contemptuous or constitutes a breach of the duty which respondent as a member of the bar of this court is bound to observe, and, if it does, whether the offense is sufficiently grave to warrant disbarment or other action upon the part of this court. In fact, the question is presented whether or not the language and order could, in any event, be deemed contemptuous or warrant any action upon the part of this court, upon the theory that they are but criticisms of an opinion of a court which it is the province of any one to indulge in, irrespective of whether such criticisms are just or unjust, or whether or not they are couched in respectful language. The right to criticise an opinion of a court, to take issue with it upon its conclusions as to a legal proposition, or question its conception of the facts, so long as such criticisms are made in good faith, and are in ordinarily decent and respectful language, and are not designed to willfully or maliciously misrepresent the position of the court or tend to bring it into disrepute, or lessen the respect due the authority to which a court of last resort is entitled, cannot be questioned. To attempt to declare any fixed rule marking the boundaries where free speech in reference to court proceedings shall end would be as dangerous as it would be difficult. The right of free speech is one of the greatest guaranties to

liberty in a free country like this, even though that right is frequently and in many instances outrageously abused. Of scarcely less, if not of equal, importance, is the maintenance of respect for the judicial tribunals, which are the arbiters of questions involving the lives, liberties, and property of the people. The duty and power is imposed upon the courts to protect their good name against illfounded and unwarranted attack, the effect of which would be to bring the court unjustly into public contempt and ridicule, and thus impair the respect due to its authority. While it is the duty of all to protect the courts against unwarranted attack, that duty and obligation rests especially upon the members of the bar and other officers of the court. It would be foolish, as well as useless, for any one to contend that the very highest courts do not make mistakes. Courts themselves prove this by overruling previous decisions. The rules of this court, as in the case of all appellate courts, provide that after a decision is rendered the losing party has the right of petition for rehearing in order to call the court's attention to what is deemed a misconception of the case or an erroneous view of the law. This court has frequently granted rehearings, and there are several instances where the previous decision was either modified or a contrary view of the law taken in the final decision. It is appropriate here to say that, if the district attorney in the Dwyer Case believed that this court had misconceived the facts of the case or misapplied the law in any material particular, the way was open to him, and it was his duty to have sought to have the same corrected upon petition for rehearing. If the trial judge observed that a mistake had been made either in fact or law, or thought that the opinion was so framed as to put his court in a false light, a suggestion from him to counsel would doubtless cause the matter to be properly presented to the court and the same investigated, and, if error was found to have been made, it would be corrected. Neither the district judge nor the district attorney saw fit to pursue such a course. This would be, at least, a more ethical procedure than to wait until opportunity to correct an error had passed, and then abuse the court for such alleged error. Even if this court had fallen into error in the statement which it incidentally made regarding what it understood to be the state's theory of the case, we cannot see any occasion for such strictures as those contained in respondent's statement, especially as no ruling was based thereon. Even if counsel for the state had not specifically argued in this court the theory of mistake, the expression might have been made, as we have before stated, very naturally in view of the testimony in reference to the quarrel between Dwyer and O'Brien, and Dwyer searching for O'Brien just previous to the shooting; the record being silent as to any

positive statement negativing the theory of mistake, and no contention ever having been made either in this or the Dwyer proceeding that this evidence was admissible upon any other theory.

What respondent said with regard to the Dwyer Case being a reversal of the Millain Case, if it could be segregated from the balance of the statement, could hardly be considered objectionable from any view, although we would have to disagree with the learned judge as to the effect of the opinion in the Dwyer Case. The Millain Case was tried in Storey county at a time when the population of that county was many times greater than that of Lander county at the time of the Dwyer trial, and the courts have distinguished between communities with a meager and a large population. In the Millain Case, after the motion for change of venue was made, the court proceeded and apparently without difficulty obtained 12 competent jurors from the number who were in attendance. It seems that but a small fraction of the number in Storey county at that time were called or examined. In the Dwyer Case nearly all the jurors obtainable in Lander county had been summoned on different venires and examined before 12 were obtained, and several of these retained to try the case showed on voir dire that they had opinions bordering on disqualification. Of the numerous witnesses examined on behalf of the state and the defendant on the motion for change of venue only one stated that he believed that Dwyer could have a fair trial in that county. Threats had been made to take him from the sheriff and execute summary vengeance. Dwyer, a migrating gambler and stranger in Austin, had soon after his arrival there killed an innocent, popular, and worthy young man who had long resided in that place and was well known to all the residents, and naturally owing to this deplorable incident, a strong feeling existed there against the defendant, although it alone may not have been sufficient to warrant a change of the place of trial. In other respects the two cases are distinguishable on the facts. We quoted from the Millain Case, and had no thought of reversing it. But, however, we do not question the right of respondent to differ with us in the view he takes of the two cases. We do not question the right of respondent to take the view he did of the Millain Case. When he came to the conclusion that the Millain Case was controlling and under the interpretation which he placed upon it required that he deny the motion for a change of venue, it became his duty to decide according to his conclusion. Upon appeal the case came under the prerogative of this court, and it was our province and duty to decide the appeal as we became convinced it should be decided. There is no word of criticism in the Dwyer opinion "or unjust reflection" upon either the conduct of the district attorney or the trial judge, unless a respectful disagreement with the trial

court upon a matter of law can be called a criticism, and we do not think it properly can be so called.

Respondent, considering that this court had erroneously stated as a fact something which, in his opinion, was unwarranted from the record, and which he characterized as stated possibly "for the purpose of bolstering up a decision" which, to his mind, "is neither founded on law nor supported by fact," proceeds to declare the opinion as a whole to be an "abnormally strange document," that it was unfair both to the district attorney and the trial court, and a reversal of a former decision which had been the accepted law of this state for 40 years. All of this is further characterized as "reprehensible if the court knew what it was doing, pitiful if it did not." It cannot reasonably be claimed in this case that the remarks of respondent are mere criticisms of an opinion of this court, which were inadvertently made because of misinformation as to what transpired in the presentation of the case upon appeal. It appears from the statement quoted that the assumed error upon the part of this court in reference to the theory of mistake was only made the excuse for the offensive language used in commenting upon the opinion as a whole. That respondent was in error in regard to all of his references to the opinion of this court would not have been deemed an occasion for citation, if such comments had not been expressed in language reflecting upon the honor, integrity, and dignity of this court. But respondent did not see fit to couch his criticisms in respectful language. Upon the contrary, the whole tenor of the statement and order of respondent is not only highly disrespectful, but contains covert intimations of grave misconduct upon the part of this court. To suggest that a court uses a false statement of a fact to "bolster up" an opinion characterized as an "abnormally strange document" is an intimation that the court is guilty of such conduct as would justly warrant the impeachment of every member. This intimation, however, is modified by its author, so that the conduct of the members of this court is declared to be "reprehensible" only in the event "the court knew what it was doing," otherwise the position of the court would be only "pitiful." These observations and intimations are made by an attorney and officer of this court while acting in his capacity as a district judge, though they are not made in any judicial proceeding pending before him. That they were made with the view of receiving public attention is evidenced by the fact that they are ordered spread upon the minutes of his court to remain a perpetual impeachment of this court. There can be but one effect of such language published to the world by one holding the high and responsible position which respondent holds. That effect is to destroy, in a measure at least, public confidence in the integrity of the highest tribunal in the state, and thus impair the

respect due its authority. To publish such statements as those of respondent's in a community where the feeling had recently been high, and in places bordering upon mob violence, might result in the gravest wrong. If any considerable portion of a community is led to believe that, either because of gross ignorance of the law or because of a worse reason, it cannot rely upon the courts to administer justice to a person charged with crime, that portion of the community, upon some occasion, is very likely to come to the conclusion that it is better not to take any chances on the courts failing to do their duty. Then may come mob violence with all its detestable features. To say that respondent meant no disrespect for this court is contrary to the plain meaning of the language used, and the order directing that it be spread upon the minutes of the district court.

Is the making of the false and defamatory statement by respondent a violation of his duty as an attorney and officer of this court? "It is the duty of an attorney not merely to observe the rules of courteous demeanor in open court, but also to abstain out of court from all insulting language and offensive conduct towards the judges personally for their judicial acts. For a breach of this duty an attorney may be suspended or disbarred." 4 Cyc. 908, and authorities cited. Both by statute (Comp. Laws, § 2625) and inherent power, the Supreme Court is given control over attorneys who receive a license to practice through its authority to suspend or disbar them for good cause shown, and this is in no way a violation of their constitutional privilege. If any attorney of this court unwarrantedly and without just and legal cause maligns a court in this state, this court, upon proper showing, may disbar him. Any tribunal that cannot tolerate free discussion and criticism of its decisions is justly entitled to contempt, but, on the other hand, little respect is due to a court that will hesitate to check or discipline any of its attorneys or officers who are so devoid of professional ethics and ordinary courtesy as to misrepresent, and vilify it in open court without any cause or semblance of reason.

In regard to respondent's claim that he did not intend any disrespect, and that he was not aware that the prosecution in the Dwyer Case had advanced anything in this court regarding the theory of killing by mistake, it may be said that with words, as with acts, it is presumed that the offender intended their plain meaning and natural and probable consequences. If the terms "reprehensible" and "pitiful" as used by respondent are not clearly disrespectful and scurrilous, it is hard to conceive of any that would be, and it is but reasonable to conclude that they were employed and spread upon the minutes by respondent in an effort to belittle and discredit this court in its opinion for the purpose of trying to sustain his own before the bar of public opinion in a community

where a strong feeling existed in regard to the Dwyer Case. In re Chartz, 29 Nev. —, 85 Pac. 353, 5 L. R. A. (N. S.) 916, a decision filed March 1, 1906, an attorney of this court had his brief stricken out, was reprimanded and warned and charged with costs of the proceedings for stating in the brief that in his opinion the decisions favoring the power of the state to limit the hours of labor, on the ground of the police power of the state, were wrong and written by men who had never performed manual labor, or by politicians and for politics, and that they did not know what they wrote about. In that case we said: "By using the objectionable language stated respondent became guilty of contempt which no construction of the words can excuse or purge. His disclaimer of any intention of disrespect of the court may palliate, but cannot justify, a charge which under any explanation cannot be construed otherwise than as reflecting on the intelligence and motives of the court." A number of decisions regarding misconduct by attorneys are reviewed in that case. We quoted with approval language holding that, where words are offensive and insulting per se, the offender may be punished, and that the disavowal of any intention of disrespect may tend to excuse, but cannot justify, them. We there quoted with approval from *Sears v. Starbird*, 75 Cal. 91, 16 Pac. 531, 7 Am. St. Rep. 123, where an attorney was censured and his brief was stricken out by the Supreme Court of California because it contained reflections upon the judge of the superior court. This was equivalent to saying that we will protect the district courts of this state from the abuse of attorneys who are officers of this court, and we feel justified in extending the same protection to this tribunal. In line with other decisions cited there we quoted from the opinion of the Chief Justice, speaking for the court, in *State v. Morrill*, 16 Ark. 384: "If it were the general habit of the community to denounce, degrade, and disregard the decisions and judgments of the courts, no man of self-respect and just pride of reputation would remain upon the bench, and such only would become the ministers of the law as were insensible to defamation and contempt. But happily, for the good order of society, men, and especially the people of this country, are generally disposed to respect and abide the decisions of the tribunals ordained by government as the common arbiters of their rights. But where isolated individuals, in violation of the better instinct of human nature, and disregardful of law and order, wantonly attempt to obstruct the course of public justice by disregarding and exciting disrespect for the decisions of its tribunals, every good citizen will point them out as proper subjects of legal animadversion. A court must naturally look first to an enlightened and conservative bar, governed by a high sense of professional ethics, and deeply sensible, as they always are, of

its necessity to aid in the maintenance of public respect for its opinions."

Nor is the fact that defendant did not know that the district attorney and Attorney General had argued regarding the theory of mistake in this court any justification. As an attorney and incumbent of the high office of district judge, he knew, or certainly ought to have known, that it was not proper for him to charge this court or any tribunal or individual with any offense, however high or low, or with any shortcoming simply because he did not know. He was aware of ample that had transpired before him when the evidence was introduced by the prosecution in its case in chief of the quarrel between Dwyer and O'Brien and that Dwyer had threatened and was seeking O'Brien on the evening he killed Williams a stranger to him, to justify the statement made as an inference in the opinion of this court to which he took exception even if the district attorney and the Attorney General had not presented anything in their argument regarding the theory of mistake. It is the duty of all attorneys to be honest and honorable, to conduct themselves as gentlemen, and to show due respect and courtesy, to enlighten and assist the courts, but never to attempt to mislead or misrepresent regarding law or facts. When they fall in any of these respects, it is essential to the proper maintenance of the respect and dignity due to the court, and to the proper administration of justice, that they be brought to a realization of their duties by a reprimand, suspension, or disbarment, and some times by fine and imprisonment. Although respondent, as well as all others, was at liberty to differ from and to criticize any opinion of this court, there is a broad distinction between difference of opinion or legitimate criticism, and mere misrepresentation or villification sought to be justified on such misrepresentation. If respondent were unable to see any material difference between the circumstances existing in the Dwyer and Millain Cases, it was his privilege to criticize the decision, and to say that in his judgment it was wrong, and a reversal of the Millain Case; but, when he went further, and made a false statement regarding what had been presented to his court and followed his misrepresentation by villifying and contemptuous words, as an attorney he passed beyond the freedom of discussion and criticism. Also, he must have been aware that he was not acting in impeachment charges, nor in any proceedings authorized by law, and that there was no warrant or authority for him as district judge to befoul the records of his court with the misrepresentation and disrespectful remarks, and consequently it seems that he had no purpose but a malicious one in so entering them, even if they could be considered permissible criticism. If mere abuse of this tribunal by its attor-

neys were to be encouraged or tolerated, there would seem to be no necessity or excuse for the entry of these scurrilous remarks in the record. The fact that defendant stands so high in esteem and as an able attorney and judge tends to aggravate rather than excuse his conduct. The greater his standing and ability the more careful he should be in word and act, and the better example he should set for attorneys practicing before his own and other courts. It may be said that after the order had been entered for a change of venue the case was removed to and pending in the district court of Elko county, and liable to come here again on appeal. If it had been in some other court from the beginning and never in respondent's, that would not have been justification for him to resort to such abuse and have it recorded. The position of a court in a case like the present is always a delicate one. No person regrets more than we that there was ever occasion for the present proceeding. Unpleasant, however, as it may be, we would not be doing our duty to the court over which we have the honor and responsibility of presiding did we pass unnoticed the conduct of respondent. While attorneys have the widest latitude to differ with and to criticize the opinions of this or other courts, yet, when they resort to misrepresentation and unwarranted assaults upon the courts whose officers they are, they violate their duty and obligation. They should remember that as one of the conditions of their admission to practice they have taken an oath to support the government and Constitution of this state, under which the district and Supreme Courts were created, and to observe or perform the duties of an attorney, nor ought they forget that they are members of a profession which they should ever try to keep unsullied. The language and order of respondent, considered as a whole, is not within the province of legitimate criticism, but is of that character which is an unwarranted reflection upon the honor, integrity, and dignity of this court, the effect of which is to impair the respect due its authority, and constitutes a grave breach of professional propriety.

Because of the language and entry complained of, it is ordered that the respondent, Peter Breen, be suspended and prohibited from practicing or appearing as an attorney or counsellor at law in any of the courts of this state until the further order of this court, and, unless within 20 days from the filing of this opinion he causes the language and order which he had so entered in the minutes of the district court to be expunged from the records of that court, and thereupon presents to this court an affidavit or other satisfactory evidence that said language and order have been so expunged, a further order will be entered by this court on the first day of its next term directing

that his name be struck from the roll of attorneys, and disbarring him from thereafter appearing or practicing in any of the courts of this state.

(30 Nev. 186)

In re BREEN. (No. 1,733.)

(Supreme Court of Nevada. Feb. 19, 1908.)

CONTEMPT—FORMER DISBARMENT OF ATTORNEY—PUNISHMENT.

Where the Supreme Court disbarred an attorney for misconduct in criticising the court, a proceeding to punish him for contempt for the same language will be dismissed, since to punish him for contempt will amount to the imposition of double punishment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, §§ 117-121.]

Proceedings to punish Peter Breen for contempt of court. Dismissed.

PER CURIAM. The facts upon which this proceeding was based are fully stated in the proceedings for disbarment this day determined. 93 Pac. 907. It is the opinion of the court that the purpose for which citation was issued in the contempt proceeding has been fully accomplished in the proceedings for disbarment. If the respondent were adjudged guilty of contempt for the language complained of, the punishment imposed would be in the nature of a double punishment, which the court has no disposition to impose, and, in consideration of the judgment rendered in the disbarment proceeding this day, this proceeding is dismissed.

(30 Nev. 187)

In re MAESTRETTI. (No. 1,741.)

(Supreme Court of Nevada. Feb. 19, 1908.)

DISTRICT AND PROSECUTING ATTORNEYS—MISCONDUCT—UNWARRANTED CRITICISM OF SUPREME COURT—SUSPENSION.

A prosecuting attorney in his argument before the Supreme Court in a homicide case stated that the evidence showed that accused at the time he killed decedent meant to kill another. The court in its opinion stated that the evidence showed that such was the fact. Subsequently the prosecuting attorney stated in the district court that there was nothing in the record warranting the Supreme Court in saying that accused when he killed decedent intended to kill another. He admitted that his statement was not true, and that the opinion of the Supreme Court correctly stated the facts, and attempted to justify his statement before the district court because of adverse criticism based on his conduct in the case. *Held*, that the prosecuting attorney was guilty of misconduct warranting his temporary suspension.

Proceedings for the disbarment of A. J. Maestretti, an attorney. Judgment of suspension awarded.

R. C. Stoddard, Atty Gen., for the State. Campbell, Metson & Brown, Campbell, Metson, Drew, Oatman & Mackenzie, W. B. Pittman, Charles Lewers, and Bartlett & Thatcher, for respondent.

PER CURIAM. The facts upon which this proceeding was based are very fully set forth in the opinion rendered in the proceedings against Peter Breen for disbarment, to which opinion reference is made for a more complete understanding of this case. In response to the citation, respondent filed an answer, in which he admitted making the statement attributed to him at the time and in the manner charged in the citation. For convenience of consideration the statement of respondent in question is here repeated: "If it please the court, at this time I wish to rise to the question of privilege in relation to a statement made in the disposition of this case, wherein it was reversed in the Supreme Court, and that is this: In its decision the Supreme Court has stated in substance that the theory of the prosecution in this case was that Dwyer killed Williams through mistake while looking for a man named O'Brien with whom the defendant had had trouble during the day over a prostitute. I wish to state at this time that that is absolutely not the fact; further, that there is nothing in the records from the first page to the last which suggests, or would warrant, the Supreme Court in making such a statement in its decision, and where anything is shown on that record upon which the Supreme Court renders such a decision is beyond my understanding." The answer of respondent avers, however, that he did not know at the time he made the statement that Judge Breen was going to order it spread upon the minutes, and had nothing to do with the making of such order. He further avers that he had no intention of being contemptuous in his said remarks. From the answer of respondent we quote the following extracts: "When this decision was rendered, * * * the essential points were copied in the Austin Reveille and printed there, leaving out all of those affidavits that were cited and the testimony on the question of venue, and some parties had suggested to me: 'Was that your theory? Was that what you tried to prove in the case, that Dwyer killed Williams through mistake while hunting for O'Brien?' And, of course, it is very hard to explain to an ordinary citizen some legal matters, and that being my intent to prove that Dwyer had the intent to commit a felony, to show his state of mind, is why I made that statement in the district court in Austin. I do not deny that I made it. I believe those are the words I used. It was not made, notwithstanding the language might be contemptuous in itself. It certainly was not made with any spirit of contempt whatever. * * * During the conduct of the trial of the case, I did not want to prove mistake. They, the defense, relied solely on the defense of temporary insanity, and this was the thing that presented itself to my mind: The statute, I believe, in substance says that, where the killing is proven, the burden of justification or excuse

lies on the defendant. I felt that if I proved that Dwyer killed Williams and simply proved that, and let it stand, that I might have had a conviction of some kind or other, but with that bare proof, the bare fact, without proving that he intended to commit murder, would not have given me a verdict of murder in the first degree. I believe that Dwyer killed Williams by mistake. I know that he had nothing against Williams. I think the record shows that he did not know Williams, and had not seen him before. The only inference you can draw from the record is that he killed him [Williams] by mistake. * * * I had no consultation at all with Gen. Stoddard until I came to Carson two or three days prior to the argument, and I remember that we discussed the fact that the theory of mistake had not been raised by the defense, and that it would be well to submit that to the court in the event that they considered that phase of it; that is the substance of it. We discussed the proposition whether or not mistake could be murder in the first degree, and the cases we looked up support the contention that a conviction under such circumstances could be murder in the first degree. I believe there was ample justification from the record for the court to have made the statement that it did in its opinion, because any lay person, and I presume any lawyer or judge, after reading the thing over thoroughly, would come to the conclusion that Dwyer killed Williams while looking for O'Brien. At the same time I never prosecuted directly on that theory. That question never was raised as an issue in the case. * * * At the time I made the remarks in the lower court I had read the opinion attached to the remittitur. I understood then, and do now, that the case was reversed solely upon the point of the change of venue, and that the theory of the prosecution had nothing to do with the determination of the case on appeal—that it was just an incidental matter.”

Upon the oral argument in this court of the case of the State v. Patrick Dwyer, 91 Pac. 305, respondent made the following statement: “There is one point I did not intend to touch upon, but I have been requested to do so and in examining the record the court will find, and I suppose that is the reason the objection is taken, that the feeling or intent to take life was not as to Williams, but as to O'Brien, and that the killing of Williams, it will be discovered by this court, must have been an accident, that Dwyer meant to get O'Brien, and not Williams, and upon that point we have collected a few authorities which we wish to call to the attention of this court. Jackson v. State, 108 Ala. 12, 17 South. 33; McGehee v. State, 62 Miss. 772, 52 Am. Rep. 209; People v. Torres, 38 Cal. 141; 21 Am. Encyc. of Law, 104, 105.” It appears from the answer of respondent, from the argument made by him in this court upon the appeal in the Dwyer Case, the brief of the Attorney General, as well as from the

record in the latter case itself, that the statement made by respondent in the district court at Austin was wholly unjustifiable and contrary to the facts. It was this statement apparently which prompted the trial judge to make the offensive remarks and order considered in the proceedings against Peter Breen. It may be conceded that respondent at the time he made the remarks in question did not anticipate that they would have the effect which they did. We cannot, however, overlook the fact that respondent made, to say the least, a deliberate misleading statement in open court concerning an opinion of this court, which conduct upon his part, under all the circumstances, was a breach of professional propriety. Respondent's remarks did not, however, contain any offensive or insulting language. Upon issuance of citation, and before it reached Austin for service, respondent promptly appeared and filed an answer frankly acknowledging his error, and has manifested a commendable disposition to correct the same so far as in his power lies.

Judges, juries, prosecuting attorneys and lawyers generally, in the performance of their sworn duty, are frequently obliged to place themselves in opposition to public opinion, and when such occasions arise ought to be fearless in upholding the right as they see it. The cool, deliberate, and dispassionate proceedings of courts are better calculated to reach a just judgment than is public opinion, which, whether based upon press reports or not, is necessarily largely controlled by hearsay evidence, which is often partially, and sometimes wholly, unreliable. Considering the stress under which respondent made the statement in the district court which was contrary to the argument he made, and the position he had taken in this court regarding the theory of mistake, his prompt appearance and disavowal of any intention of being contemptuous, his frank confession of error, and his manifest willingness to correct the same as far as in his power lies, we are not disposed to inflict any severe punishment; but by way of reprimand and as a warning it is the order of the court that he stand suspended from practice in all the courts of this state for the period of 30 days from the date of the filing of this opinion, this suspension not to apply to his official duties as district attorney.

IN RE MAESTRETTI. (No. 1,740.)

(Supreme Court of Nevada. Feb. 19, 1908.)

Proceedings to punish A. J. Maestretti for contempt of court. Dismissed.

PER CURIAM. The facts upon which this proceeding is based are stated in the opinions in the proceedings against Peter Breen (93 Pac. 997) and respondent herein for disbar-

ment filed this day (93 Pac. 1004). In view of the latter opinion, this contempt proceeding against respondent is dismissed.

CITY OF LOS ANGELES v. LOS ANGELES INDEPENDENT GAS CO. (L. A. 1.935.)

(Supreme Court of California. Jan. 24, 1908.)

1. LICENSES—MUNICIPAL ORDINANCES—GAS COMPANIES—CONSTITUTIONAL LAW.

A Los Angeles ordinance requiring gas companies to pay \$100 a month as a license tax is not invalid within the charter provision (St. 1889, p. 457) that, in imposing such taxes, no discrimination shall be made between persons engaged in the same business otherwise than by proportioning the tax upon any business to the amount of business done, though one gas company's property is worth, and its earnings are, much less than another's; the charter provision not forbidding the imposition of a uniform license tax upon all engaging in a particular calling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, §§ 8-13.]

2. SAME.

A \$100 monthly license tax by a city upon gas companies, regardless of the business done and the earnings, does not infringe Const. art. 13, § 1, requiring all property to be taxed in proportion to its value to be ascertained as provided by law, and defining property as including franchises, etc.; occupation taxes not falling within the constitutional provision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, §§ 8-13.]

3. CONSTITUTIONAL LAW—CLASS LEGISLATION.

A \$100 monthly license tax by a city upon gas companies, regardless of the business done or earnings, is not unconstitutional as an unreasonable discrimination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, §§ 8-13.]

4. LICENSES—TAXES.

A \$100 monthly license tax by a city upon gas companies is an exercise of the taxing, and not the police, power; and hence the rule that penalties or fees exacted for permits issued under police regulations must bear some reasonable proportion to the expenses of regulating the business is inapplicable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, §§ 8-13.]

5. SAME.

A \$100 monthly license tax by a city upon gas companies is not invalid as prohibitive or unduly oppressive as to a company whose property in the city is not worth more than \$100,000, and whose income is only \$1,500 monthly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, §§ 8-15.]

Department 1. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action to recover license taxes by the city of Los Angeles against the Los Angeles Independent Gas Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. M. Barstow and Clara Shortridge Foltz, for appellant. Leslie R. Hewitt, Lewis R. Works, and W. B. Mathews, for respondent.

SHAW, J. This is a suit to recover license taxes imposed by an ordinance of the city

of Los Angeles. The clause relating to defendant is as follows: "For every person, firm or corporation conducting managing, or carrying on the business of manufacturing, selling, distributing or furnishing gas for light, heat, or power, \$100 per month." The defendant claims that this clause of the ordinance is unconstitutional and void. The particular reason advanced in support of this claim is that the same sum is imposed upon every person, firm or corporation, regardless of the extent, amount, or value of the business done, or the income thereof. It is alleged in the answer that there are but two companies engaged in the business in the city; that the value of defendant's property devoted to the business in the city does not exceed \$100,000; that it distributes only 50,000 cubic feet of gas each day, has only 10 miles of street mains, and receives an income of only \$1,500 a month, whereas, the other company owns a plant in the city worth \$3,500,000, including 300 miles of street mains, distributes 5,000,000 cubic feet of gas daily, and has a monthly income therefrom of \$125,000. It is contended that this shows an unjust and unlawful discrimination against the defendant. The court below sustained a demurrer to this part of the answer, and, upon the trial, refused to allow proof of the facts therein stated. The appeal is from the judgment.

The Los Angeles charter authorizes the city to impose a license tax upon occupations, business, and trades to raise revenue for the city, qualifying the power by the following restriction: "Provided, that no discrimination shall be made between persons engaged in the same business, otherwise than by proportioning the tax upon any business to the amount of business done." St. 1889, p. 457. This provision does not require occupation taxes to be graded in all cases, according to the amount of the business done. It forbids discrimination between persons engaged in the same business; that is, the charging of a higher rate to one than to the other in any case except when it is done by grading the tax to the amount of the business. It does not forbid the imposition of a uniform license tax upon all persons who engage in a particular calling. The Constitution (article 13, § 1) declares that all property "shall be taxed in proportion to its value, to be ascertained as provided by law," and that the word "property" includes "money, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal and mixed, capable of private ownership." If a license tax upon the privilege or right to carry on a particular trade within the city was a tax upon property, as here defined, it would be necessary, in order to lay a valid tax of that character, to provide some mode of ascertaining the value of the right of each person to carry on his particular business, and to tax it at the same rate and in the same manner as other property is taxed. In that case it would also be nec-

essary for the assessor to include all of this class of property in his general assessment, and the city council could not impose such a tax upon one occupation without also imposing it upon all occupations at the same rate, or percentage of value. The Constitution is not to be so construed. The distinction between a license tax of this character and a tax upon property is well understood, and it is settled that "occupation taxes are not property taxes and therefore are not subject to the restrictions imposed upon property taxation by statutes and Constitutions." 21 Am. & Eng. Ency. of Law, 775. This statement in the text is fully supported by a large number of cases cited in the footnote. In *People v. Naglee*, 1 Cal. 252, 52 Am. Dec. 312, in an elaborate discussion of a clause of the Constitution of 1849, similar to that above quoted, the court said that it referred only to a direct tax upon property, and not to a license fee charged to persons following a particular trade or calling. The proposition that these constitutional provisions do not refer to license taxes was also stated, and approved in *People v. McCreery*, 34 Cal. 448, High v. Shoemaker, 22 Cal. 369, and *Ex parte Hurl*, 49 Cal. 559. See, also, *People v. Martin*, 60 Cal. 155. The tax in question is not contrary to the Constitution in this particular.

We find no decision in this state directly holding that a license tax imposing the same amount upon all engaged in the same business, regardless of business done, or the profits received therefrom, is not an unreasonable discrimination, where it may appear that different persons in the business have much more capital employed and earn much more profit than others. But such uniform rate has always been recognized as a valid exercise of the power. Many cases have been before this court wherein the tax has been declared valid, although it was subject to the same objection here made. *Los Angeles v. S. P. Co.*, 61 Cal. 59, Id., 67 Cal. 433, 7 Pac. 819; *Ex parte McNally*, 73 Cal. 632, 15 Pac. 368; *Merced Co. v. Helm*, 102 Cal. 166, 36 Pac. 399; *Ventura Co. v. Clay*, 112 Cal. 67, 44 Pac. 488; *Ex parte Senbe*, 115 Cal. 631, 47 Pac. 596; *Los Angeles v. Elkenberry*, 131 Cal. 464, 63 Pac. 766; *Sonora v. Curtin*, 137 Cal. 584, 70 Pac. 674; *Santa Monica v. Guldinger*, 137 Cal. 658, 70 Pac. 732; *Ex parte Braun*, 141 Cal. 205, 74 Pac. 780. In other states the question has been directly decided. In *Nebraska* the Constitution and the statute required that local license taxes should be uniform. In *Magneau v. Fremont*, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786, 27 Am. St. Rep. 436, in deciding this question, the court said: "The ordinance imposes a fixed sum upon each of the various avocations therein named. The fact that it does not classify each business and graduate the amount that shall be paid by the person pursuing an avocation according to the amount of the business he shall do is not a violation of the rule of uniformity prescribed by both

the Constitution and statute. It is not an income tax, but a license fee or tax for the privilege of carrying on business in the city. The ordinance makes no exceptions in favor of or against any one carrying on the business taxed, but operates uniformly on the class to which it applies." The following cases are to the same effect: *Braun v. Chicago*, 110 Ill. 193; *St. Louis v. Sternberg*, 69 Mo. 301; *State v. Powell*, 100 N. C. 525, 6 S. E. 424; *In re Butin*, 28 Tex. App. 304, 13 S. W. 10; *Ex parte Williams*, 31 Tex. Cr. R. 262, 20 S. W. 582, 21 L. R. A. 783; *Banta v. Chicago*, 172 Ill. 204, 50 N. E. 238, 40 L. R. A. 611; *Stull v. De Mattos*, 23 Wash. 71, 62 Pac. 458, 51 L. R. A. 892; *Singer M. Co. v. Wright*, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; *Stewart v. Kehrer*, 115 Ga. 184, 41 S. E. 682; *Browne v. Selser*, 106 La. 691, 31 South. 290.

The tax here levied is not an exercise of the police power, but of the power of taxation, and the rule that penalties or fees exacted for permits issued under police regulations must bear some reasonable proportion to the expenses of regulating the business is not applicable. The facts stated in the answer do not establish the proposition that the tax in question would be prohibitive or unduly oppressive. It would probably be fairer, where there are only a few persons engaged in a business of this character, to so graduate the tax in proportion to the amount of the business that it shall approximate a just apportionment of the burden of taxation, but we cannot say that the fact that there is a difference between the volume of business done by the respective persons engaged therein, is of itself evidence of such a discrimination in favor of the other company, or against the defendant, as to make the ordinance void. Similar differences must exist in every case, but they have never been held sufficient to invalidate the tax. The facts alleged constituted no defense, and the offer to prove them was properly denied.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

OURSLETER et al. v. THACHER et al.
(L. A. 1,955.)

(Supreme Court of California. Jan. 24, 1908.)

MINES AND MINERALS—CONTRACT OF SALE—FORFEITURE.

A contract for the sale of certain mining claims by plaintiffs to defendants provided for payment of the price in installments. Defendants also agreed to perform certain development work, the proceeds of the ore secured to be equally divided between the parties, except that, in the event of a consummation of the purchase, the portion paid to plaintiffs was to be credited on the purchase price, and that, in case of a default in the payment of any installment, the bond should be forfeited, and the sums paid treated as rent of the property. On defendant's default in payment of an installment, plaintiffs, after demand for payment, notified

defendants that they elected to terminate the contract therefor, and because of defendant's neglect to do the development work required, after which plaintiffs obtained peaceable possession of the property, and then sued defendants to quiet title as against such contract. Held, that all plaintiffs' acts after defendants' default were consistent with an election to enforce the forfeiture provided for; and hence defendants were not entitled to reimbursement of the amounts paid to plaintiffs under the contract on the theory that there had been a mutual rescission thereof.

Department 1. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by A. R. Oursler and others against P. Thacher and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

D. P. Hatch (I. H. Preston, of counsel), for appellants. Anderson & Anderson, for respondents.

ANGELLOTTI, J. This is an action to quiet title of plaintiffs to certain mining claims; the complaint being in the ordinary form. The defendants in their answer denied the ownership of plaintiffs on information and belief, but did not set up any claim of title or right in the property in themselves. By cross-complaint the defendant Marshpee Mining Company sought to recover from plaintiffs money paid as part of the purchase price of said claims under a contract for the sale thereof by plaintiffs to certain of the defendants, and also money expended by it in developing such claims while in possession thereof under said contract. The cause was submitted to the trial court for decision upon an agreed statement of facts, and judgment was given quieting plaintiffs' title to the claims, and denying defendant mining company any relief on its cross-complaint. This is an appeal by defendants from such judgment.

The facts agreed to, so far as material, are as follows: Plaintiffs were on November 14, 1904, and ever since have been, the owners of the mining claims. On said November 14th they executed a bond for a deed thereof to defendants Thacher and Blewett. This bond was for the execution and delivery by plaintiffs to said defendants or their assigns on or before the 5th day of December, 1905, of a deed for the claims, provided that said defendants or their assigns on or before that date paid to plaintiffs the agreed purchase price of \$100,000, and performed the other conditions specified therein. The other conditions so specified were that the purchasers would pay to plaintiffs on or before December 5, 1904, the sum of \$500, and the sum of \$500 per month thereafter during the continuance of the bond, said payments to be credited on the purchase price in the event of consummation of the purchase in accord with the terms of the bond, and that the purchasers would begin development work on or before December 27, 1904, and prosecute the

same continuously until said consummation of the purchase or the cancellation of the bond, the net proceeds of the ore taken out in said work to be divided equally between the parties, but in the event of said consummation of the purchase the portion paid to plaintiffs to be credited on the purchase price. It was expressly provided that, in case of default in the payment of any \$500 monthly installment, "this bond shall immediately upon such default be forfeited and become null and void," and the sums paid treated as rental of the property for the period covered thereby, and that a breach of any condition by the purchasers would release the plaintiffs from the obligation of the bond. The defendant mining company succeeded to the rights of the vendees, and went into possession of the claims under the bond. It paid to plaintiffs and plaintiffs accepted eight monthly installments of \$500 each; the last installment being that for July, 1905. It also paid on January 24, 1905, \$42.50, and on April 6, 1905, \$365.27, proceeds of sales of ore. It also expended in developing said claims the sum of \$9,846.40. (These are the amounts sought here to be recovered by defendants.) On August 5, 1905, a monthly installment became due and payable. Demand that the same be paid was forthwith made, and on request of defendants the time for such payment was extended several times, the last extension being to August 18, 1905, at 10 o'clock a. m. At that time demand for immediate payment was again made, and defendants failed and have ever since failed to pay the same or any part thereof. On August 21, 1905, plaintiffs served on Thacher, Blewett, and the mining company a written notice in the following terms: "To Messrs P. Thacher, W. G. Blewett, and the Marshpee Mining Company. Gentlemen: You are hereby notified that the terms of the bond from A. R. Oursler and Clemente Salazar, as parties of the first part, to P. Thacher and W. G. Blewett, as parties of the second part, dated November 14, 1904, and bonding all of that certain property hereinafter more particularly described, have been violated, and that the parties thereto have failed to comply with, and keep certain of its terms and conditions, in this: First. The said parties of the second part in said bond have failed and neglected to do the development work upon said mining properties as therein provided. Second. That the said parties of the second part in said bond have failed and neglected to make the monthly payments therein provided and particularly have failed and neglected to make the monthly payments of \$500 due thereunder on the 5th day of August, 1905, and the said monthly payment of \$500 still remains unpaid. * * * Wherefore we, the undersigned, A. R. Oursler and Clemente Salazar, parties of the first part in said bond, do hereby declare said bond to be forfeited and all of your interest in the property therein and hereinafter described to

be terminated, and we hereby demand of you that you forthwith vacate said property and deliver the possession of the same to us; and that you leave upon said property all of the improvements, machinery and fixtures which are now thereon and which, under the terms of said bond and agreement, endorsed upon said bond supplementary thereto, belong to and are the property of the undersigned. * * * Yours very truly, A. R. Oursler. Clemente Salazar." On August 28, 1905, possession of the property not having been delivered, plaintiffs' attorneys communicated by letter with said defendants, referring to the previous notice, and advising them that, unless the property was delivered by 12 m. of August 30th, suit would be commenced for the possession of the property. Thereafter plaintiffs peaceably took possession of the property, and then brought this action to quiet their title. At the time of the service of the notice, defendants had failed to live up to the obligations of the bond in the matter of doing development work, and did no such work after the service of the notice. There was no attempt by defendants in their pleadings to show any excuse for the failure to comply with the conditions of the bond. The theory of defendant mining company's claim for reimbursement of the amounts paid to plaintiffs under the contract and in doing the development work is that the contract for the sale of the property had been rescinded by mutual consent of the parties, and that, because of such mutual rescission, the mining company was entitled under our decisions to recover the money which it had paid in part performance of the contract.

We see nothing in the admitted facts warranting a conclusion that there was a rescission of the contract within the meaning of the decisions relied on. Plaintiffs had the right without abandoning or rescinding the contract to insist that, by the terms thereof, defendants by reason of their default had no further right thereunder. This is clearly established by the decision of this court in *Glock v. Howard, etc., Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. That was a case where the vendee after default in the payment of amounts due under the contract, and after the time when under its terms he was entitled to pay and thereupon receive a deed, tendered all sums due and demanded a deed, and, on refusal of the vendor to accept and tender and execute the deed, brought an action for the recovery of the sums paid by him under the contract. No excuse was made by the vendee for the default. The court in bank held that this refusal of the vendor did not constitute a rescission. Justice Henshaw, in an opinion concurred in by Justices McFarland and Temple, said: "But, while it is essentially true that in case of a rescission the vendee may demand that he be restored to his original condition, it does not follow that a vendor

who refuses to convey after such breach by the vendee thereby rescinds. To the contrary, in refusing to convey after the vendee's default, he is not treating the contract as at an end, but is expressly standing upon it, and basing his rights upon its terms, covenants, and conditions." Also: "But the vendor, in refusing to accept the tender and to repay the money, is neither violating his contract nor rescinding it, nor treating it as at an end. He is standing squarely upon its terms." Justice Harrison, in an opinion concurred in by Justices Garoutte and Van Fleet, after fully recognizing the doctrine that in the event of a rescission or mutual abandonment the vendee might recover money paid in part performance, said: "But it has never been held that while the contract was insisted upon by the vendor, and he had done no act by which it might be contended that he had abandoned the contract, or was in any respect in default, the vendee could recover the money paid by him in part performance of the contract. * * * The plaintiff could not maintain an action against the defendant to recover the money paid by him, unless there had been a breach of the contract by the defendant, and the defendant was not guilty of a breach of its obligation by failing to execute the conveyance, when the plaintiff was himself in default, or by refusing to comply with the demand of the plaintiff made many months after he had lost his right to the enforcement of the contract." The earlier decisions relied on by counsel for defendants were carefully examined by this court in that case because of the apparent misunderstanding as to their effect, and were fully explained in the opinion, and there is nothing in any later case that is inconsistent with the views of the court on this matter as expressed in such opinion. The stipulated facts here warrant no inference but the one that plaintiffs have done no more than to insist that, under the terms of the contract, defendants had no further rights under such contract, but had forfeited all such rights. Their notice of forfeiture and demand for possession of the mining property were strictly in line with this claim, and were in no sense a repudiation or abandonment of the contract or a consent to a rescission thereof, any more than was the refusal of the vendor to convey in *Glock v. Howard, supra*, an abandonment or a consent to a rescission. The bringing of the action to quiet title was an act of the same character. Practically it amounted to no more than the calling of the defaulting vendees into court to show why it should not be decreed that under the terms of the contract all their rights thereunder were at an end. In the absence of some sufficient equitable showing to excuse their failure to comply with the terms of the contract, plaintiffs, while standing on their contract, were entitled to such a decree, so as to cut off the possibility of any future claim by the vendee

to equitable relief, which might embarrass or cloud his title. *Glock v. Howard*, 123 Cal. 10, 11, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

There being no rescission or abandonment of the contract by the plaintiffs, and the plaintiffs at all times have insisted on the contract and stood on its terms, and being in no respect in default, the vendees in default were not entitled to recover either the moneys paid by them to plaintiffs or the moneys expended in developing the property.

Other points are made by counsel for plaintiffs in support of the judgment, including one to the effect that the matters alleged in the cross-complaint do not come within the scope of matters as to which a cross-complaint is authorized by our statute in an action to quiet title. Code Civ. Proc. § 442. We have preferred to place our decision in the case upon the ground already set forth, but in so doing we do not desire to be understood as holding that this claim of plaintiffs is without merit.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

(153 Cal. 760)

In re VANCE'S ESTATE. (L. A. 2,078.)

(Supreme Court of California. Jan. 24, 1908.)

1. EXECUTORS AND ADMINISTRATORS—PAYMENT OF CLAIM—EXERCISE OF OPTION.

An option to pay a note by delivery of corporate stock is not a mere personal right of the maker, expiring with his death, but survives to his estate.

2. SAME.

Civ. Code, § 1384, passes the property of an intestate to his heirs, subject to the control of the probate court and the possession of the administrator. Code Civ. Proc. § 1452, vests in the personal representative a right to the possession of all the property of decedent; and section 1581 requires the personal representative to take into his possession all the estate of decedent. *Held* that, where testator gave all his estate to his wife and son, and had reserved an option to pay a note by delivery of corporate stock, title to the stock passed to his legatees, subject to the exercise of the option by executrix.

3. SAME—PAYMENT OF CLAIMS.

Under Code Civ. Proc. §§ 1490 et seq., 1516, 1646, committing to the probate court jurisdiction over the presentation, allowance, and payment of claims against a decedent's estate, the probate court had jurisdiction to make an order authorizing and directing that a note presented as a claim against an estate be paid by the exercise by executrix of the option therein reserved to pay by delivery of corporate stock.

Department 1. Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Petition by Marie H. Vance, as executrix of the will of S. A. Vance, filed after the expiration of the time for presenting claims, praying for authority to deliver stock in payment of a note presented against the estate as a claim, in accordance with an option therein reserved. The claimant, Hammond Lumber Company, opposed the petition, and

from an order authorizing and directing the executrix to so pay the note, the lumber company appeals. Affirmed.

Page, McCutchen & Knight, for appellant. Taylor & Forgy, for respondent.

SLOSS, J. On May 26, 1903, S. A. Vance made and delivered to Hammond Lumber Company, a corporation, his promissory note reading as follows: "\$85,000.00 San Francisco, Calif., May 26, 1903. On or before five years after this date, I promise to pay to the order of Hammond Lumber Company sixty-five thousand dollars, United States gold coin, with interest thereon, payable semi-annually at the rate of four per cent. per annum from date until paid. This note is secured by pledge of six hundred and fifty shares of the first preferred cumulative stock of the stock of Vance Redwood Lumber Company, and is payable, at my option, by transfer and delivery of as many of said shares as shall at the time of such transfer and delivery be the equivalent at par of the then unpaid part of this note. [Signed] S. A. Vance." Thereafter S. A. Vance died, leaving a will in which he named his wife, Marie H. Vance, as executrix, and gave all of his estate in equal shares to his said wife and a minor son. Letters testamentary having issued, notice to creditors was published, and within the time allowed the Hammond Lumber Company presented a claim, setting forth the instrument above quoted, and alleging the payments of interest and nonpayment of the principal. The claim was allowed by the executrix and approved by the court. The estate is solvent. After the expiration of the time for presenting claims, the executrix filed a petition, alleging that the 650 shares of stock referred to in the claim had been appraised at \$38,750, and that it was to the best interests of the estate that the claim be paid by transfer of said 650 shares, which at par were the equivalent of the unpaid portion of the note. The prayer of the petition was for authority to deliver said stock to the claimant in full payment of its claim. In response to a citation the claimant, Hammond Lumber Company, appeared and opposed the petition. Over its objection, the court made an order authorizing and directing the executrix to transfer and deliver to Hammond Lumber Company, in full payment of the note and claim, a certificate for 650 shares of the first preferred cumulative stock of Vance Redwood Lumber Company, being the shares mentioned in the note. The order further provided that upon such transfer the claim and note "shall be fully paid and satisfied." From this order the Hammond Lumber Company has appealed.

The points made in support of the opposition in the lower court, and now urged on this appeal, are, first, that the option to pay the note by transfer and delivery of the stock was a right, personal to S. A. Vance, the maker, and expired with his death; sec-

ond, that the superior court as a court of probate had no jurisdiction to make the order directing the payment of the claim by a transfer and delivery of the shares of stock.

1. We see no good reason for holding that the option to pay in stock was a mere personal right of the maker. The note is payable on or before five years after date, and is payable, at the option of the maker, in money or in stock. Two options were here reserved to the maker—the option to pay at any time prior to the expiration of the five years, and the option to pay in stock instead of money. The payee had no right to insist on payment at any time before the end of the five-year period, nor to receive payment in money, if the maker should elect to pay in stock, or vice versa. Both of the options so reserved are valuable rights. It is not suggested that the right to pay before the expiration of the five years was lost to Vance's estate by his death. The right to pay in stock rather than in money stands on no different ground. The option to pay in this manner was reserved solely for the benefit of the maker. The appraised value of the stock (\$38,750) shows that this option, at the time of filing the petition, was worth \$26,250, the difference between such value and \$65,000. Why should the death of the maker be held to transfer this \$26,250 from Vance's estate to the Hammond Lumber Company? When the claimant took the note, it contracted for and received, not an obligation to pay \$65,000, but an obligation to do one of two things, *i. e.*, to pay \$65,000 or to transfer 650 shares of stock. The only right it bargained for was the right to receive the one of these two modes of performance which should prove to be to the advantage of the maker. The maker's death did not transform or enlarge this into an absolute right to receive \$65,000. The option reserved was in the nature of a valuable property right, and, as such, passed to the estate of the decedent. Since it had reference to the performance of an obligation of the decedent, its exercise necessarily devolved upon the executrix, who was charged with the duty of carrying out, subject to the direction of the probate court, all binding contracts made by the testator.

The appellant lays great stress upon the proposition that upon the death of one owning property the property passes at once to his heirs, devisees, or legatees. Civ. Code, § 1384; *Beckett v. Selover*, 7 Cal. 238, 68 Am. Dec. 237; *Brenham v. Story*, 39 Cal. 185; *Estate of Newlove*, 142 Cal. 377, 75 Pac. 1083. From this the conclusion is drawn that the 650 shares passed at once, on the death of Vance, to his widow and minor son, and that the executrix, with or without the order of court, had no power to transfer to the claimant any title to said shares. But the passing of title to the heirs, devisees, or legatees is subject to the control of the probate court and the possession of the administrator or executor for the purposes of ad-

ministration. Civ. Code, § 1384; Code Civ. Proc. §§ 1452, 1581. "The heirs' title is subject to the performance by the administrator of all his trusts, and they finally come into the possession and enjoyment of only such portion of the estate as may remain after the execution of them by the administrator." *Robertson v. Burrell*, 110 Cal. 568, 574, 42 Pac. 1086. One of those trusts is the payment of the debts of the decedent. Here the testator bound himself either to pay a sum of money or to transfer certain shares of stock. Both the money and the stock passed to his legatees charged with the burden of the performance of this obligation. One or the other was to pass from the estate, according to the exercise of the option by the executrix. Whatever title the legatees took was subject to the exercise of this option.

2. The contention that the probate court was without jurisdiction to make the order appealed from is, in a measure, answered by what has already been said. If the option reserved in the note was a right that passed to the estate and was to be exercised by the executrix, it will hardly be questioned that the exercise of that option for the purpose of satisfying an approved claim was a matter to be passed on by the probate court. "The objects of probate proceedings are to administer, settle, and distribute the estate of deceased persons." *Maddock v. Russell*, 109 Cal. 417, 422, 42 Pac. 139. The presentation, allowance, and payment of claims are subjects especially committed to the care of the probate court. Code Civ. Proc. §§ 1490 et seq., 1516, 1646. The order in question is to be regarded as an order for the payment of an allowed and approved claim. The appellant submitted itself to the jurisdiction of the court by presenting its claim, and it has no ground for complaint in that the court has made an order directing that it be paid in the manner provided by the contract which is the basis of the claim.

The order is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

153 Cal. 709

In re CALLEN'S ESTATE. (L. A. 1,996.)

(Supreme Court of California. Jan. 27, 1908.)
INSANE PERSONS—LIABILITY OF ESTATE FOR
SUPPORT—RIGHTS OF CREDITORS.

Pol. Code, § 2176, declaring that an insane person's estate, to the extent it is sufficient for the purpose, shall be liable for his support and maintenance in a state hospital, does not entitle a state hospital to any claim on an insane person's estate, where at his commitment his debts exceeded the value of his estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, § 106.]

In Bank. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Final accounting in the matter of the estate of James S. Callen, an incompetent person. Two classes of claims were presented—claims of private persons accruing prior

to the commitment of Callen to the State Hospital, and the claim of the State Hospital for care subsequent to his commitment. From an order directing the estate to be distributed among the creditors other than the hospital, the Southern California State Hospital and the California State Commission in Lunacy appeal. Affirmed.

John W. Stetson (Cassius Carter, of counsel), for appellants. Haines & Haines, James E. Wadham, and L. L. Boone, for respondents.

HENSHAW, J. James S. Callen had been declared an incompetent, and committed to the Southern California State Hospital. A guardian was appointed of his estate. At the time of the settlement of the final account of the guardian it appeared that he had on hand \$476 which could be devoted to the payment of the claims of creditors. Two kinds of claims were presented: First, the claims of private persons, aggregating \$1,435, which claims had accrued prior to the commitment of the incompetent to the State Hospital; and, second, the claim of the State Hospital for \$435, accrued for the support, care, and maintenance of the incompetent subsequent to his commitment. The court ordered that the moneys in the hands of the guardian be ratably distributed amongst the creditors other than the Southern California Hospital, and from this order the hospital appeals.

It contends, first, that it is an agent and mandatory of the state, and thus represents the state, and that the claim of the state as sovereign should be preferred over that of the general creditors by virtue of the common-law rule to this effect. *State v. Foster*, 5 Wyo. 199, 38 Pac. 928, 29 L. R. A. 226, 63 Am. St. Rep. 47. Appeal is here made to the rule enunciated in our Code and affirmed in our decisions that, where our statutes are silent, the common law of England furnishes the rule of decision. *Est. of Apple*, 66 Cal. 434, 6 Pac. 7. But it is sufficient on this to say that our Codes are not silent upon the matter. The state has undertaken the care of its insane and incompetents, and the liability of the estate of such an incompetent is defined by section 2176, Pol. Code. "The husband, wife, father, mother, or children of an insane person, if of sufficient ability, or the estate of such insane person to the extent it is sufficient for the purpose, shall be liable for the care, support, and maintenance of any insane person in a state hospital for the insane to which he has been or may hereafter be committed or transferred."

The first proposition to be considered, then, is whether under this section the state or the asylum has any claim at all upon the estate of the incompetent. It appears that at the time the state first took charge of him, his undisputed debts exceeded three times the value of his property. He was insolvent. Such little property as he possessed was due

and owing to creditors, and equitably that property was theirs. Under such state of facts it cannot be successfully argued that the condition contemplated by section 2176 is fulfilled. The estate of the insane person was not sufficient to any extent to provide for his maintenance at the time of his commitment to the asylum. Such property as he possessed belonged to the creditors existing at the time of his commitment. The result is, therefore, that the state had no legal claim at all against the property of the incompetent. It becomes unnecessary, therefore, to consider whether, if it had a valid claim and the funds of the incompetent were inadequate to pay all claims, the state should receive preferential consideration, or should share ratably with the others.

The order appealed from is affirmed.

We concur: **BEATTY, C. J.; ANGEL-LOTTI, J.; SLOSS, J.; MCFARLAND, J.; LORIGAN, J.**

153 Cal. 753

In re **BARCLAY'S ESTATE**. (L. A. 2,138.)
(Supreme Court of California. Jan. 24, 1908.)

1. WILLS—WORDS CREATING GIFTS—INTENTION OF TESTATOR.

No particular words are essential to create a legacy or devise, and, when the intention of the testator making a gift from the property of his estate is shown, the courts will carry it into effect, if the same can be done consistently with the rules of law applicable thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 228-233.]

2. SAME—GIFTS TO CREDITORS.

Testatrix devised specified property to designated beneficiaries, and provided that the residue of her estate, after a son had been paid what he had paid for her at various times, should go to her children. *Held* to constitute a legacy to the son of all the amounts paid by him for testatrix.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1698-1703.]

3. APPEAL—REVERSAL—TECHNICAL ERRORS—FINDINGS—SUFFICIENCY.

A judgment will not be reversed for failure to find on an affirmative defense, where the record does not show that evidence was introduced in support thereof, or where the evidence introduced was not sufficient to support a finding in favor thereof.

4. WILLS—GIFTS TO CREDITORS—ESTOPPEL.

Testatrix gave specified property to designated beneficiaries, and provided that the residue of her real estate, after a son had been paid what he had paid for her, should go to her children equally. The son presented a verified claim for the amounts advanced, but only a part thereof was allowed by the executors, on the ground that his claim therefor was barred, except to the extent allowed. *Held* that, since under the express provisions of Code Civ. Proc. § 1499, the claim of the son, so far as the same was barred, could not be allowed, he was not estopped from claiming that there was a legacy to him to the amount of his advancements for testatrix.

5. SAME—CONSTRUCTION—DEATH OF BENEFICIARY.

Testatrix gave specified property to designated beneficiaries, and provided that the residue remaining, after a son had been paid what he had paid for her, should go to her children, share

and share alike, and declared that "in case any one or more should die their share to be divided between the remaining children, unless they have heirs." *Held*, that under Civ. Code, § 1333, providing that words in a will referring to death relate to the time of testator's death, etc., the quoted provision referred only to such a death as might occur before the death of testatrix, and it did not apply to a child dying leaving a child and husband surviving.

6. SAME—CODICILS—MODIFICATION OF WILLS—EXTENT.

Under Civ. Code, § 1287, providing that the execution of a codicil referring to a previous will has the effect to republish the will, as modified by the codicil, a will controls, except as modified by a codicil, and the two instruments must be read together so as to make one consistent whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 997.]

7. SAME—ESTATES DEVISED—TRUST ESTATES.

Testatrix gave specified property to beneficiaries named, and provided that the residue should go to her sons and daughters, share and share alike. By a codicil she subjected the property given to a daughter to a trust for her benefit so long as she remained the wife of a person named. She died leaving such person her surviving husband. *Held*, that under Civ. Code, §§ 864, 865, providing that the author of a trust may devise property, subject to the execution of the trust, and declaring that the devisee acquires a legal estate in the property as against all persons except the trustee, the interest of the daughter when terminated by her death passed to her surviving husband, freed from the trust.

Department 1. Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

In the matter of the estate of S. C. G. Barclay, deceased. Proceedings in the nature of an action to determine heirship by H. A. Barclay, a beneficiary under the will of the deceased. From a decree determining the interests of claimants under the will of the deceased, and from a denial of a new trial, J. C. Blackinton appeals. Modified and affirmed.

M. W. Conkling, for appellant. Munson & Barclay, for respondent.

ANGELLOTTI, J. This is an appeal by one J. C. Blackinton from a decree determining the respective interests of claimants under the will of deceased, given in a proceeding under section 1664, Code Civ. Proc., and from an order denying his motion for a new trial. The deceased died testate January 3, 1895, leaving as her heirs at law five surviving children, H. A. Barclay, F. H. Barclay, D. E. Barclay, S. C. Blackinton (the wife of appellant), and Lenore Gillmore. Said S. C. Blackinton died intestate on January 29, 1896, leaving surviving her husband (appellant) and their minor son, Roswell, aged about two years. Said son Roswell died June 15, 1896, and the whole estate of S. C. Blackinton was subsequently distributed to appellant. As the successor of his deceased wife, appellant claims a portion of the estate of this deceased.

On June 18, 1894, deceased executed an olographic will. By this instrument, after directing payment of her just debts, she specifically devised certain real property, known

as the "Alhambra property," and certain household goods, to her two daughters, "the coins" to H. A. Barclay and D. E. Barclay, and an oil painting to each of her five children. The will then provided as follows:

"The residue of my real estate, after my son, H. A. Barclay, has been paid what he has paid for me at various times, I will and bequeath to my children, Henry A. Barclay, Frank Herbert Barclay, Sallie C. Blackinton, David Eric Barclay, and Lenore Gillmore, share and share alike. In case any one, or more, should die, their share to be divided between the remaining children, unless they have heirs."

On August 28, 1894, she executed an olographic codicil to said will, which was as follows:

"I hereby give and bequeath unto my daughter, Mrs. Lenore Gillmore, in trust for the use of my daughter, Mrs. S. C. Blackinton, wife of J. C. Blackinton, all property and goods of all kinds named in my will to my daughter, S. C. Blackinton, said property to be held by said trustee so long as the said S. C. Blackinton remains the wife of said J. C. Blackinton: provided, however, that the rents, issues and profits thereof shall be paid by said trustee to said S. C. Blackinton, from time to time, as they are received, but in case the said property is sold, the proceeds of the interest of the said S. C. Blackinton shall be placed at interest by the said trustee and the interest thereof paid to S. C. Blackinton from time to time as the same is received, but in case the said S. C. Blackinton shall so request in writing, the proceeds of said property may, instead of being put at interest, be invested in real estate to be held by said trustee and the rents, issues and profits thereof be paid as aforesaid.

"Provided, further, that in case of the death of said J. C. Blackinton, or his divorce from said S. C. Blackinton, then and in that case the whole of the property so held in trust shall be conveyed to or delivered to S. C. Blackinton."

The controversy on this appeal is as to the effect of the codicil on the rights conferred by the will on the daughter S. C. Blackinton, and the effect of the provision in the original will regarding the payment to H. A. Barclay of such sums as he had paid out for the deceased. The latter of these questions is the question principally discussed by counsel. H. A. Barclay, who was the plaintiff in this proceeding, claimed by appropriate allegations in his complaint that he had paid out for deceased between July 8, 1889, and the time of her death, amounts aggregating \$10,954.10, which he claimed should be paid to him from the property of the estate, together with interest, before any distribution to residuary legatees and devisees was made. All of these expenditures except some \$325 were barred by the statute of limitations. The trial court sustained this claim of plaintiff,

adjudging him to be entitled to receive from the estate before distribution of the residue to the residuary legatees and devisees the sum of \$10,954.10, with interest. There is no contention on this appeal that the findings as to the payments by H. A. Barclay for deceased are not fully sustained by the evidence, or that he was not entitled to the interest awarded, if he was entitled to the principal. It is urged, first, that there was no legacy of the amounts paid by H. A. Barclay for deceased created by the will, and, second, that said Barclay has elected not to treat the same as a legacy, by proceeding as an ordinary creditor of deceased, and is now estopped to claim that there is any legacy in this regard. We have no doubt that the words of the will in this behalf should be held to constitute a legacy to H. A. Barclay of all amounts that he at various times had paid for her, payable out of the estate before any residuary legacy or devise is distributed. No particular words are essential to create a legacy or devise. The essential thing is that the intention of the testator to thereby make the gift from the property of the estate is shown. When such intention clearly appears, the courts will carry it into effect, if this can be done consistently with the rules of law applicable. While more formal and apt terms would probably have been used in this will if the same had been drawn by a lawyer, the intention of the testatrix to make this gift to H. A. Barclay, and to require its payment before any distribution is had to residuary devisees or legatees, could not have been made more clearly apparent.

The claim of appellant that H. A. Barclay elected to proceed as an ordinary creditor of deceased, and is now estopped to claim as a legatee, was made by allegations in the answer, and evidence was introduced on the trial for the purpose of supporting such allegations. The allegations were substantially that said H. A. Barclay presented a verified claim for all the amounts claimed herein; that the same was allowed by the executrix for \$325 only, and rejected as to the balance; that said Barclay thereupon had the same approved by the judge for such amount, and then filed the claim as an allowed claim for \$325; and that thereafter he petitioned the superior court for an order of sale of the real property of the estate for the purpose of paying all approved claims, including his own. The trial court failed to make any finding on these allegations, and its failure to do so is claimed to be error necessitating a reversal. The evidence was, however, insufficient to support a conclusion that said Barclay was so estopped, except, perhaps, as to such items as were not barred by the statute of limitations at the time of the presentation of the so-called creditor's claim, which amounts, as we have seen, aggregated not exceeding \$325. Both executrix and judge were expressly prohibited by statute from allowing an item in the claim that was so

barred (Code Civ. Proc. § 1499), and the rejection of the claim as to such items cannot be held to have been an adjudication as to the merits thereof. There was nothing in the language of the will which put said Barclay to the necessity of abandoning his rights as an ordinary creditor for such amounts as were not barred, if he desired to take as a legatee. The case is not at all like that of *Smith v. Furnish*, 70 Cal. 424, 12 Pac. 392, where a specific sum (\$3,000) was bequeathed in compensation for services rendered the deceased. There the intention of the testator was clear that the party should receive that specific sum in lieu of such amount as might be lawfully due for the services, and proceedings against the estate for the enforcement of a creditor's claim might properly be held inconsistent therewith. But the provision in favor of said Barclay in the will before us was clearly intended not to take away from his rights as a creditor for such amounts as he might lawfully claim and enforce, but to give to him those amounts which the record shows he could not otherwise obtain. It is well settled that a judgment will not be reversed for failure to find upon an affirmative defense, if the record does not show that evidence was introduced in support thereof, and the same rule must obtain where the evidence introduced was not sufficient to support a finding in favor thereof if such finding had been made. The inclusion of the \$325 and interest thereon in the amount ordered distributed to Barclay was practically simply an order for the payment of his allowed claim with interest.

The trial court held that by reason of the provisions of the codicil the interest of S. C. Blackinton in the estate was absolutely ended by her death, while still the wife of J. C. Blackinton, and that the property given to her went to the remaining four children, share and share alike. It, therefore, excluded J. C. Blackinton from all participation in the residue of said estate. In this the court erred. The Alhambra property, which was given by the will to S. C. Blackinton and Lenore Gillmore, share and share alike, has been lost to the estate by reason of foreclosure proceedings, and the provision in regard to its disposition in the event of the death of one of the beneficiaries is not material here. As we have seen, the will gave absolutely to said S. C. Blackinton and Lenore Gillmore certain household goods, to be divided among them as they might agree. It appears that such division has been made by the beneficiaries. It also gave them the books of deceased, and gave to said S. C. Blackinton one oil painting, and, after payment of the amounts given to H. A. Barclay, one-fifth of the residue of the real estate. The only provision in the will under which S. C. Blackinton could possibly be deprived of this property was one to the effect that, in case one or more of the children should die, their share was to be divided among the remaining chil-

dren, "unless they have heirs." This provision apparently referred only to such a death as might occur before the death of the testatrix (Civ. Code, § 1336); but in any event it could not apply to S. C. Blackinton's interest, for she left a child surviving her, as well as her husband. This disposition by the will in favor of S. C. Blackinton was affected by the codicil only to the extent that a different arrangement was provided by the codicil. The will still controls except as modified by the codicil. Civ. Code, § 1287. The dispositions made by will are not to be disturbed by a codicil further than is necessary to give it effect. 1 Jarman on Wills, p. 176. The two are to be read together so as to make one consistent whole. In re Ladd, 94 Cal. 674, 30 Pac. 99; Matter of Scott, 141 Cal. 485, 75 Pac. 44. The only effect of the codicil was to subject the property so given to S. C. Blackinton to a trust (of which she was the beneficiary) so long as she remained the wife of J. C. Blackinton. The will as modified by the codicil absolutely devised this property to S. C. Blackinton, subject only to the execution of the trust. The author of a trust may devise property, subject to the execution of the trust (Civ. Code, § 864), and such a devisee acquires a legal estate in the property as against all persons except the trustee. Civ. Code, § 865. When the trust was terminated by the death of S. C. Blackinton, her interest in the property passed, freed from the trust, to her heirs, and appellant, J. C. Blackinton, is entitled to receive the same on distribution.

It follows that the decree should be modified so as to provide that the household goods and books assigned to S. C. Blackinton in the division between her and Lenore Gillmore shall be distributed to J. C. Blackinton, and that after the specific legacies are satisfied, and the amounts found due H. A. Barclay are paid, one-fifth of any residue shall be distributed to J. C. Blackinton as the successor of S. C. Blackinton, and the remaining four-fifths to the other children of deceased, or their successors, H. A. Barclay taking one-fifth as an heir of deceased and one-fifth as the successor of Lenore Gillmore, deceased, and D. E. Barclay taking one-fifth as an heir and one-fifth as the successor of F. H. Barclay.

The order denying a new trial is affirmed, and the cause is remanded, with directions to the lower court to modify the judgment in accord with the views we have expressed; said judgment, when so modified, to stand affirmed.

We concur: SHAW, J.; SLOSS, J.

153 Cal. 778

In re JOHNSON'S ESTATE. (L. A. 2,052.) (Supreme Court of California. Jan. 31, 1908.)

1. APPEAL—CONFLICTING EVIDENCE—FINDINGS.

The appellate court cannot decide contrary to the findings of the trial court, where the

evidence is conflicting; the trial court, in the absence of a jury, being the exclusive judge of the credibility of the witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

2. WILLS—PUBLICATION—REQUESTS FOR SUBSCRIBING WITNESSES.

An express declaration to the subscribing witnesses that the document executed was testatrix's will, or an express request that they attest it as witnesses, is not required; it being sufficient if testatrix, at the time, by words or conduct, conveyed to the witnesses the information that the instrument was her will, and that she desired their attestation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 305-317.]

3. SAME—EXECUTION—EVIDENCE.

A will was drawn at testatrix's request by her attorney, and was executed in his office, under the direction of his law partner. Testatrix said to him that she wanted him to call witnesses to "this will of hers," the persons who signed as witnesses being then in the room. The attorney thereupon asked them to witness the document, whereupon testatrix and the witnesses immediately signed the instrument in the presence of each other, there being written after her signature and above theirs the usual attestation clause reciting that they signed at her request and in her presence, and that she declared the instrument to be her last will in their presence. *Held*, to warrant a finding that the will was duly executed, though some of the witnesses could not recall what occurred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 700-723.]

4. SAME—DESTRUCTION—REVOCATION—EVIDENCE.

On an application for probate of a will, evidence *held* to warrant a finding that the will, properly executed, was in existence after testatrix's death, and that the will was not revoked prior to such event.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 732, 738.]

5. WITNESSES—CONTRADICTION—PARTY'S OWN WITNESS.

Under Code Civ. Proc. § 1339, requiring proponents in a proceeding to establish a lost will to prove that it was in existence at testatrix's death, where B. and contestant, so far as proponent knew, were the only persons who had seen the will after testatrix's death, so that proponent was practically compelled to produce B. as a witness, and she testified that she did not remember seeing any handwriting on the paper at all, the paper being typewritten, proponent was entitled to show that B. had previously told proponent's attorney that the will was signed by testatrix and two witnesses, for the purpose of explaining the action of proponent's attorneys in calling B., and to show that they were surprised by her testimony.

6. APPEAL—ESTOPPEL TO ALLEGE ERROR—CONSENT.

Proponent in a will contest, having been compelled to produce a witness whose testimony was adverse, sought to introduce testimony of contradictory statements made by the witness, for the sole purpose of explaining his action in calling the witness, and to show that he was surprised by her testimony, to which contestant's counsel replied that he understood that proponent's counsel wanted the testimony explained as far as that was concerned, and that it was all right. *Held*, that contestant consented to the admission of the evidence, and could not object, on appeal, that it was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3591-3616.]

7. WILLS—TESTAMENTARY CAPACITY—PRELIMINARY PROOF—PRESUMPTIONS.

When proponent of a will, on a petition for probate, opens the proceedings by preliminary proof, as required by statute, he may rely on a presumption that the testator was of sound mind when the will was executed, as evidence in his favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 101-110.]

8. SAME—EVIDENCE—ATTENDING CIRCUMSTANCES.

Circumstances attending the execution of a will and the conduct of the testator at the time are admissible on the issue of testamentary capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 111-136.]

9. SAME—PRIMA FACIE CASE.

The presumption of sanity on the part of a testatrix, and evidence that she acted in a rational manner at the time the will was executed, was sufficient to establish a prima facie case of testamentary capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 103-137, 138.]

Department 1. Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Application for probate of the will of Sarah Johnson, deceased, to which Della Sherbourne filed objections. From orders admitting the will to probate and denying contestant's motion for a new trial, she appeals. Affirmed.

C. W. Davison, J. R. Wilder, and L. L. Miller, for appellant. T. M. Stewart and Haas, Garrett & Dunnigan, for respondent.

SHAW, J. The contestant appeals from an order of the superior court admitting a will to probate, and from an order refusing her motion for a new trial. Sarah Johnson died on May 19, 1905. The petition for probate of her will alleged that the will was in writing, was signed by her in her lifetime, and was duly attested by two subscribing witnesses, and that after her death it was willfully destroyed by Della Sherbourne, the contestant. The written grounds of opposition filed by the contestant denied that the alleged will had been signed by the deceased, or had been by her declared to be her will in the presence of the witnesses, or at all, or that it had been signed by any witnesses, or that the deceased, at the time of the alleged execution thereof, was of sound and disposing mind and memory. The contest was tried before the court, without a jury, and the findings of the court were in favor of the proponent upon all the grounds of opposition.

It is earnestly contended that the evidence is insufficient to support the findings in regard to the execution of the will, the testamentary capacity of the deceased at the time, and the contents of the document found to have been executed as the will. It is sufficient to say with regard to these facts in dispute that the case comes within the rule that this court cannot decide contrary to the findings of the court below, where there is conflicting evidence, and there is substantial

evidence tending to prove the facts found, and the additional rule that the trial court is the exclusive judge of the credibility of the witnesses testifying before it. There was no very satisfactory evidence that at the time of its execution the deceased made an express declaration to the subscribing witnesses that the document executed was her will, or expressly requested them to attest it. But an express declaration and request are not absolutely necessary. It is sufficient if, at the time, she did, by words or conduct, convey to them the information that the instrument was her will, and that she desired them to attest it as witnesses. There was evidence to the effect that the will was drawn at her request by her attorney; that it was executed in his office, and under the direction of his partner, who was also an attorney accustomed to such matters and familiar with the requirements of the law regarding such execution; that she said to him that she wanted him to call witnesses to this will of hers; that the two persons who signed as witnesses were then in the room; that he thereupon asked them to witness the execution of the document; and that immediately she and they signed the document in the presence of each other, she as testator and they as attesting witnesses, there being written after her signature and above theirs the usual attestation clause reciting the facts that they signed at her request and in her presence, and that she declared that it was her last will in their presence. This was sufficient to justify the court in finding a due execution of the will. The fact that some of the witnesses to the transaction could not recollect what occurred is not sufficient to require us to overthrow the findings, where there are enough circumstances and testimony, aside from theirs, to justify the inference that the will was properly executed, as is the case here. In *re Tyler's Estate*, 121 Cal. 409, 53 Pac. 928; *Rugg v. Rugg*, 83 N. Y. 592; *Patton v. Hope*, 37 N. J. Eq. 527; *Cilley v. Cilley*, 34 Me. 164; *Barnes v. Barnes*, 66 Me. 286; *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237.

It is claimed that there is no evidence that the will was in existence after the death of the deceased. It may be conceded that the evidence that there were signatures to the document found in her trunk after her death, and claimed to be the will, is not very strong. But we cannot say that it was insufficient. It was shown that the contents of the will were first dictated to a stenographer, who took down the dictation in shorthand, and that but one longhand draft was made thereof by the stenographer, and that this draft was typewritten. From this the inference follows that this draft was the identical paper which was signed by the testator and the witnesses. It was also shown by the contestant's testimony, and also by another witness, that after the death of the testator a typewritten document was found

in her trunk, which was in all respects identical with the typewritten draft of the will made by the stenographer before its execution; but the contestant testified that it had no signatures appended, and the other witness claimed that she could not remember that it did. Their testimony on this point was somewhat hesitating, and, indeed, the contestant, in one of her answers, when testifying, said: "I just looked at the signatures." There was other testimony that the will was in the possession of the testator two days before her death, and was then produced by her and examined by one of her attorneys, who saw the signatures appended; that the testator declared that it was just as she wanted it; that it was then put back in her trunk and locked up; that between that time and her death she was unable to leave her room; and that a nurse was constantly in attendance upon her, who would have known, if any such transaction as the destruction of the will had taken place, and that she had no knowledge of any such occurrence. From these facts the court might properly have concluded that the will was not revoked or destroyed prior to her death, and that the testimony that the typewritten document bore no signatures was false.

Mrs. Beard was called by the proponents, and interrogated concerning the destruction of the will by the contestant after the death of the testator. It was she who, in connection with the contestant, testified to the finding of an unsigned copy of the will in the testator's trunk after her death. Her testimony as to the absence of signatures was very evasive, and generally negative, as, for example, that she did not remember seeing any signatures. She testified that she had a glance at the inside of the will. In further examination the following occurred: "Q. You didn't see any handwriting or pen writing on the paper at all? A. No, sir; I don't remember of any." This testimony by a friend of the only heir as to what she saw on the occasion of the finding of a paper in the form of a will in the testator's effects was some evidence tending to show that the paper was not signed. Her testimony indicated that she could have seen the signatures if there had been any, and, so far as it went, it was unfavorable to the proponents on the point. Over the objection of the contestant, and solely for the purpose of explaining to the court the reason for calling her as their witness, the proponent, after laying the proper foundation therefor, was permitted to prove that prior to the trial she had told proponent's attorney that on the occasion in question she had read the will; that it gave Della Sherbourne only one dollar, and gave the balance to the testator's brother and sisters, and made Mr. Hester her executor; and that it was signed by Mrs. Johnson and two witnesses. It is conceded that, where a witness is called to testify for a party as to a fact, and gives only negative testimony,

as that he has no knowledge on the subject, or no recollection as to the existence or non-existence of the fact, and his testimony cannot be said to be injurious to the party calling him, such party cannot be allowed to introduce evidence by way of impeachment to show that he made statements out of court to the party or his attorney, inconsistent with his testimony, and showing knowledge and recollection of the fact. *People v. Creeks*, 141 Cal. 529, 75 Pac. 101; *In re Kennedy's Estate*, 104 Cal. 429, 88 Pac. 93.

In case of a lost will proof of its existence at the death of the testator must be made by the proponent. Code Civ. Proc. § 1339. This witness and the contestant, so far as the proponent knew, were the only persons who had seen the will after the testator's death. The proponent was practically compelled to produce the witness. The impeaching evidence was offered, and was received by the court for the sole purpose of explaining the action of proponent's attorneys in calling the witness, and that they were surprised by her testimony. This was clearly stated at the close of the impeaching testimony, and was apparently understood and consented to by the contestant, for her attorney then responded: "Yes, sir; I understand that Mr. Stewart wants the testimony explained as far as that is concerned. That is all right." Under these circumstances the rule that, when a witness called by a party has no knowledge or recollection of the fact inquired of, and gives substantially no adverse testimony on the subject, explanatory testimony is inadmissible, is not strictly applicable. The testimony was evidently considered by the court and counsel as adverse and injurious to the proponent. We also think the contestant consented to the explanation, and cannot now complain, even if it were conceded to be inadmissible. The trial was had without a jury, and doubtless counsel were satisfied that the court could disregard the testimony so far as it tended to prove that there were no signatures.

When a proponent of a will, upon the trial, opens the proceedings by preliminary proof, as required by the statute, he may rely on the presumption that the testator was of sound mind at the time of the execution of the will. Such presumption is evidence in his favor. The circumstances attending such execution, and the conduct of the testator at the time, may also be considered on that point. In the present case the sanity of the testator was sufficiently established by this presumption and by the circumstances indicating that she was at the time acting in a rational manner. This evidence may have been slight; but it was sufficient to make out a prima facie case, and it fully warranted the denial of the motion for a nonsuit, or dismissal of the cause, made by the contestant at the close of the proponent's preliminary proof.

The absence of one of the subscribing wit-

nesses was sufficiently explained. The persons who were believed to be the subscribing witnesses were called to testify. One of them had no recollection whatever of the matter. The other testified to the execution of the will, and the attestation by himself and the other person as witnesses. The attestation of a will is not a matter of great importance to the witness, and a failure by such persons to remember the occurrence is not so unusual as to justify the refusal of probate on that account, if there is other satisfactory evidence of the due execution.

With respect to the insufficiency of the proof of the destruction of the will, we may add that, if the court believed from the facts we have mentioned that the will was in existence after the death of the testator, and that it was locked in her trunk a day or two before her death and while she was in her last sickness, it may have believed the testimony of the two witnesses, Della Sherbourne and Mrs. Beard, to the fact of the destruction of the paper found in the said trunk, and have refused to believe their statements that it was unsigned. This was a matter addressed to the conscience of the trial judge, and we cannot interfere with his decision on the subject.

The judgment admitting the will to probate and the order refusing a new trial are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

183 Cal. 772

CRANDALL v. PARKS. (L. A. 1923.)

(Supreme Court of California. Jan. 31, 1908.)

1. APPEAL—REVIEW—SCOPE AND EXTENT—TIME OF APPEAL—SUFFICIENCY OF EVIDENCE.

Under the express provisions of Code Civ. Proc. § 939, subd. 1, an exception to a judgment, because not supported by the evidence, cannot be reviewed, where appeal from the judgment is not taken within 60 days after its rendition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1888.]

2. PLEADING—ANSWER—ADMISSIONS BY FAILURE TO DENY.

In an action to rescind an exchange, a denial that a representation was made at all did not make an issue on the allegation of the complaint that defendant knew, when making the representation, that it was untrue, and hence under the express provisions of Code Civ. Proc. § 462, it was admitted that the representation, if made, was made with knowledge that it was untrue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1228.]

3. EXCHANGE OF PROPERTY—ACTION TO RESCIND—TRIAL—FINDINGS OF FACT—SUFFICIENCY—ADMISSIONS IN PLEADINGS.

In an action to rescind an exchange, a finding that defendant knew that a representation was untrue, or that, if he believed it true, the representation was not warranted by the information he had, Civ. Code, § 1572, was unnecessary, where it was admitted that he knew the representation was untrue, under the express provisions of Code Civ. Proc. § 462, by a failure to deny that allegation of the complaint.

4. FRAUD—FRAUDULENT REPRESENTATIONS—MATTERS OF FACT OR OF OPINION.

A representation that one had owned land for about 15 years, had lived thereon, and was well acquainted with its quality and value, and that the actual value thereof was a specified amount an acre, was a representation of fact, within the rule that, where a party states a matter which might otherwise be only an opinion as a fact, so that the other party may reasonably so treat it, then the statement is not of opinion, but a representation of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 12, 13.]

5. SAME—RELIANCE ON REPRESENTATIONS.

On an exchange of property, one party may rely on the representation of the other as to the value of land remotely situated in another state, which he has never seen, and cannot personally examine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 20.]

6. SAME.

On an exchange of property, one party may rely on the representation of the other as to the ownership of personal property.

Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by H. J. Crandall against R. N. Parks. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

W. H. Francis and Dadmun & Belieu, for appellant. F. P. Willard, for respondent.

ANGELLOTTI, J. Defendant appealed from a judgment rescinding a contract for the exchange of property, and from an order denying his motion for a new trial. The appeal from the order denying a new trial has been dismissed. The appeal from the judgment was not taken within 60 days after its rendition and entry, and therefore the exceptions to the decision on the ground that it is not supported by the evidence cannot be reviewed. Code Civ. Proc. § 939, subd. 1.

It is claimed that the findings are not sufficient to support the judgment. They show substantially the following facts: Plaintiff was the owner and in possession of certain land in San Diego county, in this state, of the value of \$2,500, and certain personal property thereon of the value of \$214. Defendant, for the purpose of inducing plaintiff to exchange the same for 80 acres of land in the state of Oregon owned by him, and a restaurant outfit in the city of San Diego in this state, claimed to be worth \$400, and found not to exceed \$225 in value, represented to plaintiff that he had owned the Oregon land for about 15 years, had lived thereon, and was well acquainted with its quality, character, and value, and that the reasonable and actual value thereof was \$40 per acre, and also that he was the owner of the restaurant outfit, including a hot water tank and an ice chest or refrigerator of the value of \$40. The value of the Oregon land did not in fact, exceed the sum of \$500, or \$6.25 per acre. Neither the hot water tank nor refrigerator belonged to defendant. Plaintiff never

saw the Oregon land, and had no knowledge as to its value, nature, or quality, except the statements of defendant in regard thereto, and he had no information as to the ownership of the restaurant outfit, except that given him by defendant. Defendant knew this. An exchange of the properties was effected, plaintiff being induced to make the same solely by reason of such representations as to value and ownership, upon which he wholly relied. Defendant well knew the plaintiff in making the exchange relied and acted solely upon these representations.

There was no finding that defendant knew or believed at the time he made the representation as to the value of the Oregon land that the same was untrue, or that, if he believed it true, the representation was not warranted by the information he then had, and defendant urges that, in the absence of such element, there was no fraud on his part. Civ. Code, § 1572. There was, however, no necessity for such a finding in view of the state of the pleadings. The complaint alleged, in terms, that defendant knew at the time he made said representation to plaintiff that it was false and untrue. This allegation was not denied by the answer, the defendant resting upon a denial that he made the representation at all. This denial did not make an issue upon the question of defendant's knowledge as to the falsity of the representation, if made. The only issue was as to whether the representation was made. If made, it was admitted by the failure to deny in the answer that it was made with knowledge that it was not true. The allegation of the complaint in this behalf, not being controverted by the answer, must, for the purposes of the action, be taken as true. Code Civ. Proc. § 462. A finding is not necessary as to a fact admitted by the pleadings, as where a fact is alleged in the complaint and not denied in the answer. *First Nat. Bank v. Maxwell*, 123 Cal. 366, 55 Pac. 980, 69 Am. St. Rep. 64. It is therefore unnecessary to consider further defendant's contention on this point. What we have said in regard to the representations as to the Oregon land is equally applicable to the representation as to the ownership of the articles of personal property of which defendant was not the owner.

It is claimed that the representation as to the value of the Oregon land was nothing more than a mere expression of his own opinion as to the value on the part of the defendant, and therefore that an action will not lie on account thereof. This, however, is not the effect of a fair construction of the findings. A statement as to the value of property is not always made as a mere expression of opinion upon which the other party has no right to rely. It may be a positive affirmation of a fact, intended as such by the party making it, and reasonably regarded as such by the party to whom it is made. When it is such, it is like any other representation of fact, and may be a fraudulent misrepresentation

warranting rescission. The rule in regard to this matter is stated by Mr. Pomeroy as follows: "Wherever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact and rely and act upon it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation." 2 Pom. Eq. Jur. § 878. He further says that the statements which most frequently come within this branch of the rule are those concerning value. There is nothing in the opinion in *Norris v. Crandall*, 133 Cal. xix, 65 Pac. 568, in conflict with this view. The court was there discussing the question of the sufficiency of the evidence to sustain the conclusion of the trial court that there was no fraudulent misrepresentation of fact, and, in affirming that conclusion, said, in effect, that the evidence was sufficient to sustain a conclusion that the expression as to value was made and understood as a mere expression of opinion only. The court there said, in accord with the rule we have stated, that there would be force in the appellant's contention, "if the evidence compelled the conclusion that the exchange of properties was brought about by a false statement of value by defendants, made as a substantive fact on which plaintiffs relied as a fact, and not as defendant's opinion as to the fact." The findings sufficiently bring the case within the operation of this rule.

That plaintiff never made or commenced any investigation for himself as to the value of the Oregon land or the ownership of the personal property, that he believed and relied solely on the statements and representations of defendant in regard thereto, and that he was induced to make the exchange solely by reason thereof, are all fully established by the findings, which are conclusive upon this appeal. We know of no reason why defendant should be allowed to maintain that plaintiff was not entitled to rely, without investigation on his part, upon a representation as to the value of land so remotely situated, which he had never seen and could not personally examine—a representation, "to the truth of which the party has deliberately pledged his faith." See *Dow v. Swain*, 125 Cal. 681 to 684, 58 Pac. 272 to 274. He was clearly entitled also to rely upon the representation as to the ownership of the personal property. *Oppenheimer v. Clunie*, 142 Cal. 313, 75 Pac. 899, is not in point. There the party had not relied on the representation made at all, but had investigated for himself as to the truth thereof, and was charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness.

Complaint is made that the trial court erred in admitting the evidence of three witness-

es as to the value of the Oregon land, the objection being that they were not sufficiently shown to be qualified to testify as experts concerning such value. No such specific objection appears to have been made in the lower court, the only objection there made being the general objection that the proposed testimony was immaterial, irrelevant, and incompetent. This was hardly sufficient to bring to the attention of the trial court the objection now made. However this may be, the evidence in the record was sufficient to warrant a ruling that the witnesses were qualified to testify on the subject.

There is no other point made by defendant that is available to him on this appeal.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

152 Cal. 785

STEELE v. SAN LUIS OBISPO COUNTY.
(L. A. 1,998.)

(Supreme Court of California. Jan. 31, 1908.)

TAXATION—RECOVERY OF TAXES PAID—IRREGULARITIES.

Pol. Code, § 3682, requires the clerk of the board of supervisors, when delivering the assessment book after equalization by the board to the county auditor, to make his affidavit that as clerk he has kept correct minutes of all the acts of the board, and that all alterations in assessments directed have been made and entered, and that no alterations have been made therein, except those authorized. Section 3732 requires the auditor, after computing the taxes, to deliver the corrected assessment book to the tax collector, with his affidavit attached thereto that he received the assessment book from the clerk of the board of supervisors, with his affidavit affixed thereto, and that he has corrected it to conform to the requirements of the state board of equalization, etc. Section 3819 provides for the recovery of taxes paid on void assessments. The affidavit required by section 3682 did not accompany the assessment book for a certain year, and was not made until two days before the day noticed for the sale for delinquent taxes. The affidavit of the auditor was never made. No change or alteration of any kind had been made by the board of supervisors, and the county auditor had complied with the law as to the computing of the taxes, and delivered the book at the appointed time. *Held*, that an owner of property who paid taxes on his property on the day of the sale for delinquent taxes, under protest to prevent such sale, cannot recover the amount so paid, because of the failure of the clerk and auditor to attach their affidavits to the assessment book.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 906.]

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by T. J. Steele against county of San Luis Obispo. Judgment for defendant, and plaintiff appeals. Affirmed.

McD. R. Venable, Albert Nelson, and Wm. Shipsey, for appellant. Charles A. Palmer and W. H. Spencer, for respondent.

ANGELLOTTI, J. This is an action to recover certain state and county taxes for the

fiscal year 1904-05, with penalties and costs, paid by plaintiff and his assignors under protest. Defendant had judgment, and plaintiff appeals from such judgment and from an order denying his motion for a new trial.

The payments were made by the taxpayers on the day noticed by the tax collector for the sale of the property for delinquent taxes, and were made for the purpose of preventing such sale and the issuance of certificates of sale thereon. The basis of plaintiff's claim was the failure of the clerk of the board of supervisors, when delivering the assessment book after equalization by the board to the county auditor, to accompany the same with his affidavit, as required by section 3682 of the Political Code, and the failure of the auditor to make or attach to the assessment book the affidavit required by section 3732 of the Political Code. Section 3682 requires the clerk to accompany the book with his affidavit to the effect that as clerk of the board he has kept correct minutes of all the acts of the board touching alterations in the assessment book, and that all alterations agreed to or directed to be made have been made and entered in the book, and that no changes or alterations have been made therein except those authorized. No such affidavit was made by the clerk when he delivered the book, or until after publication of the delinquent list and notice of sale. Two days before the day noticed for sale he did make, subscribe, and attach to the book an affidavit in the form prescribed by the section of the Code. Section 3732 requires the auditor, after computing the taxes on the various assessments, to deliver the corrected assessment book on or before the second Monday in October to the tax collector, with an affidavit attached thereto, and by him subscribed, stating that he received the assessment book of the taxable property from the clerk of the board of supervisors, with his affidavit thereto affixed, and that he has corrected it and made it to conform to the requirements of the state board of equalization, and that he has reckoned the respective sums due on taxes, and has added up the columns of valuation, taxes, and acreage, as required by law. This affidavit was never made. As a matter of fact, no change or alteration of any kind had been made by the board of supervisors or clerk in said assessment book, and the county auditor had complied with all requirements of the law as to the computing of the taxes fully and completely, and delivered the book with the taxes so computed thereon to the tax collector at the appointed time. The various assessments were in all respects valid save for the omission of such affidavits, and the amounts designated as taxes opposite the respective assessments were the amounts of taxes due from the various taxpayers for state and county taxes for the fiscal year 1904-05.

We are satisfied that under such circum-

stances the plaintiff should not be allowed to recover the taxes paid by him and his assignors. It may be conceded, in accord with the decision of this court in *Miller v. County of Kern*, 137 Cal. 521, 70 Pac. 549, that without such affidavits annexed to the assessment book the assessments were defective and not legally enforceable by the tax collector. They were defective and nonenforceable, however, solely because they were not properly authenticated by affidavits of the clerk and auditor showing certain requisites to have been complied with. When it was made to appear in this action that all such requisites had in fact been complied with by these officers, there was presented simply a case of taxpayers who have paid only their fair and just proportion of the taxes levied for the year, seeking to recover the same upon what has been made to appear is, under the facts, a most technical defect in no degree affecting any substantial right. Such a case is clearly subject to the doctrine enunciated in *Couts v. Cornell*, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168. That action, it is true, was one in equity, the plaintiff seeking a decree declaring certain assessments and the sales and certificates thereunder invalid because of a technical defect in the description of property in the assessment, and enjoining the issuance of any deed in pursuance of such certificates. But the rules based upon the maxim that he who seeks equity must do equity are applicable in suits to recover taxes paid. The idea upon which such a suit is predicated is that the county or municipality has received that which in justice it ought not to retain, and therefore, when the proceedings have been simply irregular, the action will not lie. There must be something further. The tax must be void, a mere nullity. Cooley on Taxation (3d Ed.) p. 419. Section 3819, Pol. Code, providing for the recovery of taxes paid on void assessments, was not intended to lay down any different rule. In accord with the views expressed in *Couts v. Cornell*, supra, plaintiff and his assignors, under the facts here appearing, justly owed the several amounts of taxes charged against them on the assessment book. There was a valid existing obligation upon them to pay such taxes. Assuming that payment thereof could not have been enforced in the absence of the affidavits required by statute, and that a sale by the tax collector under those conditions would not have passed the title, that case establishes that they could not, without paying or offering to pay the taxes due, have obtained a decree relieving their property from the cloud created by the assessment or preventing the execution of a deed purporting to convey that property for delinquent taxes. Instead of asking this well-recognized equitable relief, they have discharged their obligations by paying the amount thereof, and now claim to be entitled to recover the amounts they owed and paid, not on the

ground that they did not justly owe the same, but solely because of what has been shown to be a technical omission in the assessment book by the clerk and auditor. The answer to their claim must be the same as was the answer to the claim of plaintiff in *Couts v. Cornell*, supra.

No special claim has been made in regard to such portion of the amount as was paid for penalties and costs, and we have therefore not felt called upon to consider whether a recovery should be had therefor, even though the taxes themselves are not recoverable. Plaintiff and his assignors are entitled to no particular consideration in this regard, as it must have been apparent to them that they were relying upon a pure technicality to save them from paying the taxes they justly owed.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.

STEELE v. KELSHAW, Treasurer, et al.
(L. A. 1,997.)

(Supreme Court of California. Jan. 31, 1908.)

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by T. J. Steele against John Kelshaw, Treasurer, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

McD. R. Venable, Albert Nelson, and Wm. Shipsey, for appellant. Paul M. Gregg and Spencer & Burnett, for respondents.

ANGELLOTTI, J. This action, to recover certain special high school taxes paid under protest, presents the same questions as to invalidity of assessment and tax as those presented and determined in the case of *Steele v. County of San Luis Obispo* (L. A. 1,998) 93 Pac. 1020, this day decided. No recovery was sought herein of any sums paid as penalties for delinquency or for costs. The decision in that case requires an affirmation of the judgment and order in this case.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

VERDUGO CANON WATER CO. et al. v.
VERDUGO et al. (L. A. 1,797.)

(Supreme Court of California. Jan. 23, 1908.)

1. WATERS—RIPARIAN RIGHTS.

Where land in one common ownership is riparian to a stream, the waters thereof, including not only the surface stream, but also the underground flow constituting a part of the stream, are not merely appurtenant to the land as a right acquired by prescription or appropriation, but are a part of the land itself as parcel thereof.

2. PARTITION—DECREE—CONSTRUCTION.

A decree which partitioned land riparian to streams, and which apportioned the waters thereof to separate tracts, did not change the character of the rights of the respective parties to the waters of the streams; but the right assigned to each tract was a riparian right.

3. WATERS—SUBTERRANEAN WATERS—DIVERSION.

A party will not be permitted to decrease underground waters essential to the existence and preservation of surface water, to the depletion of the surface water, to the injury of those to whom the surface water has been assigned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 113.]

4. PARTITION—DECREE—CONSTRUCTION.

Where a decree which partitions lands riparian to streams apportions the waters thereof, without specifically disposing of the underground waters, the underground waters essential for the preservation of the surface streams undiminished cannot be diverted; but the surplus belongs to the riparian lands to be used by the owners in accordance with the law of riparian rights, except that the partition cuts off from this right all lands except those tracts which extend to some portion of the underground flow.

5. WATERS—SUBTERRANEAN WATERS—WELL-DEFINED CHANNEL.

Lands riparian to a stream, divided in part of its course into distinct channels, was partitioned, and the waters of the stream were apportioned among the various tracts, without specifically disposing of the underground flow. Practically all the lands were alike riparian to the whole of the stream constituted by the underground flow. *Held* that, in determining the right to use the underground flow, it must be treated as one stream, and each parcel of land is entitled to its share thereof, whether it comes from the underflow supporting the particular surface stream set apart for it by the partition, or from some other part of the underflow, except that no owner may diminish the surface stream to the injury of any party entitled to it; the riparian rights below including the right to prevent undue interference with the underflow above.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 109.]

6. SAME.

Necessity is not the sole measure of right to unappropriated underground water, and in a suit to restrain one from appropriating for irrigation purposes underground water a finding that he has never taken or used more water than reasonably necessary for the proper irrigation of his land is insufficient, since his right is limited to a proper proportion of the underground water as compared with the rights of others.

7. SAME.

In a suit to restrain defendant from taking underground waters to the depletion of a surface stream, evidence *held* to require the court to ascertain whether the taking has depleted the surface stream, and to determine the amount of the decrease of the surface water resulting from the taking, and to enjoin defendant from decreasing the surface flow, unless plaintiff was estopped from asserting his rights.

8. SAME.

To establish the right to an injunction to restrain the taking of water, it is not necessary that plaintiff should be able to prove the extent of his injury with absolute precision, and where the taking of water by defendant is a wrongful taking of that which belongs to plaintiff, and is of substantial quantity, and causes him substantial injury, the court is not excused from making any finding on the subject by the fact that the evidence is indefinite as to the exact

quantity taken or the exact amount of the injury.

9. SAME.

One whose water supply has ceased is not on that account entitled to use the supply of another, and the fact of the failure of his own water supply has no bearing on the question, except to show that he was acting from necessity, and not from a wanton desire to appropriate to himself the property of others.

10. SAME.

Where one sunk a well on his land, and pumped underground water for his private use, and thereby interfered with the rights of another, the latter is not limited to an action for damages; but in a proper case he may obtain an injunction to restrain the continuance of the wrongful act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 117.]

11. SAME.

Defendant sunk a well on his land, and pumped underground water for his own use, and thereby interfered with the water rights of plaintiff. It did not appear that defendant was induced to sink his well by any act or word of plaintiff, or that he relied on the silence of plaintiff as evidence of his own right or of plaintiff's consent; nor did it appear that plaintiff intended that defendant should act in reliance on his silence, or expected that he would do so. It was not shown that plaintiff was under any duty toward defendant to disclose any claim he might have to the water, nor that defendant did not know, as well as plaintiff, that the pumping of the well would decrease plaintiff's water. *Held*, that plaintiff was not estopped from maintaining a suit to restrain defendant from continuing to take water.

12. ESTOPPEL — NATURE — PERMITTING IMPROVEMENTS.

A party, to be estopped, must intend, or must be so situated that he should be held to have expected, that the other party shall act, and the other party must, by words, conduct, or silence of the first party, be induced to do what he would not otherwise do; but the mere fact that the latter expended money in improvements on his own land with the knowledge of another and without objection from him creates no estoppel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 264-267.]

13. SAME.

A mere passive acquiescence, where one is under no duty to speak, does not raise an estoppel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 285-287.]

14. EQUITY—"LACHES."

The defense of laches does not rest entirely on lapse of time; but to constitute laches there must be something more than mere delay by plaintiff, accompanied by an expenditure of money or effort on the part of defendant, and it must also appear that it will be inequitable to enforce plaintiff's claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 212, 213.]

For other definitions, see Words and Phrases, vol. 5, pp. 3970, 3971; vol. 8, p. 7700.]

15. WATERS—IRRIGATION—DETERMINATION OF RIGHTS—LACHES.

Plaintiffs and defendant being tenants in common of the rights in an underground water flow, defendant sank a well on his own land, and erected a pump and a distributing system to irrigate his own land. *Held*, in proceedings to determine the several rights in the water, that defendant could not urge that plaintiffs were guilty of laches in permitting his expenditure without complaint, since there was nothing in the mere erection of the water plant which would invade plaintiffs' rights and call for

protest from plaintiffs; such invasion being committed only by the pumping of an excessive amount of water, and since after the commencement of the pumping plaintiffs had done nothing to induce defendant to believe plaintiffs assented to defendant's act.

16. ESTOPPEL—NATURE—ACTS CONSTITUTING ESTOPPEL.

One embarking with others in a common enterprise to use common property for the common benefit at a common expense owes to the others the duty, where he proposes to reserve a part of the benefit to himself exclusively, to inform the others fully in regard to it; and where he does not he is estopped from asserting his claim after the others have incurred the expense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 285-287.]

17. SAME—EVIDENCE—SUFFICIENCY.

Circumstances held not to show that one was estopped from taking by means of pumps his reasonable share of underground waters for use on his land for irrigation.

18. SAME—NATURE OF ESTOPPEL.

No estoppel can exist, unless the party invoking it was led to place himself in the prejudicial position in part, at least, by his own ignorance of the rights of the other party, or his own lack of knowledge of the true state of the title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 138.]

19. SAME—EVIDENCE—SUFFICIENCY.

Evidence held to show that defendant is estopped to take by means of pumps underground water above a dam erected by him and plaintiff for their common benefit and at their common expense, and use the same on lands below the dam, so far as the same will decrease the amount that will flow to and be intercepted by the dam.

20. WATERS—APPORTIONMENT.

Land riparian to a stream was partitioned, and the waters of the stream were apportioned among various tracts, without specifically disposing of the underground flow. Some of the owners of the land entitled to a certain proportion of the stream erected a dam at their joint expense for the purpose of intercepting underground waters. Held, that no person above or below the dam should be allowed to take by means of pumps more than his reasonable part of the available surplus waters of the underground waters, where such taking affected the surface stream or prevented another person from obtaining his reasonable share, and no person of those entitled to use the water collected by the dam could pump water above the dam for use on his lands below, where such pumping decreased the flow at the dam; and the rights in the surplus of the underground waters must be adjusted by ascertaining the total average amount available and the amount required by each party when used economically, and on that basis apportioning to each his share.

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by the Verdugo Cañon Water Company and others against Teodoro Verdugo and others to quiet title to water rights. From a judgment quieting title, plaintiffs and defendant E. M. Ross appeal. Reversed.

Works, Lee & Works, for appellants, Verdugo Cañon Water Co. et al. J. S. Chapman, Graves, O'Melveny & Shankland, Hunsaker & Britt, and Robert E. Ross, for appellant Ross. H. H. Appel, for respondent Verdugo. John S. Chapman, Hunsaker & Britt, Graves, O'Melveny & Shankland, Robert E. Ross, and Catesby E. Thom, for respondent Thom.

SHAW, J. The plaintiffs herein appeal from the judgment and from an order denying their motion for a new trial. The defendant E. M. Ross appeals from certain parts of the judgment. All the appeals are presented upon the same record.

The action is by the Verdugo Cañon Water Company and some 300 other persons, who are its stockholders, to determine and quiet title to certain water rights claimed by them in a stream of water flowing in the Verdugo Cañon, and to enjoin the defendants from taking the water alleged to belong to the plaintiffs. It is alleged that the plaintiffs other than the corporation are the owners of lands bordering on the stream; that as such landowners they have the right to take three-fourths of its waters, flowing above and below the surface of the ground, for use on their lands, in proportion to the area of the respective holdings; that the corporation was organized for the purpose of diverting said waters from said stream and distributing them to the plaintiffs and other persons entitled thereto; that it has constructed works, pipes, and ditches for that purpose, and is now engaged in said diversion and distribution; and that the defendants claim adversely the waters to which the plaintiffs are entitled, and without right are taking and using said waters, to the plaintiffs' injury.

The lands comprising the La Canada Ranch and the San Rafael Ranch in Los Angeles county were, prior to 1871, held in common ownership by a number of persons. The two ranches adjoined; La Canada lying north of San Rafael. In that year, in an action between them for that purpose, a partition of the two ranches was made by judicial decree. Verdugo Cañon begins near the base of Sister Elsie Mountain in La Canada Ranch, and extends from thence southerly across the line between the two ranches and for several miles into the San Rafael Ranch, where, after passing through a rather narrow gorge, it opens or expands into a wide plain, forming part of what is usually known as the "San Fernando Valley." The floor of the cañon is comparatively level, and varies in width from about 700 feet to something over 1,800 feet, with high hills or mountains on each side. In these mountains are a number of side cañons in which small rills flow; the water sinking in the ground either before or immediately after reaching the floor of the cañon. During times of heavy rain, and for a few days afterward, a stream of water flows down the cañon, through all the lands in controversy, and into the Los Angeles river, some distance below. This is of infrequent occurrence, and, as it has no particular bearing upon the questions presented, no further consideration need be given to it.

At the time the partition decree was made, three streams arose in the cañon, within the San Rafael Ranch, and flowed for some distance separately, and then united and flowed

for some distance on the surface down the cañon, finally sinking in the sand and gravel. These streams oozed out of the loose material composing the bed of the cañon at three places nearly of the same level or altitude, almost on the same line extending laterally across the cañon, and near the northerly line of the "cañon tract" hereinafter mentioned. One arose near the east side and somewhat further up the cañon than the other two. It is called the "east side stream." The other two arose nearer the western side, and united in a single stream before joining with the east side stream. The stream composed of these two is called the "west side stream." In partitioning the ranches the waters of these streams were apportioned among and set apart to certain of the lands assigned in severalty. A tract of 2,629.01 acres, much of it unfit for irrigation, was set off to the defendant Teodoro Verdugo. It embraces the entire cañon from the narrows for several miles toward the north and includes the places whereon the aforesaid streams arose to the surface. It will here be designated as the "cañon tract." The east side stream, so far as required, was set apart to the cañon tract for irrigation and other uses thereon. The combined west side stream, and any surplus of the east side stream remaining after the cañon tract was supplied therefrom, were set off to a large body of land situated on the plain below the narrows, for irrigation and other uses thereon. These lower lands covered an area of about 3,333 acres, and were generally fit for irrigation. They were divided and set off in severalty in tracts of various areas to 21 different owners. For convenience of designation the west side stream was divided into 10,000 parts. It was apportioned to the land at the ratio of three ten-thousandths of the water to each acre of the land. A large part of this 3,333 acres was afterward subdivided and sold in smaller tracts, each having its proportionate share of the waters, originally assigned. The plaintiffs are the owners of about three-fourths of the land to which this water was assigned, and the defendants C. E. Thom and E. M. Ross, respectively, each own about one-eighth thereof. The land of the plaintiffs, collectively, is entitled to three-fourths of this water, and that of Thom and Ross, respectively, to one-eighth thereof. The Verdugo Cañon Water Company diverts this water for all the interested parties, including Thom and Ross, by means of dams and diverting works to the expense of which Thom and Ross contributed one-eighth each. Their shares of the water are delivered to their respective pipes near the diverting works. The defendant E. M. Ross has also become the owner of several hundred acres of land of the cañon tract, and has an orchard of about 100 acres thereon, upon which he uses water from the east side stream for irrigation.

In 1871, and for years thereafter, there appears to have been sufficient water in the

streams for all the uses to which it was then applied by the persons entitled thereto. As years passed, the area of land set out to orchards, vineyards, and other fruits by the plaintiffs and defendants was very much increased, and the orchards of citrous fruits also required more and more water as they grew older, so that about the year 1891 the water began to be insufficient. In the year 1893 a series of dry years began, and they continued until 1902, when the present action was begun. From the increased demand and the decreased supply the result has been that during and after 1893 the water naturally flowing on the surface was not enough to keep alive and properly nourish the trees and plants on the land entitled to share in it. From time to time the parties, or some of them, increased their individual supply of water by sinking wells deep in the strata of sand and gravel underlying the bed of the cañon and the plain below, and pumping water therefrom. For a like purpose in 1894 the Verdugo Cañon Water Company and the defendants C. E. Thom and E. M. Ross jointly purchased about 8 acres of land, part of the cañon tract, situated at the head of the narrows, and extending across the cañon from the west wall towards, but not quite reaching, the east wall thereof. Upon this tract, at joint expense, in the proportion of three-fourths to the company and one-eighth each to Thom and Ross, they have constructed what is called a submerged dam, part of its length consisting of a cement wall and part of wooden cribs, by which the water flowing underground in the sand and gravel of the cañon is collected and diverted, and this water has ever since then been distributed to the respective parties along with the surface flow of the west side stream, and in the same proportion. This dam, so far as it has been constructed, is about 500 feet long, including the cribs. Further construction thereof ceased in 1896. For many years past all the waters of the east side stream have been used on the cañon tract, and there has been no surplus therefrom to add to the waters of the west side stream.

In 1898 E. M. Ross sunk a well in the cañon at a point about 1,000 feet above the submerged dam, and near the east side of the cañon, in lands constituting a part of the cañon tract. The well was completed in March, 1899, and in May, 1899, he began pumping, and has ever since then, during the irrigating seasons, pumped therefrom a stream of water averaging a flow of 18 miners' inches flowing under 4-inch pressure. He has used this water on land in the cañon tract, and also on other lands, and he claims the absolute right to use it on any other land, as he pleases, without regard to the effect on the amount of water collected by the dam, or flowing in the west side stream. In 1897 Teodoro Verdugo sunk a well in the cañon and placed a pump therein some 2 miles above the dam and near the point where the

streams formerly rose to the surface, which he began to pump in the spring of 1898, and from which he has ever since, during the irrigating seasons, pumped a stream of about 35 miners' inches of water, which he has used to irrigate lands in the cañon tract, claiming the right to do so. The defendant C. E. Thom also has three wells near, but above, the Verdugo well, from the easterly one of which he claims the right to pump water for irrigation of his land below the dam, or upon any other land; but no water has been pumped therefrom. Thom and Ross have each put down wells in the cañon, at a point about 1,500 feet below the dam, from which they each pump water to irrigate land of the San Rafael Ranch below the dam and entitled to water from the west side stream under the decree, and each claims the right to continue to do so. These several diversions of underground water by the defendants for their exclusive use, and these claims of right to do so, occasioned this suit.

1. The partition decree did not change the character of the rights of the respective parties to the waters of the cañon. It created no new rights or estate therein, but merely divided and apportioned the pre-existing rights and estates. Prior thereto the lands were in one common ownership, and the part of the San Rafael Ranch here involved was all riparian to that stream. Its waters were therefore not merely appurtenant thereto, as a right acquired by prescription or appropriation would be, but were a part of the land itself, as parcel thereof. This was the case with respect to each of the three surface streams then flowing, and also with respect to all the underground flow which constituted a part of said streams. In making the partition of these waters the right to the use of the surface streams, which previously attached to the entire ranch, was completely severed from the other parts thereof and transferred to the lands to which water was assigned. The right thus assigned to each tract by the partition was a riparian right, and it continues to possess that character, with all its attributes, since the partition as fully as before. With respect to the two surface streams, known as the "east side stream" and the "west side stream," respectively, the partition effected a complete separation of the waters; the east side stream being given so far as necessary, and for many years past this has meant all of it, to the cañon tract exclusively, and the west side stream exclusively to the lands below the mouth of the cañon. The water of this west side stream was not actually separated among the owners of the several tracts. It was merely apportioned between them, giving to each in common a certain number of undivided shares of the whole. It is obvious that the continued presence in the soil, sand, and gravel composing the bed of the cañon of a sufficient quantity of water to supply and support these surface

streams in their natural state is essential to their existence and preservation, and that the parties have as clear a right to have this quantity remain underground for that purpose as they have to the stream upon the surface. Neither party should be permitted to decrease this necessary quantity of underground water, to the depletion of the surface stream and the injury of those to whom it has been assigned. This much is clear from the previous decisions of this court. *Los Angeles v. Pomeroy*, 124 Cal. 621, 57 Pac. 585; *McClintock v. Hudson*, 141 Cal. 280, 74 Pac. 849; *Cohen v. La Canada Co.*, 142 Cal. 439, 76 Pac. 47. And it is conceded by all the parties, except the defendant Verdugo.

The partition did not specifically deal with or dispose of the underground waters. The only right concerning them which is affected by it at all was the right to have them remain undisturbed for the preservation of the surface streams undiminished, and this is a mere incident arising from the necessity of keeping the disposition of the surface flow effectual. There may possibly be a quantity of this underground water which could be taken without affecting the surface streams, even if taken above the point where the surface water is diverted into flumes or ditches. The defendants claim that there is a large amount thus available for use. All of the underflow, whether necessary to preserve the surface flow above or not, becomes available for such taking as soon as it passes below such points of diversion. The right to make use of all such surplus still belongs to the lands riparian thereto in the same manner as before the partition. The partition cut off from this right all lands of the ranch set off to the different parties in severalty, except those tracts which extended to some portion of the underground flow; but otherwise the right to the surplus was not affected by the decree. The underground water thus undisposed of is not to be distinguished, so far as legal rights thereto are concerned, from a similar surplus remaining in a surface stream after a partition had been made allotting certain parts thereof, less than the whole, to the use of the riparian owners. For illustration, suppose that, in a partition of lands riparian to a surface stream of 1,000 miners' inches, the amount of 500 inches is allotted to the several tracts in fixed proportions. The right to the use of the 500 inches not so apportioned would in such a case, as between those parties, still remain attached to the riparian lands as a riparian right, unaffected by the provisions of the decree fixing the proportions in which the parties are entitled to use the water expressly set apart to them. So in the present case the underground water was not set apart, and the available surplus thereof belongs as before to the riparian lands, to be used by the owners in accordance with the law of riparian rights. The relative

rights of the parties in this surplus are to be determined by that law, without aid from the partition decree. The fact that the stream above, at some point in its course, is divided into distinct channels, does not affect the right of the lands below to share in the use of both or all of them. All of the lands concerned in this action, or practically all of them, are, it appears, alike riparian to the whole of the stream constituted by this underflow. For the determination of present rights to its use, it must be treated as constituting but one stream. Each parcel of land, therefore, is entitled to its proper share of the entire underflow, without regard to the question whether it comes from the underflow supporting the particular surface stream set apart for it by the partition, or from some other part of the underflow, always, of course, saving the proposition that no owner may, by extracting the underflow, diminish either surface stream to the injury of any party entitled to it.

It is to be noted that the plaintiffs are not entitled by the decree to three-fourths of all of the surface flow of the cañon, but only to three-fourths of the west side stream and of the surplus of the east side stream, when there is any. The court below appears to have adopted the view that the separation of the right to the surface streams by the partition accomplished a like separation of the right to all of the underground waters, both of the parts thereof necessary to sustain the surface flow and of the surplus. It made a finding attempting to designate on the surface of the ground a boundary line separating these two supposed underground streams, and declaring that the waters thereof, respectively, and the right to pump and use the same, belonged to the parties entitled under the partition to the respective surface streams. This declaration of right was not expressly stated in the decree; but some of the provisions thereof, as will presently appear, are obviously based upon it. In this theory the court was in error, and for this and other errors, to be presently discussed, the judgment and order must be reversed. Other points are presented in the record which may again be involved upon a new trial. We now proceed to the consideration of these propositions.

2. The finding is that the underground flow in the cañon is in two separate and distinct streams; one giving rise to the east side surface stream, and the other to the two streams composing the west side surface stream. The boundary line between them was declared to be the easterly line of a certain "inclosed field" mentioned in the partition decree. The evidence shows that the general course of this line is north and south, that it is located about midway of the bed of the cañon, and that it has many sharp angles, so acute, indeed, that it would be extremely remarkable, if not impossible, that there could be any natural impervious bar-

rier having such a course. There is no evidence to indicate that there is any difference in the material of the bed of the cañon corresponding to this line, or anything therein that could thus divide or separate the underflow. The finding as to this line of separation was purely arbitrary and entirely without support. The fact that the streams arose in different places, and the circumstance that, as the dry years continued and the places where they arose receded further and further down the cañon, the line of these places followed the previous course of the respective streams, constitute some evidence that the density or permeability of the material of the parts of the cañon bed, corresponding to the previous courses of the streams, is different from the adjacent parts thereof, and that the space between them is less porous than the lines of these streams. There is no finding, however, and no evidence, that the separation is so complete that the pumping of water from one of them will not affect the flow, above or below the surface, in the other; and this is the vital point in the case. It is unlikely that it is so, since, wherever there have been explorations in the cañon beneath the surface, the material has been found to be practically homogeneous and equally permeable throughout. But as the right to the use of the surplus underflow remains undivided, and the riparian rights of the lands below include the right to prevent undue interference with either branch of the underflow above, supposing that there are two or more branches, and as the cañon tract extends to all of them, the question of the separation of the underground flow is of no consequence in the present stage of the case.

3. Driven by the necessity arising from the increased acreage irrigated and the scant supply of water after the year 1892, many of the plaintiffs have been compelled to obtain water for their lands from wells sunk thereon. This water lies in the sands and gravels at a considerable depth beneath the surface, and for the most part appears to come from the underground flow of the cañon, which goes under the dam and spreads under the surface of the plain below. Some of it, of course, comes from rainfall below the dam, and some, it is claimed, comes from the Los Angeles river; but the water from these last-named sources is not material to the case, except, possibly, as it may affect the necessities of the particular party and thus assist in determining the amount he may be allowed to take of the waters of the cañon proper. The court did not specifically find whether or not the amount of water pumped by each party was the proportion of the underground flow to which the particular party was entitled; nor did it determine whether or not any of that pumped above the dam constituted a part of the water which, as above stated, remains unpartitioned. It finds that none of the parties has ever tak-

en or used more water than was reasonably necessary for the proper irrigation of his land, and that none has had enough for that purpose; but necessity is not the sole measure of right in such cases.

The decree does not attempt to declare the comparative rights of each party, nor to go into that question at all. It does not mention the rights of the several plaintiffs to pump below the dam, nor in any manner fix the amounts they may take by that method. It is directed entirely to the rights of the defendants. It declares that the defendants Thom and Ross may each continue to pump and use the water from his wells below the dam as heretofore; that E. M. Ross may use, upon his 100-acre orchard in the cañon tract, enough water from his upper well to make up, when added to his part of the surface flow of the east side stream, a total flow of 22½ miners' inches, but may not use a greater amount thereof on the cañon tract under present conditions, and that he may use all the waters of said upper well, "and of said east side stream, both surface and subterranean," upon any of his lands within the cañon tract; that Verdugo may, as heretofore, pump 35 inches from his well; that C. E. Thom may pump from his east well, near the Verdugo well, and use the water upon his land in the cañon tract, but not on other land; and that the waters, surface and subterranean, intercepted and diverted by the dam, are to be used upon the lands below the cañon tract, three-fourths by the plaintiffs and one-eighth each by defendants Thom and Ross. These provisions of the decree are manifestly based on the theory that the entire flow of what the court calls the "east side stream," both above and below the surface, east of the arbitrary division line established in the findings between the underflow of that and the west side stream, belongs absolutely to the cañon tract by virtue of the partition, if necessary for its irrigation. In view of what has been said, the decree is erroneous as to the surplus of the underflow, if any, in that it does not limit the right of each to his proper proportion as compared to the rights of the other owners.

4. The well of the defendant Verdugo is not situated over what the court finds to be the east side stream, but is well within the territory which it finds contains the underground waters of the west side stream. With respect to the effect of the pumping of 35 miners' inches from this well, upon the west side stream and upon the underflow intercepted by the dam, the finding is that "the court is unable to discover from the evidence in this case that the flow of the waters at the said point of diversion and at the submerged dam is affected by the pumping of said well." If this was intended as a finding that the flow of the water is not affected by the pumping from the well, the evidence does not support it. If intended as a declaration that a finding is excused by the want of evidence

on the subject, it is unwarranted. From other findings it appears that this west side stream has its source in the mountains above, is fed by water from that watershed, and flows underground in the upper part of the cañon down to the places where it appears on the surface; that it first appeared on the surface in the said "inclosed field," at a point less than 1,000 feet below the Verdugo well, and that during the last 10 or 12 years preceding the trial, which was in December, 1903, its place of appearance on the surface had gradually dropped farther and farther down the cañon a total distance of over a mile and a half, and that its flow had constantly decreased in quantity, so that it became insufficient for the needs of those to whom it was allotted. The evidence indicates that the total natural flow of the cañon, above and below the surface, is less than 200 miners' inches. This well is about 116 feet deep, the bottom being in coarse gravel containing an abundance of water, and after reaching a depth of 27 feet it passes through similar water-bearing material all the way to the bottom. It would scarcely require the evidence of experts to prove that a well sunk in the sand and gravel of an underground stream of this character, 1,000 feet or less above the point where the stream originally issued upon the surface, and pumping a constant flow of 35 miners' inches, would to some extent reduce the flow of the surface stream. Especially would this effect follow where the surface stream and the underground flow is as small as in the present case. Hydraulic engineers of admitted qualifications did testify, however, in effect, that the pumping of that quantity from the well would materially reduce the surface stream, and that, taking the underground and surface flow as a whole, its amount would ultimately be reduced by an amount equal to the quantity pumped from the well, if none of it were returned to such stream. This, in the absence of extraordinary circumstances not proven, and not to be presumed, is self-evident. There were other circumstances also tending to prove that the pumping of Verdugo's well affected the flow of water below. There is no evidence at all indicating that it would not or did not materially reduce the flow. It is true that when the pumping began it did not at once have a perceptible effect on the surface stream; but this delay was to be expected. It also appears that from 1892 to 1903 there was a scant rainfall, and that the flow of the stream was greatly diminished by the drought. But neither this natural decrease, nor the fact that the effect of the pumping upon the flow must necessarily have been gradual, makes it any the less inevitable that the taking of the water from the stream by the well above will eventually reduce the amount that would otherwise flow in the stream below to the extent that the water so taken therefrom is not returned thereto. This is the necessary effect of any diversion

from a stream, whether flowing on the surface or beneath, whether in an unobstructed channel or in the gravel and sand which partly fills the rocky gorge of its original course. From the evidence the court should have found whether it did reduce the surface stream, and, if there was a reduction, it should have ascertained, as nearly as it could from the evidence before it, the amount of such decrease. The defendant Verdugo should have been enjoined from decreasing the surface flow of the west side stream and from taking more than his share of the surplus underflow, unless, as Verdugo claimed, there was an estoppel against the plaintiffs which prevents them from asserting their rights in that respect. The court found that there was such estoppel. This proposition, and also the claim that plaintiffs are estopped as to the upper well of E. M. Ross, and that they are barred by laches as to both of these defendants, will be presently considered.

5. The court finds that the amount of water diverted by the submerged dam is greatly diminished, and that this decrease "is largely, if not wholly, due to the many years of continuous drought." It further finds "that the fluctuations in the quantity of water flowing at the submerged dam into the common works has been considerable for several years past; but the court cannot determine from the evidence in this case that such fluctuations have been due to any extent, or, if any, to what extent, by reason of the pumping of the water from the upper well of Judge Ross." Another finding states that "it is impossible to determine" to what extent, if at all, the decrease aforesaid has been caused by the pumping of the upper well of E. M. Ross. These findings, and those to the same effect concerning the Verdugo well, are the only findings in response to the issue made upon the allegation of the complaint that the defendants have put down wells and have taken out water from the stream that belongs to the plaintiffs. It may be conceded that it would be impossible to determine accurately the exact amount of the water pumped from this well that, if not so pumped, would have reached the pipes at the submerged dam. But it is not necessary, in order to establish the right to an injunction, that the plaintiff should be able to prove the extent of his injury with absolute precision. If the taking of the water by the defendants is a wrongful taking of that which belongs to the plaintiffs, and is of a substantial quantity and causes them substantial injury, the court is not excused from making any finding on the subject by the fact that the evidence is indefinite as to the exact quantity taken, or the exact amount of the injury. The evidence was that there had been continuous pumping from this well of a stream of water varying from 16 to 26 miners' inches. The well penetrated, to the depth of 100 feet, into the strata of water-bearing sand and gravel of which the bed of the cañon is composed.

It was situated about 1,000 feet above the dam. That the strata of sand and gravel pierced by the well, and from which the water was pumped, extended from the well, down the cañon, to the dam, was fairly established, and there is nothing in contradiction. The evidence referred to, and stated in the discussion of the effect of the pumping of the Verdugo well upon the underground and surface flow, is equally applicable here. It was shown that all the underground water of the cañon, which did not rise to the surface, flowed slowly down the cañon underground, and had no outlet other than the narrow gorge across which the dam was constructed. The fact that there were fluctuations in the quantity flowing, before as well as after the pumping began, and the fact that dry seasons diminished the flow at the dam, do not disprove the fact that the taking out of water above also diminished it. From the evidence it is practically certain that the pumping of this well, as stated, would materially reduce the underflow at the dam. The court should have made a definite finding upon this issue.

6. Upon the subject of these estoppels, the findings as to Verdugo state that his well was sunk in 1897, less than five years before this action was begun, and from thence hitherto has been pumped during the irrigating seasons and the water used by Verdugo upon the cañon tract to the extent of 35 miners' inches, he claiming the right so to take and use the water; "that the said well was sunk, a pump constructed, and pipes and other conduits constructed for the use of the water therefrom" at the expense of "more than \$1,000, and that the same was done with the full knowledge and acquiescence of the plaintiffs; and that no objection was made thereto by any person until a short time prior to the commencement of this action, except the general claim that he was not entitled to any of the waters of the west side stream," and the claim that the pumping of the well affected the flow of the waters at the submerged dam, and also at the points of diversion of the west side stream, and the objection shown by the action of Glassell et al. v. Verdugo, the particulars of which appear only in the evidence. It is further found that the court was unable to discover that the flow was affected as claimed; that owing to light rainfall the flow of the stream had so diminished that it was "impossible to obtain sufficient of the waters of the east side stream, by diversions from the surface, for the irrigation of the said cañon tract," or of Verdugo's part thereof; and that on account of this diminution and lack of surface flow, and "in view of the fact that the said well was sunk, and the pumps and other appliances erected and constructed, for the purposes aforesaid, by the said Verdugo, at great expense, and with the knowledge of the plaintiffs in this action, and without objection, except as above found, the court finds that the said defendant Teodoro Verdugo is entitled to use the waters of

the said well in manner as aforesaid, and is entitled to continue the use of the said water of the said well, and to pump the same for said use upon his said premises." There is another finding in which the above facts, claimed to create an estoppel in favor of Verdugo, are in substance repeated, with the additional statement that "the amount of water taken by him by means of the said pump is no more than the amount to which he would have been entitled." This we must presume to mean that the amount was no more than he would have been entitled to take from the east side stream, as against the other persons to whom he had sold parts of the cañon tract; otherwise, upon the theory adopted by the court below that all the underflow had been partitioned, it would be inconsistent with the findings that the decree in partition had excluded him from a share of the west side stream, and the underflow thereof. The evidence shows that in April, 1893, in the action of *Glassell v. Verdugo*, the plaintiffs obtained judgment against Verdugo in the superior court enjoining him from diverting or using any of the waters rising within the "inclosed field" mentioned in the partition suit, or from maintaining any dam or other artificial obstruction to the free flow of the waters thereof in the natural channels, and declaring plaintiffs to be the owners of all said waters, under the former decree of partition. From this judgment he appealed to the Supreme Court, and the judgment was affirmed by the Supreme Court and became final on August 9, 1895. *Glassell v. Verdugo*, 108 Cal. 503, 41 Pac. 403. The findings in the case show that what is here known as the "west side stream" were the waters referred to, and that the suit was to enjoin him from diverting the same by means of ditches or cuts made in the soil or sand at the places where they rose to the surface.

The upper well of E. M. Ross was completed in March, 1899, and it has been pumped, during irrigating seasons, ever since May, 1899. This action was begun on February 20, 1902, less than three years thereafter. There is no finding that the plaintiffs acquiesced in the pumping of this well. It was put down and the pump erected therein by Judge Ross with full knowledge that the plaintiffs claimed three-fourths of all the underflow that might be intercepted by the submerged dam. Otherwise, the facts are substantially the same with respect to this well as in the case of the Verdugo well. So far as the finding of an estoppel in favor of Verdugo was based upon the fact that the supply of Verdugo from the surface flow of the east side stream had failed, if based upon that fact at all, it was, upon the theory which the court had adopted, that there were separate rights to the underground flow, clearly erroneous. One whose water supply has ceased is not, on that account, entitled to seize the supply of another person. The fact of such failure

has no bearing upon the question, further than to show that Verdugo was acting from dire necessity, and not from a wanton desire to appropriate to himself the property of others. The use of the defendants was not a public use, and therefore the rule established in *Fresno, etc., Co. v. S. P. Co.*, 135 Cal. 202, 67 Pac. 773, and *Southern C. R. Co. v. Slauson*, 138 Cal. 342, 71 Pac. 352, 94 Am. St. Rep. 58, limiting the owner's right, after the public use is begun, to an action for damages, has no application.

The facts stated are not sufficient to create estoppels against the plaintiffs. It does not appear that either Verdugo or Ross was induced to put down his well by any act, word, or tacit encouragement of the plaintiffs, or either of them, or relied upon their silence as evidence of his own right or of their consent. Nor does it appear that plaintiffs intended that either should act in reliance upon their silence, or expected that either would do so. It is not shown that plaintiffs were under any duty toward either to disclose any claim they might have to the water, nor that said defendants did not know, at least as well as the plaintiffs knew, that the pumping of the respective wells would decrease the west side stream and the underflow at the dam. The party estopped must always intend, or at least must be so situated that he should be held to have expected, that the other party shall act, and the other party must, by the words, conduct, or silence of the first party, be induced or led to do what he would not otherwise do. *Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695; *Swain v. Seamans*, 9 Wall. (U. S.) 274, 19 L. Ed. 554; *Dickerson v. Colegrove*, 100 U. S. 580, 25 L. Ed. 618. The mere fact that the defendants expended money in sinking the wells and putting in the pumps each upon his own land, with the knowledge of the plaintiffs and without objection by them, creates no estoppel. *Kelly v. Taylor*, 23 Cal. 15; *Maye v. Yappen*, 23 Cal. 308; *Stockman v. Riverside L. & I. Co.*, 64 Cal. 59, 28 Pac. 116; *Leonard v. Flynn*, 89 Cal. 542, 26 Pac. 1099. If the finding that the Verdugo well was sunk and the money expended with their "acquiescence" means more than a passive acquiescence or failure to object, it would be contrary to the evidence. A mere passive acquiescence where one is under no duty to speak does not raise an estoppel. *Lux v. Haggin*, 69 Cal. 270, 4 Pac. 919, 10 Pac. 674; *Rochdale Co. v. King*, 2 Sim. N. S. 89.

It is suggested that, although the facts found may come short of creating an estoppel, they are sufficient to show that the plaintiffs are barred by their laches. It is well-established doctrine that the defense of laches does not rest entirely upon lapse of time, nor require any specific period of delay, as does the statute of limitations. But, in order to constitute laches, there must be something more than mere delay by the plaintiff, accompanied by an expenditure of money or effort on the

part of the defendant. It must also appear that it will be inequitable to enforce the claim. "The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect." *Penn. M. L. I. Co. v. Austin*, 168 U. S. 698, 18 Sup. Ct. 228, 42 L. Ed. 626. It is said that the cases on the subject "proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in conditions during this period of delay, it would be an injustice to the latter to permit the" claimant now to assert his rights. *Gallher v. Cadwell*, 145 U. S. 372, 12 Sup. Ct. 874, 36 L. Ed. 738. "The acquiescence which will bar a complainant from the exercise in his favor of the discretionary jurisdiction by injunction must be such as proves his assent to the acts of the defendant, and to the injuries to himself which have flowed, or can reasonably be anticipated to flow, from those acts." *Lux v. Haggin*, 69 Cal. 271, 4 Pac. 919, 10 Pac. 674. The same case quotes approvingly this passage from *Rochdale, etc., Co. v. King*, 2 Simon (N. S.) 89: "Where one invades the right of another, that other does not in general deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the statute of limitations." The evidence shows that the acquiescence of the plaintiffs in the sinking of these wells and the pumping thereof was nothing more than a mere failure to actively interfere. The consent of plaintiffs was not asked; nor were they informed by either defendant of the intention to sink the wells, expend the money, or pump the water. There was nothing in the circumstances to put upon the plaintiffs any duty or obligation to inform either defendant that the pumping of the water would be, or was, a violation of plaintiffs' rights. Verdugo well knew, from the former action against him, that plaintiffs did object to any diminution of, or interference with, the west side stream. The court finds that the plaintiffs, during the time the Verdugo well was being pumped, claimed that it was depleting their own supply; but it does not find that they for a moment assented to the injury thus caused. The evidence shows that there was no such assent. While these defendants were sinking the wells, erecting the pumps, and laying the pipes, the plaintiffs had no information from them, or, so far as appears, from any other source, as to the amount of water they proposed to pump. During that period they were certainly not required, by any rule of law or equity, to inform him that he incur-

red the expense at his peril if the subsequent pumping should invade their rights. Each defendant was conducting his operations upon his own land. The expense was complete when the pump was erected and the pipes laid. That expense was not incurred in reliance upon any word or act, nor upon the silence, delay, or tacit encouragement, of plaintiffs. Up to the point of the completion of the works there could be no laches. After that completion there was no change of conditions, or at all events none that would make it unjust for plaintiffs to assert their rights. The subsequent events consisted wholly of the continuous pumping of the wells, to the depletion of plaintiffs' source of supply, and to the profit and advantage of the defendants, respectively. They were not induced to pump the water by the delay of plaintiffs to prevent them, nor was either of them thereby induced to believe that plaintiffs had no right in the water he was pumping, or that, if they had such right, they had abandoned it. As presented by the evidence, the case is simply this: That each of said defendants was urged solely by his own extreme necessity, not relying on the act, omission, or word of any one, and that, while he doubtless hoped that plaintiffs would not interfere, he proposed to continue, regardless of the effect upon their supply, until they did prevent him. Each may have believed that plaintiffs had no such right; but such belief sprang from no act, word, silence, or delay on their part. The necessary elements are wholly wanting, and therefore the defense of laches is not established.

7. It is claimed on behalf of the defendant E. M. Ross that the pumping of his upper well takes water only from the underflow of the east side stream, and does not affect the water of the west side stream, nor the underflow thereof, and hence that it is within his legal rights. Under the partition decree he is entitled to the use of the east side stream upon his land in the cañon tract; but as to the underflow thereof his right under that decree, as we have heretofore stated, does not extend to its use, but only to have it remain to preserve the surface flow. As to the use of the unpartitioned surplus underflow for irrigation he is entitled only to his proportionate share with the other parties, including the plaintiffs. It is declared by the judgment in the case at bar that the plaintiffs and the defendants C. E. Thom and E. M. Ross are entitled, as tenants in common, in the proportions heretofore stated, to all the waters of the west side stream and all the waters intercepted by the submerged dam, which, of course, includes, in part at least, the underflow of both the east side and west side streams. Nevertheless E. M. Ross is given the right to pump his upper well and to thereby decrease the underflow from the east side stream at the dam. It is contended by the plaintiffs that he is estopped and cannot be allowed to pump water to the extent that

it will affect such underflow, even if he uses no more than his reasonable share. This estoppel, it is claimed, arises out of certain transactions between him and the plaintiffs, which it becomes necessary to state.

About the year 1893, when the water began to run short, the plaintiffs and the defendants Thom and Ross, being jointly interested in the west side stream, began to look about for means by which the common supply could be increased. Up to about May, 1894, the talk had been confined to proposals to make a more perfect dam to catch the surface stream. It was believed by all of them that there was a considerable amount of water flowing underground down the cañon through the narrow gorge, below the places where the surface streams were then diverted, and that by constructing a dam across this gorge to the solid ground on each side, and extending it below the surface to bed rock, all of this underflow could be intercepted and added to their common supply for their lands below. On May 14, 1894, which was about the time of the first mention of the project to construct a submerged dam, E. M. Ross wrote to the secretary of the plaintiff company, referring to the previous suggestions of a dam for surface water, and saying: "I was told yesterday and the day before that your company is now talking of putting down a submerged dam somewhere in the cañon. That, of course, is an altogether different thing, and involves the development of water not rising in the old field of the partition decree, and not of the surplus of the Teodoro Verdugo water. If it is desired to develop water on my land, perhaps terms may be agreed upon; but otherwise not." The water of the "old field" means the west side stream, and the "surplus of the Teodoro Verdugo water" the surplus of the east side stream. On May 25, 1894, the plaintiffs wrote a letter to E. M. Ross, saying that it was their desire "to obtain the co-operation of yourself and Capt. Thom in the construction of such works as are deemed advisable on the land owned in common by the owners of the waters flowing from Verdugo Cañon, for collecting all such waters, flowing below as well as on the surface, and conducting the same to our common use." This evidently referred to lands to be thereafter purchased in common, for at that time there was no land "owned in common." It is clear, from this and other evidence, that the plan in contemplation during the subsequent negotiations was the plan above stated, or some similar plan to accomplish a similar result. Soon after this negotiations began with Teodoro Verdugo, the owner of the land considered best for a site for the proposed dam, looking to the purchase of a tract of 9.39 acres, for \$4,000; but the price proved to be too high for the means of the company, and that purchase was abandoned. In all the negotiations and transactions concerning this submerged dam, it was understood that it was to be a common enter-

prise; that the property necessary therefor should be held, the expense thereof contributed, and the benefits thereof shared in the same proportions—that is, in the proportion of three-fourths to the plaintiffs and one-eighth each to Thom and Ross. Shortly after the 9.39-acre purchase was dropped, E. M. Ross obtained a contract from Verdugo to buy on his own account a tract of 58.87 acres, including part of the 9.39 acres, and, in connection therewith, an option from Verdugo for the purchase of a tract of 7.81 acres, being the westerly and remaining part of the 9.39 acres, at the price of \$2,500. He asked the plaintiffs and Thom to join with him in buying this 7.81 acres at that price as a site for the dam previously proposed. This tract did not extend entirely across the cañon to the east side, or to solid ground, but only to the easterly bank of the wash. The plaintiffs objected on this account, and wanted to have the tract extended easterly to the railroad track, to which the defendant refused to accede. Thereupon a meeting was arranged at which all the interested parties were present or represented. At this meeting it was agreed that the 7.81-acre tract should be purchased, and that E. M. Ross should give a right of way from the easterly line of the tract through his 58.87-acre tract to solid ground on the east side of the cañon, as a part of the site for the dam. Opposite the lower part of the 7.81-acre tract a small side cañon from the east joined the main cañon, and at the junction there were evidences of water. This the defendant Ross wanted to hold for his own use, and for that reason he stipulated that the dam should be placed not more than 100 feet south of the north line of the 58.87-acre tract. The agreement was carried out, and the grant of the right of way executed on September 5, 1894.

The court finds that at this meeting "it was feared that there might be some difficulty in the development of water on this 7.81-acre tract alone, by reason of the fact that the construction of a dam, submerged, might have the effect of turning the waters around the east side of the dam, and thereby escape without being brought to the surface." The dam was a considerable distance below the junction of all the surface streams, and no separation of the underflow into parts corresponding to the respective surface streams was then suggested. All present must have understood that a dam across the cañon to solid ground on each side would bring to the surface all the underflow in both tracts of land—that through which the right of way extended, as well as the 7.81 acres. Nothing was said about any division of these waters, so as to give to the common owners the water from their tract and to E. M. Ross that from the right of way. He did not at that time, nor until long after, say or suggest that, when the dam was extended upon the right of way, he would own, or would claim, the water coming directly from the right of way

for his exclusive use. It was not suggested by any one that any part of the water to be obtained by the common works, when completed, should be devoted to any other than common use, or be other than common property. It is quite clear, however, from all the evidence, that the plaintiffs understood that all the water obtained was to be owned and used in common, and that Judge Ross, on the other hand, understood or believed that the water coming to the dam through his 58.87-acre tract would belong exclusively to him, and that all other water obtained would be common water. It is also manifest that none of the parties was aware of the understanding of the other on this point, that each supposed that all understood it as he understood it, and that each was acting in perfect good faith, without intent to deceive, defraud, or mislead the other party to the arrangement.

The work on the dam was begun in 1895 and was vigorously prosecuted during that season. On September 30, 1895, the excavation had reached the land of Ross, and had disclosed considerable underflow coming from his land. He then stated to the plaintiffs that it would be necessary to "guard against taking any water that might be developed" on his land. Several thousand dollars had then been expended in the work. About the 1st of August, 1896, he made a definite claim that the water "developed on his land," as he expressed it, belonged to him exclusively, and not to the common owners, regardless of its amount. The plaintiff company, according to the arrangement between the parties, was in charge of the work. Immediately upon this claim being made, the work was stopped in order to come to a settlement of the matter. At that time the dam was completed for a distance of 210 feet at the west end, and the excavation had been made from the east end of the completed part, easterly across the 7.81-acre tract, and some 60 feet into the land of E. M. Ross, and of a depth varying from 30 to 45 feet. After considerable negotiation, on August 3, 1896, he made a written waiver of any claim he might lawfully have to the exclusive use of this water, and agreed to claim only a one-eighth of the whole thereof, in common with the others. The work was then resumed, and a substantial amount of expenditure was made upon it after this waiver. It was never completed, but it has the effect of intercepting from 30 to 40 miners' inches of water in addition to the surface flow. From the inception of the work upon it until the beginning of this action the defendant Ross has regularly received one-eighth of the water obtained thereby and has paid one-eighth of the expense of maintaining the dam and operating the common works.

Shortly before the trial of the case in the court below, in December, 1903, he discovered that, at the time he made the written waiver of August 3, 1896, giving up any right he might have to the exclusive use of the water,

he had forgotten the fact that on August 14, 1894, a day or two before he began to negotiate with Verdugo for the purchase of the 7.81-acre tract for common use, the plaintiffs had written to him a letter stating that they could not raise the money to pay their share of the price of the 9.39-acre tract previously proposed, the negotiations for which had been left in his hands, and that they had abandoned the intention of joining in the purchase. The waiver was made upon the receipt of a written statement of the plaintiffs, purporting to be a history of the negotiations from May, 1894, up to the execution of the right of way, in September; but this letter was omitted, and, although it had been all the time in his own possession, he had completely forgotten it, until, in looking over his correspondence preparatory to the trial, he found it. His testimony was that, having forgotten that the plaintiffs had abandoned the proposed joint acquisition of a dam site, the history made it to appear to him that, while he was intrusted with the negotiations for the 9.39-acre tract, he had taken a smaller tract instead, and thereby obtained an advantage for himself, and that, not wishing to appear to occupy such a position, he waived his rights, but that if he had then remembered the letter of the plaintiffs abandoning the enterprise, or the fact that they had abandoned it before he took up the negotiation on his own account, he would not have made the waiver. The court found that he was not estopped by the giving of the right of way in 1894, nor by the waiver of 1896, from pumping water from his upper well and thereby depleting the supply at the dam. The conclusion that he was not estopped by the waiver of August 3, 1896, alone, was clearly correct. It had been given under a mistake of fact, and but for that mistake it would have been withheld. His failure to recall the fact of plaintiffs' withdrawal from the scheme was not that degree of neglect that would blind him to stand by the waiver, notwithstanding the mistake by which it was induced.

The question whether or not he is estopped by the execution of the right of way, the circumstances upon which it was given, and the subsequent action of the plaintiffs on the faith of it, presents greater difficulty. He had the right to take out water by wells or otherwise of the surplus underflow of the cañon, to the extent of his reasonable proportion thereof, for use upon his lands in the cañon tract, provided he did not thereby injuriously affect the surface flow of the west side stream. The plaintiffs were fully aware of this right. His offer of an interest in the 7.81 acres with the right of way was practically an offer from him to them. It was substantially an opportunity to carry out the original plan at less cost, and it was so understood. The plaintiffs were thereby induced to accept and pay for a three-fourths interest in the site and to pay three-fourths of

the cost of the works constructed thereon. The whole object, so far as the plaintiffs knew, and he stated nothing to the contrary, was to add the water of the underflow to be collected by the dam, including the underflow of the east side stream, to the waters of the west side stream set apart for use on the lands below. He was a tenant in common with them in the west side stream. If, under all these circumstances, it was a part of his design to induce them to aid, to the extent of three-fourths of the cost, in the erection of a dam to intercept all the underflow, in which, as it was then flowing at that place, all were entitled to share, in order that, by means of that dam, he could obtain for his own exclusive use all that part of the water that might flow out of the land through which he was to grant the right of way; if he proposed to secure this advantage from their efforts and expenditure in the common work—the principles of equity and justice, and the relations existing between them, demanded of him a full and frank disclosure of his purposes and claims. He had no right to remain silent in the belief that they understood the matter as he did. One who is embarking with others in a common enterprise, to use common property for the common benefit at common expense, owes to the others the duty, if he proposes or intends to reserve a part of the benefit to himself exclusively, to inform the others fully in regard to it. If he does not, he will be estopped to assert his claim after the others have incurred the expense. This seems to have been the view of the court below with regard to all the underflow that actually reached the dam; for it declared all those waters to be subject to the common ownership, in the proportions stated, for use on the lands below. We are of the opinion that the estoppel does not apply to the claim that he has the right to take, by means of pumps in the cañon above, his reasonable share of the underflow, for use on his lands in the cañon tract.

In *Boggs v. Merced M. Co.*, 14 Cal. 279, 308, the essentials of an estoppel were said to be these: The party estopped must have known the true state of his own title; he must have intended to deceive, or have acted with such culpable negligence as to amount to constructive fraud; the other party must have been without knowledge, or the means of acquiring knowledge, of the true state of the title; he must have relied directly upon the conduct upon which the estoppel rests; and it must appear that he will be injured if the estoppel is not enforced. Other authorities, more favorable to plaintiffs' contention, hold that all these elements, and especially that of deceit or fraud, are not always necessary. In 2 *Pomeroy's Equity Jurisprudence*, § 818, other well-established instances of estoppel are thus described: "Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from

asserting legal title and rights of property, real or personal, or rights of contract. A fraudulent intention to deceive or mislead is not essential. All instances of this class in equity rest upon the principle: If one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent. *Mich., etc., Co. v. Parcell*, 38 Mich. 480, per Cooley, J. A most important application includes all cases where an owner of property, A., stands by and permits another person, B., to deal with the property as though it were his, or as though he were rightfully dealing with it, without interposing any objections, as by expending money upon it, making improvements, erecting buildings, and the like. Of course, it is essential that B. should be acting in ignorance of the real condition of the title, and in the supposition that he was rightful in his own dealing." In *Thompson v. Simpson*, 128 N. Y. 289, 28 N. E. 632, the court says: "An estoppel may arise, although there was no designed fraud on the part of the person sought to be estopped. The cases of *Storrs v. Barker*, 6 Johns. Ch. (N. Y.) 166, 10 Am. Dec. 316, and *Continental Bk. v. Nat. Bk. of Com.*, 50 N. Y. 576, were cases where there was no intent to mislead, but where what was said was intended to influence the action of the other party, and did influence it, and a duty rested upon the party giving the information, or making the statement, if he spoke at all, to have ascertained the actual facts, so as not to have misled the other party to his prejudice. An estoppel may arise also from silence as well as words. But this is only where there is a duty to speak, and the party upon whom the duty rests has an opportunity to speak, and, knowing the circumstances require him to speak, keeps silent." And upon the subject of duty it is further said: "It is not necessary that the duty to speak should arise out of any agreement, or rest upon any legal obligation in the ordinary sense. Courts of equity apply to the case the principles of natural justice, and whenever these require disclosure they raise the duty and bind the conscience, and base upon the omission an equitable forfeiture to the extent necessary to the protection of the innocent party." 128 N. Y. 291, 28 N. E. 633.

All these authorities agree that no estoppel can exist unless the party invoking it was led to place himself in the prejudicial position, in part, at least, by his own ignorance of the rights of the other party or his own lack of knowledge of the true state of the title. This element is entirely wanting in the present instance. The plaintiffs knew that E. M. Ross owned land in the cañon tract, that he had a large orchard thereon above the proposed dam which required water, and that he had the right to use thereon a due proportion of the underflow of the cañon. They may

have supposed and believed that he did not intend to exercise that right, but they were not led to that belief by any act or word of his. His conduct in entering into the work with them to obtain the underflow at the dam for use on his lower lands, which were entitled to a share thereof, was not inconsistent with his right to take, from the same flow above, the share of the water to which his upper land was reasonably entitled. He could not obtain the water from the dam for use on the upper land, and he said nothing to indicate that he would not obtain it by other means, if the upper land required it in the future. As the plaintiffs acted with full knowledge of his right and without any promise or representation by him that he would not exercise it if occasion arose, he is not estopped to pump water from his upper well, for use on his part of the cañon tract, to the full extent of the share due to that land.

8. The appeal of the defendant E. M. Ross is from that part of the judgment fixing his right to pump water from his "upper well" which limits the amount he can pump to 22¼ miners' inches and forbids him from using it elsewhere than on the cañon tract. What has been said sufficiently disposes of the questions presented by this appeal. Under the partition he is given only the right to the surface flow of the east side stream. With regard to the available unpartitioned underflow, he is entitled, as a riparian owner, to his reasonable share thereof, and may use it upon any of his riparian land in the cañon tract. In regard to his right to take the underflow, by means of a pump, from his land above the dam, for use upon his lands below, his riparian rights are modified by the estoppel existing against him by reason of the facts referred to in the preceding subdivision of this opinion. As we have said, the dam was built to intercept all this underflow and devote it to use on the lower lands; and he, no more than the other parties interested, should be permitted to take out water from the underflow above the dam for use on the lower lands to a sufficient extent to decrease the amount thereof that will flow to and be intercepted by the dam. If any can be taken out without producing that effect, he and the other owners of riparian lands below are each entitled to a reasonable share thereof.

9. In conclusion, it is necessary to give some directions relating to a new trial. If pumping is allowed without check above the points of diversion of the surface streams, it is practically certain that those streams will cease to flow. It is by no means certain that the pumping now going on below those points does not exceed the average normal flow of the underground stream; that it is not in fact a process of exhaustion, so that in a few years of use at the same rate, even that supply will fail. No party above or below the dam should be allowed to take by

such process more than his reasonable part of the available surplus, if such taking affects the surface streams, or prevents another party from obtaining his reasonable share; and no party, of those entitled to use the water collected by the submerged dam, has the right to pump water above the dam for use on his lands below, if such pumping decreases the flow at the dam. The only just method of adjusting the rights in this surplus of the underflow is to ascertain, as near as may be, the total average amount thereof available for this use, and the amount required by each party when used as economically and sparingly as may be reasonably possible, and upon this basis apportion to each his due share. In this calculation the amount of underflow collected by the dam should be included as a part of the whole available surplus underflow, and the portions of that water delivered to those interested in the dam, not including the surface flow there distributed, are to be charged to said parties, respectively, against their share of such underflow; also, those who are now pumping water of the underground stream above or below the dam must be charged therewith as part of their shares and the amount pumped computed as part of the whole supply to be apportioned. It is certain that there will be no surplus, and it may turn out that some are pumping or receiving more than their share. It appears that in some instances several persons use a common pump. There can be no objection to this, if all of them are entitled to receive some amount and reserve only their due. In the case of the division of a surface stream, the portions allotted to the respective parties and the whole flow of the stream can be readily measured, and a fair division of such waters may easily be made self-executing by the mere device of giving to each a fixed proportion of the whole, instead of a certain quantity of water, so that, although the total quantity in the stream may vary, the rule of division will remain constant. But this cannot well be done where different persons, each upon his own land and by means of his own pump, is taking a proportion of an underground stream. In such a case the parties would not be able to agree upon the total amount available of the underground supply, and there would be no means of accurate measurement to settle their differences, as in the case of common shares of a surface stream. A decree merely fixing the proportion of the underground supply to which each was entitled would be of no benefit, for it would not enable either party to know the amount which he could pump. The total supply can only be determined by the court after a consideration of such evidence as it can obtain on the question. It will be necessary for the court to determine from the evidence the total amount of the underflow available for a division and to determine the share of

each, by fixing a positive quantity which each may take as his proper proportion of the whole.

The judgment and order are reversed, with costs of appeal in favor of plaintiffs.

We concur: LORIGAN, J.; ANGELLOTTI, J.; McFARLAND, J.; SLOSS, J.

BEATTY, C. J. I concur in the judgment and generally in the opinion of Justice SHAW. I share his conviction that there is but one subsurface stream within the cañon, but in my opinion it is not very material whether there is one or two. In either case I think that all the owners of the cañon tract and of the lower tract have a right in common to pump from the subsurface stream each his just proportion of the subsurface flow, irrespective of its effect upon the surface flow. That just proportion was originally equivalent to the proportion of the irrigable area of each subdivision to the irrigable area of the whole—modified, perhaps, by the greater or less need of particular tracts in respect to artificial irrigation. By convention, by prescription, and possibly by other means, the rights of particular subdivisions may of course have been enlarged or diminished. There is nothing in any of our previous decisions which conflicts with the right of the owner of land overlying an underground stream to pump a reasonable share of the underground flow to the surface and apply it to the surface for irrigation, even though it may diminish the surface flow of a stream breaking out below. In doing so he is merely exercising his riparian right in the matter of irrigation. In this view Verdugo, Ross, and Thom have a right to pump above the submerged dam each his reasonable share of the subsurface flow for the irrigation of so much of his cultivated land as lies within the cañon tract. If upon fuller and more specific findings as to the total subsurface flow and the area of the particular tracts it shall be found that either is pumping or threatening to pump more than his share, he should be enjoined as to the excess; otherwise, not.

On the questions of estoppel I concur in the main opinion.

7 Cal. App. 150

SNIPSIC CO. v. SMITH. (Civ. 285.)

(Court of Appeal, First District, California.
Dec. 19, 1907.)

PLEADING — SEPARATE DEFENSES — GENERAL DEMURRER.

Since, under Code Civ. Proc. § 441, providing that defendant may set forth by answer as many defenses as he has, a defendant may plead as many defenses as he has, though they are inconsistent with each other, an answer

pleading separately two defenses, one specifically denying every allegation of the complaint, and one setting up affirmative matter, is not subject to a general demurrer; the denials of the first defense presenting a perfect answer to the cause of action, not destroyed by admissions in the second defense.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Snipsic Company against Joseph Smith. From a judgment against defendant for failure to further plead after sustaining a demurrer to his answer, he appeals. Reversed.

J. E. McElroy and James G. Quinn, for appellant. Howard K. James, for respondent.

HALL, J. This is an appeal from judgment rendered against defendant for failure to further plead after demurrer sustained to his answer.

The complaint states a cause of action for goods sold and delivered by plaintiff's assignor to defendant, and is unverified. The answer set up two defenses. The first specifically denies every allegation of the complaint, including the allegation of nonpayment and of the assignment to plaintiff. As a separate defense defendant set up as affirmative matter that he was fraudulently induced to sign the writing referred to in the complaint. The demurrer to the answer was a general demurrer to the entire answer, and not a demurrer to each separate defense.

As the first defense was separately pleaded, ending with a demand for judgment, it is difficult to see upon what theory the demurrer was sustained. The denials of the first defense present a perfect answer to the cause of action, and any admissions, if we assume that there are any, in the second and separate defense, cannot be regarded as destroying the effect of such denials. *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935; *Nudd & Lord v. Thompson et al.*, 34 Cal. 39; *Amador County v. Butterfield*, 51 Cal. 526; *Botto v. Vandament*, 67 Cal. 332, 7 Pac. 753; *McDonald v. Southern Ry. Co.*, 101 Cal. 206, 35 Pac. 643, 646. In several of the above-cited cases the question arose upon a motion by plaintiff for judgment upon the pleadings; but such a motion presents for determination the same questions of law as are presented by a general demurrer to the answer. The defendant had the right to plead as many defenses as he had (Code Civ. Proc. § 441), even though they were inconsistent with each other. *Banta v. Siller*, supra.

The court erred in sustaining plaintiff's demurrer to defendant's answer, and the judgment is therefore reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 136

Ex parte VON VETSER. (Cr. 117.)

(Court of Appeal, First District, California.
Dec. 19, 1907.)

1. HABEAS CORPUS—JUDGMENT—FORM—SUFFICIENCY.

A judgment sentencing one to imprisonment, and reciting that accused had been convicted of a felony, without designating the offense, is sufficient in form to withstand an attack on habeas corpus for the discharge of accused.

2. CRIMINAL LAW—EVIDENCE—BEST AND SECONDARY EVIDENCE—JUDGMENT.

A judgment must be reduced to writing, and can only be proved by the record of its entry or by parol after proof of the destruction or loss of the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 879, 882.]

3. SAME—MODIFYING JUDGMENT—AUTHORITY OF COURT.

A judgment in no way reduced to writing or entered in the minutes of the clerk may be revised by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2531.]

4. HABEAS CORPUS—JUDGMENT—DISCHARGING ONE CONFINED IN STATE'S PRISON—SUFFICIENCY.

The court on habeas corpus announced in open court that the petitioner was illegally imprisoned in the state's prison, and ordered his discharge. No written order for the discharge was made or signed by the judge, and no entry of the order was made in the minutes of the court, or in any manner, except that the clerk made a memorandum thereof in a book kept by him as a personal memorandum to aid his memory in subsequently making entries in the minutes of the court. Subsequently the court made and signed in open court a written order vacating and setting aside the previous order. *Held*, that the first order was not a final adjudication by the court that petitioner should be discharged; the order, not having been entered in the minutes of the court, being subject to be vacated by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 101.]

Petition on habeas corpus by Simon L. Monckros Von Vetsera for his discharge from imprisonment in the state's prison. Petitioner remanded.

Jas. W. Keys, for petitioner. Thos. B. Boyd, and Walter Burpee, for respondent.

HALL, J. Petitioner is in the custody of the warden of the state prison at San Quentin. From the return to the writ it appears that he was delivered into the custody of the warden of said state prison in execution of two judgments rendered by the superior court of the county of Alameda, May 31, 1900, the term of imprisonment prescribed in each judgment being 14 years, and the term in the second one to commence upon the expiration of the term of the first, it being recited that defendant had been convicted upon both charges before judgment was rendered upon either. The only possible criticism of the form of the judgments is that it is recited in each that defendant was convicted of a "felony," the particular felony not being designated. That this form of judgment is suffi-

cient to withstand an attack upon habeas corpus does not admit of discussion. Ex parte Gibson, 31 Cal. 620, 91 Am. Dec. 546; Ex parte Murray, 43 Cal. 455; People v. Kelly, 120 Cal. 271, 52 Pac. 587. It results that the prisoner must be remanded, unless he is now entitled to be discharged by virtue of certain proceedings had in and before the superior court of Marin county.

It appears that the petitioner made application, by petition addressed to and filed in said superior court, for a writ of habeas corpus. The court ordered the writ to issue, and in obedience to such writ the warden produced the prisoner before the court on the 4th day of October, 1907, with his return to the writ, setting up that he held him by virtue of the two judgments hereinbefore referred to. The hearing was continued by said court to October 15, 1907, and the presence of the prisoner waived. On the 15th day of October, 1907, the court heard the matter, and the judge of the court, in open court, announced that the petitioner was illegally detained by said warden, and ordered that he be discharged from the custody of said warden. No written order for his discharge was made or signed by the judge, and no entry of such order was made in the minutes of the court, or in any manner, save that the clerk made a memorandum thereof in pencil in a book, manifestly kept by him as a personal memorandum book in aid of his memory in subsequently making entries in the minutes of the court. The book bore no title, label, or other indicia of official character. The entry concerning the order announced by the judge of the court is in pencil, several words are represented by abbreviations, and the whole is manifestly a personal memorandum of the clerk to be used to aid his memory when he should enter the order in the minutes of the court. Subsequently, on October 17, 1907, the court, in the absence of the prisoner, made and signed in open court a written order, reciting that the previous order had never been entered in the minutes of the court, and vacating and setting aside the same, and, in effect, reserving the matter of the prisoner's application for further action.

Petitioner now insists that the order made on October 15th was a final adjudication by a court of competent jurisdiction that petitioner should be discharged, and that said court thereby lost jurisdiction to subsequently enter any different order. We cannot agree with this contention. Until the judgment had been entered in the minutes of the court, or had been in some authentic manner reduced to writing, as by the judge signing a written order, it must be held that the judgment lay in the breast of the judge, and that the court had plenary power thereover. We have been cited to no case precisely in point, but in jurisdictions where terms of court exist it has always been held that the court had such

power during the term. "A court has plenary control of its judgments, orders, and decrees during the term at which they are rendered, and may amend, correct, modify, or supplement them for cause shown, or may, to promote justice, revise, supersede, revoke, or vacate them as may in its discretion seem necessary." 23 Cyc. 860. See, also, *De Castro v. Richardson*, 25 Cal. 49. "This power is inherent in all courts of general jurisdiction, and is not dependent upon, nor derived from, the statute." 23 Cyc. 902; 1 Black on Judgments, § 305. The right to revise the judgment during the term is based upon the fiction that the judgment was not entered or the roll made up until the close of the term. The actual want of the entry of the judgment, surely, is a stronger basis for the existence of the right to change the judgment than the fiction that it has not been entered or the roll made up. "A judgment must be reduced to writing, and cannot exist in the memory of the officers of the court." 11 Ency. of Pl. & Prac. 925; *Davidson v. Murphy*, 13 Conn. 213; *Jones v. Walker*, 5 Yerg. (Tenn.) 427; *Balm v. Nunn*, 63 Iowa, 641, 19 N. W. 810; *Young v. People*, 171 Ill. 299, 49 N. E. 503. A judgment can only be proved by the record of its entry, or by parol after proof of the destruction or loss of the record. *Young v. People*, supra; *Case v. Plato*, 54 Iowa, 64, 6 N. W. 128. It has been held that the oral announcement of the court's decision is not sufficient basis for the entry of a judgment nunc pro tunc. *Boyd v. Schott*, 152 Ind. 161, 52 N. E. 752; *Young v. Young*, 165 Mo. 624, 65 S. W. 1016, 88 Am. St. Rep. 440.

We have been cited to no case that holds that an order or judgment in no way reduced to writing, or entered in the minutes of the clerk, may not be revised by the court making the order or judgment. On the contrary, it has been held that at any time before "final judgment signed" it was proper for the court to amend its judgment. *People v. Thompson*, 4 Cal. 239. So, too, the court may change its conclusions of law at any time before judgment is entered. *Condee v. Barton*, 62 Cal. 1; *Crim v. Kessing*, 89 Cal. 478, 28 Pac. 1074, 23 Am. St. Rep. 491; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52. In *Niles v. Edwards*, 95 Cal. 47, relied on by petitioner to support the proposition that an order or judgment, to be effectual, need not be entered in the minutes, the court had under consideration an order modifying a department judgment of the Supreme Court that was not entered by the clerk in the minutes of the court until after the expiration of the time for granting a rehearing, but the order had been reduced to writing and signed by four justices. So, too, *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109, cited by petitioner, is really authority against him. It is there said: "It is essential, however, that the action of the court be made a matter of record in order that there may be no uncertain-

ty as to what its action had been, and for this purpose it is customary, as well as expedient, to have its acts entered in the minutes kept by the clerk; but if the order is formally prepared and signed by the judge, and made a matter of record by filing with the clerk, the same end is attained as if it were spread at length upon the minutes of its daily transactions."

In the case at bar the order relied on by petitioner for his discharge, never having been entered in the minutes of the court, was subject to be vacated and revised by the court, and, having been thus vacated, affords no warrant for his release from the imprisonment under which he is held by virtue of the judgments of the superior court of Alameda county.

Petitioner is therefore remanded.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 163

PEOPLE v. CAIN. (Or. 68.)

(Court of Appeal, Second District, California.
Dec. 20, 1907. Rehearing Denied by Supreme Court Feb. 17, 1908.)

1. LARCENY—OWNERSHIP OF PROPERTY—LARCENY BY GENERAL OWNER—"PERSONAL PROPERTY OF ANOTHER."

Pen. Code, § 484, defines larceny as the felonious stealing, etc., of personal property of another. Held, that the phrase "personal property of another," as so used, means property in the possession of another who is entitled, as bailee or otherwise to retain possession for some benefit or profit to himself to the exclusion of all others, and not absolute ownership as defined by Civ. Code, § 679, so that a taking of a heifer by the general owner thereof from the possession of an agister entitled to hold the same under a lien for pasturage, with the intent to deprive the latter thereof, constituted larceny.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 11-21.

For other definitions, see Words and Phrases, vol. 5, pp. 3991-4003; vol. 8, p. 7701.]

2. CRIMINAL LAW—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

An instruction in a criminal case must be read in connection with other portions of the charge; it being unnecessary in dealing with each particular phase of the case for the court to repeat all the conditions and limitations which are to be gathered from the entire charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1990-1995.]

3. SAME—CIRCUMSTANTIAL EVIDENCE.

Where the court charged that the law presumes every man innocent until his guilt is established to a moral certainty, and beyond all reasonable doubt, and that such presumption attaches to every fact essential to a conviction, an instruction that, while every fact essential to prove defendant's guilt to a moral certainty must be fully proven, the law permits this to be done by circumstantial evidence, and where the evidence is circumstantial, but proves every fact essential, to sustain the hypothesis of guilt, and to exclude the hypothesis of innocence, and is inconsistent with any other rational conclusion than that of guilt, it is the jury's duty to convict, was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1990-1995.]

4. SAME—APPEAL—PREJUDICE.

On appeal from a conviction, the burden is on accused not only to disclose wherein an instruction objected to constituted error, but also to affirmatively show that it tended to mislead the jury to the possible prejudice of his rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3090-3099.]

5. LARCENY—INSTRUCTIONS.

B. agreed to pasture a heifer for defendant at a certain price per month, and during the season sold possession of the pasture to C., who continued the pasturage until the animal became lost, and, being later discovered in a pasture where it was claimed defendant had placed her, he was charged with stealing her from C. *Held*, that an instruction that a person who takes in cattle to pasture for compensation, and who has the possession thereof, has a lien for pasturing them, and may be deemed the owner thereof within the law of larceny, was not objectionable as justifying a construction that, if defendant took the animal, he was guilty of stealing her as against B.

6. CRIMINAL LAW — APPEAL — CONVICTION — CONFLICTING EVIDENCE.

Where the evidence is conflicting, the conviction will not be set aside on appeal as contrary to the evidence, the credibility of the witnesses and the weight of their testimony in the first instance being for the jury, and then for the trial judge on a motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

7. LARCENY—EVIDENCE—INTENT.

B., having taken defendant's heifer to pasture, sold the possession of the pasture to C., who continued the pasturage until the heifer was lost, whereupon defendant stated that he would hold both B. and C. responsible. The heifer having been subsequently found in an adjoining pasture, where it was claimed she was taken by defendant, B. and C. returned her to the latter's pasture, whereupon they were arrested for stealing her, and, after this prosecution was dismissed, defendant was arrested for stealing her from C. *Held*, that evidence that B. and C. were arrested for stealing the heifer and the proceedings in such prosecution were admissible as bearing on defendant's intent in taking the heifer from C.'s pasture.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Samuel Cain was convicted of grand larceny, and he appeals. Affirmed.

Alfred Daggett, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Dep. Atty. Gen., for the People.

SHAW, J. The defendant was convicted of the crime of grand larceny upon an information wherein it was charged that he did willfully, unlawfully, and feloniously take, steal, lead, and drive away a certain young cow, to wit, a heifer, then and there of the age of about 2½ years and then and there the personal property of one T. D. Cheney. Defendant appeals from the judgment and an order of the court denying his motion for a new trial, and in support thereof presents his bill of exceptions.

The subject of the larceny charged was a cow which belonged to defendant. When it was about one year old defendant placed it in a pasture owned by one Blades, agreeing to pay Blades a certain sum per month for its pasturage. A year later, April, 1906, Blades

sold and transferred possession of the pasture to T. D. Cheney, who, through Blades, informed defendant that, if the animal remained there, he (Cheney) would charge defendant \$1 per month for its pasturage. In September following the defendant called upon Cheney to pay the pasturage bill, and get the cow, but, owing to a dispute as to the amount due for pasturage and defendant's refusal to pay the sum claimed by Cheney as due himself and Blades, he did not get her. In November, 1906, the cow disappeared from the pasture, and, upon defendant being informed of her disappearance, he stated that he would hold Blades and Cheney responsible for her value. Several months later a cow claimed and shown by the prosecution to be the one in dispute was found in a neighboring pasture, where, it was charged, she had been placed by defendant, and from which she was taken by Blades and Cheney to the latter's pasture. Defendant caused the arrest of both Blades and Cheney for taking this cow, claiming that she was not the one in dispute, but another which defendant owned. The charge against Blades and Cheney was dismissed upon the hearing; whereupon defendant was charged with the larceny of the animal as above stated.

1. It is insisted that the court erred in instructing the jury, in substance, that the law recognized a general and special ownership in personal property, and that it might be stolen from one whose ownership was either general or special; that one who had actual possession of cattle received by him for pasture for compensation has a lien thereon for such compensation, and is a special owner thereof and may be deemed the owner thereof within the law of larceny, and an information may properly allege him to be the owner thereof; and, in connection therewith, giving the following instruction: "From these principles it follows that a person having the general ownership of personal property may be guilty of stealing his own property from another who has a special ownership therein; and, if a man willfully and feloniously takes his own personal property away from the possession of a special owner thereof, with intent to charge such special owner therewith when such special owner has the right as against him to retain it for some benefit to himself, he is guilty of larceny of such property." Section 484 of the Penal Code defines larceny as the felonious stealing, taking, carrying, leading, or driving away the personal property of another. It being admitted that the animal was the personal property of the defendant, appellant strenuously contends that one of the essential elements necessary to constitute the crime, namely, that the subject of the larceny shall be the "personal property of another," is lacking. This position is not tenable. The law is well settled that the taking of personal property by the general owner with felonious

intent from one in possession by virtue of some special right or interest therein constitutes larceny. "It is larceny to steal cattle from an agister who takes them from the owner to pasture, and the property may be alleged in the information to be the property of the agister." *People v. Buelna*, 81 Cal. 135, 22 Pac. 396; *People v. Thompson*, 34 Cal. 671; *People v. Long*, 50 Mich. 249, 15 N. W. 105; 12 Ency. of Plead. & Prac. p. 965; *Palmer v. People*, 10 Wend. (N. Y.) 166, 25 Am. Dec. 551; *State v. McCoy*, 89 N. C. 466; *State v. Stephens*, 32 Tex. 156. By virtue of the law (Civ. Code, § 3051) Cheney not only had an interest in the heifer to the extent of his lien thereon, but sustained to defendant as the general owner a relation which might render him legally chargeable for the value of the cow; and this lien, the enforcement of which depended upon possession, as well as the liability for her value, if imposed, constituted property in the animal which might be feloniously taken from him by the general owner. There is nothing in the Code provisions to which appellant directs attention contrary to the general rule. The phrase, "personal property of another," as used in section 484 of the Penal Code, correctly interpreted, means property in the possession of another who is entitled as bailee, or otherwise, to retain possession thereof for some benefit or profit to himself to the exclusion of all others, rather than the absolute ownership defined by section 679 of the Civil Code. Our conclusion is that the taking of property by the general owner thereof from the possession of one who rightfully holds it as bailee or otherwise for benefit to himself, with the intent to charge such bailee with the value thereof, or deprive him of such benefit, constitutes larceny.

2. There was no error in the instruction given to the jury in relation to the scope, effect, and consideration to be given to circumstantial evidence, as follows: "While every fact essential to prove the guilt of the defendant to a moral certainty must be fully proven, the law permits this to be done by circumstantial evidence, and where the evidence is circumstantial, but proves every fact essential to sustain the hypothesis of guilt, and to exclude the hypothesis of innocence, and is inconsistent with any other rational conclusion than that of the guilt of the defendant, the law makes it the duty of the jury to convict the defendant." The instruction upon this subject must be read in connection with other portions of the charge. (*People v. Flynn*, 73 Cal. 511, 15 Pac. 102; *People v. Neber*, 125 Cal. 560, 58 Pac. 133); and, when so read and considered, the instruction is substantially identical with that upon the same subject sanctioned in the case of *People v. Dick*, 32 Cal. 215, cited by appellant. The court had theretofore charged the jury that "the law presumes every man innocent until his guilt is established to a

moral certainty and beyond all reasonable doubt, and this presumption attaches * * * to every fact essential to a conviction." In charging the jury it is not necessary in dealing with each particular phase of the case to repeat all the conditions and limitations which are to be gathered from the entire text. *People v. Doyell*, 48 Cal. 85; *People v. Nelson*, 56 Cal. 77; *People v. Clark*, 84 Cal. 573, 24 Pac. 313.

3. The court at the request of the prosecution instructed the jury in the language of section 485 of the Penal Code relating to the finding of lost property. Appellant insists that the action of the court in giving this instruction was erroneous, for the reason that such instruction was not applicable to any theory in support of which evidence was offered. Conceding appellant's position to be correct, it does not follow that it constitutes reversible error. "The giving of an instruction not supported by the evidence is sufficient ground for reversal where it appears that such instruction misled, or might have misled, the jury to the prejudice of the party complaining." *Blashfield on Instructions to Juries*, § 91; *People v. Devine*, 95 Cal. 227, 30 Pac. 378; *People v. Roberts*, 1 Cal. App. 447, 82 Pac. 624. In the case last cited the court says: "While we recognize that it is not every case of giving an instruction not pertinent to the evidence that will result in the reversal of a judgment, we are of the opinion that the giving of the instruction under discussion, under the circumstances of this case, was prejudicial." A careful examination of the record fails to disclose any manner in which the alleged error could have prejudiced the substantial rights of the defendant (Pen. Code, § 1404), and counsel does not attempt to point out wherein such rights might have been affected. At the hearing on an appeal prosecuted by one convicted of a crime, the burden rests upon him, not only to disclose wherein the giving of an instruction constituted error, but also to show affirmatively that it tends in some degree to mislead or confuse the minds of the jury to the possible prejudice of his rights; and, unless this is made to appear, the alleged error must be regarded as harmless.

4. The court instructed the jury as follows: "A person who takes in cattle to pasture for compensation, and who has the care and possession of such cattle, has a lien thereon for his compensation for pasturing the same, and is a special owner thereof, and may be deemed to be the owner thereof within the law of larceny, and an information charging the larceny of such cattle may properly allege that he is the owner thereof." Appellant contends that the giving of this instruction constituted error, for the reason that it conveyed to the jury the idea that if defendant took the animal away he was guilty of stealing her as against Blades. The defendant was not charged with stealing the property of

Blades, but was charged with stealing the personal property of one T. D. Cheney. The instruction clearly shows that, in order to justify a verdict of guilty, the jury must be satisfied that the helper was at the time of the taking in the possession of Cheney.

5. It is next contended that the verdict is contrary to the evidence. In reply to this it may be said that an examination of the voluminous record shows abundant testimony to justify the conclusion reached by the jury. No good purpose could be subserved by reviewing it. The evidence is conflicting, and, while some of the witnesses may have sworn falsely, as claimed by appellant, still the credibility of the witnesses and the weight to be given their testimony are matters, in the first instance, for the consideration of the jury, and, in the second, for the trial judge upon hearing the motion for new trial.

6. The witness Blades was asked the following question by the prosecution: "Were you and Mr. Cheney placed under arrest for stealing this calf, you have been referring to, that you took into town at that time?" The court overruled defendant's objection to the same, and this ruling is assigned as error. The question was proper as tending to elicit evidence of the intent of defendant in taking the helper from the pasture of Cheney. It was necessary, under the theory of the prosecution, to prove that he took her with the intent to charge Cheney with her value. He had stated that he would hold Blades and Cheney responsible for her loss. This question, and the admission of the evidence in the proceedings had before the justice of the peace wherein Blades and Cheney had been arrested for taking the helper from the pasture wherein it was claimed defendant had placed her, were proper and legitimate for the purpose of showing the wrongful intent with which defendant deprived Cheney of the possession of her. The evidence was admissible upon the same ground that evidence of a civil suit instituted by defendant against them for her value would be admissible.

We are unable to find any prejudicial error in the record.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

7 Cal. App. 160

WEBSTER v. GIBSON et al. (Civ. 431.)

(Court of Appeal, Second District, California.
Dec. 20, 1907.)

1. SPECIFIC PERFORMANCE — CONTRACT — RESCISSION.

Where after the execution of a contract for the sale of land it was modified by an escrow agreement providing that, unless a certificate showing an unincumbered title should be signed by an abstract company within a specified time, the transaction was at an end, and the vendee refused to accept the title as shown by the certificate, whereupon the abstract company surrendered to each of the parties the papers and

money to which they were entitled, there was a rescission of the contract, precluding a decree for specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 183-187.]

2. SAME—FRAUD—ABILITY TO CONVEY.

Where a contract for the sale of land was tainted with fraud practiced by the vendee, and the price agreed to be paid was not the full value of the premises, and defendant was not able to convey a marketable title, specific performance was properly denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 160-171½, 257-277.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Suit by E. C. Webster against Anna N. Gibson and another. From a judgment for defendants, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

Kemp & Collier, for appellant. Munson & Barclay, for respondents.

ALLEN, P. J. Action for specific performance. Judgment for defendants. Appeal from judgment and an order denying a new trial.

The material facts involved, as found by the court, were: That on March 21, 1905, defendant Anna Gibson was the owner of certain real property. That on said date she signed a receipt for \$100, acknowledging the same as part payment on account of a sale by her to plaintiff of said property. That the total consideration price was \$4,900. Of this sum \$2,900 was to be paid on production of a certificate of title and delivery of a deed, and the balance to be secured by mortgage, drawing 6 per cent. interest, on a part of the premises sold. No time was specified in this agreement within which the same should be performed.

The court found the signature of Mrs. Gibson to have been procured by misrepresentation in relation to certain material facts involved in the transaction. Subsequent to the execution of the instrument Mrs. Gibson acknowledged the deed conveying said premises to plaintiff, and left the same with a notary, without instructions, intending, however, that the same should be by some person delivered to the purchaser in performance of her agreement. Subsequently, on April 14, 1905, the husband, without instructions from the wife, obtained possession of the deed, and on said date he and the plaintiff executed to an abstract company certain written escrow instructions relative to its delivery, among which instructions it is stated that, if the abstract company could, within 15 days, write an unlimited certificate showing the title to be free of incumbrance, except taxes for the current year, it should deliver the deed to plaintiff and pay to defendant Anna Gibson the \$2,900 purchase money, and deliver to her the mortgage. It was further stipulated that, unless such abstract company could

write such certificate within 15 days, it should return the money and mortgage to plaintiff. It appears that the title was in such condition, by reason of certain building restrictions theretofore imposed upon the premises, that the abstract company could not write such certificate, and the title was not free and unincumbered in defendant; that on May 3d notice of the condition of the title was communicated to all parties, and plaintiff was notified that unless he was willing, within 24 hours, to accept the title in its then condition the deed would be returned to the defendant; that plaintiff did not agree to accept such title within the time specified, and thereupon, on May 5th the deed was returned to the defendants, and the money and mortgage restored to plaintiff; that on the day following the defendant tendered to plaintiff the \$100 received under the original receipt, which he refused to accept; that no subsequent tender of the money or mortgage was ever made by plaintiff to said Anna Gibson, and she is not able to transfer a good and sufficient title to plaintiff; that the terms of said original agreement were not just and equitable; that the sum of \$4,900 was not the full value of the premises at the date of the execution of the said agreement.

There is testimony in the record tending to support each and every finding above mentioned, and such findings support the judgment. Viewing the case presented by the record from any point, the judgment should be affirmed. Assuming the correctness of plaintiff's position—that certain findings have no support from the evidence, and therefore it is but just to say that the husband was the authorized agent of the wife, and that all of his acts were by her authority—it still appears that the written agreement of the wife, as subsequently modified by the escrow agreement, signed by the husband alone, all of which instruments, if considered at all, should be read together, is an agreement that, unless a certificate showing an unincumbered title should be signed by the abstract company within 15 days from April 15th, the transaction was at an end. There is evidence in the record that plaintiff refused to accept the title as shown by the certificate, and thereupon the abstract company holding the papers and money in escrow, acting under the instructions given by the parties, surrendered to each the papers and money to which they were respectively entitled. We believe, however, that the court was warranted from the evidence in finding that the original transaction was tainted with fraud, practiced by plaintiff, and that the husband was in no respect the agent of his wife, and that the price agreed to be paid was not the full value of the said premises, and that defendant was not able to convey a good and sufficient title—all of which being true, no judgment other than that rendered would be warranted.

We have examined the specifications of er-

ror alleged to have occurred at the trial, and find nothing prejudicial therein.

The judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 176

JOYCE v. NEWMARK & EDWARDS et al.
(Civ. 439.)

(Court of Appeal, Second District, California.
Dec. 20, 1907.)

COURTS—STARE DECISIS—RULE OF PROPERTY.

The rule that, where a contract for public improvement and the resolution of intention and the intermediate proceedings to the final award of the contract are based upon specifications providing that all loss or damages arising from the nature of the work to be done shall be sustained by the contractor, the bonds issued pursuant to such contract and the property assessments are void, is a rule of property, which the court must follow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 336.]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Suit by T. F. Joyce against Newmark & Edwards and others. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Affirmed.

Jones & Drake, for appellants. Bernard & Potter, for respondent.

ALLEN, P. J. Action to obtain a decree annulling certain assessments and bonds issued pursuant thereto, and to quiet title to certain premises involved. Judgment for plaintiff, from which judgment and a subsequent order denying a new trial defendants appeal.

The ownership of plaintiff in the premises is not questioned. The only claim of defendants thereto grows out of the issuance of certain bonds issued on account of the improvement of Workman street in the city of Los Angeles. The record shows that the contract for the work of such improvement was awarded to one Groat; that such contract, and the resolution of intention to improve the street, and all proceedings intermediate the adoption of the resolution to improve and the final award of the contract, were based upon provisions contained in the specifications; "that all loss or damages arising from the nature of the work to be done * * * shall be sustained by the contractor." The effect of such provision in the specifications has been determined by the Supreme Court of this state in many cases, and finally in *Woollacott v. Meekin* (Cal. App.) 91 Pac. 612, wherein such specifications are said to be unauthorized and impose conditions tending to increase the cost of the work, and therefore render void the bonds issued pursuant to such contract. In that case it is further determined by a majority of the court that the like decisions in previous cases involving a similar question were permissible and com-

stitute a rule of property, and the duty of the courts was to adhere thereto. Under this mandate, we are permitted only to say that this claim of defendants, being a claim of lien based upon a void assessment and void bonds, was properly annulled, and, under such last-named decision, the decree quieting title properly entered.

This conclusion renders it unnecessary to discuss any other questions involved in the appeal.

The judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 127

PEOPLE v. JOHNSON. (Cr. 111.)

(Court of Appeal, First District, California.
Dec. 16, 1907.)

1. FORGERY — INFORMATION — MANNER OF
FRAUD.

Where an instrument alleged to have been forged appears to be one the forgery of which is prohibited by statute, and to be one that may work a fraud on the person intended to be defrauded, it is not necessary that the information allege the manner in which the person could be defrauded by such instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 78.]

2. SAME.

An information for forgery charged that J. did willfully, etc., and with intent to defraud the United Railroads of San Francisco, make, alter, forge, and counterfeit a certain writing set out, which purported to be a receipt by one Francis A. for services rendered to such railroads, and further charged that defendant uttered the same to the assistant treasurer of the United Railroads with intent to defraud them, etc. *Held*, that the instrument being a proper subject of forgery under Pen. Code, § 470, prohibiting the forging of receipts, the information sufficiently showed that it was susceptible of being used to defraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 78.]

3. SAME — INFORMATION — EVIDENCE — VARI-
ANCE.

Where an information charged defendant with forging a receipt but the proof showed that the receipt was signed by defendant in his own name as his receipt, and, at most, tended to show forgery of an instrument in the aspect of an order for the payment of money, there was a fatal variance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 93.]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Thomas Johnson was convicted of forgery, and he appeals. Reversed.

Brennan & Lane, for appellant. Attorney General Webb, for the People.

HALL, J. Defendant was convicted of the crime of forgery, and appealed to this court from the judgment, the order denying his motion in arrest of judgment, and the order denying his motion for a new trial. No demurrer was filed to the information, but defendant, on his motion for an arrest of judg-

ment, attacked, and now attacks, the information upon the ground that the facts stated do not constitute a public offense. Pen. Code, § 1012.

The information charges that the defendant, Thomas Johnson, did willfully, unlawfully, feloniously, falsely, fraudulently, and with intent to prejudice, damage and defraud the United Railroads of San Francisco, a corporation, make, alter, forge and counterfeit a certain instrument in writing in the words and figures following, to wit:

"Date190.....Page 0330, No. 4517.

"Name: Francis A.

"Received of the United Railroads of San Francisco \$11.25, in full for services to Jan. 12, 1907.

"Francis A. [Signature]."

—and further charges in the usual form that he then and there uttered the same to one Ivor Jones, then and there the assistant treasurer of said United Railroads of San Francisco, with intent to defraud said United Railroads, knowing the same to be altered, forged and counterfeit.

The point urged against the information is that it does not appear that the United Railroads could have been injured by the instrument set forth; it being upon its face a receipt, evidencing payment of money by the United Railroads to the signer of the receipt. Where it does not appear from the face of the instrument that the instrument forged could work an injury to the person alleged to have been intended to be defrauded, extrinsic facts must be alleged sufficient to show that such party could have been defrauded thereby. On the contrary, if the instrument appears on its face to be one prohibited to be forged by the statute, and appears on its face to be one that may work a fraud on the person intended to be defrauded, it is not necessary to allege how such person could be defrauded. "The instrument being set out, and purporting on its face to be the thing prohibited to be forged, * * * there is no need of further allegations to show how it was the thing, or how it could be used as an instrument of fraud, or that it was so used in fact." *Commonwealth v. White*, 145 Mass. 392, 14 N. E. 611. It is sufficient that the forged instrument might be used to perpetrate a fraud, and it is not necessary to set out in detail how the fraud could be effected. *Commonwealth v. Costello*, 120 Mass. 358; *Travis v. State*, 83 Ga. 372, 9 S. E. 1063; *People v. Van Alstine*, 57 Mich. 74, 23 N. W. 594; *People v. Ah Woo*, 28 Cal. 212; *Ex parte Finley*, 46 Cal. 262, 5 Pac. 222; *People v. Bibby*, 91 Cal. 470, 27 Pac. 781; *People v. McGlade*, 139 Cal. 66, 72 Pac. 600; *West v. State*, 22 N. J. Law, 212; *Snell v. State*, 2 Humph. (Tenn.) 347. In *People v. Munroe*, 100 Cal. 664, 35 Pac. 326, 24 L. R. A. 33, 38 Am. St. Rep. 323, it is said that the essential ingredients of forgery are "(1) A false making of some instrument; (2) a fraudulent intent; (3) if genuine, the writing might injure an-

other." The court further said that "the third element stated is expressly recognized by this court to be the true test as to the nature of the writing"—citing *People v. Frank*, 28 Cal. 514; *People v. Tomlinson*, 35 Cal. 506; *Ex parte Finley*, 68 Cal. 263, 5 Pac. 222.

Turning, now, to the instrument set forth in the indictment, and alleged to have been forged by defendant Johnson with intent to defraud the United Railroads, it purports on its face to be a receipt of one Francis A., who, for the purpose of determining the sufficiency of the information, must be assumed to be a different person from the defendant. Receipts are in terms mentioned in the statute in the list of instruments that may be the subject of forgery. Pen. Code, § 470. If the defendant forged this receipt, and then presented it to the United Railroads as the genuine receipt of Francis A., and thereby procured any money from said United Railroads that it may have owed Francis A., it is perfectly clear that the corporation would have been defrauded thereby. Or, again, if Johnson were a disbursing officer of such corporation, and forged said receipt, and gave it to the corporation as a voucher for money falsely claimed to have been paid out by him for said corporation to Francis A., the corporation could and would have been prejudiced and defrauded thereby. We thus see that the instrument might, if accepted as true and genuine, work a fraud on the United Railroads, and the information meets the requirements of the law in this regard. It appears on its face that it might be used to work a fraud on the person or corporation intended to be defrauded. The only case cited by appellant which we think sustains his contention is *Clarke v. State*, 8 Ohio St. 630, where it was held that a receipt could not be forged with intent to defraud the payor therein. But this case was not argued by the Attorney General, but he confessed error, and the court, without citing any authorities, held that the receipt could not work a fraud on the payor. We believe the court came to a wrong conclusion in that case, even under the rule announced in general terms by itself in that case. The information in the case at bar is sufficient. We have thus far been considering the information only; but when we come to an examination of the evidence the case bears a different aspect.

It appears that Thomas Johnson and Francis A. are one and the same person, and, when the defendant signed the name Francis A. to the receipt, he signed it as his own name. It was the name under which he was known, and under which he was working for the United Railroads. It seems to have been the practice with the United Railroads to issue to laborers, such as was the defendant, brass tags numbered to correspond with numbers written against the names of the laborers in the weekly pay roll. In order to facilitate paying the men, blank receipts would be

filled out by clerks in the office of the company for the amount due the men. Upon each blank receipt thus filled out would be written the name of the man and his number. These receipts were thereupon, by an employé of the company, delivered to the men holding the corresponding brass tags, and the tags taken up. The men were required to sign these receipts upon being paid their wages. In accordance with this custom, defendant was given the receipt set forth in the information, save that the amount written thereon was \$4.25, and the same had not then been signed by anybody. Defendant subsequently presented the same to the assistant treasurer of the company for the purpose of getting his wages, signed by himself, but with the amount thereof changed to \$11.25. Treated as a receipt, the instrument was clearly the instrument of the defendant. He had a perfect right to sign his name thereto, and it is difficult to see why he had not the right to change the amount thereof before executing it; that is, before delivering it to the company. It was an instrument intended to be signed and executed by himself alone. While as a matter of convenience the instrument had been prepared by the clerk of the United Railroads, it did not on its face purport to be an instrument executed or to be executed by the company.

It is claimed by the respondent that the instrument, when delivered to defendant, was in effect, under the methods adopted by the company for the payment of its laborers, a request or order for the payment of money. But on its face it certainly did not so appear, and no facts are charged in the information to give it such effect. The instrument charged to have been forged appears in the information to be a receipt, shown in the evidence to have been signed by defendant in his own name as his receipt. If it be conceded for purposes of argument that, notwithstanding that the instrument set forth is, on its face, unambiguous and plainly a receipt, facts might have been alleged to give it the force and effect of a request or order for the payment of money, an information so framed would charge a different offense than the one charged in the information. Defendant is charged with forging a receipt. True, it is not called a receipt in the information, but it is set out in full, and clearly appears to be a receipt. The evidence, however, at the best, only tends to show a forgery of the instrument in the aspect of an order for the payment of money. No such case is made by the information, but an entirely different offense is charged. Defendant raised the question of variance several times during the trial. For the reasons above set forth, the evidence does not support the verdict, and the court should have granted a new trial. In the case of *People v. Peacock*, 6 Cow. (N. Y.) 72, cited by the respondent, although defendant signed his own name, he signed it as the name of another person who bore the

same name, and for whom the goods were intended, as the defendant well knew. The case simply enunciates the same rule as laid down in *People v. Rushing*, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141, but in its facts bears no resemblance to the case at bar.

The judgment and order denying the motion for a new trial are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 132

LYNCH v. McGHAN. (Civ. 327.)

(Court of Appeal, Third District, California.
Dec. 17, 1907.)

1. TROVER AND CONVERSION—DAMAGES—USE OF PROPERTY.

Civ. Code, § 3333, provides that, for breach of a noncontract obligation, the measure of damages, except where otherwise expressly provided, is the amount that will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. Section 3336 provides that the detriment caused by the wrongful conversion of personal property is presumed to be the value of the property at the time of the conversion, with interest, or, where action has been prosecuted with reasonable diligence, the highest market value at any time between the conversion and the verdict, without interest at the option of the injured party, and a fair compensation for time and money properly expended in pursuit of the property. *Held*, that plaintiff in an action for conversion of certain horses could not recover for the use of the horses under section 3333, but was limited to the damages specified in section 3336.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 253-255.]

2. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION.

The granting a motion for a new trial for newly discovered evidence is largely in the discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 201.]

3. SAME—NATURE OF ORDER.

Where an order granting a new trial did not specify the ground on which it was granted, it would be upheld on appeal if justified on any ground contained in the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3772-3776.]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by L. A. Lynch against Charles Mc-Ghan. From an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

A. H. Carpenter, for appellant. Jacobs & Flack, for respondent. Miller & Clark, for intervener.

BURNETT, J. The appeal is from an order granting defendant's motion for a new trial. The action was brought to recover damages for the conversion of six horses and some other personal property. The court found that "plaintiff has been damaged by such unlawful conversion in the following specific amounts, namely: The sum of \$252.60 cash taken from plaintiff; the sum of \$160,

the value of the aforesaid six horses; the sum of \$17. the amount of time and money spent by plaintiff in the pursuit of the aforesaid property; the sum of \$140 on account of the loss of use of the aforesaid six horses from the time of their conversion, and the sum of \$22.60, which is the interest on the value of the aforesaid money and horses from the time of their conversion by defendant at the rate of seven per cent per annum, which makes the total amount of plaintiff's damages sustained in the premises the sum of \$592.20." It is obvious that this finding is erroneous, at least as to the \$140 for the use of the horses.

The rule as to damages for the conversion of personal property is prescribed in section 3336 of the Civil Code as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of the conversion, with the interest from that time, or where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict without interest at the option of the injured party; and (2) a fair compensation for the time and money properly expended in pursuit of the property." The interest on the value of the property is the allowance provided by the statute in lieu of the value of the use of the property and not in addition thereto. The question has been more or less considered in the following cases: *Douglass v. Kraft*, 9 Cal. 562; *Hamer v. Hathaway*, 33 Cal. 117; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *Barrant v. Garratt*, 50 Cal. 112; *McCray v. Burr*, 125 Cal. 636, 58 Pac. 203; *Yukon River, etc., Co. v. Gratto*, 136 Cal. 541, 69 Pac. 252.

Appellant claims that interest was allowed under said section 3336 and damages for the use of the stock under section 3333 of the Civil Code, and that these are concurrent sections. In support of the contention the following cases are cited: *Stevenson v. Smith*, 28 Cal. 103, 87 Am. Dec. 107; *Fairbanks v. Williams*, 58 Cal. 242; *Livestock, etc., Co. v. Union Co.*, 114 Cal. 447, 46 Pac. 286. The language employed by the Legislature precludes such construction, and the cases cited are not in point. Said section 3333 lays down a general rule of damages, and especially excepts the instances "where otherwise expressly provided by this Code." As we have seen, for the case at bar there is an express provision in said section 3336. The *Stevenson Case*, supra, was not in conversion, but was for the recovery of the possession of a mare and damages for her detention. It was properly held by the court that special damages must be pleaded. The question involved in the *Fairbanks Case*, supra, was as to the expense incurred in the pursuit of the property. In the *Livestock, etc., Case* the action was for the recovery of the possession of the property with damages for its detention or its value in case delivery could not be had

What is said by the court as to damages for the detention of the property must be considered in view of the nature of the action.

Again, one of the grounds upon which the motion for a new trial was based is "newly discovered evidence material for the defendant which he could not, with reasonable diligence, have discovered and produced at the trial." Certain affidavits were introduced containing important statements bearing upon the issue as to the ownership of the property. Much must be conceded to the discretion of the trial court in the determination of the sufficiency of the newly discovered evidence to justify a new trial. This is true whether said evidence be cumulative or otherwise. Admitting that it is cumulative, if the court had denied the motion on that ground, it would be a sufficient reason for affirmance; but the contrary is not true that the order granting the motion should be reversed because the additional evidence is merely cumulative, because, as said in *Oberlander v. Fixen & Co.*, 129 Cal. 692, 62 Pac. 254: "For, in either case, it is for the trial judge to determine whether the evidence is of character probably to affect the result on a new trial; and, unless the evidence be of such a character as to make it manifest and certain to this court that in the one case it would, or in the other that it would not, result differently on a retrial, the order will not be disturbed." So here the newly discovered evidence is such that, if the motion for a new trial had been either granted or denied on that ground, it could not be said that the trial court was not justified in its action. It does not appear upon what specific ground the motion was granted, as the order is in the following form: "And the court, being fully advised thereupon, grants said motion for a new trial to the defendant, Charles McGhan."

There can be no question, therefore, that, if justified on any ground contained in the motion, the order must be upheld.

The order granting the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. App. 170

SALTER et al. v. CALIFORNIA CYCLEWAY CO. et al. (Civ. 436.)

(Court of Appeal, Second District, California. Dec. 20, 1907.)

DEEDS—RESERVATIONS.

The owner of land granted an easement for a bicycle road on condition that, unless it should be used within a specified time, the right of way should revert to him. After his death his executors sold a portion of the premises over which the easement extended. The sale was confirmed by the superior court, and, in the order of confirmation and in the appraisalment filed by the executors, the property was described as "being part of Tp. 1 S., Rg. 12 W., 18²/₁₀₀ acres, * * * (except 24¹/₁₀₀ of an acre in a cycleway) of lot 4, Sec. 6." The deed executed by the executors described the property so as to include all of lot 4, which gen-

eral description was followed by a statement that the property was described in the inventory in the manner following, and then followed a description as in the order of confirmation. *Held*, that the deed, order, and inventory could only be read as to include all of the ground included in the easement, subject to whatever rights existed under the grant thereof, and there was nothing to show a reservation of the fee in the ground over which the easement extended.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Fred R. Salter and another against the California Cycleway Company and another. Defendants appeal from a judgment in favor of plaintiffs, and from an order denying a new trial. Affirmed.

Porter, Sutton & Cruickshank, for appellant. Charles L. Batcheller, McNutt & Hannon, and Walter L. Krug, for respondents.

ALLEN, P. J. Action to quiet title and to have certain easements declared forfeited. Judgment for plaintiffs. Defendants appeal from the judgment, and from an order denying a new trial.

The first point made on appeal is that plaintiffs did not show title to the property across which the easements were originally granted. We think there is nothing in this point. All parties claim under Andrew Glassell, deceased. Glassell granted the easements upon the express stipulation that, unless the contemplated bicycle road and the viaduct referred to should be completed and used within five years from and after the date of the deed, said right of way should revert to the grantor, and, if at any time the grantees or their assigns should cease to use the same for the purposes specified for a continuous period of three years, a reverter should result. After the death of Glassell his executors sold to one Rogers a portion of the premises over which the easements extended. Plaintiffs deraign title through Rogers. The sale to Rogers was confirmed by the superior court, and in such order of confirmation and in the appraisalment filed by the executors the property under consideration was described as "7³⁰/₁₀₀ acres, being (exc. of 2⁵/₁₀₀ acres in Cycleway & R. R. R. W.) S. 7⁵⁵/₁₀₀ acres of lot 3," etc. The second tract is described as: "Being part of Tp. 1 S., Rg. 12 W., 18²/₁₀₀ acres, being all S. of R. R. R. W. (except 24¹/₁₀₀ of an acre in a cycleway) of lot 4, Sec. 6." The deed executed by the executors to Rogers described the property so as to include all of lots 1 and 4 hereinbefore mentioned. This general description was followed by a statement that the said real property was described in the inventory in the manner following. Then follows, so far as affects the property in litigation, a description as in the order of confirmation.

We are of opinion that a fair construction of the deed, order, and inventory can only be to read the same as including all of said ground included in the easements, but subject to whatever rights existed under the deeds

granting the same; and this intention is evident from the manner of description, and nothing therein can be said to amount to a reservation of the fee in the ground over which the easements extended. There is satisfactory evidence in the record supporting the finding that no part of this cycleway over the premises in question had been completed; nor had the same ever been used in the manner stipulated in the deed.

The judgment of forfeiture and decree quieting title to the premises were warranted.

We find no error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 172

UNITED STATES NAT. BANK OF PORTLAND v. WADDINGHAM. (Civ. 438.)

(Court of Appeal, Second District, California. Dec. 20, 1907.)

1. BILLS AND NOTES—CONSTRUCTION—INTEREST.

Civ. Code, § 1651, provides that the written parts of an instrument shall control the printed ones, and section 1654 declares that an uncertainty in the language of a contract is to be interpreted most strongly against the party who caused the uncertainty to exist. A blank form of note contained a provision that the maker would pay, "with interest, payable monthly, at the rate of — per cent. per — until paid," and a further provision that, should the note not be paid at maturity, it should thereafter bear interest at a specified per cent. per month. The maker struck out the first provision as to payment of interest, except the words "until paid," and wrote in place of such provision "without interest." *Held*, that the maker was required to pay interest at the rate of 2 per cent. from the maturity of the note.

2. INTEREST—INTEREST ON FINDINGS.

Code Civ. Proc. § 1035, provides that the clerk must include in the judgment entered up by him any interest on the verdict or decision of the court from the time it was rendered or made. *Held* that, where, in an action on a note calling for 2 per cent. interest after maturity, the decision was in favor of the holder, the judgment entered by the clerk should have been the aggregate amount of principal and interest due at the rate called for by the note at the time the decision was rendered, and a judgment apparently entitling the holder to the rate called for by the note until execution on the judgment was erroneous.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by the United States National Bank of Portland against J. H. Waddingham. From a judgment in favor of plaintiff, defendant appeals. Modified and affirmed.

Theo. Martin and Grant Jackson, for appellant. Lawler, Allen & Van Dyke, for respondent.

TAGGART, J. Action on promissory note. Judgment for plaintiff, and defendant appeals.

Defendant, on August 1, 1905, executed to plaintiff's assignor a promissory note for \$2,000, using for that purpose a blank form as follows:

"\$. Los Angeles, Cal.,, 190..

"On.....190.., at three o'clock p. m. of that day (no grace) for value received, I promise to pay to the order of..... dollars, at the Los Angeles National Bank, *with interest payable monthly, at the rate ofper cent. per.....until paid.* [If said interest be not paid when due, it shall be added to the principal, and bear interest at the same rate as the principal, and the whole amount of principal and interest shall thereafter be due and payable at the option of the payee.] Principal and interest payable in gold coin of the United States; and should this note not be paid at maturity it shall thereafter bear interest at the rate of two per cent. per month." (The italics and brackets are inserted for purpose of reference.)

The amount (\$2,000), date (August 1, 1905), day when due (November 1, 1905), and the name of the payee (Caples Bros., Portland, Or.), were inserted in the proper blanks in the form. The words italicized were erased by running a pen through them, and there was written immediately above them the words, "without interest." It is conceded that the portion of the note included in the brackets has no bearing upon the question to be considered upon this appeal, which is: Was it the intention of the parties to said note that the principal should bear interest as provided in the last clause of the note?

The agreement that the principal shall bear interest at the rate of 2 per cent. per month after maturity is irreconcilable with the promise, "without interest until paid." The words "until paid," are a part of the original form, and the words "without interest" are the only written part of the instrument to be considered in applying the rule of section 1651, Civ. Code, that the written parts control the printed parts. In seeking to ascertain the intention of the parties from the writing, it will be observed, first, that the maker of the note selected from the various current blank forms of promissory notes one containing a penal clause. If instead of erasing the reference to per cent. and interest the maker had inserted some rate of interest, say 6 per cent., the note would then have read: "With interest payable monthly, at the rate of 6 per cent. per annum until paid." It would not, we think, or at least could not legally be said, that the maker intended by the use of the word "paid" to render ineffective the penal clause in the note increasing the interest to 2 per cent. after maturity. If the expression "with interest until paid" should be construed so as to render the penal clause effective, the same rule would render such a construction proper where the expression used was "without interest until paid." Giving effect thus to every part of the contract, so far as possible, the last interest clause was evidently intended to modify the first, if payment were not made prior to the maturity of the note, that is, on or before November 1, 1905. This construc-

tion is also supported by the rule of section 1654 of the Civil Code that an uncertainty in the language of a contract is to be interpreted most strongly against the party who caused the uncertainty to exist, the promisor being presumed to be such party.

The conclusion of the court that plaintiff was entitled to recover judgment for \$2,000, with interest thereon at the rate of 2 per cent. per month from November 1, 1905, was correct, but would have been better expressed had the computation of interest been made and the whole amount of the principal and interest due at the date of the finding stated therein. The judgment as framed apparently entitles the plaintiff to continue to enjoy the benefit of the 2 per cent. per month interest clause until execution on the judgment. This is improper.

The statute provides (Code Civ. Proc. § 1035), "the clerk must include in the judgment entered up by him any interest on the verdict or decision of the court from the time it was rendered or made." The interest after verdict or decision must be computed at the legal rate upon the aggregate amount of principal and interest due at the contract rate at the time the decision or verdict was rendered. *Murdock v. Clarke*, 88 Cal. 394, 26 Pac. 601. The theory of the law is not that the party recover the particular note or chose in action, but that he recover a fixed and definite sum as damages for the nonperformance of the contract, and in cases of failure to pay money due the true measure of damage is the amount of money owing and the interest that was agreed upon. The amount of the judgment being ascertained, the statute steps in and regulates the rate at which it shall bear interest. *Guy v. Franklin*, 5 Cal. 417. The rule is not affected by the judgment being formulated by the court instead of the clerk. *Barnhart v. Edwards*, 128 Cal. 575, 61 Pac. 176.

That there may be no uncertainty in this respect, the judgment should be modified so as to state the total sum of principal and interest due at the date of the rendition of the decision (findings) in accordance with the foregoing opinion, which appears from the record to have been on July 20, 1906. Eight months and 19 days interest at 2 per cent. per month on \$2,000 would be \$345.33. The amount of the judgment, then, should be \$2,345.33, entered as of July 20, 1906. The statute provides the rate of interest thereon.

It is therefore ordered that the superior court modify said judgment by striking out the words and figures "two thousand (2,000) dollars, together with interest thereon from November 1, 1905, at the rate of two (2) per cent. a month," and inserting in lieu thereof the words and figures "two thousand three hundred and forty-five and $\frac{33}{100}$ (\$2,345.33) dollars"; and, when said judgment is so modified, it is affirmed.

We concur: ALLEN, P. J.; SHAW, J.
Cal.Rep. 92-94 P.—37

7 Cal. App. 199

In re MCCARTHY'S ESTATE. (Civ. 423.)

(Court of Appeal, First District, California.
December 24, 1907. Rehearing denied by
Supreme Court Feb. 20, 1908.)

HOMESTEAD — SURVIVING WIFE — VALUE —
RIGHTS OF CREDITORS.

Community property of a husband and wife, of the value of \$2,000 at the time it is set apart as a homestead, which at the time of the death of the husband has increased in value to an amount in excess of the homestead exemption, cannot be reached by creditors of the estate, since by the direct provisions of Code Civ. Proc. § 1474, title to the homestead vests absolutely in the survivor, and the fact that Civ. Code, § 1265, provides that the title shall vest subject to no other liability than such as exists or has been created under the provisions of the title "Homestead," and the latter part of Civ. Code, § 1474, provides that in either case it is not subject to the payment of any debt or liability except as provided in the Civil Code, does not affect the rule, where the creditors' claims do not come within the liabilities to which the sections refer, as fixed by Civ. Code, tit. "Homesteads," § 1241.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Petition by the administratrix of the estate of Charles Patrick McCarthy, deceased, to set apart a homestead to her as his widow. From an order setting apart the homestead, a creditor appeals. Affirmed.

See 82 Pac. 635.

Wyckoff & Gardner, for appellant. James A. Hall, for respondent.

COOPER J. Appeal from order setting apart a homestead. The facts necessary to a decision of the question in this case are as follows: In November, 1883, Charles Patrick McCarthy duly executed and recorded a declaration of homestead upon the premises described in the petition. At the time of such recording the premises were community property of the said McCarthy and his wife, Ellen, and they resided thereon with their children. The value at that time was \$2,000. The premises continued to be the home of McCarthy and his family until his death in January, 1903. In February, 1903, Ellen McCarthy, the widow, was duly appointed administratrix, took the oath, qualified, and ever since has been such administratrix. The estate is insolvent, and certain creditors have proven their claims, which have been duly allowed by the superior court, and are on file. An inventory and appraisement has been duly made and filed, in which the said premises are appraised at the sum of \$5,000. In June, 1903, the administratrix duly filed her petition, praying for an order setting apart the premises to her as the surviving widow of deceased. This petition was opposed by Mary Burke, a creditor of the estate, whose claim has been duly allowed and filed. Upon the trial the court found that the homestead was, at the time of the death of McCarthy and at the time of the hearing, of the value of \$8,000.

This finding may be regarded as immaterial, if the homestead is, under the law, the property of the widow and exempt from execution or other process by the creditors of the estate. If the homestead was exempt from execution, it was the duty of the court to set it apart to the widow. Code Civ. Proc. § 1465. The question for decision, as stated by appellant's counsel, is: "As against a protesting creditor of the estate, may the court set apart to the surviving wife the whole of a homestead selected by the husband during his lifetime from the community property; the said homestead having been of the value of \$2,000 at the time of selection, and of the value of \$8,000 at the time of the death and ever since, and the estate being otherwise insolvent?"

Section 1474 of the Code of Civil Procedure provides: "If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor." This case comes within the language of the above-quoted section. It has been held in such case that the title vests by operation of law in the survivor immediately upon the death of the other spouse, without any order setting apart the homestead (*Baker v. Brickell*, 87 Cal. 339, 25 Pac. 489, 1067; *Fisher v. Bartholomew* [Cal. App.] 88 Pac. 608, and cases cited), and the title to such homestead could not be affected by a subsequent order of the court (*Fisher v. Bartholomew*, supra; *Estate of Fath*, 132 Cal. 612, 64 Pac. 995).

It is contended by appellant that, notwithstanding the language of the section quoted, the survivor gets title to the homestead subject to the provisions of the Civil Code as to reaching any excess in value beyond \$5,000 by process in behalf of creditors of the deceased. In other words, it is claimed that to "vest absolutely in the survivor" does not mean to "vest absolutely," but to vest subject to the right of the creditors of the deceased to reach any excess of \$5,000 in value. Such, in our opinion, is not the meaning of the section. We must read the sections of the Codes together for the purpose of arriving at the intent and purpose of any particular provision. It is provided in the Civil Code, under the title relating to homesteads (section 1265), as follows: "From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a

homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this title." This section adds the provision "subject to no other liability than such as exists, or has been created under this title," and again emphasizes the intention of the Legislature by adding, "but in no case shall it be held liable for the debts of the owner, except as provided in this title." These provisions must be read into section 1474, Code of Civil Procedure.

We must, then, look to the liabilities created by the title on homesteads (Civ. Code, § 1241), and we there find the following: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained: (1) Before the declaration of homestead was filed for record and which constitute liens upon the premises. (2) On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, material men's or vendors' liens upon the premises. (3) On debts secured by mortgages of the premises, executed and acknowledged by husband and wife, or by an unmarried claimant. (4) On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." The creditors' claim in this case does not come within the class enumerated in said section, and therefore the homestead is not subject to this liability.

It is claimed that the latter part of section 1474, Code Civ. Proc., which provides: "In either case it is not subject to the payment of any debt, or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband and wife, except as provided in the Civil Code"—is sufficient to show that the intention was to allow general creditors to reach the excess in value over \$5,000. In our opinion such is not the proper construction of the statute. It evidently means the provisions of section 1241 of the Civil Code hereinbefore quoted. The particular provision of the Code herein quoted, with reference to homesteads upon the death of the husband or wife, is the particular provision of the Civil Code that governs. It is a special provision relating to the very question as to where the title to the homestead vests in case of the death of the husband or wife.

Section 1476 of the Code of Civil Procedure seems to contemplate that, if the homestead exceeded in value the sum of \$5,000 at the time it was selected and recorded, the excess over \$5,000 may be reached. This is evidently upon the theory that a homestead could not be valid upon premises which exceeded \$5,000 in value at the time of the selection. It is not necessary to decide the question in this case, for the reason that it is not pretended that the premises were of the value of

\$5,000 at the time of the selection of the homestead. It is true that under the construction herein given the creditors of a deceased person would not have the right to reach the value of the homestead in excess of \$5,000, which they could have reached during his lifetime, and are thus placed in a worse position by his death; but for this reason we cannot change the statute. A creditor is presumed to know the law, and its provisions in relation to homesteads and exemptions. The homestead being of record, and the Code making provision as to where it should vest on the death of deceased, the debts were contracted with reference to the law and to the right of the widow to take the homestead free from such debts. The homestead was free from liability to general creditors at the time it became such. It continued so during the lifetime of deceased, unless it became of greater value than \$5,000. It vested in the survivor entirely free from such liability, no matter what its value at the time of the death. The wife held in the nature of a joint tenant, with the right of survivorship.

The order is affirmed.

We concur: HALL J.; KERRIGAN, J.

(7 Cal. App. 206)

ZIPPERLEN et al. v. SOUTHERN PAC. CO. (Civ. 380.)

(Court of Appeal, Third District, California. Dec. 24, 1907. Rehearing Denied by Supreme Court Feb. 20, 1908.)

1. TRIAL—WITNESSES—CREDIBILITY—QUESTION FOR JURY.

Where inconsistency or apparent inconsistency in testimony is developed through cross-examination, it is for the jury to determine whether the witness is unworthy of belief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 334-335.]

2. RAILROADS—STREET CROSSING ACCIDENT—LIABILITY.

If plaintiff before undertaking to cross railroad tracks at a street crossing exercised reasonable and ordinary care, and if, after the engineer or fireman on an approaching engine applied steam to the engine, the horse plaintiff was driving became frightened and stood upon the track on which the engine was moving, and plaintiff attempted to urge the horse forward, but could not do so, the company's employees were bound to keep a lookout and to ascertain whether the crossing was clear, and if they failed to do so, and plaintiff was injured in consequence without any fault on her part, the company is liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 988.]

3. APPEAL—REVIEW—VERDICT—CONCLUSIVENESS.

A verdict on a substantial conflict of evidence will not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

4. RAILROADS—STREET CROSSING ACCIDENT—EVIDENCE—SUFFICIENCY.

Evidence, in an action against a railway company for injury to one driving across tracks at a street crossing and struck by an engine,

held sufficient to sustain a verdict and judgment for plaintiffs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1138-1150.]

5. WITNESSES—CONTRADICTION—WHEN PROPER.

The rule authorizing the contradiction of one's own witness is, in its application, like the rule as to impeachment, attended by more or less danger of producing injustice, and hence should never be exercised except where the exigencies of the situation clearly warrant it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1268.]

6. SAME—EFFECT OF TESTIMONY.

Code Civ. Proc. § 2049, prohibits a party to impeach his own witness by evidence of bad character, but provides that he may contradict him by other evidence, and may also show that he has made inconsistent statements with his present testimony, as provided in section 2052. Section 2052 provides that a witness may be impeached by evidence of inconsistent statements, but that he must be first given a chance to refresh his memory by having his attention called to the circumstances of times, places, and persons present when such statements were made. Held, that though the effect of admitting testimony to contradict one's own witness may be practically the same as if offered for impeachment, the only purpose for which the testimony may be given is merely to explain the manifestly awkward position in which a party has been placed through unexpected testimony of his own witness; section 2049 not authorizing the "impeachment" of one's own witness in the true legal sense of that term, the reference to section 2052 merely meaning that, before being permitted to prove that his witness has made inconsistent statements, the party must lay the foundation as provided by section 2052.

7. SAME.

The rule under the express terms of Code Civ. Proc. § 2049, that one may contradict his own witness or show that he has made inconsistent statements is subject to the qualification that the witness must give testimony damaging to the party calling him, and that it must appear that such party has been misled and taken by surprise and had reason to believe that the witness would give favorable testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1268.]

8. SAME.

A party will not be permitted under guise of the rule that one may contradict his own witness or show that he has made inconsistent statements to present to the jury mere hearsay declarations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1268.]

9. SAME.

If, in an action against a railway company for injury to one struck by an engine at a street crossing, it was plaintiff's theory that the engineer was negligent in failing to keep a lookout, the engineer's testimony, as her witness, that he saw her approaching the crossing was adverse to plaintiff as affecting her right to show that he had made an inconsistent statement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1268.]

10. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

If, in an action against a railway company for injury to one struck by an engine at a street crossing, plaintiff relied on the last clear chance theory, the admission of testimony for plaintiff rebutting the engineer's testimony, as her witness, that he saw her approaching the crossing was harmless to the company; it appearing that if the jury found on that theory

the verdict was based largely upon the engineer's testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4175.]

11. TRIAL—PRELIMINARY QUESTIONS OF FACT—QUESTIONS FOR JURY—WITNESSES—CONTRADICTION.

Whether a party whose witness has given unfavorable testimony was surprised as affecting his right to show inconsistent statements by the witness is a question for the court.

12. WITNESSES—CONTRADICTION.

Though in determining whether a party has been surprised by unfavorable testimony of his own witness, as affecting his right to show an inconsistent statement of the witness, the better practice is to receive evidence through sworn witnesses, much is left to the trial court's discretion, and there was no abuse of discretion in accepting as a basis for evidence of an inconsistent statement unsworn statements of the party's counsel that the unfavorable testimony was different from that which the party's attorneys understood it would be.

13. RAILROADS—STREET CROSSING ACCIDENT—LIABILITY.

If an engineer did not see one crossing the track until she was in a position of danger, and then could have avoided injuring her, he was negligent in not doing so, though she was primarily negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1096-1099.]

14. EVIDENCE—RES GESTÆ.

In an action against a railway company for injury to one struck by an engine while crossing a track, evidence that, in the injured person's presence and immediately following the accident, the engineer asked the fireman "Why didn't you tell me to stop?" was admissible as part of the res gestæ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 351-388.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Personal injury action by Minnie Zipperlen and another against the Southern Pacific Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

L. L. Cory, for appellant. G. W. Cartwright and Edgar S. Van Meter, for respondents.

HART, J. Action for damages for personal injuries. The verdict of the jury was in favor of plaintiffs for the sum of \$4,125, and, agreeably to said verdict, judgment was entered in their favor for that sum. The appeal, supported by a bill of exceptions, is from said judgment.

The defendant corporation, at the time plaintiff, Mrs. Zipperlen, received the injuries for which reparation in damages is sought through this action, operated a steam railway through and over certain public streets in the city of Fresno. On the 13th day of February, 1900, said plaintiff was traveling in a conveyance, drawn by a single horse, along Tuolumne street, in said city. The complaint alleges that said street was "a regularly laid out, open, and traveled public highway in the said city of Fresno from the west part of said city to the east part thereof," and that said street crosses the railroad tracks of defendant at a point between G

and H streets in said city. While the plaintiff was attempting to cross said tracks on said Tuolumne street, the vehicle in which she was riding was struck by a locomotive or "yard engine," used by defendant for "switching purposes," with the result that she was thrown with great violence to the ground, sustaining a fracture of the thigh, or, technically, the femur bone, and other less serious injuries. The plaintiff alleges that the injuries suffered by her were due to the negligence of the defendant. The claims of the plaintiffs are resisted by the defendant upon the ground of contributory negligence. A reversal of the judgment is insisted upon for the following reasons: (1) "That the evidence discloses, without substantial conflict, that the accident was occasioned by the contributory negligence and want of care of the plaintiff;" (2) "the court erred in allowing in evidence, as against this defendant, a certain conversation of the engineer of the defendant long after the accident occurred;" (3) "errors of the court in allowing, and refusing to give, certain instructions to the jury."

From the nature of the instructions submitted to the jury by the court, it is evident that the case was tried upon two distinct and diametrically opposite theories, viz.: (1) Knowledge on the part of the engineer of the perilous position of Mrs. Zipperlen and his failure to exercise the care imposed upon him under such circumstances to prevent the accident resulting in the damage. (2) Want of knowledge on the part of the engineer that any one at all was attempting to make the crossing, due to his gross carelessness and negligence in not looking, before and while the engine was moving toward the crossing, to ascertain whether or not it was clear. The first-stated proposition, it will be noted, involves what is known as the doctrine of the "last clear opportunity"—that is, that the engineer, having discovered Mrs. Zipperlen's perilous situation before damage was done, failed to exercise ordinary care to prevent the accident. *Bennichsen v. Market St. Ry. Co.*, 149 Cal. 22, 84 Pac. 420. The second proposition involves the contention that the engineer moved his engine toward the crossing without exercising any care whatever, or in total disregard of the duty as to care imposed upon him—that is, without looking down the track on which his engine was moving to learn whether the crossing was clear or in use by some traveler. In order that a clear understanding may be conceived of two of the points urged against the validity of the judgment—insufficiency of the evidence to sustain the verdict of which the judgment is predicated, and errors in the giving of certain instructions—it will be necessary to review the evidence to some extent.

The testimony of the engineer Mosler (introduced as a witness by the plaintiff) is to the effect that, just previous to the accident, his engine was standing, according to his best judgment, about 2,000 feet north of the

Tuolumne street crossing; that he was sitting on the right hand side of the cab at the time; that, after he started the engine, and was going in the direction of and approaching said street, he was looking toward the crossing. He proceeded: "I was keeping a close lookout upon the track in the direction in which the engine was moving to see that the crossing was clear. My fireman was on the left hand side of the engine, and at that time was ringing the bell. * * * I came down the Collis main line from the roundhouse. It is the first track west of the main line, which would be the third line coming from the west. * * * In crossing the railroad from G street upon Tuolumne street I think a cart would cross the two tracks before reaching the track I was on. I should judge I was backing up about four or five miles an hour. There were automatic brakes and reverse upon this engine. I ought to stop it in five or six feet, or eight feet, anyway, at the rate I was then going. I cannot say just when was the first time I saw the horse and cart of Mrs. Zipperlen, it was quite a distance when I saw her coming. She was then coming down from G street and was traveling east. In order to see her I would not have to look across where the fireman was sitting on that engine. I could sit up there and look on both sides, as it had a low tender. I could see the whole front all the time and the whole situation. I could see the track back of the tender. I would say I could see the track back of the tender as far as across this courtroom here. I could see a horse or buggy crossing the track as far away as across this courtroom by looking over the tender. I could look over the tender and could see Mrs. Zipperlen coming in the cart. There was no time after I first saw her that it would have been impossible for me to see her before the accident, and I watched her, and I watched her during the whole time. When I first saw her she was going east coming down Tuolumne street." The witness Stoner, who was driving toward Tuolumne street, and was some 30 or 40 feet back of Mrs. Zipperlen when the latter started across the tracks, testified that "when she got to the crossing she looked up and down to see if there were any cars, and saw a clear track and started to go across. The engine was then about 50 yards from the crossing on Tuolumne street, and was standing. I saw the fireman when it started to back down on the track. The fireman was sitting in his seat looking east. I did not watch the engine continuously until it arrived at the crossing. The rear end of the tender was about six or eight feet from the buggy when I saw it next. I should judge the engine was going about three miles an hour. Mrs. Zipperlen did not stop traveling or check up her horse to see whether the track was clear, and did not stop at any time after until the accident. She could not have stopped without my observing it. There was no time while Mrs. Zipperlen was driving

along upon that track that she crossed entirely over the track upon which the engine and tender were backing, prior to the accident. She could not have done that without my seeing her. I did not observe her horse backing into the engine, * * * I did not see the engine slack speed before the collision. * * * The fireman was not looking in Mrs. Zipperlen's direction, that I saw. He was not ringing the bell, and no bell was rung. I am positive no bell was rung. I could see the engineer's head sticking up over the cab. I might if I looked, but I do not think it would have been possible for the engineer to sit on that side without my observing him. I have acted as a fireman on the railroad. At the time of the collision the cart had just come on the first rail; the horse's ears were about past the tender. I am sure of that. Just as the collision took place the engineer started the engine the other way." Mrs. Zipperlen testified that she had been familiar with the crossing at Tuolumne street for about eight years, and that when she reached the crossing and before starting to pass over it she "paused to see that the track was clear"; that she observed that the engineer was standing on one of the tracks, about 75 or 100 feet from the crossing, and then started across. "I was perhaps 12 feet, or something like that, from the track that the engine was standing on. When I saw the engine standing still I started to cross. I was traveling at a slow, little trot. As I started to cross the engine started to back up, and then the engine struck the cart. I tried to back—back her off—but of course the engine frightened the horse and I could not do anything with her. She was badly frightened. I was not driving with a whip, and had no whip in my hand, and I heard no bell ringing. When I first saw the engine I saw the fireman. He was then on the west side of the cab. I did not see the engineer. I think I could have seen the engineer if he had been in the cab and high enough to have seen me over the tender. I do not think the fireman saw me. I observed the engine as it came on down. I did not notice the fireman looking in my direction as long as I looked. Of course, after the horse became unmanageable, I had all I could do to watch her. I do not think at any time I crossed entirely over the crossing upon which the engine was backing. I did not see the engineer or the engineer's face at any time. I did not hear the whistle blow. I do not think the engine was coming back very fast. After the engine struck the cart and I was thrown out upon the ground, I was lying right along side of the engine, or along side of the track rather. I could not see exactly how far the engine was from me when I saw it moving towards me. Possibly it was the length of this room, maybe not quite so far. When the engine struck the cart the horse reared up to one side—toward the right. The tender did not strike me. When the engine struck the wheel, it threw

me out. I rather think I fell backwards. The engine, tender, and wheels, just at the moment I struck the ground, were beside me. I was lying pretty close to the track, as close as I could possibly be without being injured by the wheels. The engine then ran on ahead, and I think the engineer sent the fireman to get it. I first saw the engineer when he stooped to pick me up about a couple of minutes afterwards." Mosier, the engineer, testifying for the defense, repeated that he saw "Mrs. Zipperlen at all times from the time she started to cross until she got across"; that he "could see the whole rig until I got as close as the width of this room to it—about 30 feet." He stated that Mrs. Zipperlen had crossed the track the engine was on, when her horse became frightened and began to "buck and back," and backed onto the track on which the engine was moving. He declared that when the engine was six or eight feet from the cart, and the moment the horse began backing toward the track the engine was on, he stopped the engine as soon as he could, "put on the brakes and reversed the engine." The horse kept on backing, he continued, until it struck the engine, causing Mrs. Zipperlen to be thrown to the ground. E. F. Phillips testified for the defendant that he saw the engine backing down the track toward the crossing over which Mrs. Zipperlen attempted to pass. He said that "the best of my recollection is that the locomotive was backing down, without any stop whatever from the roundhouse, and I heard its bell ringing as it was backing down. The locomotive came on down, and when the engineer saw her crossing the tracks it slowed up very perceptibly. I cannot say now whether it made a full stop or not, but I think it did. I think it kept on coming very nearly to a stop. Then her horse crossed the track that the locomotive was approaching on, and got the cart wheels, as far as I could see from where I was, between the rails of the track beyond the track that the locomotive was approaching on; then her horse got unmanageable. She had no whip to strike him with. She did all she could with the lines to urge him on, and, instead of his going forward as she wished he would, he commenced backing, and backed in a quarter circle until the wheel of the cart was struck by the approaching locomotive, with just enough force to upturn the cart onto the other wheel and threw her from the vehicle."

The foregoing constitutes the substance of the testimony given on direct examination of the principal witnesses introduced by both sides. The cross-examination of the witnesses, particularly that of Mrs. Zipperlen, revealed some discrepancies and inconsistencies which were of a character to make them peculiarly a matter for the jury to settle to its own satisfaction. A written statement, obtained from Mrs. Zipperlen a few hours after the accident happened, by Dr. Maupin, the

defendant's local surgeon, and to which statement the husband of Mrs. Zipperlen signed the name of his wife, contained a declaration that the horse she was driving was wholly to blame for the accident. This writing was shown to Mrs. Zipperlen, and she was asked, on cross-examination, if she made the statement. Her reply was that, while she was able to recall that Dr. Maupin had called to interview her on the day of the accident, she had no recollection of making the declarations which the written statement indicated she had made. But, as before declared, whatever inconsistency or apparent inconsistency might have been developed in her testimony through her cross-examination, it was, after all, for the jury, and not for this court, to determine whether her evidence had been thus shaken or shown to be unworthy of belief.

It is, however, plain to be seen from the evidence, of which we think we have given a fair conspectus, that either of the two theories upon which the case was tried in the court below is supportable by the proofs. From the testimony of Stoner, a strong inference may be drawn that neither the engineer nor his fireman saw Mrs. Zipperlen at any time, and knew nothing of her presence upon the crossing until the engine had collided with the cart. The jury would have been warranted from the engineer's testimony, and from the circumstance that the engine proceeded to move down the track toward the crossing after she started over the crossing, and from the probability that, had the engineer seen Mrs. Zipperlen in the act of passing over the crossing when he claimed that he did, he would have stopped his engine long before he reached the crossing, and remained at a standstill until she got beyond any possibility of danger, in adopting the view that the negligence of the defendant consisted in the failure of the engineer to look for the purpose of determining whether the crossing was clear. Upon this theory, the following instruction, of which particular complaint is made, contains a clear declaration of the law, and was, therefore, proper and pertinent: "If you believe from the evidence that plaintiff Minnie Zipperlen before undertaking to cross the railroad, at said time, exercised reasonable and ordinary care, and if you believe that, after the engineer or fireman gave steam to their engine, the horse which the said Minnie Zipperlen was driving became frightened and stood upon the track on which the engine and tender were so moving towards her, and that plaintiff Minnie Zipperlen endeavored to urge the horse forward, but could not do so, then the court charges you that the law imposed upon the servants of the defendant the duty of keeping a lookout and to observe and ascertain whether the crossing was clear, and if they failed to do so, and the said Minnie Zipperlen was injured in consequence of their failure so to do, without any fault on her

part, your verdict should be for the plaintiff, and you should assess such damages as you may deem just under all the circumstances, not exceeding the amount prayed for."

There is nothing in the case of *Bennichsen v. Market Street Ry. Co.*, 149 Cal. 18, 84 Pac. 420, in conflict with the views herein expressed. The instruction given to the jury in that case was upon the assumption that there was evidence showing that the motorman saw the plaintiff in a situation of danger, and declared that she was entitled to recover "if the defendant's employes could have avoided the injury by the exercise of ordinary care." The Supreme Court reversed the case, because there was no evidence disclosed by the record "that the motorman 'had an opportunity' to avoid injuring the plaintiff, or that he discovered her in a perilous situation." If the record in that case had contained evidence justifying it, the instruction would not, of course, have been subject to criticism. There is no claim that the instruction challenged here does not contain a correct statement of the law, and if, as we have suggested is the case, there is evidence to which it was applicable, then no valid objection can be urged against it.

Upon the theory of the "last clear opportunity"—that is, that the engineer saw and realized Mrs. Zipperlen's perilous situation, and had ample opportunity to have avoided the accident by the exercise of reasonable caution and care—the evidence presents, we think, a substantial conflict, so that with the verdict, even if we could say that that was the theory adopted by the jury, we are powerless to interfere. The engineer, we have seen, testified that he saw Mrs. Zipperlen all the time—from the moment she started to cross the tracks; that she had passed over the track over which the engine was backing just before the engine reached the crossing. The latter statement was designed to furnish the inference that the accident would not have occurred but for the fact that the horse became frightened and unmanageable and backed upon the track in use by the engine, and backed into the engine, thereby causing the accident. But Stoner says that "there was no time while Mrs. Zipperlen was driving along upon that track that she crossed entirely over the track upon which the engine and tender were backing, prior to the accident." From this testimony it was within the province of the jury to conclude that Mrs. Zipperlen had not crossed over the track occupied by the engine, and, from all the circumstances, find that the engineer knew such to be the fact. We are not concerned, it is true, with the reasoning of the jury upon the evidence by which it reached its verdict, but we may call attention to the testimony for the purpose of illustrating how it might have reached its conclusion and have been justified under the evidence in so doing. We think the evidence is sufficient to support the verdict and judgment.

It is claimed that the court erred in permitting the plaintiffs to introduce evidence for the purpose of showing that one of their own witnesses had, prior to the trial, made a statement with reference to the accident inconsistent with his testimony at the trial. The witness Mosler, having been called as a witness by the plaintiffs, testified to the facts to which we have already adverted with some particularity, and was then asked if he did not, addressing the husband of Mrs. Zipperlen, on the evening of the day of the accident, and alluding to the accident, say: "Ben, don't blame me for that. I was not to blame. I didn't see that horse until its ears projected past the end of the tender." To this question he replied in the negative. In rebuttal, and over the objection of the defendant, Bernhard Zipperlen was allowed to testify that Mosler made the statement embodied in the question. The court below, as well as counsel for respondents, appear to have assumed that the testimony was admissible for the purpose of impeachment; but we are of the opinion that, while its effect may practically be the same as if offered for impeachment, the only reason for which such testimony may be given is merely to explain the manifestly awkward position in which a party has been placed by reason of statements made by a witness, produced by himself, contrary to what he expected to prove by said witness, and which are calculated to operate against the interests of his cause. It must be conceded that the rule authorizing the contradiction of one's own witness is, in its application, like the rule as to impeachment, attended with more or less danger of producing injustice, and, therefore, should never be invoked or allowed to be exercised by the court except where the exigencies of the situation and the circumstances of the alleged betrayal clearly warrant it. When enforced on appropriate occasions in a proper way, it undoubtedly produces a wholesome and just result.

The authority by which a party in this state is allowed to contradict his own witness, or show that he has made, at other times, statements "inconsistent with his present testimony," is found in section 2049 of the Code of Civil Procedure. That section also provides that "the party producing a witness is not allowed to impeach his credit by evidence of bad character." And, as seen, we think that the section was not intended as authority for the impeachment by any means of one's own witness, in the true legal sense of that term. The reference in that section to section 2052 of the same Code merely means, we think, that, before being permitted to prove that his witness has made previous inconsistent statements, the party must lay the foundation as provided by the last-mentioned section—that is, must give the witness a chance to refresh his memory by calling his attention to the "circumstances of times, places, and persons present," when

and before whom such alleged inconsistent statement is claimed to have been made.

There are, however, certain qualifications to the rule established by section 2049, *supra*, and which it is indispensably necessary should be strictly observed, lest some other important rule of evidence be violated. First, the witness must give testimony damaging to the party producing him. Secondly, it must appear that the party by whom the witness has been produced has been misled and taken by surprise, and that he had reason to believe that the witness would give testimony favorably to his side. A party producing a witness virtually stands as an indorser of the character of such a witness, and by the act of calling him to testify in his behalf in effect declares to the court and jury that the testimony of said witness will strengthen and support his contention; so, when the witness gives evidence which tends to destroy, rather than build up, the cause of the party who has presented him to the court and jury as a person possessing information valuable and material to his side of the controversy, the law steps in, and says that no litigant should thus be placed at the mercy of such treachery, and authorizes the party to explain why he called him as a witness, and thereby acquit himself of the otherwise disadvantageous imputation of contributing toward making out a case against himself. But a party, under the guise of the rule in question, will not be suffered to present to the jury mere hearsay declarations—declarations admissible neither under the rule of *res gestæ* nor as having been made in the presence and hearing of the party against whom they are offered. The statement, the admission of which under the indicated circumstances is here claimed to have been prejudicially erroneous, could not, it is obvious, have gone into the record either as part of the *res gestæ* or as a declaration in the presence and hearing of the opposite party. If it was not admissible for the purpose of "contradicting the witness," or of showing that he at another time made statements "inconsistent with his present testimony," to the end that the party might explain why he introduced him as a witness, then it was incompetent for any purpose, because, if admitted, though a mere naked hearsay declaration, it would erroneously go before the jury as independent evidence. We are aware that some early cases were disposed to hold that such testimony was admissible under no circumstances. We have not taken the trouble to ascertain whether, at the time of the filing of the opinions to which we refer, section 2049 of the Code of Civil Procedure, as it now reads, was a part of our law of evidence; but we would be unable to reconcile the intimation in those cases with the language of the section as it now exists. There is no reason upon principle why a party should not be allowed to contradict his own witness if the latter has

betrayed such party, and by his unexpected testimony placed the party producing and standing sponsor for him in a false light before the court or jury. There is every reason in principle why such a practice should be upheld, where it is clear that it has not been abused. Moreover, the Legislature has recognized the soundness of the principle.

The questions, then, determinative of the admissibility of the testimony here are: Did the witness give testimony adversely to the plaintiffs, for whom he was called to testify? If so, does it reasonably appear that the plaintiffs were taken by surprise because of the nature of the testimony given by said witness? The plaintiffs undoubtedly sought to prove by Mosier that he did not see Mrs. Zipperlen until the accident occurred, and that, therefore, he was not, when moving his engine toward the crossing, exercising the care and caution with which he was charged by the law. But the engineer declared he did see her all the time, the effect of such declaration being that he was approaching the crossing in a careful, prudent, and cautious manner. It was then that counsel for plaintiffs asked him if he did not state to Bernhard Zipperlen that he did not see his wife until about the time the collision occurred. We doubt not that the sole theory of the plaintiffs, up to the time Mosier was called by them and testified as their witness, was that the engineer's negligence, if there was negligence, was due to his total failure to look down the track toward the crossing to learn whether it was clear or being used by some traveler. In this view and upon this theory his testimony was certainly adverse and damaging to plaintiffs. But, assuming that the evidence shows the other theory to be the correct one, the theory for which the testimony of Mosier given as a witness for plaintiffs was undoubtedly the inspiration—that is, the last clear opportunity theory—and that the jury adopted that view, then the testimony of Bernhard Zipperlen rebutting the statements of Mosier was, it is manifest, altogether immaterial and harmless, for if the jury found in accordance with the last-suggested theory it no doubt based its verdict largely upon the evidence of the engineer himself, said evidence tending more to establish that theory than the other.

The solution of the second question determinative of the competency of the testimony appears to be fraught with greater difficulty than the first, yet it seems to us, as the first part of this sentence implies, that the difficulty is more apparent than real. Were the plaintiffs surprised by the character of the testimony given by Mosier? There is nothing in the record showing that the court received evidence upon which to found its determination of this preliminary question. The question is one addressed solely to the judgment of the court, for it is a question of law with which the jury is not concerned. The record does show, however,

that Mr. Cartwright, one of the attorneys for the plaintiffs, stated to the court, when objection was made to questions to Mosler for the purpose of laying the foundation for Bernhard's testimony, that the statement of Mosler "is entirely different from what we had expected," and when it was sought to show the alleged contradictory statements through said Bernhard, Mr. Van Meter, for the plaintiffs, declared to the court that Mosler's testimony "was different from that which the plaintiffs' attorneys understood that it would be," and requested the court to instruct the jury that "this question is asked solely for the purpose of impeaching" Mosler, and "not for the purpose of showing any affirmative fact other than the impeachment." The statute does not expressly point out the procedure to be adopted in such a case, nor has our attention been directed to any appellate court opinion in which any suggestion as to the proper procedure is ventured. It is obviously true that the court must be put in possession of facts from which it can say whether testimony contradicting one's own witness may be introduced, and we think that there can be no doubt that the better practice would be to present evidence through sworn witnesses upon the question. But in any event much should be left to the sound discretion of the trial court. In the case at bar the course suggested was not pursued, the court evidently being satisfied with the unsworn statements of counsel that Mosler's testimony was "different from that which the plaintiffs' attorneys understood that it would be." We cannot say that the court below abused its discretion in allowing the evidence upon the statements of counsel. To assume that counsel were not acting in good faith with the court—that they knew that Mosler would testify as he did, and that they called him as a witness for no other purpose than to furnish a mere pretext for introducing evidence otherwise absolutely incompetent and inadmissible—would be tantamount to accusing counsel of resorting to the veriest pettifoggery. The judge of the court below is presumably well acquainted with plaintiffs' counsel, and without apparent hesitation exercised for the court a discretion favorable to their contention, and, as before suggested, we cannot say abused it.

We have reviewed the record before us in extenso because the case, like nearly all cases of personal injury, presents important questions. The state of the evidence is such (as we believe and have held) as to make it a case peculiarly for the jury, with whose function under the law there would be, we think, unwarranted interference were we to hold that the evidence is insufficient to justify its conclusion. There is evidence, as will be perceived by an examination of the record, showing that Mrs. Zipperlen, before proceeding to start over the crossing, stopped for an instant and looked to see if the track

was clear, and that when she started to cross the tracks the engine was at a standstill. If the engineer, as he declared was the fact, saw her all the time, there appears no reason why he should not have exercised a greater degree of care and caution than the evidence discloses. If he did not see her until she was in a position of danger, and then had the opportunity of avoiding the accident, as the jury was justified in finding, he was at fault in not doing so, even if it should be admitted that she herself was primarily negligent.

There are other assignments of alleged error which are, we think, undeserving of special or extended notice.

The question addressed to the fireman by the engineer, in the presence of Mrs. Zipperlen, immediately following the accident, "Why didn't you tell me to stop?" was asked so near the time the accident occurred as to make it a part of the transaction, and therefore admissible under the rule of *res gestæ*. The mere fact that the accident preceded the question does not, necessarily, take it out of that rule. *Heckle v. S. P. Co.*, 123 Cal. 442, 56 Pac. 57—the opinion by McFarland, J., giving a clear exposition of the rule.

We are unable to discover any just reason for disturbing the judgment, and, for the reasons herein discussed, it is affirmed.

We concur: CHIPMAN, P. J., and BURNETT, J.

7 Cal. App. 231

QUINN v. NEVILLS. (Civ. 396.)

(Court of Appeal, First District, California.
Dec. 26, 1907. Rehearing Denied by Supreme Court Feb. 20, 1908.)

1. APPEAL AND ERROR—REVIEW—CONFLICTING EVIDENCE.

The question of residence or domicile is a mixed one of law and fact, and the determination thereof by the trial court on conflicting evidence is conclusive on review.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3316-3330.]

2. DOMICILE—EVIDENCE.

Neither voting nor registration as a voter is conclusive on the question of domicile.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by John J. Quinn against William A. Nevills. From an order denying defendant's motion for a change of venue, defendant appeals. Affirmed.

Carter & Ricketts and McClellan & McClellan, for appellant. Albert M. Johnson and Hiram W. Johnson, for respondent.

HALL, J. This is an appeal from an order denying defendant's motion for a change of the place of trial of the action from the city and county of San Francisco to the county of Tuolumne. The demand and motion were upon the ground that defendant resided

in Tuolumne county at the time of the commencement of the action. In opposition to the motion, plaintiff filed and read his affidavit, which set forth facts tending strongly to support the view that defendant resided and had resided in the city and county of San Francisco continuously for several years immediately preceding the commencement of the action. The affidavit sets forth in detail that during the years 1900, 1901, 1902, and 1903 defendant resided and had his dwelling place in a private family dwelling owned and occupied by him at No. 2224 Washington street in said city and county. That during the entire year 1904 (the action was commenced November 9, 1904) defendant maintained and kept his actual residence at the Palace Hotel in said city and county, and that he continuously and permanently occupied a suite of rooms there, furnished in part with the personal effects, paraphernalia, bric-a-brac, house furnishings, and family portraits of himself and wife. The affidavit set forth other details tending to show that defendant resided and had continuously resided in San Francisco as his home for several years, and that his visits to Tuolumne county were for business purposes only. On the other hand, defendant, by his own affidavit and others, presented evidence tending to show that his legal residence was in Tuolumne county. Especial stress is laid on the evidence that he always claimed Tuolumne county as his place of residence, and was there registered as a voter, and in fact voted there the day before the action was commenced.

The case is a typical one of a conflict of evidence, and of inferences to be drawn from the facts, and we cannot disturb the order of the trial court. The question of residence or domicile is a mixed question of law and fact, and the determination of the trial court upon conflicting evidence is conclusive upon this court. 14 Cyc. 865, and cases there cited; *Estate of Weed*, 120 Cal. 634, 53 Pac. 30.

Appellant has cited *Shelton v. Tiffin*, 6 How. (U. S.) 185, 12 L. Ed. 387, as authority for the contention that the fact of registration and voting in a given county is conclusive evidence of domicile. An examination of the case discloses that it cannot be held to be an authority on this point. *Shelton* was sued in the United States Circuit Court in Louisiana by a citizen of another state, and pleaded want of jurisdiction in that he was not a citizen of Louisiana, but was a citizen of Virginia. The evidence showed that he had formerly resided in Virginia, but for two years had resided on and cultivated a plantation in Louisiana, but had not voted there. It was held that the evidence was sufficient to sustain a finding that he was a citizen of Louisiana. The court did say that the exercise of the right of suffrage was conclusive on the question of intention, but as

Shelton had not exercised such right, and no such fact was in the case, what the court said was clearly obiter.

Neither voting nor registration as a voter is conclusive on the question of domicile. *Easterly v. Goodwin*, 35 Conn. 295, 95 Am. Dec. 237; *Enfield v. Ellington*, 67 Conn. 459, 34 Atl. 818; *Smith v. Croom*, 7 Fla. 81; *Hewes v. Baxter*, 48 La. Ann. 1303, 20 South. 701, 36 L. R. A. 531; *Clark v. Territory*, 1 Wash. T. 68; *East Livermore v. Farmington*, 74 Me. 155.

The order is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

QUINN v. NEVILLS et al. (Civ. 397.)

(Court of Appeal, First District, California. Dec. 26, 1907. Rehearing Denied by Supreme Court Feb. 20, 1908.)

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by John J. Quinn against William A. Nevills and another. From an order denying a motion for change of venue, defendants appeal. Affirmed.

Carter & Ricketts and McClellan & McClellan, for appellants. Albert M. Johnson and Hiram W. Johnson, for respondent.

HALL, J. This is an appeal from an order denying defendants' motion for a change of venue, and presents the same question as is presented by the case of *John J. Quinn v. Wm. A. Nevills* (No. 396; this day decided) 93 Pac. 1055, and for the same reason the order is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 194

YOUNG v. CLARK et al. (Civ. 398.)

(Court of Appeal, First District, California. Dec. 23, 1907.)

1. TRIAL—FINDINGS—SUFFICIENCY.

A finding that all the allegations of the complaint are true is sufficiently definite and certain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial; § 783.]

2. BANKRUPTCY—DEBTS DISCHARGED—DEBTS CREATED IN "FIDUCIARY CAPACITY"—ACT CONSTRUED.

The term "fiduciary capacity," as used in Bankr. Act July 1, 1898, c. 541, § 17, subd. 4, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1907, p. 1026] excepting from debts released by a discharge in bankruptcy those created by fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity, applies only to technical trusts, such as those arising from the relation of attorney, executor, or guardian, and not to debts due by a bank-

rupt in the character of an agent, factor, commission merchant and the like.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 794-807.

For other definitions, see Words and Phrases, vol. 3, pp. 2755-2760; vol. 8, p. 7663.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by A. J. Young against W. F. Clark and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Franklin P. Nutting, for appellants. Heller & Powers, for respondent.

KERRIGAN, J. The complaint alleges that at the time of the transactions set forth defendants were commission merchants, and were in the employ of La Sociedad Anonima de Hilados y Tejidos de Cantel, Lda, a corporation (plaintiff's assignor), as its agents; that plaintiff's assignor deposited with its said agents certain moneys, to be paid out on its order; that said agents expended a portion of these funds on said assignor's account; and that the money claimed by plaintiff is a balance remaining in the agents' hands after such expenditures had been made, which balance plaintiff alleges the defendants refuse to pay over. Upon the issues framed by the pleadings, judgment was entered for plaintiff, from which judgment this appeal is prosecuted.

1. Appellant claims that there is no finding on the issue of the assignment of the claim to the plaintiff. There is no special finding on the subject, but it is covered by the following general finding: "That all of the allegations of plaintiff's complaint and answer to the affirmative allegations of defendants' answer and cross-complaint are true." The part of this finding relating to the allegations of the answer is open to criticism for uncertainty; but the finding is definite and certain—and therefore sufficient—wherein it states "that all the allegations of plaintiff's complaint * * * are true." *Gale v. Bradbury*, 116 Cal. 40, 47 Pac. 778.

2. Appellants' special demurrer to the complaint was overruled, and that ruling is now assigned as error. We think there is enough uncertainty in the complaint to have warranted the court in sustaining the demurrer on that ground; but the action of the court in this regard is not of sufficient importance to demand a reversal of the judgment. *Alexander v. Central L. & M. Co.*, 104 Cal. 536, 38 Pac. 410.

3. During the trial defendants were permitted to amend their answer by pleading in bar of the action their adjudication in bankruptcy in the United States District Court; Whereupon plaintiff amended his pleadings by alleging that his cause of action was to recover moneys held in trust by defendants for plaintiff's assignor, which would not be

released by a discharge in bankruptcy, and that said district court had granted permission to plaintiff to continue the prosecution of this action. The court found these allegations to be true, and a judgment was accordingly entered. Appellants contend that the trial court reached an erroneous conclusion in holding that respondent's claim was of such a trust character that it would not be released by defendants' discharge in bankruptcy. We agree with this contention. Section 17 of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1907, p. 1026], prescribes what debts are exempt from the operation of the bankrupt's discharge. The only part of that section applicable to this case reads: "Sec. 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." It has been often held that the term "fiduciary capacity" as used in this subdivision of section 17 applies only to technical trusts, such as those arising from the relation of attorney, executor, or guardian, and not to debts due by a bankrupt in the character of an agent, factor, commission merchant, and the like. In *Re Basch* (D. C.) 97 Fed. 761, it was held that a debt due by a bankrupt who, being a commission merchant, has received goods for sale upon a contract to return the same or the proceeds thereof, is not one of those described in section 17 (subdivision 4). In *Knott v. Putnam* (D. C.) 107 Fed. 907, a broker having, upon a customer's order, bought and then sold cotton, it was held that the obligation to pay over the proceeds of such sale is a debt from which the bankrupt will be freed by his discharge.

The United States Supreme Court, in speaking of a factor who had wrongfully retained the money of his principal, says: "If the act embraces such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and indeed all cases in which the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of the trust. But his is not the relation spoken of in the first section of the act. The cases enumerated, 'defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee,' are not cases of implied, but special, trusts, and the 'other fiduciary capacity' mentioned must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, with-

in the act." *Chapman v. Forsyth*, 2 How. (U. S.) 202, 11 L. Ed. 236.

In *Palmer v. Hussey*, 119 U. S. 96, 7 Sup. Ct. 158, 30 L. Ed. 362, where the bankrupt had received certain bonds "as the agent and broker" of the plaintiff, and had converted them to his own use, the same court held that there was no such fraud in the creation of the debt, and no such trust in respect to the possession of the bonds by the defendant, as to bar the operation of the discharge.

In *Upshur v. Briscoe*, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931, it was held by the same court that an instrument appointing a person as attorney to receive moneys for the benefit of another, and to pay the interest annually to such other, and at her death to pay the principal sum to her legal issue, or in default of such issue the said sum to revert to the maker of the instrument, did not create between the attorney and the beneficiary a trust in its technical sense, nor a debt of a "fiduciary character" within the meaning of the bankruptcy act, although the obligation was called a "trust," and the attorney a "trustee," in the instrument. The court says (page 377 of 138 U. S., page 317 of 11 Sup. Ct. [34 L. Ed. 931]) that, within the meaning of the exception in the bankruptcy act, the debt is not created by a person while acting in a fiduciary character, merely because it is created under circumstances in which trust or confidence is reposed in the debtor, in the popular sense of these terms.

In the case of *Noble v. Hammond*, 129 U. S. 65, 9 Sup. Ct. 235, 32 L. Ed. 621, the record showed that the defendant was a produce dealer, and had been requested by certain parties to collect money for them, and to keep it until it should be called for. After collecting the money, he deposited it in bank in his own name, and before he paid it over was forced into bankruptcy. The court held that the parties' claim against him was not created by the fraud of the bankrupt, or by his defalcation while acting in any fiduciary character within the meaning of the bankruptcy act; and that, even if the agreement might be construed as creating a trust in some sense, it was not such a trust as comes within the provisions of the bankruptcy law.

Most of the above decisions arose under former bankruptcy acts, but section 17 of the act of 1898 is practically identical with the corresponding provisions of the earlier acts, and has received the same construction in such cases as have arisen since its enactment. In *re Basch* (D. C.) 97 Fed. 761.

In *Bracken v. Milner* (C. C.) 104 Fed. 522, decided under the act of 1898, where defendant had received money from another to be loaned for that other's account, and was authorized to receive payments of the interest or principal of such loans, and remit the same to the owner, and afterward became bankrupt without having paid over the moneys, it was held by the Circuit Court that the

defendant had not received the money in a fiduciary capacity within the meaning of the statute, but merely as an agent; and that the plaintiff's claim for the money was one from which the defendant was released by a discharge in bankruptcy.

The judgment is, therefore, modified by striking therefrom the following: From paragraph 1 thereof the words, "and plaintiff's assignor's claim therefor was not such a claim as would be released by a discharge of defendants in bankruptcy," the words "in trust" occurring in the phrase "to be held in trust by defendants," and the word "trust" occurring in the phrase "entitled to the return of said trust moneys." And from paragraph 2 thereof the following: "And since said assignment said defendants have been and now are holding said sum and interest thereon in trust for this plaintiff, and plaintiff's claim therefor is not such a claim as would be released by a discharge of defendants in bankruptcy."

As so modified, the judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

7 Cal. App. 178

BURKE v. SUPERIOR COURT OF CALIFORNIA, IN LOS ANGELES COUNTY,
et al. (Civ. 410.)

(Court of Appeal, Second District, California.
Dec. 21, 1907.)

1. DEPOSITS IN COURT—APPLICATION FOR ORDER—CORPORATIONS—DISSOLUTION—FUNDS.

Plaintiff alleged that the directors of a corporation, desiring to wind up its affairs, authorized him to pay its debts and distribute its assets, and alleged that defendants owed certain sums on stock subscriptions, to which defendants by cross-complaint alleged that plaintiff, as an officer of the corporation, had a certain sum which he held as funds of the company, and asked that he be required to deposit the amount in court. Plaintiff's answer to the cross-complaint admitted having received such sum, but set up a claim for disbursements and expenses and for compensation for services. Held, that these allegations were deemed denied under Code Civ. Proc. § 462, and therefore plaintiff's title to that part of the fund which he claimed constituted an issue to be tried in the ordinary manner, and it was error to order him to pay the same into court under section 572, authorizing an order for such payment when it is admitted by the pleading or shown that a party has in his possession any property, the subject of litigation, held by him as trustee for another party or which belongs to another party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deposits in Court, § 1.]

2. PROHIBITION—JURISDICTION.

Where the pleadings did not disclose the requisite facts necessary to confer jurisdiction on the superior court to make an order requiring a party to pay money into court under Code Civ. Proc. § 572, such an order was void, and, the court having no jurisdiction to entertain subsequent proceedings for contempt based thereon, the writ of prohibition would issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, §§ 87-86.]

Application by Edmund Burke for writ of prohibition against the superior court of the

county of Los Angeles and Hon. Frederick W. Houser, Judge. Writ granted.

Edmund Burke, in pro. per. Henry J. Stevens and O'Melveny, Stevens & Millikin, for respondents.

SHAW, J. Soto Heights Land & Improvement Company is a corporation of which the petitioner is the secretary, as well as a member of the board of directors. A complaint was filed by plaintiff, wherein it is alleged that the board of directors of the corporation determined to abandon the prosecution of the business for which it was incorporated, and authorized petitioner to take such steps as might be deemed necessary to obtain an accounting and wind up its affairs, pay its debts, and distribute the remaining assets to the stockholders in proportion to their respective rights. A number of persons alleged to have subscribed for stock, upon whose subscriptions a balance was due, were made party defendants, against whom judgments were asked for such sums as might be found due the corporation, and praying that an order be made directing payment of the amount which might be found due to plaintiff and other creditors of the corporation; it being alleged that said corporation was indebted to plaintiff and others for services, money advanced, salary, disbursements, office rent and legal expenses, as well as for other purposes. In answer to this complaint, the defendants California Cornice Works, Pacific Coast Planing Mill Company, and Arletta F. Davenport, alleged in the complaint to be indebted to said corporation for moneys due on their subscriptions to stock, filed cross-complaints wherein, among other things, they alleged that plaintiff, as an officer of the corporation, had in his hands as such officer the sum of \$2,050, which he held as funds of the company and for its use and benefit, and asked for judgment that said plaintiff be required to deposit said sum of \$2,050 in court. In his answer to these cross-complaints plaintiff admits that he did receive of the funds of said corporation the sum of \$2,050, and that prior to the commencement of the action said cross-complainants and the other defendants authorized him, as trustee, in his and their behalf, to take such steps as he deemed proper to wind up the affairs of the said corporation, and to that end collect amounts due, pay its obligations, and divide the residue among those found to be entitled to the same; that pursuant to such authorization he, among other things, instituted this action, and is maintaining the same for said purpose. It is then alleged that said corporation is indebted to plaintiff in various sums, for advancements and disbursements actually made for and on its behalf, amounting in the aggregate to several hundred dollars, as well as for salary as secretary of the corporation since the date of its incorporation at \$150 per month; and alleging, further, that he claims the right to

deduct from the funds in his possession the amount due him from said corporation, and asks that the rights of all parties to said action be adjudicated therein. Upon these pleadings the cross-complainants, upon notice duly given, moved the court for an order requiring plaintiff to deposit in court the sum of \$2,050, the ground therefor being that he had in his possession such sum of money belonging to said corporation; whereupon the court granted said motion and ordered plaintiff forthwith to pay into court the sum of \$2,050. Thereafter a motion was made by plaintiff to vacate and annul said order, or modify the same to the extent of crediting plaintiff with the amount of cash expended for and in behalf of said corporation as its secretary, which motion the court denied, and on June 21, 1907, the court made an order requiring petitioner to appear before it on June 28, 1907, then to show cause why he should not be adjudged guilty of contempt for disobeying said order requiring him to pay into court said sum of \$2,050, and why he should not be punished for such disobedience.

The order requiring petitioner to deposit this \$2,050 in court was made under and by virtue of section 572 of the Code of Civil Procedure, which is as follows: "When it is admitted by the pleading, or shown upon examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court."

The court's jurisdiction to make the order requiring petitioner to deposit in court the sum of \$2,050 was, under the provisions of said section, dependent upon whether or not petitioner by his pleading admitted having in his possession said sum of money belonging to the corporation. If he did not make such admission, then it would seem clear that the court was without jurisdiction to make such order. Petitioner in his answers to the cross-complaints admits having received funds of the corporation to the amount of \$2,050, but as against this he sets up a claim for several hundred dollars on account of disbursements made and expenses incurred by him for and on behalf of the corporation, and also claims compensation for services rendered since the incorporation of the company as secretary thereof. These allegations, under the provisions of section 462 of the Code of Civil Procedure, are deemed to be denied; and therefore petitioner's title to that part of the fund which he claimed by way of compensation for services rendered as secretary, and on account of disbursements made for the corporation, constituted an issue to be tried, not in this summary manner, but in the usual

and ordinary action wherein a verdict of the jury or finding of the court could be had thereon. His answer showed that petitioner claimed the right to part of the fund in his possession, and the court was without jurisdiction to compel him to surrender to another what he claimed to be his property, until there had been a judicial determination, upon the hearing of all the facts, that he had no right to it. To justify the making of the order, the admission in the pleadings of having money in possession belonging to another must be free from any claim thereto. "If money is ordered to be brought in which is not clearly due, very gross injustice may be done, as the defendant may be put to great inconvenience, and afterwards be told that his view of the case was correct." *Hagall v. Currie*, L. R. 2 Ch. App. 449.

Furthermore, the fund must, under the provisions of said section, be the "subject of the litigation." "If the money in the possession of the party is not the subject of the litigation, but its payment is an incident thereto, dependent upon the judgment to be rendered in the action, as in the case of an action for * * * accounting * * * the provisions of this section do not authorize such order." *Green v. Duvergey*, 146 Cal. 379, 80 Pac. 234. The pleadings clearly show the action to be one having for its purpose the procuring of an accounting between the corporation and its stockholders, and to determine the amount of money in the possession of any of the parties to the action belonging to the corporation, with a view of having it paid into court and winding up the corporate affairs.

In our judgment the pleadings do not disclose the requisite facts necessary to confer jurisdiction upon the court to make the order requiring a deposit of the money in court. The order is therefore void, and, being void, it follows that the court had no jurisdiction to entertain any subsequent proceedings based thereon and instituted for the purpose of having the petitioner adjudged guilty of contempt for disobedience of such order.

Our conclusion renders it unnecessary to pass upon other alleged points affecting the validity of the order.

The alternative writ of prohibition heretofore granted is made preemptory.

We concur: ALLEN, P. J.; TAGGART, J.

7 Cal. App. 151

CAMPBELL v. FREE. (Civ. 440.)

(Court of Appeal, First District. California. Dec. 19, 1907.)

1. ELECTIONS—CONTEST—VOTES FOR INELIGIBLE CANDIDATE—"PLURALITY."

Under Const. art. 20, § 13, providing that a plurality of the votes given at an election shall constitute a choice, and Pol. Code, § 1066, providing that the person receiving at any election the highest number of votes for any office to be filled at such election is elected thereto, a can-

didate not receiving a plurality of votes given at an election was not entitled, in order to secure his own election, to have disregarded the votes cast for an ineligible candidate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 207-215.]

2. SAME—COSTS.

Under the express provisions of Code Civ. Proc. § 1125, where an election is annulled and set aside, judgment for costs must be rendered against the party whose election was contested in favor of the party contesting the same.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Proceeding by James H. Campbell against Arthur M. Free to contest an election. From a judgment declaring void the election of Free, but refusing to declare contestant elected, contestant appeals. Modified as directed in opinion, and, as modified, affirmed.

John E. Richards, C. C. Coolidge, and Jas. P. Sex (H. S. Bridges, of counsel), for appellant. Rogers, Bloomingdale & Free, for respondent.

COOPER, P. J. This proceeding was brought by plaintiff as contestant to determine the question as to who, if any one, was elected to the office of district attorney of the county of Santa Clara at the general election held in November, 1906, and to have it declared that the election of respondent be annulled and set aside. The trial court, upon its findings, ordered judgment, annulling and setting aside the declaration of the official board of canvassers and declaring void the alleged election of respondent, but refused to declare the appellant elected to said office. This appeal is from the judgment so entered.

Respondent does not question the judgment annulling the election as to him. Appellant contends that it should have been further adjudged that he was duly elected to the said office. The record contains many questions as to rulings on ballots, and as to whether or not certain ballots were properly rejected or counted. It is, however, to the credit of counsel, conceded that, if the ruling of the court was correct on the main question, the ballots concerning which the rulings are questioned, however counted, would not change the result. All other questions are therefore eliminated, except the single one as to whether or not the appellant was elected to the office of district attorney at the said election.

The facts material to the question, as found by the court, are as follows: Respondent received at said election 5,840 legal votes, and appellant 5,748. The respondent at the time of said election held the office of postmaster at Mountain View, with a compensation exceeding \$500 per annum, and was therefore ineligible to the office. The Constitution provides (article 20, § 13) that a plurality of the votes given at an election shall constitute a choice; and the Political Code (section 1066) states that "the person receiving at any election the highest number of votes for any

office to be filled at such election is elected thereto." The appellant did not receive the plurality of the votes given at the election. He contends that the votes cast for respondent should not be considered in any manner in the count, for the reason that the respondent was ineligible; that the case should be determined in the same manner as if the votes respondent received had been cast for the King of England or the Man in the Moon. To such doctrine we cannot accede. The respondent was a citizen of the state, a resident and elector of the county, and it does not appear that he even knew of his own ineligibility. The law contemplates that the electors shall decide the question as to who shall be elected to an office, and that it is necessary to a choice that some one legally qualified shall receive a plurality of the "votes given at the election." The appellant did not receive such plurality. The votes cast for respondent were votes given at the election. It is not necessary to discuss the question as to the effect of votes given for a name in mythology, or to some one whose name has come down in history, as Julius Cæsar, or Mohammed. In such case the elector would clearly appear not to have intended to express his choice as to who should hold the office. The electors usually take a pride and an interest in casting their votes for the person or candidate of their choice, not as an idle act, but with a view of giving the office, with its honors and emoluments to such person or candidate. If the person for whom such votes are cast is ineligible, the votes are not to be counted for the next highest candidate on the list. If a majority of the voters, either by mistake of law or of fact, happen to cast their ballots for an ineligible candidate, it does not follow that the next highest on the list would receive the office. The votes, if given in good faith for a person who is a candidate for the office, and who afterwards is found to be ineligible, are notwithstanding legal votes. It sometimes happens, notwithstanding all care, that a political convention nominates a person to an office who is afterwards found to be ineligible, and that such fact was not only unknown to the convention which nominated him and to the voters, but also unknown to himself. In such case it is consistent with the theory of our institutions, and the right of the people to have officers of their own choosing, to consider the election void, because it is not an expression of the will of the people by a plurality of the votes cast. Any other rule might result in giving an office to a very incompetent or dishonest man who received only a few votes. In the case at bar one Brandt received 407 votes out of about 12,000 cast for the office of district attorney. Suppose the appellant was also ineligible to that office, if his views are correct the courts would have to declare Brandt the duly elected district attorney.

The views we have expressed are support-

ed by decisions in our own state. *Saunders v. Haynes*, 13 Cal. 145; *Crawford v. Dunbar*, 52 Cal. 36; *People v. Rodgers*, 118 Cal. 373, 46 Pac. 740, 50 Pac. 668. In the latter case it is said: "The election of appellant was declared void, and was annulled by reason of his ineligibility to the office; but inasmuch as he received a majority of the votes cast at the election, the court was not authorized to declare that any other person was elected." The same rule prevails in Pennsylvania. *Commonwealth v. Cluley*, 56 Pa. 270, 94 Am. Dec. 75. It is there said: "Even in England it has been held that votes for a disqualified person are not lost or thrown away, so as to justify the presiding officers in returning as elected another candidate having a less number of votes, and, if they do so, a quo warranto information will be granted against the person so declared to be elected on his accepting office. Under Constitutions such as ours there are even greater reasons for holding that a minority candidate is not entitled to the office, if he who received the highest number of votes is disqualified." And in *New York (People v. Clute)*, 50 N. Y. 451, 10 Am. Rep. 508; and in *Michigan (Crawford v. Moliter)*, 23 Mich. 341; and in *Kentucky (Howes v. Perry)*, 92 Ky. 200, 17 S. W. 575, 36 Am. St. Rep. 591; and in *West Virginia (Dryden v. Swinburne)*, 20 W. Va. 89; and in *Arkansas (Sweptson v. Barton)*, 39 Ark. 549; and in *Missouri (State v. Walsh)*, 7 Mo. App. 142; *State v. Vail*, 53 Mo. 97. In *Indiana* the rule appears to be to the contrary, but we do not approve of the doctrine as laid down in the cases from that state.

In the judgment, after annulling and setting aside the election of respondent, the court directed "that each party pay their own costs." This is not in accord with the plain mandate of the statute in regard to election contests (*Code Civ. Proc.* § 1125), which provided at the time of this contest that, "if the election is annulled and set aside, judgment for costs must be rendered against the party whose election was contested in favor of the party contesting the same."

The trial court is directed to modify the judgment by striking therefrom the portion quoted, and inserting in lieu thereof "and the contestant is entitled to judgment for costs against respondent"; and, as so modified, the judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

7 Cal. App. 155

CAMPBELL v. BOARD OF SUP'RS OF
SANTA CLARA COUNTY et al.
(Civ. 447.)

(Court of Appeal, First District, California.
Dec. 19, 1907. Rehearing Denied by
Supreme Court Feb. 17, 1908.)

1. OFFICERS—PUBLIC OFFICE—"INCUMBENT."
Under Pol. Code, § 906, providing that "an office becomes vacant on the happening of either

of the following events before the expiration of the term: (1) The death of the incumbent * * *—one who has been elected to an office, but who fails to qualify by filing the bond, is in the sense of the statute the incumbent, though he never was in possession of nor performed any duty in connection with the office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 82.

For other definitions, see Words and Phrases, vol. 4, pp. 3518, 3519.]

2. SAME—VACANCY.

Under Pol. Code, § 996, providing that "an office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent. * * * (10) The decision by a competent tribunal declaring void his election or appointment"—an office became vacant on the decision of the court declaring void an election on the ground that the person elected, but who had not taken possession of the office, and who failed to qualify and take his official oath, was ineligible to take the office at the time of the election, in proceedings to contest the election under Code Civ. Proc. § 1111, providing that the right of any person declared elected may be contested when he was not at the time of the election eligible to the office, and section 1122, providing that, after hearing the proofs and allegations of the parties, the court must pronounce judgment either confirming or annulling and setting aside such election.

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by James H. Campbell against the board of supervisors of the county of Santa Clara and others to enjoin defendants from declaring a vacancy in the office of district attorney of said county and then filling such office by appointment, and also to enjoin the county clerk from issuing a certificate of appointment to any person appointed by the board to such office. Judgment for plaintiff, and defendants appeal. Reversed.

Rogers, Bloomington & Free, for appellants. James H. Campbell (John E. Richards, of counsel), for respondent.

COOPER, P. J. This action was brought to enjoin the board of supervisors of Santa Clara county and the several members thereof from declaring a vacancy in the office of district attorney of said county and then filling such office by appointment, and also to enjoin the county clerk of said county from issuing a certificate of appointment to any person who might be appointed district attorney of said county by said board of supervisors. Judgment was entered for plaintiff as prayed for, and this appeal is from the judgment.

At the general election held in November, 1902, plaintiff was duly elected district attorney of said county for the term of four years, his term to commence on the first Monday of January, 1903. He duly qualified, entered upon the discharge of the duties of his office, and ever since has continued in possession of said office and in the discharge of the duties thereof. At the general election held in November, 1906, the plaintiff and one Arthur M. Free were each candidates for

the said office of district attorney. Free received a plurality of the votes cast at such election, and was declared by the board of supervisors duly elected to such office. He declined and refused to file his official bond and take the oath of office. After the declaration by the board of supervisors to the effect that Free had been duly elected, the plaintiff instituted proceedings in the superior court of said county to contest the election of said Free, which resulted in a judgment declaring that at the time of the election Free was ineligible to the office by reason of the fact that he held a lucrative office under the United States government, the compensation of which exceeded \$500 per year, and annulling his election for this reason. The judgment, besides declaring that at the time of his election Free was ineligible to the said office, in effect adjudged that plaintiff was not elected to said office. This judgment has this day been affirmed here. *Campbell v. Free* (No. 440) 93 Pac. 1060. The question therefore resolves itself into whether or not there is a vacancy in the office of district attorney of said county, which the board of supervisors are authorized to fill by appointment.

It is provided in the Code of Civil Procedure (section 1111) that the right of any person declared elected may be contested when the person was not at the time of the election eligible to the office. The Code evidently contemplates that cases may arise in which the person declared elected, and who receives the highest number of legal votes, was at the time of his election ineligible to the office. In many cases the evidence as to the ineligibility of a candidate is conflicting, and it requires a careful weighing and analysis of the evidence by the trial court to determine the ultimate fact. The Code in such case provides for a contest as to the right of a person declared elected to an office, although he be at the time of the election ineligible. It provides (section 1122) that after hearing the "proofs and allegations of the parties the court must pronounce judgment in the premises, either confirming or annulling and setting aside such election." We must then look to the Political Code as to when an office becomes vacant. It is there provided (section 996): "An office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent. * * * (10) The decision by a competent tribunal declaring void his election or appointment."

The court declared void the election of Free before the expiration of his term, and the question therefore narrows itself to the one as to whether or not he was the incumbent. It has been held, and is the rule in this state, that one who has been elected to an office, but who fails to qualify by filing the bond, is in the sense of the statute the incumbent, although he never was in possession of nor

performed any duty in connection with the office. The office in such case has been held to become vacant by his refusal to file his official oath or bond within the time prescribed. *People v. Taylor*, 57 Cal. 620. The court in that case, after a careful consideration of section 996 of the Political Code, said: "This provision of the Code regards the person duly elected to an office as the incumbent of that office from the time of the commencement of the term for which he was elected until the expiration thereof, whether he qualifies or not." The difference between that case and the one at bar is that there the person elected neglected and failed to qualify after his election, and here he neglected to qualify by making himself ineligible before election. There the person elected was ineligible at the time his term began because he did not comply with the statutory mandate as to qualifying; here he was ineligible because at the time he was elected he had neglected to resign his office of postmaster. In the one case the person elected did not do that which the law declared that he must do after his election in order to be qualified to get title to the office; in the other he neglected to do that which the law required that he should do in order to be a person qualified to be elected to the office. In both cases the officer was elected. In neither was he entitled to the office when the term commenced. In the case cited the court held that the person elected was not eligible to take the office at the time the term began; in the case at bar the court held that the person elected was not eligible to take the office at the time of the election. We think that it would be a distinction without a substantial difference to hold that in the case cited the party elected was the incumbent, and that in this case he was not. We therefore conclude that the office became vacant upon the decision of the court declaring void the election of Free.

The decision in *People v. Rodgers*, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668, supports the conclusion we have reached in this. In that case Rodgers was elected chief of police of the city of Sacramento, and received his certificate of election. He was ineligible at the time of his election, but at the commencement of his term he, without the consent of Drew, his predecessor in office, intruded into and obtained possession of the office. After Rodgers had so taken possession of the office, a proceeding was instituted by an elector of the city, contesting his right to hold the office, which resulted in a judgment duly made, setting aside his election by reason of his ineligibility at the time of such election. After the judgment so made, the board of supervisors appointed Rodgers to the office. It will thus be seen that the only difference between the two cases is that in that case the party declared elected, but who was ineligible, had taken possession of the office, and in this case the predecessor is still holding. The court, after a statement of the facts, and a refer-

ence to subdivision 10, § 996, of the Political Code, said: "There was thus presented the precise circumstances contemplated by the above provision of the Political Code. The election of the defendant had been contested on the ground that he was ineligible to the office, and a competent tribunal had decided that the election was void. * * * An election to fill the office, regular in all respects, had been held, and the electors of the city had at that election chosen the defendant by a majority of their votes to be the successor of the relator, and he had qualified for the office and entered upon its duties. By reason of certain extrinsic facts he was held not to be entitled to retain the office, but he had nevertheless been elected as the successor of the relator, and had qualified for the office and entered upon its duties."

In the case at bar Free did not qualify nor enter upon the duties of the office; but we cannot see any reason for holding that an office becomes vacant in a case where an ineligible officer, who has been elected, enters into possession of it, and a judgment is afterwards entered, declaring his election void, that would not apply with equal force to a case where, under like circumstances, the ineligible officer has not taken possession of the office. The question as to who is in the actual possession of the office is not made a factor by the provisions of the Code. Nor would the fact that Free failed to qualify and take the oath of office make any difference. In *Adams v. Doyle*, 139 Cal. 878, 73 Pac. 582, the question was as to whether or not there was a vacancy in the office of sheriff of Tuolumne county at the time the board of supervisors appointed Adams to that office. Adams had been a candidate for the office at the preceding election, had received the highest number of votes, and had received his certificate of election. He did not file his bond and take the oath as prescribed by law. His predecessor in office continued to be the incumbent after the term of Adams had begun and before the board of supervisors appointed him to the office. Adams had not only failed to qualify after his election, but had not taken possession of the office. The board of supervisors declared the office vacant, and appointed Adams to the very office to which he had been elected, and for which he had failed to qualify. He qualified under the appointment so made, and the court held that there was a vacancy, and that his title under the appointment was valid. The court there said: "The incumbent, in the sense of the statute, is the person declared elected to hold the term, who holds title to it, subject to forfeiture by failing to qualify, although it is not yet begun. The fact that the prior incumbent, in order that the public business may be done, is allowed and directed to continue to discharge the duties in the meantime, and until some person is lawfully invested with title to the term, does not affect the question of there being a vacancy in the sense intend-

ed. The vacancy is in the term of four years just beginning. The prior incumbent does not claim title to this term, and he has none but is a mere locum tenens, holding for public convenience until the vacancy in the term is filled."

The conclusion we have reached does not injure the plaintiff. He has enjoyed the full benefit of the term for which he was elected. He was not elected for the term he is seeking to hold. The question involved is one of public concern. The office having become vacant, the ordinary machinery of the law cannot be enjoined from filling such vacancy by appointment.

The judgment is reversed.

We concur: HALL, J.; KERRIGAN, J.

7 Cal. App. 190

MAHLER v. DRUMMER BOY GOLD MIN. COMPANY et al. (Civ. 412.)

(Court of Appeal, Third District, California.
Dec. 21, 1907.)

VENUE—CHANGE—AFFIDAVITS.

On a motion for change of venue, plaintiff filed a counter affidavit stating that at the commencement of the action against defendant corporation and E., its secretary, the residence of said E. was unknown to plaintiff; that E. had given his address as San Francisco, and had written from that place, and also from other places, but that letters sent by plaintiff to such address had received no answers or had been returned; that plaintiff had no other means of finding out the residence of said E.; that he was informed by employees of the corporation located where the action was brought that they could get no answers to letters written to E.; that plaintiff was informed and believed that the B. Company could not find said E. at such address in order to serve summons on him, and that, being unable to learn the address of said E. and his residence being unknown, plaintiff designated the county where the mine was as the county in which to bring action. *Held*, that the affidavit was insufficient to permit plaintiff to name a county in which to sue, under Code Civ. Proc. § 335, requiring the action to be tried in the county in which defendants reside, but providing that, if defendants' residence is unknown to plaintiff, the same may be tried in any county which plaintiff may designate.

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by Fred W. Mahler against the Drummer Boy Gold Mining Company and another. From an order refusing a motion for change of venue, defendants appeal. Reversed.

Coburn & Collier and Charles G. Nagle, for appellants. J. H. Magoffey and Taylor & Tebbe, for respondent.

CHIPMAN, P. J. Motion to change the place of trial. Plaintiff commenced the action in Siskiyou county to recover from defendants for services as superintendent of certain quartz mines in said county. It is alleged in the complaint that plaintiff was employed by defendants on August 1, 1905; that he commenced work on October 20, 1905,

and "continued to work for defendants as superintendent until the 5th day of March, 1906." The complaint was filed April 13, 1906. Plaintiff "prays judgment against defendants and each of them." Defendants moved the court to change the place of trial from Siskiyou county to the city and county of San Francisco, on the ground that at the commencement of the action the latter place was and ever since has been their place of residence. At the hearing of the motion it appeared from the uncontradicted affidavit of defendant Emmons that defendant corporation at the commencement of the action was a corporation organized under the laws of this state, with its principal place of business at the city and county of San Francisco, which was then and is now its residence and its principal place of business. Affiant also deposed that he was at the commencement of the action and ever since has been and now is a resident of said city and county; that he was at all times the secretary of said corporation; that each of said defendants has fully and fairly stated the case in said action to his and its attorney, and after such statement each of said defendants was advised by said attorney and verily believes "that they and each of them have a good and substantial defense to said cause on its merits." A general demurrer to the complaint was filed, with the demand by both defendants for a change of the place of trial. Plaintiff in the action filed a counter affidavit, in which he stated "that at the time of the commencement of the action the residence of said defendant Emmons was unknown to plaintiff"; that at the time of employing plaintiff as superintendent of said mines Emmons "gave this plaintiff his address as San Francisco; that thereafter he wrote this plaintiff from San Francisco, and also from Portland, Or.; that for the period of several months before the commencement of this action this plaintiff addressed letters to said Emmons at his last-named address in San Francisco; that he received no answers to several of said letters, and then one or two letters were returned to him by the Post Office Department as undelivered letters; that thereupon this plaintiff sent a registered letter to said Emmons, and that said registered letter was returned by the postal department to this plaintiff as undelivered; that this plaintiff had no other means of finding out the residence of said Emmons." Affiant then states that he was informed by the men working at the mine that "they could get no letters from said Emmons in answer to their letters sent to him at his last address"; that affiant was "informed and from such information believes that the Bee Hive Company, of Yreka, could not find said Emmons at such address in order to serve summons upon him"; that being "unable to learn the residence of said Emmons, and his residence being unknown, plaintiff designated the county of Siskiyou as the county in which to bring

said action, said county being the county in which the cause of action accrued." There is no brief on file by respondent.

Under section 395 of the Code of Civil Procedure all the defendants must join in the motion to change the place of trial (*McKenzie v. Barling*, 101 Cal. 460, 36 Pac. 8; *Quint v. Dimond*, 135 Cal. 574, 67 Pac. 1034); and the section has been complied with in the present case. But plaintiff seeks to retain the case in the court where it was commenced, under the provisions of said section which read as follows: " * * * The action must be tried in the county in which the defendants, or some of them reside at the commencement of the action; or, if none of the defendants reside in the state, or if residing in this state, and the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint. * * * " We presume that at the hearing of the motion plaintiff was successful in convincing the court that his affidavit was sufficient to show that the residence of defendant Emmons was unknown to plaintiff, and hence he had the right to designate the county in which to bring the action. The right to thus designate the place of trial is not an arbitrary right, or optional with plaintiff, upon a mere statement that the residence of defendant is unknown to him. He must state facts sufficient to show that he has resorted to such means to ascertain the defendant's residence as would be expected of a reasonable man seeking in good faith to make the discovery. The practice act, as amended in 1858 (*St. 1858*, p. 82, c. 103), contained a provision similar to that in section 395 of the Code of Civil Procedure. It was said in *Loehr v. Latham*, 15 Cal. 418: "But this provision must receive a reasonable construction. A willful or careless ignorance of the residence of the defendant does not put it in the power of the plaintiff to sue him in any county of the state, however remote from his residence; for, if this were so, the effect of the rule would be practically to repeal this provision requiring suit to be brought in the county of the residence of defendant. It would be putting it in the power of the plaintiff, by keeping ignorant of the facts, or feigning ignorance, to sue where he pleased, and thus fraud would be encouraged and oppression practiced. To resist the application of the defendant, the plaintiff should have shown that he used proper diligence to ascertain the residence of defendant before suit, and failed." In *Thurber v. Thurber*, 113 Cal. 607, 45 Pac. 852, speaking of the opinion in *Loehr v. Latham*, supra, the court said: "This decision has not been overruled or questioned, so far as we are informed. The reasons for enforcing the rule enunciated by Mr. Justice Baldwin are aptly put and cogent, and the practice indicated should be upheld and enforced."

Tested by these rules the affidavit of plain-

tiff was insufficient. At the time the action was commenced Emmons was a resident of San Francisco, as shown by his undisputed affidavit; and this was but a few weeks after plaintiff quit work. Emmons was known to plaintiff to be the secretary of the defendant company, and yet plaintiff made no inquiry of any of its officers or at its place of business in San Francisco; nor is any explanation given why he made no such inquiry, or that, if made, it would not have availed anything; nor is it shown that the address of the company's place of business was unknown to plaintiff. The letters alleged to have been sent to San Francisco were not sent to any street address, nor does affiant state that such address was unknown to plaintiff. In stating that he sent letters to Emmons' last-known address, plaintiff fails to state where that was; nor is the time stated when these letters were sent. The registered letters, as in the case of the others, were doubtless addressed to the general delivery. As superintendent of a mine being operated by the defendant corporation, and serving in that capacity under its direction and employment, there should have been no difficulty in finding the address of the secretary by inquiring of the officers of the company or at its place of business; and if, for any reason, the information by these obvious means could not be had the affidavit should have so shown. Plaintiff makes like indefinite statement that he was informed by the Bee Hive Company, of Yreka, that that company could not find Emmons. But when he made inquiry, or from what persons connected with that company, or why they should know anything about Emmons, does not appear. The men working in the mine under plaintiff as superintendent, of whom plaintiff made inquiries, cannot be supposed to have known more than plaintiff of Emmons' whereabouts, and the failure of the men to impart information in no wise strengthens the affidavit. The affidavit fails to show that diligence which the law very properly demands before plaintiff will be permitted to select his own forum in which to try his case.

The order is reversed, with directions to grant the motion.

We concur: HART, J.; BURNETT, J.

HOLLY ST. LAND CO. v. BEYER.

(Supreme Court of Washington. Feb. 10, 1908.)

1. TRUSTS—RESULTING TRUSTS—ESTABLISHMENT BY PAROL.

Where defendant was in possession of land, holding and claiming it adversely to F., and, on an attempt to oust her, M. intervened and agreed to settle the adverse claim of F. for and in behalf of defendant, and did so by paying the demand of F., and taking a quitclaim in his own name, merely as a matter of convenience and because of difficulties between defendant and her husband, the trust in favor of defendant may be shown by parol; title being acquired

by M. in such way that equity will not permit him or those claiming under him to assert it against defendant, for whose benefit it was acquired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 130-133.]

2. HUSBAND AND WIFE—SEPARATE OR COMMUNITY PROPERTY.

Where a deed is acquired either in exchange for separate property or as a gift, the interest of the grantee is his separate property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 893, 900-902.]

3. TRUSTS—DEED TO HUSBAND AS TRUSTEE—RECONVEYANCE.

Where one acquires title to property as a naked trustee, and so acquires no beneficial interest, joinder of his wife in a reconveyance is unnecessary.

4. TRIAL—RECEPTION OF EVIDENCE—TIME FOR OBJECTION.

Objection that there was no sufficient proof of the loss of a deed to authorize parol evidence of its contents, not having been made when the parol evidence was offered, is waived, and cannot be raised for the first time in a request for instructions, or on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 183-190.]

5. DEEDS—EXECUTION AND CONTENTS—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.

Evidence, in an action for land of the execution, contents, and delivery of a deed, held sufficient to go to the jury.

6. MONEY PAID—RIGHTS ARISING.

No claim or cause of action can accrue in favor of one because of a payment which he makes on behalf of another, either as a gift to or in satisfaction of some obligation legal or moral which he deems he owes the other.

7. APPEAL—CLAIMS NOT MADE BELOW.

Though an unsuccessful plaintiff in an action for land was entitled to a lien for taxes paid on the property, such claim, not having been made below before or at time of rendition of judgment, cannot be made on appeal.

Appeal from Superior Court, Whatcom County: Jeremiah Neterer, Judge.

Action by the Holly Street Land Company against Pauline Beyer. Judgment for defendant. Plaintiff appeals. Affirmed.

Healy & Slentz and Fairchild & Bruce, for appellant. Rose & Craven, for respondent.

RUDKIN, J. The defendant in this action acquired title to the property in controversy on the 13th day of June, 1890. On the 12th day of December, 1891, judgment of foreclosure was entered against the property in the superior court of Whatcom county in a certain action wherein the Fairhaven Land Company was plaintiff and the defendant herein and her husband were defendants. The property was sold on execution pursuant to this judgment on the 30th day of January, 1892, and bid in by the execution plaintiff, the Fairhaven Land Company. The sale was thereafter confirmed, and a sheriff's deed issued to the purchaser on the 20th day of October, 1893. On the 15th day of March, 1897, a writ of assistance was awarded to place the purchaser in possession. While

this writ was in the hands of the sheriff for execution, and on the 17th day of February, 1898, one R. E. Meyer settled and compromised the matter with the Fairhaven Land Company by conveying to that company certain lands owned by him; the deed of conveyance reciting that the property so conveyed was his separate property. The Fairhaven Land Company, in turn, on the same day, quitclaimed and released the property in controversy to Meyer. On the 5th day of September, 1899, Meyer conveyed this property, together with other property, to his brother Fred Meyer, and the plaintiff in this action claims title by mesne conveyance under him. The defendant, on the other hand, claims title (1) by adverse possession for more than 10 years; (2) by deed from R. E. Meyer of an earlier date than the deed under which the plaintiff claims; and (3) upon the ground that the title acquired by Meyer from the Fairhaven Land Company was taken in trust for the defendant. The case was tried before a jury, and, from a judgment in favor of the defendant, the plaintiff has appealed.

The first and principal assignment of error is the refusal of the court to withdraw the case from the consideration of the jury and direct judgment in favor of the appellant. This assignment is very general, and numerous questions have been discussed under it. It is contended that a trust in real property cannot be proved by parol; that the title acquired by Meyer from the Fairhaven Land Company was community property, and could not be conveyed by him without his wife joining in the conveyance; and that there was no sufficient evidence of the loss of the deed from Meyer to the respondent or of its execution, contents, or delivery. While it is true as a general rule that a trust in real property cannot be proved by parol, we think this case falls within a well-established exception to that rule. The respondent was in possession of the property, holding and claiming adversely to the Fairhaven Land Company, whether rightfully or wrongfully we need not inquire. When an effort was made to oust her, Meyer intervened, and agreed to settle the adverse claim to the property for her and in her behalf. He did so by paying the amount demanded by the adverse claimant, and took a quitclaim deed in his own name merely as a matter of convenience, and because of certain difficulties then existing between the respondent and her husband. When a party acquires title to property in such a way a court of equity will not permit him or those claiming under him to assert the title so acquired against the person in whose behalf and for whose benefit it was acquired. *Borrow v. Borrow*, 34 Wash. 684, 76 Pac. 305; *Peterson v. Hicks*, 43 Wash. 412, 86 Pac. 634, and cases there cited. The claim that the title acquired by Meyer under the quitclaim deed from the

Fairhaven Land Company became community property of himself and wife is not borne out by the record. The property conveyed by Meyer in settlement and satisfaction of the claim of the Fairhaven Land Company was his separate property, or at least the conveyance so recited. If it was community property, he conveyed nothing in exchange. The quitclaim deed was therefore acquired either in exchange for separate property or by gift, and, in either event, the interest acquired would be separate property. Furthermore, if Meyer acquired title to the property in controversy as a naked trustee, he acquired no beneficial interest, and a joinder of his wife in a reconveyance was unnecessary. It is quite apparent from the record that there was no sufficient evidence of the loss of the deed from Meyer to the respondent to warrant the admission of parol testimony of its contents. But an objection of this kind cannot be raised for the first time in a request for instructions, or in this court. If not made when the parol testimony is offered, it is deemed waived. *Wheeler, Osgood & Co. v. Ralph*, 4 Wash. 625, 40 Pac. 709; *Price v. Scott*, 13 Wash. 577, 43 Pac. 634.

Considering the fact that the respondent remained in possession of the property in controversy, claiming the same as her own, until the death of Meyer some four years after he acquired the quitclaim deed, and considering, further, the declarations of the grantor, the relationship of the parties, and all the surrounding circumstances, we think there was ample testimony of the execution, contents, and delivery of the deed to warrant the submission of the question to the jury. Some objections are urged against the charge of the court, but these present no questions that we have not already considered.

The appellant suggests that it is at least entitled to a lien against the property for the amount paid by Meyer, and for the amount of the taxes paid. The action was not prosecuted for the purpose of enforcing a lien for moneys advanced by Meyer; and, furthermore, it appears that the advancement was made as a gift or in satisfaction of some obligation legal or moral which Meyer deemed he owed to the respondent, and from such a payment no claim or cause of action could accrue. The appellant was doubtless entitled to a lien for taxes paid on the property, but such claim should have been presented to the court below at or prior to the rendition of judgment. It cannot be asserted here for the first time.

This disposes of all the questions presented by the appeal, and, finding no error in the record, the judgment is affirmed.

HADLEY, C. J., and FULLERTON, CROW, MOUNT, and DUNBAR, JJ., concur.

COLUMBIA VALLEY R. CO. v. PORTLAND & S. RY. CO.

(Supreme Court of Washington. Feb. 13, 1908.)

PUBLIC LANDS—GRANTS IN AID OF RAILROADS—FORFEITURES.

Acts Cong. March 3, 1875, c. 152, 18 Stat. pp. 482, 483, §§ 1, 4 [U. S. Comp. St. 1901, pp. 1568, 1569], provide that any railroad which files its articles with the Secretary of the Interior and proof of its existence, and after the completion of 20 miles of road files a copy of its profile, etc., shall be entitled to public lands for a right of way and stations, with a proviso that, on noncompletion of the road for five years, the rights of the road would be forfeited as to such uncompleted parts. *Held*, that Act Cong. June 26, 1906, c. 3550, 34 Stat. 482 [U. S. Comp. St. Supp. 1907, p. 553], providing that any grant to a railroad which had failed to complete its road in accordance with the provisions of the above act shall be declared forfeited to the United States as to the uncompleted parts, and that the forfeiture declared shall, without further assurance or conveyance, inure to the benefit of any owners of land heretofore conveyed by the United States, etc., is effective and complete without any judicial or other or further proceedings on the part of the government, and that the questions of fact upon which the forfeiture depends may be inquired into and determined in any judicial proceedings in which rights claimed under the original grants are involved.

Appeal from Superior Court, Klickitat County; W. W. McCredle, Judge.

Suit by the Columbia Valley Railroad Company against the Portland & Seattle Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. W. Cotton, Covert & Stapleton, and Ralph E. Moody, for appellant. James B. Kerr and George T. Reid, for respondent.

RUDKIN, J. This was a controversy between two railway companies over a right of way through certain public lands of the United States, or, more properly speaking, through what were public lands of the United States at the time the rights of the plaintiff company attached. The first and fourth sections of Act Cong. March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], are as follows:

"Section 1. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed

in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

"Sec. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road." 18 Stat. 483.

The plaintiff company complied with the requirements of these two sections during the year 1899 by filing with the Secretary of the Interior copies of its articles of incorporation, proofs of its due organization, and profiles of its road as located, but failed to complete the road or any section thereof within five years after location as required by the proviso to section 4. On the 26th day of June, 1906, an act to declare and enforce the forfeiture provided by section 4 of the act of Congress of March 3, 1875, was approved by the President. 34 Stat. 482, c. 3550 [U. S. Comp. St. Supp. 1907, p. 553]. This act provides as follows: "That each and every grant of right of way and station grounds heretofore made to any railroad corporation under the act of Congress approved March third, eighteen hundred and seventy-five, entitled 'an act granting to railroads the right of way through the public lands of the United States,' where such railroad has not been constructed and the period of five years next following the location of said road, or any section thereof, has now expired, shall be, and hereby is, declared forfeited to the United States, to the extent of any portion of such located line now remaining unconstructed, and the United States hereby resumes the full title to the lands covered thereby freed and discharged from such easement, and the forfeiture hereby declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land heretofore conveyed by the United States subject to any such grant of right of way or station grounds: Provided, that in any case under this act where construction of the railroad is progressing in good faith at the date of the approval of this act the forfeiture declared in this act shall not take effect as to such line of railroad." The court below found that the plaintiff company had not constructed its road within the

five years next following the location thereof, and that the construction was not progressing in good faith at the date of the approval of said last-mentioned act, and concluded as a matter of law that all rights acquired by the plaintiff company under the act of March 1875 were forfeited by the act of June 26, 1906. From a judgment entered in accordance with these findings and conclusions, the present appeal is prosecuted.

The contention of the appellant is briefly this: (1) That the grant made by the first section of the act of March 3, 1875, is a grant in present. (2) That the title vested in the appellant as soon as it filed proofs of its organization and a profile of its road with the Secretary of the Interior. (3) That the rights thus acquired could only be divested or forfeited by act of Congress, or by some judicial proceeding instituted by the United States in the nature of the inquest of office at common law. (4) That the act of June 26, 1906, is not sufficiently specific to work a forfeiture, because by its terms it only extends to cases where the road has not been constructed within five years from date of location or where construction was not progressing in good faith at the date of the approval of the act, and these questions of fact can only be determined in some judicial proceeding instituted by the United States. In so far as the rights of the appellant rest on the act of 1875, we will concede for the purposes of this appeal that its claims under that act are well founded. We cannot agree, however, that any form of judicial proceeding is requisite or necessary to enforce the forfeiture declared by the act of 1906. The nature of these grants and the manner in which a forfeiture for breach of condition subsequent may be declared and enforced have often been considered by the Supreme Court of the United States. In *Schulenburg v. Harriman*, 21 Wall. (U. S.) 44, 22 L. Ed. 551, the court said: "In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and therefore an office found was necessary to determine the estate; but, as said by this court in a late case (*United States v. Repentigny*, 5 Wall. [U. S.] 286, 18 L. Ed. 627), 'the mode of ascertaining or of assuming the forfeited

grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings." In *United States v. Northern Pacific Railroad Co.*, 177 U. S. 435, 20 Sup. Ct. 706, 44 L. Ed. 836, the court said: "In July, 1866, Congress granted unto the California & Oregon Railroad Company a right of way over the public lands. In a subsequent suit between the railroad company and one Bybee, a holder of a mining claim, it was claimed that the railroad company had forfeited and lost its right under the grant by its failure to complete its road within the time limited in the act; that such failure operated ipso facto as a termination of all right to acquire any further interest in any lands not then patented. But it was held by this court, in the words of Mr. Justice Brown: 'That in all cases in which the question has been passed upon by this court the failure to complete the road within the time limited is treated as a condition subsequent, not operating ipso facto as a revocation of the grant, but as authorizing the government itself to take advantage of it and forfeit the grant by judicial proceedings, or by an act of Congress, resuming title to the land.'" In *Atlantic & Pacific Railroad Co. v. Mingus*, 165 U. S. 413, 17 Sup. Ct. 348, 41 L. Ed. 770, the court said: "But, while we think the practice of forfeiting by legislative act is too well settled to be now disturbed, we do not wish to be understood as saying that this power may be arbitrarily exercised, or that the grantee may not set up in defense any facts which he might lay before a jury in a judicial inquiry. It would comport neither with the dignity of the government, nor with the constitutional rights of the grantee to hold that the government by an arbitrary act might divest the latter of his title when there had been no breach of the conditions subsequent, or when the government itself had been manifestly in default in the performance of its stipulations. The inquiry in each case is a judicial one, whether there has been, upon either side, a failure to perform, and it makes but little practical difference whether such inquiry precedes or follows the re-entry or act of forfeiture." In *Farnsworth v. Minn. & Pacific Railroad Co.*, 92 U. S. 49, 23 L. Ed. 530, the court said: "A forfeiture by the state of an interest in lands and connected franchises, granted for the construction of a public work, may be declared for non-compliance with the conditions annexed to their grant, or to their possession, when the forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. Such mode of ascertainment and determination—that is, by judicial proceedings—is attended with many conveniences and advantages over any other mode, as it establishes as matter of record, importing ver-

ty against the grantee, the facts upon which the forfeiture depends, and thus avoids uncertainty in titles, and consequent litigation. But that mode is not essential to the divestiture of the interest where the grant is for the accomplishment of an object in which the public is concerned, and is made by a law which expressly provides for the forfeiture when that object is not accomplished. Where land and franchises are thus held, any public assertion by legislative act of the ownership of the state, after default of the grantee—such as an act resuming control of them and appropriating them to particular uses, or granting them to others to carry out the original object—will be equally effectual and operative. It was so decided in *United States v. Repentigny*, 5 Wall. (U. S.) 211, 18 L. Ed. 627, and in *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, 22 L. Ed. 551, with respect to real property held upon conditions subsequent. * * * The only inconvenience resulting from any mode other than by judicial proceedings is that the forfeiture is thus left open to legal contestation, when the property is claimed under it, as in this case, against the original holders." See, also, *Northern Pacific Railway Co. v. Miller*, 20 Wash. 21, 54 Pac. 603.

From these decisions, it appears manifest to us that the forfeiture declared by the act of 1906 is effective and complete, without other or further proceedings on the part of the government, and that the questions of fact upon which the forfeiture depends may be inquired into and determined in any judicial proceeding in which rights claimed under the original grant are involved.

For these reasons, the judgment of the court below is free from error, and stands affirmed.

HADLEY, C. J., and FULLERTON, ROOT, MOUNT, and DUNBAR, JJ., concur.

WAIGHT v. LAKE WASHINGTON MILL CO.

(Supreme Court of Washington. Feb. 7, 1908.)

1. APPEAL—REVIEW—HARMLESS ERROR.

Where plaintiff was permitted, over defendant's objection, to prove what he had alleged in his reply, he cannot object to the court's action in striking that matter from the reply.

2. MASTER AND SERVANT—INJURY TO SERVANT—ISSUES AND PROOF.

Where, in an action for injuries sustained by the breaking of a belt in defendant mill, plaintiff contended that the use of an idler pulley for tightening the belt so as to set a saw in motion was the cause of the accident, and the only allegation of negligence upon which a recovery could be based was that the belt was too short and that by the application of the idler pulley an additional strain was placed upon it which caused the belt to break, the trial court properly refused to permit plaintiff to show that he had complained to the foreman that because the belt was too short it sometimes set the saw running without the use of the idler

and he might get his hand cut, and that because of the foreman's promise to fix it he was induced to remain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 861-876.]

3. SAME.

Where, in an action for injuries sustained in defendant mill, plaintiff alleged the causes of his injury to have been because the machine at which he worked was out of plumb and the belt was too short, and neither of these allegations was supported by any definite proof whatever, the trial court was justified in sustaining defendant's motion for nonsuit.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by C. H. Waight against the Lake Washington Mill Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

Reynolds, Ballinger & Hutson, for appellant. Roberts & Hulbert, for respondent.

DUNBAR, J. This is an action brought by appellant for the recovery from respondent of damages for alleged personal injuries. The complaint alleges: That the plaintiff was employed by the defendant to operate a rip-saw in the defendant's sawmill. That plaintiff was inexperienced in the operating of the machinery, and so informed the defendant at the time of his employment, but was assured that there was no danger in the operation of the rip-saw. That the rip-saw was operated by the use of steam power applied as follows: A belt runs around two pulleys, one of which pulleys is attached to said machine, the other around the main line shaft. The belt is so arranged that the machine remains at rest except when the belt is tightened by the pressing against it of another pulley. That it was the duty of the plaintiff to start and stop said machine by the use of said pulley. That the defendant carelessly and negligently permitted said machine to be and to become out of plumb, and that said machine was out of plumb on the date on which the plaintiff received the injuries complained of. That the belt was too short, as defendant well knew, and that said machine being out of plumb, it was dangerous for a person to operate said machine. That defendant well knew of the dangerous condition of the machine, and negligently and carelessly permitted it to remain in that condition. That plaintiff was inexperienced in the matter of operating the machinery, and relied wholly upon the assurance and representations of the defendant as to the safety of the place in which he was required to work. That on the afternoon of the 12th day of December, 1906, plaintiff was in his accustomed place and operating said machine in the usual way. That at the same time plaintiff, in order to start the machine in the usual manner, permitted the pulley to be pressed against the belt of said machine, so negligently and carelessly provided and arranged by said defendant, and that said belt broke, striking plaintiff on the head and knocking him to the

floor, where he remained for a long time unconscious, by reason of which he received the injuries complained of. The answer denied negligence on the part of the defendant, and averred that the accident and injury to plaintiff, if any was received, was caused wholly by his own fault, carelessness, and negligence, and by reason of the dangers incident to his employment and assumed by him. To this affirmative defense plaintiff replied with the allegation, in substance, that he had told the foreman that the upright belt was too tight; that it was so tight that sometimes when the idler pulley or tightener was not brought to bear it would start the machinery, thereby placing the plaintiff in peril by reason of the fact that he was liable to get his hand sawed; that the defendant had agreed to repair the machinery; and that by reason of said agreement the plaintiff continued to work. To this affirmative matter defendant interposed a demurrer, which was overruled. Thereafter defendant moved to strike said affirmative matter, which motion the court sustained. It was shown on the trial that the machine on which plaintiff worked was operated by a belt running from the main shaft to a pulley attached to the machine. The belt ran vertically, and was intended to be at rest except when tightened by being pressed upon by the large weight or tightener, which consisted of a very heavy pulley, the carriage of which was hinged in such a manner that, when it was desired to tighten the belt to start the machine into operation, the pulley could be lowered upon the belt, and its weight binding the belt would thereby have the effect to tighten the belt and cause it to put the machine in motion. It is the contention of the plaintiff that this belt was too short when the tightener was not pressing upon it, and that it would occasionally revolve the machinery, as before indicated. Upon the close of plaintiff's testimony, a motion for nonsuit was made by the defendant, which motion was sustained by the court. The cause was dismissed, and from judgment of dismissal this appeal is taken.

It is alleged that the court erred (1) in sustaining respondent's motion to strike the affirmative matter from the reply; (2) in refusing to permit appellant to show a promise of respondent's foreman to repair the defects which caused the injury; (3) in sustaining respondent's motion for nonsuit; (4) in refusing to overrule respondent's motion for nonsuit; (5) in rendering judgment dismissing the action. It was the theory of the court that the affirmative matter which was stricken should have been stated in the complaint, as it was a part of the appellant's cause of action, the appellant contending, however, that, inasmuch as assumption of risk and contributory negligence are matters of defense, he had a right to set up the promise to repair in his reply. But it is not necessary to pass upon the question of technical

pleading, the appellant having been allowed, over respondent's objection, to prove exactly what he asked to be allowed to allege in his reply. If we should consider the case with the pleadings before us, as contended for by the appellant, there is no testimony which could sustain a judgment for appellant in this case; for, if it be conceded that he was induced to remain by reason of the foreman's promise to repair, there is no showing here whatever as to the cause of the injury. The matter complained of by the appellant to the foreman simply was that, by reason of the machine running without the use of the idler, he might get his hand cut. But there is no proof, and indeed no claim, that the accident occurred by reason of the machine running without the use of the idler. On the contrary, it is the appellant's contention that it was the use of the idler which caused the accident. So that, if there is any allegation of negligence here upon which a recovery could be based, it is the allegation that the upright belt was too short, and that by the application of the idler an additional strain was placed upon it which caused the belt to break.

It is the contention of the appellant, although the testimony is not definite in that regard, that he was struck on the head by the belt when it broke. We are not satisfied from an examination of the model which was brought up that the fact that the belt was too short would cause any more strain to be placed upon it by the application of the idler; for, while it is true as a principle of mechanics that the weight, which carries the belt out of perpendicular would tend to shorten it thereby bringing an additional strain upon it, it is equally true that the longer the belt was and the more slack it had the more obliquely the idler would rest against it, thereby causing a greater weight to rest upon the belt than if the belt were tighter and the idler were held in more perpendicular position with reference to the belt. But, however this may be, the testimony which is very brief absolutely fails to show that the breaking of the belt was caused by its being too short; and, although there is an allegation that the machine was out of plumb, the proof in this respect entirely fails to sustain the allegation. Under all the testimony in this case, nothing more than a guess could be hazarded as to what was the cause of the breaking of the belt. Conceding that there was sufficient proof that it did break, and further conceding that there was proof that the breaking of the belt was the cause of the injury, and there being but the two causes alleged, viz., the machinery being out of plumb and the belt being too short, and neither of these being supported by any definite proof whatever, the court was justified in sustaining the motion for nonsuit.

The judgment is therefore affirmed.

HADLEY, C. J., and ROOT, MOUNT, CROW, RUDKIN, and FULLERTON, JJ., concur.

LUND et al. v. IDAHO & W. N. R. R.

(Supreme Court of Washington. Feb. 13, 1908.)

1. APPEAL—SUPERSEDEAS BONDS—INJUNCTION.

In the absence of statutory provisions, a trial court will not be required, by the mandate of an appellate court, to fix a bond superseding a prohibitory injunction.

2. SAME—DISCRETION OF COURT.

Where a decree is entered partially suspending the granting of a prohibitory injunction pending appeal, and the record shows that the appeal is being prosecuted in good faith and that plaintiff would not be deprived of ultimate relief should the decree be affirmed, the appellate court will, in the exercise of its discretion, suspend the operation of the decree altogether pending the determination of the appeal on the giving of a supersedeas bond by defendant.

Appeal from Superior Court, Stevens County; D. H. Carey, Judge.

Suit by H. M. Lund and others against the Idaho & Washington Northern Railroad to enjoin the construction of a railroad. From a decree granting the injunction, defendant appeals. Petition in appellate court to suspend injunction pending appeal. Granted.

E. H. Belden, for appellant. E. J. Cannon, for respondents.

CROW, J. The Idaho & Washington Northern Railroad, a corporation, acquired from the city of Newport, in Stevens county, Wash., a franchise over certain of its streets, and proceeded to construct a steam railroad across Fourth street immediately in front of certain lots belonging to the plaintiffs H. M. Lund and L. M. Lund, his wife. Thereupon the plaintiffs commenced this equitable action, in which, on final hearing, a decree was entered enjoining the defendant corporation from constructing or operating its railroad in front of their premises until it shall have paid to them the damages caused to their property. The defendant has appealed.

The decree provides that, if an appeal shall be diligently prosecuted, the injunction shall be suspended pending such appeal, so as to permit the running of construction trains, but that otherwise it shall be in full force and effect from and after its entry. The appellant has petitioned this court to enter an order suspending the injunctive relief granted until the final determination of its appeal. A show-cause order having issued, the respondents have appeared and resisted appellant's application, which is now before us for consideration.

It appears that appellant's franchise from the city of Newport permits it to construct a railroad across Fourth street; that its railroad does not touch respondents' lots, being located about 20 feet therefrom; and that as constructed it is neither above nor below the street grade. Respondents predicate their right to an injunction upon their contention that appellant has, in violation of section 16, art. 1. of the state Constitution, damaged their private property without just

compensation having been first made or paid into court. The appellant contends that it has neither taken nor damaged their property, that it is entitled to enter upon and occupy the street under its franchise granted by the city, and that it is not interfering with any private property rights which it can be required to condemn or which it has any authority to condemn. These contentions present the issue to be determined upon the final hearing of the appeal. It appears that appellant's road has been constructed and is now being operated for a distance of 45 miles or more; that in such operation it passes near respondents' lots on Fourth street; that appellant is prosecuting the business of a common carrier, but that it entered upon Fourth street without respondents' knowledge, consent, or acquiescence. The appellant strenuously contends that, if it is not permitted to continue its business as a common carrier over Fourth street pending this appeal, it will suffer great and irreparable loss, and that, if a suspension of the injunction is not granted, it will be compelled to settle with respondents upon their own terms, without regard to the validity of their alleged claims, and that it will thus be deprived of the fruits of its appeal, which it is now prosecuting diligently and in good faith.

The injunction is prohibitory, and cannot be superseded as a matter of right under any statute of this state. We have repeatedly held that a trial court will not, by the mandate of this court, be required to fix a bond superseding a prohibitory injunction. *State ex rel. v. Stallcup*, 15 Wash. 263, 46 Pac. 251; *State ex rel. Byers v. Superior Court*, 28 Wash. 403, 68 Pac. 865; *State ex rel. Gibson v. Superior Court*, 39 Wash. 115, 80 Pac. 1108, 1 L. R. A. (N. S.) 554, 109 Am. St. Rep. 862. In *State ex rel. Burrows v. Superior Court*, 43 Wash. 225, 86 Pac. 632, it was held that the superior courts of this state, in the exercise of their equitable jurisdiction, having all the powers of the English chancery court, may in their discretion suspend the operation of injunctive decrees pending appeals to this court. In the case at bar the trial court did partially suspend the operation of its decree by permitting the appellant to run its construction trains. This concession, however, does not seem to have been entirely satisfactory to the appellant. The question now before us is whether, after the appeal has been perfected, we may, upon appellant's petition, grant a further or complete suspension. This court has held that to maintain the existing status and to preserve the fruits of litigation to an appellant it has, in aid of its appellate jurisdiction, and in the exercise of its discretion, authority to grant a supersedeas pending the determination of an appeal, and that it may do so although the appellant is not, as a matter of right, entitled to a supersedeas under any existing statute. *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 52 Pac. 317, 40 L. R. A. 317, 67

Am. St. Rep. 706. "The court of last resort has jurisdiction to issue an order of supersedeas to preserve the status quo of the parties to an appeal pending a determination upon its merits, when, for want of such an order, the appeal may be rendered of no value to the party appealing, and the judgment of the court of last resort rendered ineffective, and if it can do so without depriving the adverse party of a substantial right; and it will exercise its power only upon the terms which the statute requires for perfecting a stay in the lower court, such as that the party applying enter into a sufficient undertaking." 20 Enc. Pl. & Pr. 1237, 1238; *Norris v. Tripp*, 111 Iowa, 115, 82 N. W. 610; *Carson v. Jansen*, 65 Neb. 423, 91 N. W. 398; *In re Epley et al.*, 10 Okl. 631, 64 Pac. 18; *Eno v. N. Y. Elevated R. R. Co.*, 15 N. Y. App. Div. 336, 44 N. Y. Supp. 61; *City of Janesville v. Janesville Water Co.*, 89 Wis. 159, 61 N. W. 770; *In re Ray, Proute v. Lampe (Neb.)* 104 N. W. 1150. Such a supersedeas, however, should not be granted if it will result in preventing the respondents from ultimately securing the equitable relief to which they will be entitled in the event of an affirmance of the judgment of the trial court. We have examined the record to ascertain (1) whether the appeal is being prosecuted in good faith; (2) whether a suspension of the injunction can be granted without depriving respondents of ultimate relief should the decree be affirmed; and (3) whether we should, in the exercise of our discretion, grant the suspension or supersedeas. We conclude that all of these questions should be answered in the affirmative. We cannot at this time enter upon an investigation or discussion of the merits of the appeal, nor do we indicate our views thereon. We are satisfied that a suspension of the injunction should be ordered pending the appeal.

It is ordered that the petition of the appellant be granted, and that the injunction be suspended during the pendency of this appeal, and until the further order of this court; upon condition, however, that the appellant shall execute and file herein an undertaking to the respondents, to be approved by the clerk of this court, in the sum of \$5,000, conditioned that the appellant will pay all damages sustained by the respondents by reason of the suspension of such injunction during the pendency of the appeal.

HADLEY, C. J., and MOUNT, DUNBAR, ROOT, FULLERTON, and RUDKIN, JJ., concur.

WRIGHT v. LAKE.

(Supreme Court of Washington. Feb. 13, 1908.)

1. WORK AND LABOR—EVIDENCE.

Testimony of plaintiff that he performed certain services for defendant, that he rendered a bill therefor to defendant for a certain amount,

and that defendant stated the bill was satisfactory, warrants submission to the jury of right to recover, either on contract or quantum meruit.

2. MASTER AND SERVANT—DISCHARGE—NEGLIGENCE.

Discharge for negligence, of one employed to manage a dairy business, is warranted; he having left a wild colt attached to a wagon, unhitched and unattended, within a few feet of the railroad, which was frightened by a passing train, causing it to run away, and it appearing that, though the train was not on schedule time, he was paying little heed to the team or train, and that a few days later he suffered the same team to run away under circumstances no more favorable to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 30-36.]

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by E. Wright against E. J. Lake. Judgment for plaintiff. Defendant appeals. Reversed and remanded, with directions.

Voorhees & Voorhees and Cullen & Dudley, for appellant. A. E. Barnes and Willis H. Merriam, for respondent.

RUDKIN, J. On the 26th day of September, 1905, the plaintiff and defendant entered into a written contract whereby the plaintiff agreed to give his entire time and attention to the management of a dairy business conducted by the defendant for a term of four years from and after October 1, 1905, at a salary of \$100 per month. The plaintiff entered upon the discharge of his duties under this contract on the 1st day of October, and continued in the employ of the defendant until the evening of December 12, 1905, at which time he was discharged. This action was thereafter instituted to recover the following items of damage: (1) The sum of \$4.70 for services performed by the plaintiff at the special instance and request of the defendant before entering upon the performance of the written contract; (2) wages earned under the written contract prior to the discharge; (3) an item for board furnished a hired man under the written contract; and (4) damages for a wrongful discharge. A trial was had, and the jury returned a verdict in favor of the plaintiff for the sum of \$279.09. The court below remitted the sum of \$3.33 from the verdict, and rendered judgment for the residue. From this judgment, the defendant has appealed.

The second cause of action in the complaint was based on the \$4.70 item above referred to. The complaint alleged that the respondent performed two days' labor at the special instance and request of the appellant, "at the agreed and reasonable wages" of \$1.50 per day, and paid out \$1.70 car fare in going to and from the place of work. On his direct examination the respondent was asked the reasonable value of these services, but an objection to the question was sustained on the ground that the complaint alleged an express contract. At the close of the respondent's case a motion for a nonsuit was

interposed as to this cause of action on the ground that the contract was not proved as alleged. The court allowed an amendment to the complaint to conform to the proofs, and denied the motion for nonsuit. The appellant still contends that the proof offered does not sustain a recovery either on contract or on a quantum meruit. The respondent testified that he performed the services, that he rendered a bill to the appellant for the amount claimed, and that the appellant stated that the bill was satisfactory. This testimony, in our opinion, fully warranted the submission of the question to the jury under either the original or amended complaint. It may seem that we have given undue importance to this small item, but several pages of the appellant's brief are devoted to a discussion of it. Doubtless some question of costs in the court below hinged upon its allowance. There seems to be no conflict in the testimony as to the second and third items. The respondent entered the employ of the appellant on the 1st day of October, and was discharged on the 12th day of December. The wages for this period at \$100 per month would aggregate \$240, \$97.13 of which is admitted to have been paid. Board was furnished to a hired man from October 9th to December 12th at the agreed price of \$10 per month. This item would amount to \$22.12.

The only remaining question is the claim for damages for the wrongful discharge. The appellant contends that the discharge was justified for incompetency, for disobedience of orders, and for negligence in the performance of duty. While the testimony shows that the respondent had rather a superficial knowledge of the instrumentalities usually employed in the business in which the master was engaged, we are not prepared to say that the discharge was justified on this ground alone. The uncontradicted testimony also shows that the respondent disobeyed the lawful commands of the master in some minor matters, and we think some of the instructions of the court were too favorable to the respondent as to his duties in this regard, but for reasons hereafter stated this question is not material. We are of opinion, however, that the negligence of the respondent in the performance of his duty was such as to warrant the master in discharging him. It appears that he suffered a team under his control to run away on two different occasions during the short time he was in the appellant's employ. On the first occasion he left a wild colt attached to a wagon, unhitched and unattended, within a few feet of a railroad track. A train passed by, and the team became frightened and ran away. He attempted to justify his conduct by stating that it was not train time, and that the train was a day and a half late; but it seems to us that he placed too much reliance on train schedules, and all the surrounding circumstances show conclusively that he was pay-

ing little heed to the team or the passing train. On a second occasion, a few days later, he suffered the same team to again run away under circumstances no more favorable to him. By these acts, which were manifestly negligent, he endangered, not only the property of the master, but the lives and property of others as well. Had injury resulted to third persons by reason of his negligence, the master would clearly be liable under the doctrine of respondeat superior, and we do not think that the law requires the master to incur such risks or keep such a servant in his employ. We arrive at this conclusion without hesitation from the testimony of the respondent himself.

The court should therefore have withdrawn this item of damage from the consideration of the jury, and for its error in that regard the judgment is reversed, and the cause is remanded, with directions to enter judgment in favor of the respondent for the sum of \$169.69, with interest from date of commencement of action.

HADLEY, C. J., and DUNBAR, FULLERTON, CROW, ROOT, and MOUNT, JJ., concur.

HENDELMAN v. KAHAN et al.

(Supreme Court of Washington. Feb. 26, 1908.)

1. APPEAL — REVIEW — ORDER DISCHARGING ATTACHMENT.

An order dissolving an attachment as having been improperly or irregularly issued will not be disturbed on appeal, unless clearly erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3816.]

2. ATTACHMENT — DISSOLUTION — FINDING AS TO REASONABLE CAUSE.

On dissolving an attachment the court properly refused to recite in the order that there was reasonable ground for suing out the writ: the reasonableness not being material in such action.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Louis Hendelman against Bernhard Kahan and others. From an order dissolving an attachment, plaintiff appeals. Affirmed.

Robertson & Rosenhaupt, for appellant. Belt & Powell, for respondents.

ROOT, J. This is an appeal from an order of the superior court dissolving an attachment. The writ issued upon an affidavit setting forth that defendants were about to convert their property, or a part thereof, into money for the purpose of defrauding their creditors. Upon the motion to dissolve the attachment, several affidavits were filed by each party. From these the trial court found the writ to have been improperly or irregularly issued, and made an order dissolving the same. Such an order will not be disturbed by an appellate court, unless clearly erroneous.

Bingham v. Keylor, 25 Wash. 156, 64 Pac. 942; **Gehres v. Orlowski**, 36 Wash. 156, 78 Pac. 792; **Bender v. Rinker**, 21 Wash. 633, 59 Pac. 503. We think the action of the trial court in dissolving the attachment was justified.

Appellant requested that court to incorporate in the order of dissolution a recital that there was reasonable ground for suing out the attachment. The court having refused to so do, its refusal is assigned as error. The question of reasonable cause might be material in a suit upon the attachment bond; but it is not so in this action.

No error appearing, the judgment of the trial court is affirmed.

HADLEY, C. J., and FULLERTON, CROW, and MOUNT, JJ., concur.

GULLICKSON v. FENLON et ux.

(Supreme Court of Washington. Feb. 14, 1908.)

HOMESTEAD—ABANDONMENT.

After defendants had removed from their land, and to another state, after secretly selling part of their household goods and removing the rest, the land was attached by a creditor, pursuant to Ballinger's Ann. Codes & St. § 5254, providing that the exemption law shall not apply to "property, real or personal, of nonresidents, or a person who left, or is about to leave, the state, with intent to defraud his creditors." Held, that the fact that defendants, after the attachment, returned to the land, filed a declaration of homestead thereon, placed household goods in the house, and remained there a month, but did not attempt to set aside the attachment, is not sufficient to defeat the sale of the land under judgment on the attachment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 312-314, 320-326.]

Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by Alfred G. Gullickson against Thomas L. Fenlon and another. From an order confirming the sale of land, defendants appeal. Affirmed.

Hathaway & Alston, for appellants. John W. Miller and Robert McMurchie, for respondent.

ROOT, J. This is an appeal from an order confirming the sale of certain real property. Appellants purchased these premises about May, 1904, and lived thereupon until September, 1905, when they removed therefrom, and subsequently, in November, 1905, left the state. While they were absent this action was commenced on February 6, 1906, an attachment in the action being levied the same day upon these premises. Judgment was obtained, and the property sold under an execution issued thereupon, the sale occurring on the 7th day of July, 1906. In the month of April, 1906, appellants returned to the state of Washington, and on the 26th of May, 1906, filed a declaration of homestead upon these premises, and, on that day, rented and placed in the building thereon certain house-

hold goods, and resided in said building until the 22d of June, 1906. It is contended by respondent that the appellants left the state of Washington in November, 1905, with the intention of establishing their residence in the state of Oregon, and that they did so establish their residence; that they so left the state of Washington, with intent to defraud their creditors, having secretly sold the greater portion of their household goods and effects, and shipped the remainder to Portland, Or. The trial court made findings to this effect. Appellants contend that these findings are not justified by the evidence. We think they are.

No effort was ever made to set aside the attachment, and the same merged with the lien of the judgment when the latter was entered in the case. Section 5254, Ballinger's Ann. Codes & St. among other things, says: "That nothing in this chapter shall be construed to exempt from attachment or execution the property, real or personal, of nonresidents, or a person who has left, or is about to leave, the state with intent to defraud his creditors." The trial court moreover found that the appellants' action in going upon the premises in May, 1906, and remaining there for only a month, was not in good faith, with the intention of making said premises their home, but merely as a subterfuge to defeat the sale of the premises in satisfaction of respondent's judgment. Considering all of the facts in the light of the statute above quoted, we do not think the lien of the attachment and judgment was defeated by the attempt made by appellants to claim this property as a homestead exemption.

The judgment of the superior court is therefore affirmed.

DUNBAR, RUDKIN, FULLERTON, and MOUNT, JJ., concur. HADLEY, C. J., and CROW, J., took no part.

MERRIMAN et ux. v. THOMPSON et al.
(Supreme Court of Washington. Feb. 14, 1908.)

1. BROKERS—LIABILITY TO PRINCIPAL—ACTIONS FOR ACCOUNTING—EVIDENCE—SALE AS AGENT.

Evidence in an action to recover a balance collected by defendants on a sale of plaintiff's real estate considered, and held to show that defendants made the sale as plaintiff's agents.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 33.]

2. SAME—DEFENSE—ORAL APPOINTMENT.

Although an appointment in writing is necessary to constitute one an agent for the sale of real estate, one who sells real estate as the owner's agent would not be justified in retaining the difference between the amount that he represented to his principal he received for the property and the amount he actually received, because his appointment was not in writing.

Appeal from Superior Court, Clarke County; W. W. McCredie, Judge.

Action by James A. Merriman and wife against S. W. Thompson and Floyd Swan, doing business under the name of S. W. Thompson & Co. Judgment for plaintiffs, and defendants appeal. Affirmed.

Edgar M. Swan and A. L. Miller, for appellants. E. M. Green, for respondents.

ROOT, J. This is an action by plaintiffs to recover a balance of \$475 collected by defendants on the sale of a 40-acre tract of land. From a judgment in favor of the plaintiffs, this appeal is taken by defendants.

Respondents, in writing, appointed appellants their agents to sell the land referred to, the latter doing business as real estate agents in Vancouver, Wash. The time within which they were authorized to make the sale expired. Subsequently they gave appellants no written authority to sell, but told them orally that, if they could get a purchaser for \$2,500, they would pay them 5 per cent. commission. Afterwards they, by letter, authorized appellants to sell it for \$2,250. Some time after this appellants sent to respondent James A. Merriman this message: "Will give \$1,900 for your claim if accepted now. Wire answer." In response to this telegram respondent Merriman called appellants over the long-distance telephone from Seattle, and talked with appellant Swan. There is a conflict as to what was said over the 'phone. Merriman testified that he was led to believe that they were selling the property as his agents to some other person, and that the price mentioned was the highest amount that could be obtained on a sale, and that he consented thereto under these circumstances. Appellants drafted a warranty deed, wherein the consideration was mentioned as \$2,000, and wherein one Gregory was named as grantee. This deed was sent to respondents to be executed, and was returned by them after execution to a bank in Vancouver, to be delivered upon payment of the purchase price. In the meantime appellants had sold the property to one Gregory; in fact, had negotiated with him for a sale for \$2,500 prior to the time of sending the telegram to respondents.

It is contended by respondents that appellants were their agents, and that they relied upon the representations of such agents in executing and delivering the deed; that as such agents they were holden to make a full disclosure to respondents of all the facts concerning the contemplated sale. Appellants urge that they were not the agents of respondents; that under the statutes of this state they could not be such agents except under a written appointment, which they did not have, the time covered by the former appointment having expired. Mr. Gregory testified that respondents, in selling the property to him, told him that it belonged to Mr. Merriman, and that he understood that Merriman was asking \$2,500. Respondent Mer-

riman says that, in the telephone conversation, he asked respondent Swan if the amount mentioned in the telegram was the best he could do, and Swan said that it was, and said: "We have a contract lying on the table for \$2,000. That is all the man will give." If the facts were as stated by Merriman, it would seem very clear that appellant Swan was talking as an agent to Merriman, and that the basis of their negotiations was the relationship of principal and agent. The testimony of Gregory, as well as certain admissions on the part of the appellants, tends to corroborate and strongly support the theory of respondents. The jury hearing the evidence, and having the parties and witnesses before it, accepted respondents' theory, and the record is not such as to justify us in disturbing its conclusion. The fact that there was not, in writing, an employment of appellants as agents for respondents, might have a bearing upon the question of their commission. But we do not think the lack thereof would justify appellants, after selling this property for \$2,500, in retaining the difference between that and \$2,000, which was the amount they represented to respondents as being the highest sum they could get for the property, and for which they had sold, or were about to sell, the same. *Stearns v. Hochbrunn*, 24 Wash. 206, 64 Pac. 165.

The judgment of the superior court is affirmed.

DUNBAR, RUDKIN, FULLERTON, and MOUNT, JJ., concur. HADLEY, C. J., and CROW, J., took no part.

HAPEMAN et ux. v. McNEAL et al.

(Supreme Court of Washington. Feb. 24, 1908.)

REFORMATION OF INSTRUMENTS—MISTAKE IN DESCRIPTION OF DEED—EVIDENCE.

Evidence in an action to reform a deed held insufficient to warrant a finding that it incorrectly described the lines intended at the time of its execution.

Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Action by M. W. Hapeman and wife against Thomas D. McNeal and another. Judgment for defendants. Plaintiffs appeal. Affirmed.

Millon, Houser & Shrauger, for appellants. Smith & Brawley, for respondents.

MOUNT, J. This action was brought by the appellants to reform a description in a deed for a tract of land owned by appellants in the town of Mt. Vernon. After issues were made up, a trial was had, and the court found that there was no mistake in the deed, and dismissed the action. The plaintiffs appeal.

The tract of land in question is about midway between Myrtle street to the north and Kincaid street to the south. It fronts on Second street on the west. Kincaid street runs east and west. Second street runs

northward 20 degrees east. Myrtle street extends eastward from Second street 70 degrees south. So that Kincaid and Myrtle streets are not parallel with each other, but converge toward the east. The line on the north of the parcel of land in question is concededly parallel with Kincaid street. It runs east and west. The line on the south is the one in dispute. The deed describes this line as parallel with Kincaid street, while appellant M. W. Hapeman contends that it was his intention and the intention of the grantor that this line should be parallel with Myrtle street, so that his lot, instead of being 50 feet wide at each end, should be 50 feet wide in front and 73 feet wide in the rear or east end. There is some evidence to the effect that a fence was built upon the south line of the lot by the grantor soon after the deed was executed, and that this fence, if on the line intended, places the south line of appellant's lot as contended for by him. But the evidence also shows that at about the time the deed was drawn the appellant and his grantor and two other persons, for the purpose of describing the lot, measured the front line of the lot on Second street 50 feet; that they also measured the north line and the east line; that the line on the east, which line runs due north and south, was measured the same length as the west line, viz., 50 feet. This shows, of course, that the lot was a strip of land 50 feet in width, and that the lines on the north and south were intended to be parallel as they are described in the deed. It is true that the south line as described in the deed runs through one corner of the building located upon the lot, and the grantor testified that he intended to sell to the appellant sufficient land to clear the building, and, if the land described in the deed does not do so, there was a mistake. But this mistake, of course, was not in the description of the land actually sold and conveyed by the deed, but was a mistake in the quantity of land sold and purchased. From a consideration of all the evidence in the case we are not free from doubt that the deed incorrectly describes the lines intended at the time of its execution. "The authorities all require that the parol evidence of the mistake and of the alleged modification must be clear and convincing—in the language of some judges, 'the strongest possible'—or else the mistake must be admitted by the opposite party. The resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of the error." 2 Pomeroy's *Equity Jurisprudence* (3d Ed.) § 859.

The evidence is not, in our opinion, sufficient to warrant a reversal of the case. The judgment must therefore be affirmed.

HADLEY, C. J., and CROW, FULLERTON, and ROOT, JJ., concur.

PETERSEN et al. v. UNION IRON WORKS.
(Supreme Court of Washington. Feb. 17, 1908.)

1. MASTER AND SERVANT—LIABILITY FOR INJURY—QUESTION FOR JURY.

Evidence in an action to recover for the death of an employé held insufficient to take the case to the jury on the question whether such accident was due to the master's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1000-1050.]

2. SAME—ADMISSIBILITY OF EVIDENCE.

In an action to recover for the death of an employé killed while operating a rip saw, there was no one present when he was killed, and no direct evidence as to the accident causing his death. Held, that evidence of an alleged defect in the saw table was inadmissible, as too remote.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Emma Petersen and others against the Union Iron Works. Judgment of nonsuit, and plaintiffs appeal. Affirmed.

A. E. Barnes, Geo. A. Latimer, and B. M. Branford, for appellants. Post, Avery & Higgins, for respondent.

RUDKIN, J. The defendant is a manufacturing corporation, having its principal place of business in the city of Spokane. At the time hereinafter mentioned it had installed in its establishment a rip saw used by its employes in the manufacture of flasks used in moulding. The saw was 12 inches in diameter, and was situated upon, or attached to, a table about 3 feet in width and 5 feet in length, so that about 4 inches of the saw blade extended above the surface or plane of the table. It is customary to equip or guard saws such as this with a device known as a "splitter." The splitter consists of a piece of iron or steel about the thickness of the saw blade, placed in an upright position, 4 inches back of the saw, the top of the splitter extending nearly to the top of the saw. The object of the splitter seems to be two-fold: First, to keep the board from pinching after it passes through the saw; and, second, to prevent splinters and other material from catching on the saw at the rear, or dropping upon the saw, and being hurled against the operator. The saw in question was not equipped with a device of this kind. On the 25th day of August, 1905, one Nels Petersen was in the employ of the defendant, and was engaged in operating this saw. While thus engaged, he received an injury which resulted in his death some four or five days later. At the time the accident happened the deceased was alone in the carpenter shop, and no living witness saw the accident, or could explain how it happened. Indeed, it is only by inference that we can say that the saw was in motion, or that the deceased was engaged in operating it at the time of receiving his fatal injury. An examination of the person of the deceased after the injury disclosed the fact that he had been struck in the abdomen by

some blunt instrument which left a mark about 4 inches in length and one inch wide. A piece of a board about 1 by 4 inches and 4 feet in length, used in the manufacture of the flasks, was found after the accident in close proximity to where the operator would ordinarily stand in the discharge of his duties. This board had some indentations upon it, indicating that it might have been caught by the teeth of the saw and hurled against the deceased. These were the only facts or circumstances tending in the remotest way to show the cause of the accident, or how it happened. The theory of the plaintiffs was that the piece of board above described dropped or caught on the teeth of the revolving saw, and was hurled against the deceased, and that the accident would not have happened had the saw been properly equipped and guarded. They contended, and now contend, that the jury might properly infer this from the testimony. The court below ruled otherwise, and granted a nonsuit, and from the judgment of nonsuit the present appeal is prosecuted.

In their brief the appellants make the following concessions: "The evidence in this case showed that the deceased was alone in said carpenter room at the time of the accident; hence there is no living witness who saw the accident and can explain from his observation of same how it happened." Again: "So in this case there may have been a dozen or more different ways in which a similar piece of board might have come in contact with this saw and would have caused the same to be hurled back against the operator. A board might, for example, be dropped from his hand directly on top of the saw, either crosswise or otherwise, and be turned back against him, even though there had been a splitter behind the saw, and one can imagine various other reasonable ways that an accident might happen, even though a saw had been equipped with a splitter." Yet, in the face of these concessions, which are manifestly in accordance with the facts, the appellants earnestly insist that the jury might have adopted their theory of the accident, and that the inference to be drawn from the facts was exclusively for that body. With this contention we cannot agree. In *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, the court said: "The fact of the accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer had been guilty of negligence. * * * In the latter case it is not sufficient for the employé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And, when the testimony leaves the matter uncertain, and shows that any of half a dozen things may have brought about the injury, for some of which the employer is responsible,

and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, where there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff falls in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs." This rule has frequently been applied in this court. *Hansen v. Seattle Lumber Company*, 31 Wash. 604, 72 Pac. 457; *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118; *Stratton v. Nichols Lumber Company*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. Rep. 881.

The court rejected testimony tending to show an alleged defect in the saw table, but the inference that the injury was caused by any such defect is even more remote than the inference we have been discussing. In view of the conclusion we have reached on the merits of the case, we will not consider or discuss the appellants' right to maintain this action under the factory act.

The judgment of the court below is affirmed.

HADLEY, C. J., and DUNBAR, ROOT, MOUNT, FULLERTON, and CROW, JJ., concur.

O'CONNOR v. SLATTER.

(Supreme Court of Washington. Feb. 14, 1908.)

1. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS.

In an action against a widow, as administratrix of her deceased husband, on a note indorsed by him, plaintiff cannot, under the statute relating to the competency of persons to testify in an action where a party sues or defends as administrator, testify as to transactions had by him with the decedent or as to statements made to him by decedent, and cannot testify as to whether the note has been changed since he received it from decedent, though the widow testified as to what took place between decedent and plaintiff in her presence at the time the indorsement was made, but plaintiff may testify that she was not present at that time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 604.]

2. APPEAL—ERRONEOUS EXCLUSION OF EVIDENCE—CORRECTION BY ADMISSION OF OTHER EVIDENCE.

Error in excluding the testimony of a witness that a certain person was not present at a particular transaction, as testified to by such person, is not cured by permitting him to give the names of the persons present at that time, which did not include the name of such person.

3. BILLS AND NOTES—TRANSFERS—INDORSEMENTS.

Under Laws 1899, p. 349, c. 149, § 49, providing that, where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the

transferee such title as the holder had therein, etc., and independent of the statute, a promissory note may be transferred without indorsement, though the rights of the parties under the transfer without indorsement are different from the rights of the parties under a transfer with indorsement.

4. APPEAL—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where, in an action against a widow, as administratrix of her deceased husband, on a note indorsed by him, the question of the liability of an indorser was not involved, an instruction that, to transfer the title to a note, it was necessary that the person holding it shall place his name on the back of it and deliver it to the purchaser, was not prejudicial to plaintiff, and, if he desired more specific instruction on the question of the purpose of an indorsement, he should have requested it.

5. PLEADING—COUNTERCLAIM IN ANSWER.

In an action against a widow, as administratrix of her deceased husband, on a written contract of guaranty indorsed on a note, an answer admitting that decedent indorsed the note in blank and delivered it to plaintiff, and denying that the contract of guaranty was on the note at the time he indorsed it, and alleging, as an affirmative defense, without demanding affirmative relief, fraud on the part of plaintiff, not connected with the contract in suit, sets forth but one defense, since the affirmative matter does not add anything to the previous denials, and it is erroneous to submit to the jury the issue of fraud raised by the affirmative defense.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by John O'Connor against Bessie Slatter, administratrix of John Slatter, deceased. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Merrill, Oswald & Merrill, for appellant. Roche & Onstine, for respondent.

RUDKIN, J. This case was before this court on a former appeal, where a full statement of the issues will be found. 89 Pac. 885. A retrial resulted in a verdict and judgment in favor of the defendant, from which the present appeal is prosecuted.

The principal errors assigned on this, as on the former appeal, relate to the rulings of the court on the admission of testimony. On the former appeal it was contended that the surviving wife was not a competent witness to testify to a transaction between a third person and her deceased husband in an action brought by such third person against the surviving wife as executrix of the deceased husband's estate. This contention we refused to sustain. It is now contended that, by testifying fully to such transaction, the surviving wife waived her right to object to the competency of the adverse party to testify to the same transaction. This proposition, thus broadly stated, we likewise refuse to sustain. Cases have been cited from other jurisdictions sustaining the contention of the appellant in this regard, but they are all based on statutes differing materially from the statute of this state. As said by us on the former appeal: "No statute exactly like

ours has been called to our attention by the parties to this appeal, and, upon independent investigation, we have been unable to find any using the same language in the same order as ours. The authorities in other states upon similar statutes shed but very little light upon the question presented here." Doubtless one of the objects of the statutes is "to prevent interested parties from testifying to transactions and statements made by a deceased person when there might be no person to rebut such testimony," as declared in the former opinion, but manifestly the operation of the statute does not depend upon whether there are or are not others who may testify to the transaction or statement. Death has sealed the lips of one of the parties, and the statute imposes the same silence upon the other. The prohibition of the statute is absolute and unconditional. It admits of no qualification or exception, and it is not the province of this court to add to it or take from it. We are satisfied, therefore, that the court below correctly ruled that the appellant was not competent to testify to any transaction had with or statement made by the deceased, regardless of the testimony that may have been given by other witnesses. The prohibition of the statute, however, extends only to transactions had by the appellant with the deceased, or to statements made to the appellant by the deceased. It does not extend to all facts to which the deceased might testify if living, and we are satisfied that the court below extended the prohibition too far. The respondent testified that she was present at the appellant's bank when the notes in suit were indorsed, and testified fully to all that transpired there. The appellant was called as a witness in his own behalf, and was asked the following question: "I will ask you to state whether or not this defendant was present at the time the notes in suit were indorsed by John Slatter." To this question an objection was interposed and sustained, on the ground that it related to a transaction with a deceased person. This ruling was plainly erroneous. The testimony was important, as it tended directly to contradict the testimony of the respondent previously given, and by no possible rule of construction can it be held that the testimony offered related to a statement made by or transaction had with the deceased. Nor was the error cured by the following testimony admitted before the respondent had testified: "Q. I will ask you who was present at the time John Slatter signed his name on these notes. A. Myself, John Slatter, Charles Graves, and James O'Connor." By a process of elimination the jury might determine from this answer that the respondent was not present, but the testimony did not have the force or effect of a direct denial that she was present after she had testified in her own behalf. The appellant was further asked whether the notes had been changed since he received

them from the deceased. This in our opinion was an indirect way of asking what their condition was when received from the hands of the deceased, and was a palpable attempt to evade the statute. The objection was therefore properly sustained.

It is contended that other testimony was excluded tending to show statements made by the respondent and transactions had with her and not with the deceased, but what we have said will be a sufficient guide for the court on a retrial.

The court charged the jury as follows: "In order to complete the title—to transfer the title—it was necessary that the person holding the note must place his name upon the back of it and deliver it to the purchaser." The giving of this instruction is assigned as error. The instruction is at least ambiguous. No doubt a promissory note may be transferred without indorsement, the same as any other article of personal property, either under our statute (Laws 1899, § 49, p. 349, c. 149) or independent of statute. At the same time there is or may be a vast difference between the rights of the parties under a transfer made with or without indorsement. The question of the liability of an indorser was not involved in this case, however, and we are unable to say that the instruction was prejudicial. If the appellant desired a more specific instruction on the question of the necessity for or purpose of an indorsement, he should have requested it.

The appellant finally contends that inconsistent defenses were interposed. The issues in the case are well summarized in the respondent's brief as follows: "Appellant sued the respondent as the administratrix of an estate upon a written contract of guaranty, wherein he alleges that the deceased in his lifetime guaranteed in writing the payment of certain promissory notes, which he sets out in full by signing a written guaranty indorsed on the back of said notes. The respondent answers, admitting the execution of the notes and that he indorsed them in blank and delivered them to the appellant, but denies that the contract of guaranty was upon the notes at the time he indorsed them. Respondent then alleges fraud as an affirmative defense, by setting forth the following facts: That the deceased in his lifetime was the owner of a sum of money which he delivered to the appellant as his agent, and that appellant, as such agent, agreed to loan said money for deceased, upon good real estate security and take properly executed notes and mortgages therefor so that deceased's money would be well secured; that the deceased was a man of no education and experience with business methods, especially loaning money; that appellant was a banker and shrewd business man, and agreed with the deceased that he would loan his money for him upon good real estate security, and that deceased fully trusted the appellant and relied implicitly

upon the honor and ability of the said appellant in all their transactions; that appellant, shortly after he had received the decedent's money to loan, gave to decedent the promissory notes mentioned in appellant's complaint, which were made payable to decedent, and then and there informed him that said notes were well secured by real estate mortgages upon farm lands in Lincoln county, and that said decedent, believing the statements of appellant to be true and relying upon them, accepted said notes from appellant; that after said notes had been delivered to said decedent said appellant sold to said decedent certain real estate, and as a part payment therefor decedent indorsed in blank and delivered to appellant all of said notes except the note mentioned in appellant's first cause of action, and that, at the time decedent indorsed said notes in blank and delivered them to appellant, appellant informed decedent that, by indorsing his name in blank on said notes, he was merely transferring his interest in said notes to appellant, and was incurring no liability thereon; that, at the time decedent indorsed said notes, he believed that said notes were secured by good real estate mortgages, and that the indorsement of decedent upon said notes was procured by appellant with a fraudulent design of holding decedent responsible therefor; that decedent never knew during his lifetime that said notes were not secured by good real estate mortgages; that, in truth and fact, none of said promissory notes were secured by mortgages of any kind, and that said appellant did not, in fact, loan said decedent's money, but that appellant, who was then booming the town of Downs, contracted to sell the makers of said notes certain real estate in Downs for exorbitant and unreasonable prices, taking a small cash payment, which he put in his pocket, and then accepted these notes in lieu of the balance of said purchase price, which notes he turned over to decedent in lieu of decedent's money which he had agreed to loan as aforesaid for decedent, the appellant at all times holding the title to said real estate which he had agreed to sell as aforesaid in his own name, and said contracts of sale being oral contracts entered into by appellant and the makers of said notes, and that appellant thereby appropriated decedent's money to his own use; that some time after said notes had been delivered to appellant and indorsed in blank by decedent the appellant by means of a stamp placed a printed guaranty above the name of the decedent; that the promissory note mentioned in appellant's first cause of action was delivered to appellant for collection, appellant informing said decedent at the time he received said note for collection that it was necessary for decedent to indorse his name on the back thereof in order that he could collect the same for decedent; and that thereafter appellant wrongfully placed the stamp of guaranty

above his signature and claimed to be the owner thereof."

We cannot say that these defenses are inconsistent, but it seems to us that the affirmative matter adds nothing to the previous denials. The action was brought on a written guaranty, and, if there was no such guaranty, the action must fail. The affirmative matter was not set forth as a basis for affirmative relief, and the fact that the appellant obtained a blank indorsement from the deceased by fraudulent means, or the fact that the appellant had perpetrated some previous fraud on the deceased, would seem utterly immaterial. In other words, if the guaranty set forth in the complaint was never executed, any different transaction between the parties as a matter of pleadings was irrelevant. The fraud alleged was not connected with the contract in suit. *Puget Sound Nav. Co. v. Worthington*, 2 Wash. T. 472, 7 Pac. 882, 886; *Trumbull v. Jackman*, 9 Wash. 524, 37 Pac. 680; *Williams v. Nienmire*, 23 Wash. 400, 63 Pac. 534; *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586.

For the error in excluding testimony and submitting the affirmative defense to the jury, the judgment is reversed, and a new trial ordered.

HADLEY, C. J., and DUNBAR, MOUNT, FULLERTON, and CROW, JJ., concur.

W. P. FULLER & CO. v. HARRIS et al.
(Supreme Court of Washington. Feb. 21, 1908.)

1. SALES — ACTION FOR PRICE — EVIDENCE — ADMISSIBILITY.

In an action for the price of shellac, defendants claimed damages for breach of warranty of quality, and claimed that they did not know of the inferior quality until after they had used the shellac on furniture; and plaintiff introduced evidence tending to show that a sample of the shellac taken immediately before shipment had shown it to be first-class. *Held*, that there was no error in permitting plaintiff to show that he had sold to defendants an inferior grade of glue, and that, if used in preparing the furniture for finish, such glue would have produced the conditions of which defendants complained and which they attributed to the inferior quality of the shellac.

2. TRIAL — INSTRUCTIONS — CHARGE AS A WHOLE.

The court instructed that if the jury believed that defendants delayed asserting any claim against plaintiff until after plaintiff had commenced suit, and defendants had knowledge of the defect in the shellac for a long time prior thereto, they might regard defendants' failure to assert their claim as a circumstance against the good faith thereof. Another instruction was to the effect that the purchaser of an article purchased under a warranty is under no obligation to return the same on discovery of breach of the warranty, but that he may affirm the contract, retain the goods, and recover his damages in an action brought by the seller. *Held*, that the first instruction was not prejudicial error, on the theory that it advised the jury that delay by defendants in asserting their claim would neces-

sarily deprive them of the right to claim damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

3. SALES—ACTION FOR PRICE—COUNTERCLAIM FOR BREACH OF WARRANTY—QUESTIONS FOR JURY.

Where purchasers obtained a credit on the account for the goods sold, and obtained an extension of time for payment, and presented no claim for breach of warranty of quality until they filed their answer in an action for the price, such facts should be considered by the jury on the question as to defendants' good faith.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by W. P. Fuller & Co. against Emmet Harris and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Charles P. Harris and Bamford A. Robb, for appellants. Gray & Stern and Jas. A. Snoddy, for respondent.

CROW, J. This action was brought by W. P. Fuller & Co., a corporation, to recover \$240.98 from the defendants, Emmet Harris and T. P. Keeney, copartners as Harris-Keeney Company, for certain goods sold and delivered, including one barrel of powdered white shellac, of the alleged value of \$180.08. The defendants admitted the purchase, but for an affirmative defense alleged that the shellac was impure, adulterated, and worthless; that it was purchased by them with plaintiff's knowledge; that it was intended for use in finishing furniture; that plaintiff warranted it as fit for such use; that defendants could obtain no other shellac at Hong-kong, China, where their furniture factory was located; that before they discovered the worthlessness of the shellac they had used about one-half of it in finishing large quantities of furniture, which appeared to be in good and merchantable condition when finished; that after the furniture had been shipped to defendants' customers the shellac finish flaked and fell off; that their customers refused to receive the consignments; and that the defendants were thereby damaged in the total sum of \$3,000, for which they asked judgment. The only issue was as to the quality of the shellac and the alleged damages. It appears from undisputed evidence that no claim for damages was presented to the plaintiff until the answer was served herein. The goods were sold August 9, 1904; this action was commenced November 28, 1905; and the defendants answered on February 26, 1906. The original agreed purchase price for the goods sold was \$251.58; but the plaintiff alleged that the defendants became entitled to an allowance of \$10.60 on account, which was made on January 25, 1905. The undisputed evidence shows that this allowance was made at the time alleged in settlement of some claim for a reduction presented by the defendants, but that no damages were

then mentioned. The plaintiff offered evidence tending to show that, when the \$10.60 credit was allowed, the defendants asked for an extension of time on the remainder of the account, which was granted. On a jury trial a verdict was rendered in favor of the plaintiff. From the judgment entered thereon this appeal has been taken.

The appellants, in presenting their defense, offered evidence showing that it was their custom, before applying the shellac finish, to treat the furniture with a preparation made with glue. They also introduced the depositions of their customers to whom furniture had been shipped, showing the inferior quality of finish. There is much doubt whether any of this evidence indicated that the defective finish resulted from the use of inferior or adulterated shellac. After this evidence had been admitted, the respondent introduced a witness, who over appellants' objection was permitted to testify that he had, at appellants' request, sold for respondent and delivered to them an inferior quality of glue, which, if used in preparing the furniture for finish, would produce the conditions to which appellants' customers had testified. The trial court afterwards denied appellants' motion to strike this evidence, and refused to instruct the jury to disregard the same. Appellants now claim that prejudicial error was thereby committed. Appellants introduced no direct evidence showing that the shellac shipped by respondent was of an inferior or worthless quality. In fact, they excuse themselves for using it in finishing a large amount of furniture by claiming they did not then know it to be worthless, but supposed it to be as warranted. The principal facts upon which they now predicate their claim that it was worthless are that they used it in finishing and that the finish afterwards flaked and fell off. Respondent's witnesses positively testified that a sample of the shellac taken from the barrel immediately before shipment had been examined and found to be first-class in every respect. Under the issues, and these circumstances, we fail to understand how any prejudicial error was committed by permitting respondent to show the sale of the inferior glue shipped to appellants at their request, as it tended to show that appellants had an opportunity to use it in preparing the furniture, and it was contended that such use was improper. There was no witness corroborating the evidence of one of the defendants, who was the only person testifying to the method of using the glue and shellac in finishing. His credibility was for the jury, and in passing thereon and in weighing his evidence it was proper for the jury to know and understand all the attendant circumstances.

The appellants further contend that the court erred in instructing the jury as follows: "The jury are instructed that if they believe from the evidence that the defendants delayed

asserting any claim against the plaintiffs until after the plaintiffs had commenced suit, and that defendants had knowledge of the defect in the shellac for a long time prior, then you may regard defendants' failure to assert such claim as a circumstance against the good faith of defendants' claim." This instruction as worded is perhaps not entitled to an unqualified approval. There is no doubt but that an unreasonable delay in presenting appellants' claim for damages, when, as here contended, they had obtained an item of credit and asked further time for payment, should be considered by the jury in passing upon their good faith or lack of good faith. The language used by the court, in the absence of any further instructions, might have possibly misled the jury into understanding that such unexplained delay amounted to a waiver of appellants' right to recover damages; and the question now before us is whether the instruction, in view of the entire record, constituted prejudicial error. In *Elliott v. Puget Sound, etc., S. S. Co.*, 22 Wash. 220, 60 Pac. 410, cited by the appellants, it was in substance held that a vendee's failure to make a claim for damages on account of the defective condition of goods sold until after the dates of all items of the account, and after payments had been made thereon, was not such a showing of lack of good faith as to necessarily deprive the vendee of his right to afterwards plead, prove, and recover damages in an action for the purchase price. "If a warranty has been proved, keeping the goods, delaying to give notice of the defect, etc., may furnish a strong presumption against an alleged breach of warranty, but cannot bar the buyer from suing for or recouping his damages for such breach, if proved." *Abbott's Trial Evidence* (2d Ed.) c. 16, § 84. The instruction above set forth does not in this case go to the extent of advising the jury that appellants would by such delay necessarily deprive themselves of the right to claim damages. It is not shown that they requested any instruction on this subject, or that they asked the court to modify or explain the instruction given. The evidence that such delay did occur, and that the damages were first claimed in the answer, was undisputed. Yet the court further instructed as follows: "The purchaser of an article purchased under a warranty is under no obligation to return the same on discovery of breach of a warranty but may affirm the contract, retain the goods, and recover his damages arising from the breach of warranty in an action brought by the seller for the purchase price, if any such damages he has sustained." On this record we fail to see how the jury could have been misled, or that any prejudicial error was committed.

The judgment is affirmed.

HADLEY, C. J., and MOUNT, FULLERTON, and ROOT, JJ., concur.

SPOKANE INTERURBAN RY. CO. v. CONNELLY.

(Supreme Court of Washington. Feb. 19, 1908.)

1. EMINENT DOMAIN—PROCEEDINGS TO TAKE PROPERTY—NOTICE—SERVICE.

In condemnation proceedings the validity of the service of notice depends upon whether personal service was actually made by a qualified person, and not upon the filing of an affidavit making proof thereof, in strict compliance with the statute.

2. SAME — SUPPLEMENTARY PROOF OF SERVICE.

In condemnation proceedings, where the record contained an affidavit of proof of personal service of the notice and copy of petition on defendant, which affidavit was defective, because it did not aver that the person making the service was at the time over 21 years of age, the court could in its discretion permit plaintiff to file a supplemental affidavit remedying the defect after the entry of judgments decreeing a public use, awarding damages, and appropriating the land.

3. SAME—STATUTORY PROVISIONS.

Ballinger's Ann. Codes & St. § 5038, providing that in condemnation proceedings due proof of service shall be filed with the clerk of the superior court before or at the time of the presentation of the petition, is directory only, and the failure to comply therewith does not deprive the court of jurisdiction, where legal service has actually been made by a competent person, since the court's jurisdiction depends upon actual service made, and not upon the act of filing proof of it.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Proceedings by the Spokane Interurban Railway Company against Edward Connelly to condemn a right of way. After the entry of judgments decreeing a public use, awarding damages, etc., defendant's motion to quash the notice and set aside the judgments because no proper service had been made, was overruled, and defendant appeals. Affirmed.

P. F. Quinn, for appellant. Hamblen, Lund & Gilbert, for respondent.

CROW, J. The Spokane Interurban Railway Company, a corporation, commenced this action to condemn a right of way over land of the defendant, Edward Connelly. After the entry of judgments decreeing a public use, awarding damages, and appropriating the land, the defendant appeared specially, and moved the court to quash the notice and set aside the judgments, for the reason that no proper service had been made, that no proof thereof had been filed, and that the court had not obtained jurisdiction. Thereupon the plaintiff moved for leave to file an amended or supplemental affidavit showing legal service on the defendant. The trial court overruled the defendant's motion to quash, but granted plaintiff's motion for filing a supplemental affidavit. The defendant has appealed.

It is not contended by the appellant that he had not been actually served with a copy of the original notice which was properly filed, although no proof of service was attached

thereto. The decree adjudging a public use, which was entered on December 24, 1906, recited that personal service of the notice and a copy of the petition had been made on the appellant in Spokane county, as required by law, and on January 19, 1907, the final decree of appropriation was entered. The appellant's motion to quash was made February 9, 1907, and on February 14, 1907, the following proof of service was filed: "R. H. Macartney, being first duly sworn upon oath, deposes and says that he is a citizen of the United States, over the age of 21 years, competent to be a witness in the above-entitled action, and is not interested therein; that on the 14th day of December, 1906, he served the petition and notice in the above-entitled action upon Edward Connelly, the above-named defendant, by delivering to and leaving with the said defendant in Spokane county, Wash., a true and correct copy of the original petition and notice in said cause." This affidavit was made December 16, 1906, and fixes the date of service as December 14, 1906.

Appellant now contends the service was void, citing *French v. Ajax Oil & Development Company*, 44 Wash. 305, 87 Pac. 359. In that case we said: "It is the contention of the appellant that due service was not made in this case, for the reason that it does not appear from the affidavit of Allen that he was 21 years old at the time the service was made, the affidavit going only to the extent that he was 21 years old at the time he made his affidavit, viz., on the 27th day of December, 1905, the service having been made on December 2, 1905. Technical as this may appear, this objection is sustained by authority, and literally, there is no proof or showing that the summons was served by a person who was competent under the law to serve it." The objection certainly is a technical one. The vital question is whether personal service was actually made by a qualified person, and not whether an affidavit was filed making proof thereof in strict compliance with the statute. The respondent in this case supplemented the record with an affidavit showing that Mr. Macartney was over 21 years of age when he made the service, and the trial court properly exercised its discretion in permitting respondent to file such supplemental proof. In *State ex rel. Thomas v. Superior Court*, 42 Wash. 521, 85 Pac. 256, a condemnation proceeding, this court, in passing on a similar objection, interposed to a proof of service, said: "There are two affidavits making proof of service. In the first it affirmatively appears that copies of the petition and summons were left with each of said relators. The second affidavit was made to show that the party who made the service was qualified. These two affidavits are sufficient proof of a valid service, none of their statements being denied by the relators."

Substantially the same conditions are now

before us, and we hold the service and amended proof thereof sufficient. The appellant cites section 5638, Ballinger's Ann. Codes & St. (section 5103, Pierce's Code), and contends that the trial court had no jurisdiction of his person or the subject-matter of the action when the several orders and decrees were made and entered, as no proper affidavit or proof of service had then been filed. Although the section cited provides that due proof of service shall be filed with the clerk of the superior court before or at the time of the presentation of the petition, we hold that failure to make such prior filing will not deprive the court of jurisdiction where legal service has actually been made by a competent and qualified person; the provision above mentioned being directory rather than mandatory. We reach this conclusion from the language immediately following, to wit: "Want of service of such notice shall render the subsequent proceedings void as to the person not served; but all persons or parties having been served with notice as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings." This language clearly indicates that jurisdiction to enter valid orders and decrees depends upon actual service made, and not upon the act of filing proof of the same. If appellant had attempted to show that he had not been served, or if the respondent had thereafter failed to supplement its proof by showing that the party who made the service was qualified, there might be some merit in appellant's contentions.

The record before us shows that the trial court had jurisdiction, and the judgment is therefore affirmed.

HADLEY, C. J., and MOUNT, FULLERTON, and ROOT, JJ., concur.

PORTLAND & S. RY. CO. v. CLAPKE COUNTY et al.

(Supreme Court of Washington. Feb. 18, 1908.)

1. EVIDENCE — DOCUMENTARY EVIDENCE — MAPS.

Where, in a proceeding to condemn land for a railroad right of way, there is no dispute in the evidence as to the exact location of the railroad line on the ground, or of the amount of land sought to be appropriated, maps shown to be an accurate description of the location of the road as laid out on the land are admissible as illustrative of the testimony of the witnesses, though not made by the persons who made the surveys on the ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1500-1508.]

2. HIGHWAYS—ESTABLISHMENT BY USE.

Where there is no dispute as to the existence of a road, it is immaterial whether its establishment was by dedication or by user, or that in certain places changes have been made by necessity; the road sometimes becoming flooded or filled by debris.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 17-20, 222-225.]

3. TRIAL—CONSISTENCY OF INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Instructions must all be construed together, and, if consistent when so construed, error cannot be based on their inconsistency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

4. EMINENT DOMAIN—DAMAGES—INSTRUCTIONS.

In proceedings to condemn a railroad right of way across the premises of a stone quarry, where defendant claimed that damage would result from the operation of the railroad because blasting would be interfered with and greater care required to prevent injury to trains, and it appeared that a highway existed between the proposed railroad and the quarry, an instruction that there is no evidence that the highway affected or depreciated the value of defendant's land was properly refused.

5. SAME—ADEQUACY OF DAMAGES—REVIEW.

The question of damages on condemning land being one for the jury, a judgment will not be reversed as inadequate where the verdict was based on all the evidence, a view of the premises, and proper instructions, a new trial was denied by the judge who heard the case, and substantial justice seems to have been done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 681-685.]

Appeal from Superior Court, Clarke County; W. W. McCredie, Judge.

Condemnation proceedings by the Portland & Seattle Railway Company against Clarke county, the Columbia Contract Company, and another. From the judgment rendered, the Columbia Contract Company appeals. Affirmed.

Teal & Minor and Donald McMaster, for appellant. A. L. Miller and James B. Kerr, for respondent.

MOUNT, J. This appeal is from an award of damages in condemnation. The respondent condemned a right of way for railway purposes across certain lands of the appellant. The question of damages was tried to the court and a jury, and a verdict was returned in favor of the appellant for \$15,000. The strip of land taken lies along the north bank of the Columbia river, between the river and a steep bluff. The appellant for several years last past has operated a stone quarry along the face of the bluff. The stone was carried from the bluff to the river by means of tramways. The right of way of the railway company lies between the bluff and the river. A public road passes over the appellant's premises between the bluff and the river, crossing the right of way near the west end of the premises and paralleling the right of way on the side next to the bluff, until near the east end, where the road comes in contact with the right of way, and from there on is included within the right of way. The tramways above mentioned cross the right of way and the wagon road on trestles built sufficiently high so as not to interfere with either the roadway or the operation of the railway trains. Appellant alleges that the court erred in receiving in evidence certain maps similar to those in the case of

Portland & Seattle Railway Company v. Ladd (Wash.) 91 Pac. 573. The point made in this case is identical with the one made there. For the reasons there stated, it was not error for the court to receive these maps in evidence.

At the request of the respondent, the court instructed the jury as follows: "A public road may be established in this state by user. It is the law of this state that any road or highway which has been continuously, openly, notoriously, and adversely used as a public road or highway by the general public under a claim of right for 10 years, where the same has been worked and kept up at the expense of the public, is a lawful road or highway, and the public has a right to pass to and from thereon. If you find from the evidence that a public road exists below the quarries referred to in the evidence, you are entitled to take that fact into consideration in determining the damages which will be sustained by the claimants by the taking of a strip of land which is necessary for the railroad right of way. No owner of land adjoining a public highway has a right to interfere with public travel upon such highway. If, therefore, you find that a public highway exists below the quarries in question, you may consider whether the taking of a right of way by the railroad company will interfere with the manner in which the claimant is now entitled to operate its stone quarries. Where a public road or highway exists, and slight changes have been made in portions thereof, the remainder of such road still continues to be a public road or highway and the rights are the same therein as if such changes had not been made, provided, of course, the travel is substantially the same as before the making of such changes. You are instructed that when a public road or highway has been established, either by user or otherwise, it remains such public road until vacated according to law, or until abandoned for the time fixed by the statute, and no person has a right to change such road unless such change is directed or consented to by the authorities having charge of such road." At the request of the appellant, the court charged the jury as follows: "If you find that a highway or county road has been established over the claimant's lands, the claimants as the owners of said lands have, notwithstanding the establishment of the highway or county road, the exclusive right to the soil, subject only to the easement of the right of passage in the public and the incidental right of properly fitting the highway or county road for public use. Subject only to the easement or right of passage, and the incidental right of properly fitting the highway or county road for use, which is vested in the public, the proprietor of the soil, the claimants in this case, has all the usual rights and remedies of the owner of the freehold. The owner of lands abutting upon a highway or county road, such as

the claimant in this proceeding has the right to sink drains and put in subways, carry pipes, and use the soil of such highway or county road for any lawful purpose, so long as he shall maintain the surface so that it may be safe and convenient for the passage of the public. The owner of lands abutting on a highway or county road, such as the claimants in this proceeding, may also build overhead crossings, tramways, and bridges over the highway or county road, and maintain and use the same for any lawful purpose so long as the same do not render the passage of the public on such highway or county road unsafe or inconvenient. The owner of lands abutting on a highway or county road such as the claimants in this proceeding may use the highway or county road for the purpose of loading and unloading goods, merchandise, and other things bought for use or for sale on his lands, and for the purpose of loading the produce of his lands, or building or other materials thereon, or of taking the same therefrom, so long as he does not use the highway or county road for such purposes for an unreasonable time, and so long as such use is temporary, and he does not obstruct the highway or county road for an unreasonable period. He may even temporarily encroach upon the highway or county road for such purpose, and the use of the highway or county road by the public for travel may be temporarily interfered with by him in this way, but such use must be temporary and reasonable. The owner of lands abutting on a highway or county road, such as the claimants in this proceeding, may blast stone and other substances on his lands in close proximity to such highway or county road, or fell timber on his said lands, even though some stone or material may be thrown upon the highway or county road; but he must restore the highway or county road with reasonable dispatch, and remove the stone or material thrown thereon, and not permit the public travel to be unreasonably interfered with thereby. If you find from the evidence that the public has traveled over the land described in the petition for years, I charge you that such use in law establishes a highway or county road over said lands, even though there has been no dedication or appropriation of the lands for this purpose, but the public's right to a highway or county road established by user in this way and for such period, the width of the highway and the extent of the servitude or public right to use the same, is limited to the ground so used and the character of the user." The appellant also requested the court to charge the jury upon this subject as follows: "I charge you that there is no evidence in this case from which you may find that any of the lands of the claimants described in the petition have been dedicated to or appropriated by the public for use as a public highway or county road. I instruct you, gentlemen of the jury, that there has

been no evidence introduced in this cause tending to show that the wagon road over the lands of claimant does in any way affect or depreciate the value of the property in question, whether said road is or is not a county road or public highway." It is argued, first, that the court should have told the jury that whatever rights the public have in the highway are based wholly upon user and not dedication by the owner, for the reason that the evidence clearly shows that fact. We are inclined to agree that the evidence shows clearly the establishment of a highway by user for nearly 50 years; the only difference among the witnesses being that in certain places changes have been made by reason of necessity, the road sometimes becoming flooded or filled by debris or rock placed in the road by the operation of the stone quarry by the agents of the appellant. There seems to have been no dispute that the wagon road was there. Whether it was established by user or by dedication could therefore make no difference. "The fact of the existence of a public highway may be established by any competent evidence, and there is no distinction in the validity of either method of the establishment of a public highway in this state." *State v. Horlacher*, 16 Wash. 325, 47 Pac. 748. Appellant also argues that the instructions given are inconsistent with each other. It is true the court told the jury that "no owner of land adjoining a public highway has a right to interfere with public travel upon such highway," and thereafter that "the owner of lands abutting upon a highway * * * may use the highway * * * for the purpose of loading and unloading goods * * * so long as such use is temporary, * * * but such use must be temporary and reasonable," etc. These instructions must all be construed together, and, so construed, we think they are not subject to the criticism that they are inconsistent. If any error is shown, it is not error prejudicial to the appellant.

It is next argued that the court should have instructed the jury that there was no evidence that the wagon road over the appellant's lands affected or depreciated the value of the lands. We think it was not error to refuse this instruction, because the appellant claimed at the trial that great damage would result by the construction of the railway, for the reason that blasting operations would be largely interfered with, and much greater care would be required to prevent stone from injuring trains and the railway. The wagon road which lies between the railway and the quarry would, of course, necessitate some care to prevent injury to travelers, and would tend for that reason to lessen the value of the property as a quarry. The jury certainly had a right to consider this fact so as not to charge against the railway the whole expense of extraordinary

care in the operation of blasting or in the operation of the stone quarry. There were other reasons of a like nature, but the one just stated justified the court in refusing the requested instruction.

Appellant next argues that the verdict was too small. There was great diversity of opinion among the many witnesses as to the amount of damages caused by the taking of the right of way and the construction of the railway. The question was properly one for the jury. The jury heard all the evidence, viewed the premises, and was properly instructed as to the measure of damages. The trial judge accompanied the jury upon the view, heard all the evidence, and was familiar with all the facts in the case, and, after verdict, denied a motion for new trial. After reading the record, we are satisfied that the verdict returned is not too small, but that it does substantial justice between the parties.

The judgment must therefore be affirmed.

DUNBAR, ROOT, and RUDKIN, JJ., concur. HADLEY, C. J., and CROW, J., took no part.

WHITEHOUSE v. COWLES et al.

(Supreme Court of Washington. Feb. 26, 1908.)

1. LIBEL—COMPLAINT.

A complaint against C. and a company alleged that, in a paper published by them, they published of plaintiff an article to the effect that he secured a license for marriage to R., but that he does not know where she is, that mysterious circumstances have intervened to prevent the marriage, that he refuses to explain, that efforts to locate her to obtain her version were unsuccessful, that he tried to prevent publication of the license, and that he said he did not know who R. was. There was no direct allegation that any of the statements were untrue, and nothing to show that defendant C. had anything to do personally with, or any knowledge of, the publication of the article. Held that, the article not being libelous per se, and there being no inducement, colloquium, or innuendo pleaded, a demurrer to the complaint was properly sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 181-197.]

2. SAME—NOTICE TO PUBLISHER BEFORE ACTION—EVIDENCE.

Laws 1899, p. 101, c. 50, providing that, before an action for libel, the aggrieved party shall serve notice on the publisher or publishers, specifying the statements alleged to be false and defamatory, is not shown to have been complied with, though before the action against C. and the Review Publishing Company, the alleged publishers, such a notice was served on C.; the only evidence to show that he was a publisher or agent of a publisher July 19, 1904, the date of the publication, being two checks, dated December 10, 1904, and March 21, 1905, and a contract, dated May 19, 1904, the checks being signed "R. Pub. Co., C., Publisher," and the contract being signed "R. Pub. Co., C., Publisher, by Y., Business Manager," they, in view of their remoteness in time, and the rule against proving agency by declarations of the agent, being incompetent as primary evidence.

Appeal from Superior Court, Spokane County; Geo. A. Joiner, Judge.

Action by M. H. Whitehouse against W. H. Cowles and the Review Publishing Company. Judgment for defendants. Plaintiff appeals. Affirmed.

Willis H. Merriam and A. G. Gray, for appellant. H. M. Stephens, for respondents.

ROOT, J. Plaintiff brought this action to recover damages alleged to have been occasioned by certain matters published in the *Spokesman Review*, of which defendants are alleged to have been the publishers. From a judgment of dismissal, this appeal is prosecuted.

Two causes of action were set forth in the amended complaint. The first cause of action was based upon the following article published in said newspaper:

"That on the 14th day of July, 1904, at Spokane, county of Spokane, and state of Washington, the defendants published a newspaper called the *Spokesman Review*; that on said 14th day of July, 1904, the defendants published in said newspaper the following words of and concerning the plaintiff:

"Secured License but No Bride. Matrimonial Plans of Well-Known Spokane Pioneer Fall of Realization. M. H. Whitehouse—Clara Reed. Fifty-Year Old Would-Be Benedict does Not Know Where Prospective Bride is.

"Mysterious unforeseen circumstances have intervened to prevent the contemplated marriage of M. H. Whitehouse, a well-known pioneer citizen of Spokane, to Clara S. Reed. What the circumstances are Mr. Whitehouse declines to explain and diligent efforts to locate the prospective bride in order to ascertain her version of the story have proven unavailing.

"Mr. Whitehouse secured the license at the office of the county auditor last Saturday. He appeared at the office about the hour of closing and by arrangement with Auditor Stewart, planned to have the license issued to him, recorded after the office had been closed and kept from the public and the press until Monday morning. Mr. Stewart signed the application for the license as witness identifying the prospective bridegroom and certifying that the prospective bride is of marriageable age. Monday Mr. Whitehouse appeared at the county auditor's office again to ascertain whether the fact that the license had been issued could not be withheld from the public and upon ascertaining that it could not be arranged with the auditor's office again set out in search of the reporters with a view of urging them to withhold the publication.

"Whatever the reason the marriage has not occurred. Mr. Whitehouse when seen last night at his place of business at 1025 Sprague Ave., said: 'I am not married and there appears no immediate prospect that I shall be. Further than this I have nothing to say.'

"Who is Clara E. Reed, the woman in

the case?" he was asked. "I do not know who she is, nor where she is. In fact I know nothing about her. I have nothing to report. When there is anything to report, I will let you know." In the application for the marriage license Mr. Whitehouse gave his age as 50 years and that of his prospective bride 37. Mr. Whitehouse has lived in Spokane for a number of years and makes his home at E. 2103 Fourth Ave. He is engaged in the millinery business on Sprague Ave. near Lincoln street.'"

There is no direct allegation that any one of these statements is untrue, and only by inference or implication does it appear that any portion is untrue. There is nothing to show that respondent Cowles had any knowledge of the publication of the article, or had anything to do personally therewith. A demurrer to this cause of action was sustained by the trial court. We do not think that the language of the published article constitutes a libel per se, and there is no inducement, colloquium, or innuendo pleaded. The ruling of the trial court in sustaining the demurrer to the first cause of action must be sustained.

The defendants interposed an answer to the second cause of action. A motion to strike a portion of this answer was made by plaintiff, and denied by the trial court. Plaintiff then demurred to the answer, but his demurrer was overruled. These rulings are assigned as error; but it is unnecessary for us to pass upon them by reason of our conclusion relative to another question in the case. The statute (Laws 1899, p. 101, c. 59) provides that, before any action for libel shall be brought, the aggrieved party shall serve notice on the publisher or publishers of the newspaper specifying the statements in said article which such party alleges to be false and defamatory. Such a notice was served upon Cowles: but at the trial there was no competent evidence to prove that he was the publisher of the paper on the 10th of July, 1904, the date when the offending article appeared. The proof offered to establish this fact consisted of two checks, dated, respectively, December 10, 1904, and March 21, 1905, and a contract, dated May 19, 1904; the checks being signed, "The Review Publishing Company, W. H. Cowles, Publisher," and the contract being signed, "The Review Publishing Company, W. H. Cowles, Publisher, by J. F. Young, Business Manager." It will be noticed that the dates of these instruments are considerably removed from that upon which the article in question was published, that none of them bears the signature of the respondent company, and that in the contract the name of Cowles appears to have been signed by another. In the light of these facts, and the rule of law against proving agency by the declarations of an alleged agent, it must readily appear that the proffered documents were, as primary evidence, incompetent. This was the view of the trial judge, who directed a verdict in favor of the

defendants, and upon which the judgment of dismissal was entered.

Finding no error in the record, the judgment is affirmed.

HADLEY, C. J., and CROW and MOUNT, JJ., concur.

McCLELLAN v. GERRICK et al.

(Supreme Court of Washington. Feb. 24, 1908.)

1. NEGLIGENCE—ASSUMPTION OF RISK.

Where plaintiff was employed by the owner of a building under construction to inspect the steel work as it was completed by the subcontractor, and, on being advised of the completion of a portion thereof, went on the building and was injured by reason of one of the beams not being riveted, which was fairly obvious on inspection, he may not recover against the subcontractor, since he was employed to detect defects in the work, and assumed the risk of the employment.

2. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action to recover for injuries received while inspecting a building by falling from a beam which was not riveted, evidence examined, and held to show that plaintiff was guilty of contributory negligence in failing to observe that the beam was not riveted before going on it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 274-276.]

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by Alexander McClellan against John Gerrick and Joseph Gerrick, copartners. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Walter S. Fulton, for appellant. Kerr & McCord, for respondent.

MOUNT, J. This appeal is from a judgment of nonsuit in an action for personal injuries. At the time of appellant's injuries Herman Chapin was erecting a large building in the city of Seattle. Matthew Dow had the contract for the work. The respondents Gerrick & Gerrick were subcontractors, having to erect the steel construction work of the building; the material therefor being furnished by the owner ready to put in place. The appellant was in the employ of the owner and the principal contractor. His duties were to inspect the work of Gerrick & Gerrick, to see that all of the material was properly placed and securely riveted and the structure plumb, and that the work, when completed, was in accordance with the plans and specifications. On August 14, 1906, appellant noticed that the gang of riveters employed by Gerrick & Gerrick had been sent away, and, on inquiry, was informed by John Gerrick, one of the respondents, that the reason therefor was that all of the steel work was in place, and that the riveting was all finished excepting a portion under the derick, and that the work was in condition to be inspected. Two days later the appellant

went upon the building for the purpose of making an inspection. When going from one part to another, he attempted to walk across an I-beam, 6 inches deep, about $3\frac{1}{2}$ inches wide on top, and about 12 feet long. This beam was not riveted. A temporary bolt was in one end and the other end lay loose upon a lug. It was not fastened either by bolt or rivet. When appellant walked to about the center of the beam, it dropped down at the unfastened end, and let the appellant fall a distance of about 35 feet. He was severely injured. The respondents Gerrick & Gerrick knew of the condition of this beam, but did not inform the appellant thereof. The appellant's evidence shows that it was the duty of respondents Gerrick & Gerrick, immediately after the work was riveted, to paint the steel work, and this beam was not painted; that appellant's first duty upon inspection was to plumb the work, and to do this it was necessary for him to cross over from one part of the structure to another on these I-beams; that he relied upon the statement of respondent that the work was completed, and did not notice the condition of this particular beam before he went upon it. Upon substantially these facts the trial court granted the defendants' motion for a nonsuit. The action was thereupon dismissed. Matthew Dow and Herman Chapin, who were originally made parties defendant, were dismissed upon motion of the plaintiff before the trial began.

It is contended by the respondents that the appellant was not in their employ, and that, therefore, they owed him no duty. We shall not pass upon this question, because we are clearly of the opinion that the appellant assumed the risk, and was also guilty of contributory negligence, even though respondents Gerrick & Gerrick had employed him. The appellant himself testified that he was employed as an inspector of the building; that it was his duty to carefully and critically examine every part of the work, and to see that every piece of material was in place and properly riveted; that this was his sole duty; and that he was constantly on the building for that purpose. It was therefore his duty to discover this defect which caused his injury. He was employed and was there for that purpose. The defect was not a hidden one. It was obvious and apparent to a casual inspection. Upon this subject he testified: "The heads of the rivets were one inch wide. * * * If I had stopped and looked down, I could have seen whether there were any rivets or not. * * * I was not looking for rivets. * * * If I had looked, I would have seen the work was not complete, and would then have examined it carefully." This conclusively shows that, if the appellant had used ordinary diligence, he would have avoided the injury. He seeks to excuse his neglect by saying that he was required to plumb the work before he examined for de-

fects in riveting; that he had been notified that the work was completed, except a certain specified portion. Assuming these facts to be true, they do not excuse the carelessness of appellant, because ordinary prudence dictates that, before a man should attempt to walk across a beam $3\frac{1}{2}$ inches wide—no wider than his shoe sole—12 feet long, and which was 35 feet from the ground, he should at least look and see that the beam is fastened in place. He could have seen the beam was insecure by simply looking. This he failed to do. His failure to use his senses was therefore the proximate cause of his injury. When, in addition to this, it is conceded that he was employed to inspect and discover defects of this kind, it is plainly evident that respondents are not liable.

The trial court therefore properly granted the motion, and the judgment must be affirmed.

HADLEY, C. J., and CROW, FULLERTON, and ROOT, JJ., concur.

WARING v. LOOMIS et al.

(Supreme Court of Washington. Feb. 26, 1908.)

PUBLIC LANDS—SURVEY AND DISPOSAL—CONTRACTS—VALIDITY OF CONTRACTS—PRESUMPTION OF LEGALITY.

Where plaintiff and defendant's grantor, joint occupants of unsurveyed government land, contracted that the latter should occupy the land and pay plaintiff a certain proportion of the annual product, etc., and obtain a patent thereto when it was in the market, for the benefit of plaintiff to the extent of his interest therein, it will not be presumed, in the absence of convincing proof, that the contract contemplated obtaining the patent unlawfully, under the homestead laws, when title could be, and was subsequently obtained lawfully, under the mining laws.

Appeal from Superior Court, Spokane County; Henry L. Kepnan, Judge.

Action by Guy Waring against J. A. Loomis and others. From a judgment dismissing the action, plaintiff appeals. Reversed and remanded for decree as directed.

Graves, Klizer & Graves, for appellant. Merrill, Oswald & Merrill, for respondents.

ROOT, J. Plaintiff brought this action to establish ownership to an undivided one-half interest in certain realty in Okanogan county. From a judgment dismissing the action, he appeals.

In 1888 plaintiff, while in possession of the premises as unsurveyed government land, sold to one J. A. Loomis (since deceased) an undivided one-half interest in and to the improvements upon and rights in the land, and at the same time entered into a copartnership with said Loomis for the purpose of carrying on a general merchandise business. Subsequently the partnership was dissolved, and appellant removed from the land, leaving Loomis in possession under the contract here-

inafter set forth. In 1891 Loomis located the land as quartz claims under the United States mineral land laws. In 1896 patents for such land were taken in the name of one Bogart, a brother-in-law of Loomis; he knowing of the contract between appellant and Loomis, and taking the patents as a convenience to the latter. Subsequently the lands were conveyed to respondent Calhoun, who took title with notice of appellant's rights. Appellant and Loomis, knowing or believing that any agreement between them as to the conveyance by one to the other of an interest in land held and to be acquired as a homestead by one of them would be illegal, consulted an attorney as to what they could do in order to make an equitable division of the property, or adjust matters so that Loomis could keep the property and appellant get the value of his equitable interest therein. Upon the advice of the attorney, appellant and Loomis entered into the following agreement, to wit: "Be it known by these presents, that we, J. A. Loomis, of Sinlahekin ranch, near Sinlahekin creek, in the county of Okanogan and territory of Washington, party of the first part, and Guy Waring, late of the same place, party of the second part, being the undivided one-half owners of one hundred and sixty acres of land (subject to the paramount title of the United States), located upon Sinlahekin creek in said county of Okanogan, and known as the Sinlahekin ranch, together with the improvements thereon, and having heretofore been in the joint occupancy thereof, and the said Waring being about to remove therefrom and to leave said Loomis in the sole use, occupation and possession of the same, have agreed and concluded concerning said land and ranch and improvements thereon as follows, viz.: (1) Loomis is to pay Waring in cash money upon the signing of this agreement the sum of two hundred and fourteen (\$214.00) dollars, as his part of the expense of erecting the dwelling house lately occupied by said Waring and his family on said ranch. (2) Loomis is to have the sole use, occupation, and possession of said land, ranch and improvements thereon, upon the following terms, viz.: (a) He shall keep all boundary posts in position and in every lawful manner protect the exclusive possession thereof, and prevent said land from being jumped as unoccupied lands of the United States, and when the same are in market will apply for and obtain patent thereto if he can. (b) Loomis is to pay to Waring one-fifth in quantity and quality of hay raised on the ranch each year, delivered on said ranch, and shall have the privilege of buying the same from Waring for cash at any time before the end of the year in which the same was grown at the current price for hay of similar class and quality on December 1st, of such year, and in any event, said Loomis shall take said one-fifth of the hay at the end of the year in which it is grown, and pay Waring therefor in cash money the cur-

rent price of hay of similar class and quality in that vicinity at the end of such year in which the same is grown. (c) Loomis is hereby authorized at any time to make a bona fide sale of said ranch or any part thereof for the mutual and equal benefit of both parties hereto, and to execute in Waring's name any and all necessary conveyances thereof, and pay the proceeds of such sale, one-half to himself and one-half, less 5 per cent. commission, to Waring forthwith, provided, that if Waring furnishes a purchaser for said ranch, Loomis shall not be entitled to retain any percentage as commission, but in all other respects this paragraph remains the same. (d) Loomis shall have no right to sublet or lease said land or any part thereof to any third person. (e) Loomis hereby acknowledges a trust in favor of said Waring for an undivided one-half interest in the whole of said land, and in the event of his obtaining the paramount title of the United States to said land in his own name he hereby acknowledges an express trust to the extent of one undivided one-half thereof in favor of Guy Waring for the faithful administration of which said express trust he hereby binds his heirs, executors and administrators to the same extent as himself. (f) Waring hereby warrants Loomis in the quiet and peaceable possession of said premises against his own acts and against any and all persons claiming by, through or under him. Witness our hands and seals this 28th day of May, 1888, in duplicate. J. A. Loomis. [Seal.] Guy Waring. [Seal.] In presence of: Thomas C. Griffiths. A. Waltman." To the amended complaint setting forth this contract a demurrer was interposed by defendants and sustained by the trial court. Upon appeal this ruling of said court was reversed. *Waring v. Loomis*, 35 Wash. 85, 76 Pac. 510. The main contention was that the contract was void because it contemplated obtaining title to government land unlawfully. This court, declining to uphold this contention, said: "There are various ways by which title can be acquired to the public land of the United States, even though it be agricultural in character, only some of which are inconsistent with a contract of this kind. This being the case, it will not be presumed that the parties intended to violate the law. On the contrary, it is a rule of interpretation that, when a contract is open to two constructions by one of which it would be lawful and the other unlawful, the former must be adopted."

It is now urged that the purpose of the parties to this agreement at the time of its making was to acquire the property as a homestead by Loomis, which would necessarily involve fraud and perjury. It is conceded, however, that the title was afterwards obtained from the government honestly and according to law. It is evident that the ultimate purpose of the parties to the contract was to so arrange the matter that each

should eventually receive a half interest in the land, or that Loomis should acquire the title thereto to be held subject to appellant's right to a half interest therein. This purpose could be attained by either of two methods—one lawful, the other unlawful. In the light of the agreement, Loomis could not "prove up" upon the land as a homestead without committing perjury. But he could acquire title to the land, or cause it to be acquired, from the government under the "mining laws," and do so legitimately. He did the latter, and no question is made as to the legality of this acquisition. Even if the original intrusion had been to secure title under the homestead law, we doubt if Loomis or his successors in interest could be heard to urge that fact as a defense at this time, inasmuch as such purpose was not carried out, but abandoned for one that was perfectly lawful. However, we do not think the evidence establishes an intention to acquire the property from the government in an unlawful manner. Both parties knew that the land could not be obtained under the homestead law without fraud and perjury. It was because of this that they consulted an attorney as to how they could arrange the matter. In the absence of clear and convincing evidence, it will not be presumed that the attorney drafted, and they, pursuant to his advice, executed, a contract with the intention of carrying out its terms in a criminal manner when it was susceptible of a lawful performance. Under the pleadings and evidence, we think appellant is entitled to a decree awarding him an undivided one-half interest in and to the property in question.

The judgment and decree of the honorable superior court is reversed, and the cause remanded, with instructions to enter a decree as above indicated in appellant's favor.

HADLEY, C. J., and FULLERTON, and CROW, JJ., concur.

DICKEY et ux. v. MADDUX et ux.

(Supreme Court of Washington. Feb. 10, 1908.)

1. WATERS—"SPRINGS."

In an action involving an alleged appropriation of certain springs, it appeared that certain so-called "springs" occupied a space of about one-half an acre, and that during a portion of the year about 10 acres was marshy, and a witness testified that the springs rested right on the brow of a drop-off; that there was quite a bit of water standing around in the springs, and it looked like there might be five or six springs; but the evidence showed that there was no stream leading into them, and that the water therefrom formed no channel or stream in leaving, though during a portion of the wet season some of the water would flow down, for a short distance on the side hill, where it would disappear in the soil. *Held*, that the pools of water were not live springs, and that they constituted nothing more than a bog occasioned by seepage water.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6617.]

2. SAME—APPROPRIATION—STATUTORY PROVISIONS.

A territorial statute enacted in 1873 (Laws 1873, p. 520) provided that any person holding a title or possessory right to any agricultural lands within Y. county should be entitled to the use of the waters of the streams in the county for the purpose of irrigation. This law and the common law were in force at the time of an alleged appropriation of certain water in 1883. The land on which the water was situated was a part of a railroad land grant; but plaintiff claimed its right did not attach until 1884, and that plaintiff had a right to appropriate the water under Rev. St. U. S. § 2339 [U. S. Comp. St. 1901, p. 1437], providing that whenever by priority of possession rights to the use of water have vested and accrued, and the same are recognized by local customs, laws, and decisions, the possessors shall be protected in the same. It appeared that the water consisted of mere pools occasioned by seepage, that no stream or channel entered or flowed therefrom, that plaintiff gathered the water by digging a large number of holes and small ditches, and that no channel or flow of the water was obtained other than by this artificial means and by natural percolating and seepage to a small extent. *Held*, that there was no authority in law for the appropriation of water of that kind prior to the statute of 1891, if at all.

3. SAME—PRESCRIPTIVE RIGHTS.

Where plaintiffs, seeking to enjoin taking of water from certain streams, claimed that they have used the water a sufficient length of time since the enactment of the statute of 1891 to give them a prescriptive right thereunder, but had never attempted to comply with the provision of such an act, they could not invoke it in support of their claim.

Rudkin and Fullerton, JJ., dissenting.

Appeal from Superior Court, Kittitas County; H. B. Rigg, Judge.

Action by Ed. V. Dickey and wife against A. L. Maddux and wife. From a judgment for plaintiffs, defendants appeal. Reversed and remanded, with instructions.

J. B. Davidson, for appellants. Hovey & Hale, for respondents.

ROOT, J. This is an action brought by respondents to enjoin appellants from interfering with the taking of water from certain alleged springs situated on the lands of appellants, which water the respondents claim was appropriated by their predecessor in interest in 1883. From a decree in favor of plaintiffs, this appeal is taken by defendants.

It is urged by appellants that the so-called springs are not flowing springs, nor in reality springs at all, and that there is no stream connected therewith; but that they are merely pools of seepage water coming from the side hill, and making a marsh or bog, and not constituting the character of water authorized to be appropriated under the law. It appears that there was about half an acre of these so-called springs, and that during a portion of the year there was a surrounding area of something like 10 acres which was marshy. One witness said: "There was a piece of level ground that goes off to the south and drops very abruptly. These springs rest right in the brow of that little drop-off. There was quite a bit of water standing around in the springs; looked like there

might be five or six springs." The evidence showed that there was no stream leading into these springs, and that the water therefrom formed no channel or stream in leaving, although during a portion of the wet season of the year some of the water would flow down (but not in any stream or channel) for a short distance on the side hill, where it would disappear in the soil. A territorial statute enacted in 1873 read as follows: "Be it enacted by the Legislative Assembly of the territory of Washington, that any person or persons, corporation or company who may have or hold a title or possessory right or title to any agricultural lands within the limits of Yakima county, Washington territory, shall be entitled to the use and enjoyment of the waters of the streams or creeks in said county for the purpose of irrigation and making said land valuable for agricultural purposes to the full extent of the soil thereof." Laws 1873, p. 520. This and the common law were in force at the time of the alleged appropriation of this water.

Respondents claim that these springs are surface bodies of water, and that, though their source may be from percolating water, they themselves are situated open to the air, and that they were flowing springs a portion of the year. It is admitted that this land was originally a portion of the Northern Pacific Railway Company's land grant. It is claimed by respondents that the rights of this company did not attach to said lands until December, 1884, and that, under section 2339 of the Revised Statutes [U. S. Comp. St. 1901, p. 1437], respondents or their predecessors in interest had a right to appropriate this water from these springs prior to said date. An examination of the evidence convinces us that these pools of water were not live springs, and constituted nothing more than a bog occasioned by the seepage water. No stream or channel entered this bog, or flowed therefrom. The respondents and their predecessors gathered this water by digging a large number of holes and small ditches, and it was only by this artificial means that any channel was made or any flow of the water obtained, other than the natural percolating and seepage thereof, and there was but a comparatively small amount of that. We think there was no authority in law for the appropriation of water of this kind prior to the enactment of the state statute of 1891, even if that statute would authorize it—a question not necessary to be now decided.

It is urged by respondents that they have used the water a sufficient length of time since the enactment of the statute of 1891 to give them a prescriptive right thereunder. As they have never complied, nor attempted to comply, with the provisions of the last-mentioned statute, we do not believe they are entitled to invoke it in support of their claim to the use of this water. See *Wheelock v. Jacobs*, 70 Vt. 162, 40 Atl. 41, 43 L. R. A. 105, 67 Am. St. Rep. 659; *Slaght v. U. P.*

R. Co., 39 Wash. 576, 81 Pac. 1062; *Atkinson v. Wash. I. Co.*, 44 Wash. 75, 86 Pac. 1123; *Hathaway v. Yakima W. L. Co.*, 14 Wash. 409, 44 Pac. 896, 53 Am. St. Rep. 874. *Farnham on Waters and Water Courses*, p. 1561, § 458, says: "Water oozing from a spring through a soft and spongy ground, and flowing into a pond, does not constitute a stream within the meaning of a lease demising the pond of water and the water of the stream leading thereto; and the lessor is not liable for having sunk a tank on the ground adjoining the demised premises, thereby drawing off from the marshy ground such oozing water." See, also, *Geddis v. Parish*, 1 Wash. 587, 21 Pac. 314; *Meyer v. Tacoma L. & P. Co.*, 8 Wash. 144, 35 Pac. 601; *Southern Pac. R. R. Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; *Angell on Water Courses* (7th Ed.) §§ 108b and 108p; *Farnham, Waters and Water Rights*, p. 2082, § 672a.

The judgment of the honorable superior court is reversed, and the cause remanded, with instructions to dismiss the action.

HADLEY, C. J., and MOUNT and CROW, JJ., concur. RUDKIN and FULLERTON, JJ., dissent.

KENDALL et ux. v. JOYCE et al.

(Supreme Court of Washington. Feb. 14, 1908.)

1. WATERS—APPROPRIATION—PRIORITIES.

In 1895 plaintiff settled on unsurveyed public lands under the federal homestead laws, and continued to occupy and cultivate his claim until 1903, when he received a patent therefor. Commencing in 1895, he diverted the waters of a stream for irrigation and for domestic use. He increased the amount of his cultivated land from year to year until 1905. He proceeded in good faith and with reasonable diligence to bring his land under cultivation and in applying the waters diverted to beneficial uses. *Held*, that his rights to the waters of the stream related back to the date of his original appropriation.

2. SAME—NOTICE.

Where one, at a time the law did not authorize it, filed a notice with the auditor of the county reciting that he claimed 500 inches of water from a stream at a certain point and an additional 500 inches at a certain other point, but did not divert the water and apply the same to beneficial uses within a reasonable time, he acquired no rights.

3. SAME—STATUTES—EFFECT.

Laws 1891, p. 327, c. 142, providing that one desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended storage or diversion, etc., does not change the rule as to what constitutes a valid appropriation, and a valid appropriation may be made by an actual diversion and use of the water, without posting any notice.

4. SAME.

Laws 1889-90, p. 706, § 2, providing that persons holding a possessory right to land abutting on a natural stream shall be entitled to use any water not otherwise appropriated for irrigation, etc., is declaratory of the then existing law that title acquired under a patent from the United States relates back to the date of settlement or filing, but does not authorize a mere squatter on public land, who subsequently sells or abandons his claim, to acquire riparian

rights in a stream flowing through the land; riparian rights being a mere incident to ownership in the soil, not vesting until patent issues.

Appeal from Superior Court, Okanogan County; R. S. Steiner, Judge.

Action by John Kendall and wife against Bill Joyce and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

E. W. Taylor, J. W. Graham, and Harold Preston, for appellants. A. W. Barry, for respondents.

RUDKIN, J. This was a controversy between two landowners over the right to use the waters of Johnson creek, a small stream flowing into the Okanogan river, in Okanogan county, for irrigation purposes. The rights of the respective parties are predicated upon the following facts: In the year 1895 the plaintiff John Kendall, a citizen of the United States above the age of 21 years, settled upon lots 3, 4, and 5, and the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 25, and lot 1 and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 36, township 35 N., range 26 E. W. M., under the homestead laws of the United States. The lands embraced within the settlement were at that time unsurveyed public lands of the United States. Kendall continued to occupy and cultivate his claim from date of settlement until September 11, 1903, at which time he received a homestead patent therefor. Commencing with the year 1895 he diverted the waters of Johnson creek for the purpose of irrigating his orchard and meadow lands and for stock and domestic purposes. He increased the amount of his cultivated land from year to year until 1905, when he had 55 or 60 acres under irrigation and cultivation. The testimony showed that he proceeded in good faith and with reasonable diligence in bringing his land under cultivation and in applying the waters diverted to beneficial uses. In the year 1887 one Philip Perkins settled upon lands now owned by the defendants. On the 9th day of October of that year Perkins filed a notice of claim of water right with the county auditor of Okanogan county, claiming 500 inches of water from Johnson creek at a certain point, and an additional 500 inches at a certain other point. He continued to occupy the claim until about the year 1889, when he was succeeded by one Warren Perkins. The latter occupied the claim until 1897, when he was succeeded by William Maretta, and Maretta in turn was succeeded by the defendant Joyce in the year 1890. Joyce has since derived title to the original Perkins claim in part under the homestead law and in part by scripping. Prior to the year 1897 not to exceed 5 or 6 acres of the Joyce lands were irrigated or cultivated. Under these facts the court below awarded to the defendants a prior right to use the waters of the creek to the extent of seven miners' inches, measured under a four-inch pressure, to the plain-

tiffs one-third of one cubic foot per second of time, subject to the prior right of the defendants to the seven miners' inches, and enjoined the defendants from diverting the waters of the creek to the injury of the plaintiffs. From this judgment the defendants have appealed.

Under the facts stated, the respondents having diverted the waters of the creek in 1895 and applied the same to beneficial uses with reasonable diligence, their rights relate back to the date of their original appropriation. *Offield v. Ish*, 21 Wash. 277, 57 Pac. 809; *Longmire v. Smith*, 26 Wash. 439, 67 Pac. 246, 58 L. R. A. 308. It is equally apparent that Perkins acquired no rights by filing the notice of claim of water right in 1887. There was then no law authorizing such a notice. The notice was too indefinite to subserve any purpose, and the notice was not followed by a diversion of the water and its application to beneficial uses within a reasonable time. If, therefore, the rights of the parties depend upon the law of prior appropriation, it is manifest that the rights of the respondent are superior to those of the appellants, except as to the quantity of water awarded to the latter by the court below. The appellants contend that the respondents acquired no rights as appropriators by reason of their failure to post and record a notice of their appropriation as required by the act of March, 1891 (*Laws 1891*, p. 327, c. 142); but "the statutes requiring the posting and recording of a notice are not intended to change the rule as to what constitutes a valid appropriation, but simply, by requiring an appropriator to post and record a notice, to apprise other persons contemplating the diversion of water from the same stream that the appropriator has taken the first step toward securing his rights, and also to preserve the evidence thereof. It is accordingly held that, notwithstanding the existence of these statutes, a valid appropriation may be made by an actual diversion and use of the water without posting any notice. The one who fails to comply with the statute requiring notice, but actually diverts and uses the water, acquires a good title in the absence of any conflicting adverse rights, and cannot be deprived thereof by another who complies with the statute at a time subsequent to the former's completed diversion. Thus the failure of an actual appropriator of water upon the public domain to post a notice as required by law does not conflict with his right to the water as against one subsequently acquiring the land from the government." 17 Am. & Eng. Enc. of Law (2d Ed.) p. 498.

The appellants further contend that they acquired certain rights under section 2 of the act of March 4, 1890 (*Laws 1890-90*, p. 706), as successors in interest of Warren Perkins, who was occupying the land at the date of the passage of that act. The section referred to reads as follows: "All persons who claim, own, or hold a possessory right or title to any,

land, or parcel of land, within the boundary of the state of Washington, when such lands, or any part of the same, are on the banks of any natural stream of water, shall be entitled to the use of any water of said stream, not otherwise appropriated, for the purposes of irrigation to the full extent of the soil for agricultural purposes." This section was simply declaratory of the existing law, viz., that title acquired under a patent from the United States relates back to the date of settlement or filing. *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761. It has never been contended that a mere squatter on public land, who subsequently sells out or abandons his claim, acquires or can acquire riparian rights in a stream flowing through the land. Riparian rights are a mere incident to ownership in the soil, and, while they may relate back by fiction of law to the date of settlement or filing, by virtue of the patent subsequently issued, yet they do not vest until patent issues; for up to that time the title to the land, with all its incidents, is vested in the United States, utterly beyond the power or control of state Legislatures, and the party thereafter acquiring title from the government acquires the land with all its incidents.

We are therefore of the opinion that the respondents have a valid claim to the waters awarded them by the court below, superior to any claim on the part of the appellants, and the judgment is accordingly affirmed.

HADLEY, C. J., and FULLERTON, DUNBAR, MOUNT, and CROW, JJ., concur.

WELTY v. GIBSON et al.

(Supreme Court of Colorado. Feb. 3, 1908.)

APPEAL—REVIEW—FINDINGS OF COURT.

A finding of the court, sustained by evidence, cannot be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

Appeal from District Court, Saguache County; Charles C. Holbrook, Judge.

Action by John Welty against Homer Gibson and another. Judgment for defendants, and plaintiff appeals. Affirmed.

J. P. Veerkamp, for appellant. J. I. Palmer, for appellees.

MAXWELL, J. Appellant, as plaintiff below, sued appellees to recover damages alleged to have been sustained by him by reason of the destruction by appellees of an irrigation ditch in which he claimed an interest. The evidence shows that the ditch was originally constructed by one who is not a party to this suit, through government lands; that, subsequent to the time when appellee Harriet Gibson acquired title to a quarter section of the land through which the ditch was constructed, appellant en-

larged the ditch through Harriet's land for the purpose of irrigating the land owned by him, without acquiring any right, title, or interest in the original construction. At the time of the enlargement of the ditch by appellant the location of the section line in that vicinity was in doubt, and at that time it was generally supposed that the ditch was not on appellees' land. By a survey made subsequent to the enlargement of the ditch the location of the section line was determined, when it was found that the ditch was on appellee Harriet's land, who then arranged with the original owner of the ditch to move it off her land, and after she had plowed in the ditch, which alleged trespass is the foundation of this suit, she proposed to appellant to build a ditch upon appellant's land on the east side of the line separating her land from appellant's land. This proposition was declined by appellant, and this suit was instituted by him.

Appellant based his right to recover upon an alleged parol license for a right of way granted by appellee Harriet. Issue was joined upon this allegation. The court found that appellant made an enlargement of the ditch through the land of appellees without any license, or any right of way, or any right whatever, and dismissed the action. This finding of the court is sustained by sufficient competent evidence, and under the well-settled rule of this court the judgment cannot be disturbed. *Tynon v. Despain*, 22 Colo. 240, 43 Pac. 1039, and cases there cited, are relied upon by appellant. Appellant's evidence failed to bring his case within the rule announced in those cases. Let the judgment be affirmed.

Affirmed.

STEELE, C. J., and HELM, J., concurring.

THOMAS v. BEATTIE.

(Supreme Court of Colorado. Feb. 3, 1908.)

APPEAL—FAILURE TO DOCKET—REMAND.

3 Mills' Ann. St. Rev. Supp. § 1087, providing that, if an appeal from the county court to the district court is not docketed by appellant in the district court within 30 days after being lodged with the clerk thereof, the transcript shall be remitted by the clerk to the county court, etc., is mandatory; and where appellant, after the expiration of the prescribed time, docketed his appeal by paying his docket fee, the transcript should be remitted to the lower court on appellee's motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2177, 2181.]

Appeal from District Court, Rio Blanco County; John T. Shumate, Judge.

Proceedings for the allowance of the claim of James Beattie against the estate of John P. Thomas. From a judgment of the county court disallowing the claim, claimant appealed to the district court, where judgment was rendered in his favor, and Thomas G. Thom-

as, administrator, appeals. Reversed and remanded, with directions to dismiss the appeal.

E. A. Martin, for appellant. James C. Gen-try, for appellee.

GABBERT, J. Appellant is the administrator of the estate of John P. Thomas, deceased. In the county court, where the administration proceedings were pending, appellee filed his claim against the estate. Such proceedings were had thereon that the claim was disallowed. From this judgment claimant appealed to the district court. The transcript was lodged with the clerk of that court on July 15, 1904. On August 19th following the administrator filed a motion in the district court asking that the papers be sent back to the county court, for procedure as though no appeal had been taken, on account of claimant's failure to docket his appeal as required by law. When this motion was filed, claimant had not paid his docket fee. On September 5, 1904, claimant paid his docket fee to the clerk of the district court. On the next day, the first day of the regular term of the district court, the motion of the administrator to remand came on to be heard, and was overruled. Later the case was tried before a jury, the court instructing a verdict for claimant, which was returned, and judgment entered thereon. From this judgment the administrator appeals. The errors assigned relate to the action of the district court in overruling the administrator's motion to remit the case to the county court, the refusal of the court to direct a verdict for the estate, and the reception of testimony. It is only necessary to consider the first error assigned.

Section 1087, 3 Mills' Ann. St. Rev. Supp., which relates to proceedings upon appeal from the county to the district court, provides the time within which the original process, pleadings, and other papers relating to the suit, together with a transcript of the record entries relating to the action from which an appeal is taken, shall be filed in the office of the clerk of the district court to which the appeal is taken. It further provides: "In case the appeal is not docketed by the appellant in the district court within thirty days after being lodged with the clerk of the district court, the transcript shall be remitted by the clerk of the district court to the county court, and the county court shall proceed on such judgment as though no appeal had been taken." This section was under consideration by the Court of Appeals in *Tierney v. Campbell*, 7 Colo. App. 299, 44 Pac. 948, where it was said that the failure to docket an appeal from the county to the district court within the time prescribed prevented jurisdiction of the district court attaching to entertain the appeal. This section was also under consideration by this court in *People v. District Court*, 33 Colo. 416, 80 Pac. 1069, wherein it was stated that the statement in *Tierney v. Campbell* with respect to the jurisdiction of the district court was dictum, and that the failure of the party ap-

pealing from the county to the district court to follow up his appeal as the statute requires pertains to procedure, and is visited with the prescribed penalty. Whether the failure of appellant to follow the steps prescribed by the statute prevents the jurisdiction of the district court attaching, or whether such failure merely subjects him to the penalty prescribed, is immaterial, so far as the case at bar is concerned.

The purpose of the statute was to prevent unnecessary delay by requiring the appellant to promptly docket his appeal in the district court by paying the fee required for that purpose. If he did not do so within the time prescribed, the duty was imposed upon the clerk of the district court to remit the transcript to the county court, so that the latter might proceed as though no appeal had been taken. In the present case it appears from the record that more than 30 days had elapsed after the necessary papers were lodged with the clerk of the district court before the claimant paid his docket fee, and that during this default the administrator filed a motion asking that all papers in the appeal which had been lodged with the clerk of the district court be remitted to the county court. This motion was denied by the district court. This action was clearly erroneous, because the provision of the statute relating to the steps which a party appealing from the county court to the district court shall take are mandatory. The penalty prescribed for failure to take these steps had attached when the motion of the administrator was filed, and it should have been sustained.

The judgment of the district court is reversed, and the cause remanded, with directions to dismiss the appeal, and transmit the transcript lodged with the clerk to the county court, with directions to that tribunal to proceed as though no appeal had been taken.

Reversed and remanded.

STEELE, C. J., and CAMPBELL, J., concur.

KEEL v. SCHAUPP.

(Supreme Court of Colorado. Feb. 3, 1908.)

1. APPEAL—FINDINGS—REVIEW.

Where the court has resolved a conflict in the testimony in favor of one of the parties, the finding cannot be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

2. VENDOR AND PURCHASER—CONTRACT OF SALE—EVIDENCE.

Plaintiff offered certain real estate to defendant for \$1,600. Defendant made a memorandum of the price, and said to plaintiff, "You will hear from me," which statement he repeated on declining an invitation to examine the property. Defendant later wrote plaintiff, asking if he would take \$1,200 net, adding, "I think I can make a deal at that figure." Plaintiff answered that \$1,600 was his best price, to which defendant replied that he did not know whether he could make a deal at that figure, but would try his best. Later defendant requested the

plaintiff to send a deed, made out in blank as to the consideration and grantee, with an abstract of title, to a bank, and that the bank would send plaintiff \$1,600, all cash. Defendant wanted the blanks left, so he could fill in "name and amount to whom I sell." *Held*, that such negotiations indicated that defendant was endeavoring to sell the land as broker, and did not show a contract to purchase for himself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 75.]

3. APPEAL — PREJUDICE — RULINGS ON EVIDENCE.

Where, in an action for the price of certain land, it was established that defendant never agreed to purchase the land on his own account, plaintiff was not prejudiced by evidence that defendant did not at any time tell plaintiff that he would purchase his land at any price, which was objected to as a conclusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

Appeal from District Court, Rio Grande County; Chas. C. Holbrook, Judge.

Action by Enos Keel against John M. Schaupp. Judgment for defendant, and plaintiff appeals. Affirmed.

Ira J. Bloomfield, for appellant. Jesse Stephenson, for appellee.

GABBERT, J. This is an appeal from a judgment rendered in an action brought by appellant, as plaintiff, to recover from appellee, as defendant, the purchase price of land which plaintiff claimed to have agreed to sell defendant, and which the latter agreed to purchase. There was judgment for defendant, from which the plaintiff appeals.

In his complaint plaintiff alleged, in substance, that defendant, in writing signed by him, promised that if plaintiff would execute a warranty deed to certain premises, leaving the name of the grantee blank, so that he (the defendant) could fill in the name of the grantee when he would thereafter sell the premises, and send such deed to a bank at Ft. Dodge, Iowa, the bank would pay him the sum of \$1,600; that plaintiff accepted this offer, and executed and sent the deed as requested, but the purchase price has not been paid. The defendant answered, denying that the deed mentioned was sent on account of any contract of purchase made by him. To this answer a replication was filed, reiterating that the deed was sent to the bank by direction of defendant, under an agreement that he was to pay the purchase price for the land therein described. It appears from the testimony of plaintiff that negotiations with respect to the land in question were first opened between the parties in this state, when plaintiff stated to defendant that he had a place he would sell. At this time plaintiff informed the defendant that \$1,600 would buy the land. The defendant made a memorandum of the price, saying: "You will hear from me." Shortly thereafter the parties again met on a train, at which time plaintiff requested the defendant to stop off and look at the land; but he declined, saying he did not have the time,

but stated to the plaintiff: "You will hear from me in a few days." Defendant resided in Iowa, and after his return there was some correspondence between the plaintiff and himself; the latter writing a letter in which he wanted to know if plaintiff would take \$1,200 net, adding: "I think I can make a deal at that figure." To this plaintiff replied, declining the offer, saying that he would take \$1,600 for the land, but no less. To this the defendant answered: "I do not know that I can make a deal at that figure, but will try my best." Plaintiff replied that he would not take less than \$1,600 cash. Later the defendant wrote plaintiff as follows: "I want you to make out a warranty deed, signed by yourself and wife, and bring the abstract down to date, and send all to the First National Bank, of Ft. Dodge, Iowa, and they will send you \$1,600, all cash. * * * I want you, in making the deed, to leave the name and amount blank, so I can fill in the name and amount to whom I sell. You will get \$1,600, all cash, from the bank, so it won't matter to you what I get." Plaintiff testified that upon receiving this letter he replied, accepting the terms, and shortly thereafter sent the deed and abstract to the bank, as requested. The deed was never taken up, nor the purchase price paid. The defendant testified that, when negotiations were first opened, he informed the plaintiff that he did not want to buy the land himself, but that he might be able to sell it for him, to which plaintiff answered he would like to have him do so. Upon this record the trial court found that the defendant never agreed to purchase the land from the plaintiff, but was merely trying to sell it for him. The contention of counsel for plaintiff is that the testimony establishes that defendant agreed to purchase plaintiff's land, and that plaintiff performed all conditions upon his part.

We are of the opinion that the evidence clearly sustains the finding or conclusion of the trial court that the defendant never agreed to purchase the land on his own account, but merely undertook to negotiate a sale for a specified sum to be paid the plaintiff. The arrangement between the parties was never reduced to writing, and their agreement must be deduced from the oral testimony and letters which passed between them. There is a conflict in their oral testimony; but this conflict was resolved in favor of the defendant by the trial court, and cannot be disturbed on review. Besides, we think the trial court was right in determining this conflict in favor of the defendant, because the letters between the parties clearly indicate that the defendant merely undertook to negotiate a sale of the premises to some one who would be willing to pay a price over and above that which plaintiff was to receive. Otherwise, the defendant would not have employed the expression in his letter, wherein he inquired if

plaintiff would take \$1,200 net: "I think I can make a deal at that figure"—or have stated, when plaintiff informed him that he would not take less than \$1,600: "I do not know that I can make a deal at that figure, but will try my best." Nor would he have stated, in his letter which the plaintiff seems to rely upon as evidencing the contract which he says he accepted: "I want you, in making the deed, to leave the name and amount blank, so that I can fill in the name and amount to whom I sell. You will get \$1,600, all cash, from the bank, so it won't matter to you what I get." From these letters it is evident that a sale depended upon the defendant finding a purchaser at a price above that which plaintiff was to receive. An arrangement between the owner of land and another, to the effect that the latter will pay a specified sum for such land in the event he finds a purchaser, does not render the person merely undertaking to negotiate a sale upon such conditions liable to the owner as purchaser.

During the course of the examination of defendant he was asked, "Did you at any time tell Mr. Keel that you would purchase his land at any price?" to which he replied, "I did not." This was objected to by counsel for plaintiff upon the ground that the witness should not be permitted to state his conclusions. The objection was overruled. Conceding that the objection was good, plaintiff was not prejudiced, because we think it is established beyond all dispute, by the letters to which we have referred, that defendant never agreed to purchase the land on his own account. The admission of incompetent testimony, which it affirmatively appears was not prejudicial, is not reversible error. The judgment of the district court is affirmed.

Affirmed.

STEELE, C. J., and CAMPBELL, J., concur.

CITY OF COLORADO SPRINGS v. NEVILLE.

(Supreme Court of Colorado. Feb. 3, 1908.)

1. MUNICIPAL CORPORATIONS—DEFECTS IN STREETS—NOTICE OF CLAIM.

Sess. Laws 1899, p. 365, c. 145, provides that, before a city of the first class shall be liable for injuries received on its streets, notice must be given stating "when, where, and how the injury was received, and the extent thereof." *Held*, that a notice that plaintiff "received personal injuries on account of the negligence of said city of Colorado Springs, for which she intends to hold said city liable for damages sustained in that regard," is insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1696-1707.]

2. SAME—LEGISLATIVE CONTROL—LIABILITY FOR INJURY—CONDITION PRECEDENT.

Municipal corporations organized under the general municipal corporation act have such rights and powers and are subject to such liabilities as the General Assembly may give or

impose, and an obligation may be imposed for injuries caused by defects in streets or sidewalks, and making it a condition precedent to such a liability that a notice of such injury be given the city.

3. STATUTES—RETROACTIVE OPERATION—STATUTES IMPAIRING VESTED RIGHTS.

Retrospective effect will never be given a law, unless the intention of the Legislature to give it such effect is clearly manifest; and a constitutional prohibition against such legislation renders void retrospective laws affecting vested rights injuriously.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 344.]

4. MUNICIPAL CORPORATIONS—TORTS—DEFECTS IN STREETS—ACTIONS—NOTICE OF CLAIM—STATUTORY PROVISIONS.

Sess. Laws 1899, p. 365, c. 145, provides that, before a city of the first class shall be liable for injuries received on its streets, a notice must be given stating "when, where, and how the injury was received, and the extent thereof." Sess. Laws 1903, p. 457, c. 175, approved April 9, 1903, became a law 90 days thereafter, and provides that, as a condition precedent to liability of a city for injuries due to its negligence, a notice must be given of the "time, place, and cause of injury." *Held*, that notice of an injury which occurred June 11, 1903, must be given under the law of 1899.

Appeal from District Court, El Paso County; Louis S. Cunningham, Judge.

Action by Ella Neville against the city of Colorado Springs. Judgment for plaintiff, and defendant appeals. Reversed.

J. W. Sheaffer, City Atty., Sheaffer & Kinney, and Wm. C. Robinson, for appellant. George Gardner, for appellee.

CAMPBELL, J. The plaintiff, Mrs. Neville, claiming to have been injured by falling on one of defendant's sidewalks, recovered a judgment against defendant, the city of Colorado Springs, a city of the first class, from which judgment defendant appeals.

Of the numerous errors assigned only one will be considered, as its decision in favor of the city's contention necessitates a reversal of the judgment. The injuries were inflicted June 11, 1903. The statute then in force (Sess. Laws 1899, p. 365, c. 145) provided: "Before any city of the first class shall be liable for damages to any person injured upon any of the streets, avenues, alleys or sidewalks of the city, the person so injured, his agent or attorney, shall give the mayor, city clerk or city council notice in writing of such injury within six months after the same has been received, stating in such notice when, where, and how the injury was received, and the extent thereof." The Fourteenth General Assembly (Sess. Laws 1903, p. 457, c. 175) passed an act concerning liabilities of cities and towns for personal injuries, which was approved April 9, 1903, and became a law 90 days thereafter, section 1 of which is: "No action for the recovery of compensation for personal injury or death against any city of the first or second class or any town, on account of its negligence, shall be maintained unless written notice of the time, place and cause of

injury is given to the clerk of the city, or recorder of the town, by the person injured, his agent or attorney, within ninety (90) days and the action is commenced within two years from the occurrence of the accident causing the injury or death." Before beginning the action, and on July 21, 1903, after the act of 1903 took effect, plaintiff served upon the city clerk of defendant a notice, avowedly given as a compliance therewith, which, *inter alia*, stated that she "received personal injuries on account of the negligence of the said city of Colorado Springs, for which she intends to hold said city liable for damages sustained in that regard." When on the trial plaintiff offered in evidence a copy of this notice, defendant objected thereto upon the ground that it was not such a notice as is required by law. The particular defect thereof is said to be that the injuries were not therein described at all, or their extent given, as the act of 1899 requires.

It becomes important, therefore, to determine so far as concerns plaintiff's cause of action, which one of the foregoing acts concerning notice applies; for, if the rights of the parties are governed by the act of 1899, the notice was clearly insufficient under the decision of our Court of Appeals in *City of Denver v. Barron*, 6 Colo. App. 72, 39 Pac. 989. See, also, *Stoors v. City of Denver*, 19 Colo. App. 159, 73 Pac. 1004. Indeed, plaintiff makes no claim that this notice is sufficient under this act; but her contention is that the act of 1903, being a law in force at the time the notice was given (July 21, 1903), controls, and as this notice was strictly in accordance with its requirements, which are different and less onerous than those contained in the act of 1899, her compliance with the later act entitles her to maintain this action. Municipal corporations organized, as is the city of Colorado Springs, under the general municipal incorporation act, have such rights and powers, and are subject to such obligations and liabilities as the General Assembly sees fit to give or impose. For damages incurred by injuries upon its streets or sidewalks the General Assembly may or may not impose an obligation upon them to respond therefor. It is competent, therefore, for the General Assembly to pass statutes like those we are considering, making a condition precedent to the attaching of liability for such injuries, or the right to sue therefor, the giving of a notice of this character. *Cunningham v. Denver*, 23 Colo. 18, 45 Pac. 356, 58 Am. St. Rep. 212. These statutes therefore, are valid, and to settle the rights of these parties the point for decision is: With which one was plaintiff obliged to comply in giving notice.

In those jurisdictions where there is no constitutional inhibition upon retrospective legislation, unless the intention of the Legislature is clearly manifested to the contrary, the courts will give only a prospective

effect to public laws; and where, as in Colorado, there is a constitutional prohibition against this species of legislation, it would be beyond the power of the Legislature, even by manifesting its intention to do so, to pass retrospective laws which substantially affect injuriously vested rights. Though the title of the act of 1903 provides for a repeal of inconsistent acts, there is no express repeal in the body of the statute; and if the statute in any respect repeals or amends the act of 1899, it is by implication only. It is not necessary, however, for us now to determine whether the later operates as an implied repeal or amendment of the earlier act. For our present purpose we may assume that the intention of the General Assembly was to accomplish its repeal. In the act of 1903 no intention whatever is shown, and, if it was, effect could not be given to it, to make it apply to existing causes of action. It is restricted to causes of action for injuries which shall thereafter be sustained. In the leading case of *Denver, South Park & Pac. Ry. Co. v. Woodward*, 4 Colo. 162, the court, speaking by Thatcher, C. J., of our constitutional provision against retrospective legislation, said that it "operates as a saving clause incorporated into the repealing section"; and he further said that "neither an affirmative enactment nor a repealing statute can be so construed under our Constitution as to retroact upon and impair or take away accrued rights, which by the authority of law and in the manner pointed out by it had been previously asserted." In *Brown v. Challis*, 23 Colo. 145, 46 Pac. 679, it was held to be incompetent for the Legislature to create a new ground for the support of an existing cause of action, or to take away any legal defense to such action; and our Court of Appeals in *Day v. Madden*, 9 Colo. App. 464, 48 Pac. 1053, said that any law which deprives a party of any vested right of action or defense has been universally held unconstitutional and void under similar constitutional provisions.

It is clear, therefore, under these and other authorities which might be cited, that, without respect to the effect or bearing upon this case of the general savings act of 1891 (Sess. Laws 1891, p. 366), our constitutional provision (section 11 of article 2) against retrospective legislation operates as a saving clause incorporated into the act of 1903, if the latter is, as plaintiff claims, a repeal of the act of 1899 saving to plaintiff her vested cause of action, and to defendant its defenses thereunder, which could not be taken away. The liability of the city for the injuries which plaintiff sustained was conditioned by the act of 1899, among other things, upon the giving of the prescribed notice. Thereunder defendant's liability did not attach, and it had a substantial defense to the maintenance of an action by the plaintiff, if she did not, within the specified time, give the prescribed notice. It was not

competent for the General Assembly, even had it so intended, which it did not, after the defendant's right of defense became vested, thereafter seriously to impair or take it away.

For the failure of plaintiff to give the statutory notice required this judgment must be reversed, and the cause remanded.

Reversed.

STEELE, C. J., and GABBERT, J., concur.

LA FITTE v. CITY OF FT. COLLINS.

(Supreme Court of Colorado. Feb. 3, 1908.)

1. APPEAL—REVIEW—QUESTIONS CONSIDERED—ERROR IN OTHER CASES.

In an action for violation of a city ordinance, an order was entered on motion of defendant's attorney, after the case had been taken under advisement, to submit on the evidence produced two other cases against defendant for violation of other ordinances. *Held*, that the order did not consolidate the cases for trial and purposes of appeal, and assignments of error pertaining to the two cases not tried could not be considered on appeal from the case tried.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 59, 60.]

2. SAME—RECORD—BILL OF EXCEPTIONS—RESERVATION OF GROUNDS OF REVIEW.

Where a motion for change of venue and the affidavits in support thereof are not within the bill of exceptions, and no exception was saved to the ruling of the court on the motion, error in denying the motion will not be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2875.]

3. SAME—INSUFFICIENCY OF EVIDENCE—EXCEPTIONS IN RECORD.

Objections that the evidence is insufficient to support the judgment will not be considered, where exceptions on that ground are not made a part of the record by bill of exceptions; recitals in the record of an exception to the findings and in the order allowing the appeal of exception to the judgment being insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2441-2451.]

4. MUNICIPAL CORPORATIONS—PROCEEDINGS OF COUNCIL—ORDINANCES—EVIDENCE—PROOF OF PASSAGE AND PUBLICATION.

In an action for violation of a city ordinance, the original record of the meeting of the council at which the ordinance was passed, produced by the city clerk, and showing that the mayor and seven of the eight aldermen of the city were present at the meeting, and that on its final passage all the aldermen present voted aye and that the mayor declared it adopted, is competent to show the passage of the ordinance, and the files of a newspaper, produced by the editor, showing that the ordinance was properly published, are competent to prove its publication; Mills' Ann. St. § 4443, providing that the book of ordinances shall be *prima facie* evidence that the ordinances contained therein have been published, not making such book the sole means of proving publication.

5. EVIDENCE—"PRIMA FACIE EVIDENCE."

"*Prima facie* evidence" is evidence sufficient to establish a fact, unless rebutted.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5549, 5550; vol. 8, p. 7702.]

Appeal from Larimer County Court; J. Mack Mills, Judge.

Action by the city of Ft. Collins against Marie La Fitte. Judgment in police court for plaintiff. Defendant appealed to the county court, where plaintiff again recovered judgment, and defendant appeals. *Affirmed*.

J. H. Feeny, E. A. Ballard, and C. M. Bice, for appellant. Cornelius Ferris, Jr., for appellee.

MAXWELL, J. Three separate complaints were filed in the police magistrate's court of the city of Ft. Collins, charging appellant with having violated three ordinances of the city, which are designated as "Ordinance No. 17, 1889," "Ordinance No. 14, 1902," and "Ordinance No. 3, 1903." Trials resulted in judgment against appellant upon the three complaints, from which judgments appeals were taken to the county court, where the appeals were docketed and numbered 2,502, 2,503, and 2,504, respectively. Trial was had to the court; a jury being expressly waived. Preceding the introduction of evidence, by agreement of the parties, it was ordered by the court that, each case be tried separately, and that case No. 2,502 be tried first, being the case for the violation of Ordinance No. 17, 1889. After the evidence had been introduced and the court had taken the case under advisement, the following appears in the record: "And thereupon, on motion of the attorney for defendant, it is ordered by the court that cases Nos. 2,503 and 2,504 be and they are hereby submitted to the court upon the evidence produced in case No. 2,502." Thereafter the court found the issues in favor of appellee, and rendered judgment against appellant in the sum of \$200 and costs in each case, and, after denying the motion for a new trial, entered an order allowing an appeal to the Court of Appeals upon the filing of an appeal bond in the sum of \$400.

Counsel for appellant says, in his printed brief, that the three cases were consolidated for trial and for the purposes of appeal. A thorough search of the record presented does not warrant this position. The order made by the court on the motion of the attorney for defendant, appellant here, after the case on trial had been taken under advisement, amounts to nothing more than the submission of the other two cases upon the evidence introduced in the case which had been tried. There is nothing in the record touching this question, other than the order above quoted; so counsel is in error in assuming that the cases were consolidated for trial and purposes of appeal. This conclusion eliminates from consideration all assignments of error urged by counsel pertaining to the two cases which are not in this court upon this appeal. It is due counsel for appellant, who signs the brief filed in this court, to state that he did not try the case in the court below, nor did he prepare the transcript filed in this court.

It is urged (1) that the court erred in denying the motion for change of venue, based upon the alleged prejudice of the inhabitants of the county and of the judge of the county court; (2) that the evidence was insufficient to warrant the judgment rendered.

1. The motion for change of venue and the affidavits in support thereof are not within the bill of exceptions, and no exception was saved to the ruling of the court upon the motion, which are sufficient reasons for declining to consider this question. *Duncan v. Thomas*, 17 Colo. App. 522, 524, 69 Pac. 310.

2. No exception was saved to the findings or judgment. Recitals in the record of an exception to the findings, and in the order allowing the appeal of an exception to the judgment, are no evidence that exceptions were taken. Exceptions are made part of the record only by bill of exceptions, allowed, signed, and sealed by the judge who presided at the trial. *Goldsmith v. Newhouse*, 19 Colo. App. 1, 4, 72 Pac. 809, and cases cited. Hence we cannot consider the assignment of error challenging the sufficiency of the evidence to support the findings and judgment.

3. It is contended that there was a failure of competent proof of the passage and publication of Ordinance No. 17, 1889. The clerk of the city, sworn as a witness for appellee, produced the original record of the minutes of the meeting of the city council of Ft. Collins held June 4, 1889, which record was admitted in evidence, and showed that the mayor and seven of the eight aldermen of the city were present at the meeting; that Ordinance No. 17, 1889, was taken up, read, and put upon its final passage; that the ayes and nays were called, and the names of the seven aldermen present were recorded as voting aye, and the mayor declared the ordinance passed and adopted. Section 4445, *Mills' Ann. St.* The editor of the *Ft. Collins Courier*, a newspaper published within the limits of the corporation, a witness sworn for appellee, produced the files of the *Courier* for 1889, which were introduced in evidence, and showed that the ordinance in question was published in that paper June 6, 1889. Counsel argues that section 4443, *Mills' Ann. St.*, is mandatory as to the manner of proving the publication of an ordinance, and that the passage and publication of an ordinance can only be proved by the introduction in evidence of the book of ordinances therein provided for.

The last paragraph of the section completely refutes the argument of counsel. It is: "The book of ordinances herein provided for shall be taken and considered in all courts of this state as prima facie evidence that such ordinances have been published as provided by law." Prima facie evidence means evidence which is sufficient to establish the fact, unless rebutted—evidence which, stand-

ing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced. 22 A. & E. Ency. 1294. The statute was intended to provide a convenient method of proving the fact that an ordinance had been published as required by law, and not for the purpose of making the book of ordinances the only and exclusive evidence of such fact, as contended by counsel. There was no error in the reception of the evidence introduced to prove the passage and publication of the ordinance.

This disposes of all the assignments of error available to appellant, with the result that the judgment must be affirmed.

Affirmed.

STEELE, C. J., and HELM, J., concur.

MERRILL v. SUFFA.

(Supreme Court of Colorado. Feb. 3, 1908.)

1. MANDAMUS—NATURE OF ACTION.

Where mandamus is invoked for the protection of the purely private right of the applicant, the proceedings may be conducted in the names of the real parties in interest, mandamus being, under the Code, a civil action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 287.]

2. SAME—JOINDER OF CAUSES.

In mandamus, the alternative writ must not include more than one cause, whether of the same or many individuals, because two or more distinct rights which the petitioner may have growing out of two or more entirely distinct wrongs committed against him cannot be joined in the same mandamus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 6.]

3. SAME—PARTIES—ENFORCEMENT OF RIGHT TO INSPECT CORPORATE BOOKS.

In mandamus by a stockholder to enforce his right to inspect the corporate books, it is not necessary to make the corporation a party respondent, and it is sufficient to make the officer on whom the statutory duty is devolved such party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 291-293.]

4. SAME—JOINDER OF CAUSES OF ACTION—INSPECTION OF CORPORATE BOOKS.

The acts of the secretary of different corporations in refusing leave to a stockholder to inspect the books of the corporations are separate and distinct wrongs committed against the stockholder, though the same person is the secretary of all the corporations, and one petition for mandamus by the stockholder to compel the secretary to permit inspection of the books of the corporations is had for improperly uniting several causes of action, within *Mills' Ann. Code*, § 70, providing that in no event shall causes of action be joined unless they affect all the parties in the same character and capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 6.]

5. PLEADING—IMPROPER JOINDER OF CAUSES OF ACTION—REMEDY.

Where several distinct causes of action which may properly be joined have been commingled in one statement, a motion is the proper remedy to compel a separate statement, but where the objection is that the causes of action cannot be joined, demurrer is the appropriate

remedy when the defect appears on the face of the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 435, 1194-1198.]

6. MANDAMUS—PARTIES—MISJOINDER OF PARTIES RESPONDENT.

Since the acts of the secretary of different corporations in refusing leave to a stockholder to inspect the books of the corporations are separate and distinct wrongs against the stockholder, though the same person is the secretary of all the corporations, one petition for mandamus by the stockholder to compel the secretary to permit inspection of the books of the corporations is bad for misjoinder of parties respondent, there being a misjoinder in suing one individual in different representative capacities.

Appeal from District Court, City and County of Denver; F. T. Johnson, Judge.

Mandamus by George A. Saffa against N. C. Merrill, secretary of certain corporations, to compel respondent to give petitioner access to corporate books. From a judgment awarding a peremptory writ, respondent appeals. Reversed and remanded.

George S. Redd, for appellant. Horace G. Benson and De Witt C. Webber, for appellee.

CAMPRELL, J. Action in mandamus. The petition for the writ designates the parties as petitioner and respondent respectively. Where, as here, the writ is invoked for the protection of the purely private right of the applicant, the proceedings may be conducted in the names of the real parties in interest, and therefore with equal propriety they might be called plaintiff and defendant, mandamus being, under our Code, regarded as a civil action. *Stoddard v. Benton*, 6 Colo. 508; *Orman v. People*, 18 Colo. App. 302, 71 Pac. 430.

The petitioner, a stockholder in each of eight separate and independent corporations, having, after due demand, been deprived, as he says, of his statutory right to inspect the stock books and other books and papers of these different corporations by the secretary thereof, who is one and the same individual, the respondent herein, filed this petition to compel respondent, as secretary of each company, to give him access to such books and papers with the privilege of making and carrying away extracts therefrom. To the alternative writ which was issued upon filing the petition, respondent demurred upon a number of distinct grounds, two of which are: (1) A misjoinder of parties respondent; (2) an improper union of several causes of action. The court overruled the demurrer, and, respondent electing to stand thereby the alternative writ was made peremptory, and from the final judgment awarding the same respondent appeals.

Without so deciding, we shall assume, for our present purpose, that the alternative writ alleges a proper demand and refusal, and shows that petitioner has, in other respects, brought himself within the statute which enjoins upon the secretary of a corporation, intrusted with its books, records, and

papers, the duty of allowing an inspection thereof by certain stockholders at a proper time and place. It is manifest, however, that the special demurrer should have been sustained.

The misjoinders complained of are said to consist in the facts that each of the separate corporations is a distinct legal entity, neither one of which, nor its secretary, has any connection whatever with any other corporation or its secretary, nor any interest in this application, so far as concerns any of the other corporations, or its secretary; and that, if petitioner has an action against respondent in his official capacity as secretary of any of these corporations, the action is founded upon a tort entirely distinct from the tort committed by him as secretary of either of the others, and, as secretary of one, he has no interest in any manner affecting him in his capacity of secretary of any of the other corporations; and the tort, if any, which he has committed as secretary of one, was in a representative capacity which is not the same as, but different from, the capacity in which he acts as secretary of the others. We think this contention of respondent is sound. It is a primary rule in mandamus that the alternative writ must not include more than one case, whether of the same or many individuals, because two or more distinct rights which the petitioner may have, growing out of two or more entirely distinct wrongs committed against him, cannot be joined in the same mandamus. *Tapping on Mandamus*, *324.

In order to enforce the right of inspection here demanded, it is not necessary to make the corporation a party respondent, but merely its officer upon whom the statutory duty is devolved. Yet even though respondent, at the same time and by the same act, committed a wrong upon the same person (the petitioner) by refusing, as secretary of the eight distinct corporations, the inspection demanded, the same act constituted eight separate and distinct torts. The denial of the right of inspection in each case, in his capacity as secretary, constituted a single wrong by respondent, a violation of a duty imposed by statute, eight wrongs in all, and gave rise to eight separate rights and causes of action in petitioner's favor. Some torts are in their nature several, not joint—as slander. As secretary of one of these corporations, respondent could not, in the nature of things, be guilty of a tort which, as secretary of another, he committed against petitioner in refusing access to its books. The torts are of the same kind, but committed by different persons or the same individual acting in different capacities. Doubtless, petitioner would be the first to admit this if he were suing for the penalty the statute gives for a wrongful refusal. In their nature they were several, and not joint, torts, and could not be joined in one action. The respondent is not sued in his individual but in his of-

ficial or representative capacity. Each of the eight corporations is a distinct and separate legal entity. True, the same individual (Merrill), who is secretary of one, is the secretary of each of the others, but his representative capacity as secretary of one is a different capacity from that in which he is secretary of the others, and is just as distinct as is that of the corporate entities themselves. So that when he is sued, as here, as secretary of each of eight distinct corporations, he is sued in eight different representative capacities, just as if the action was brought against eight different individual secretaries. The rule against such joinders has thus been stated by the learned author of the article on *Mandamus* in 26 Cyc. 447: "In the absence of statute to the contrary, separate and distinct rights, whether of one person or of several persons respectively, cannot be joined for the purpose of enforcement in one *mandamus* proceeding, whether the different duties rest on one person or on several persons respectively." Section 70, Mill's Ann. Code, relates to the joinder of causes of action, but does not permit of such a joinder as was attempted here. That section expressly, *inter alia*, says that, in no event, shall causes of action be joined unless they affect all the parties, and affect them in the same character and capacity. A joinder of causes of action, such as is here attempted, is just as improper as would be in one action the union of eight distinct causes of action, based upon eight distinct wrongs which, as executor of eight separate and distinct estates, respondent had committed against petitioner. We have been cited to no authorities, and have found none, sustaining such joinder of causes of action, or of parties respondent.

The point made by petitioner that a motion, and not a demurrer, is the remedy for a misjoinder of causes of action is not good. Where several distinct causes of action which might be properly joined have been commingled in one statement, a motion is the proper remedy to compel a separate statement; but where the objection is that the causes of action cannot be joined at all, demurrer is the appropriate remedy when the defect, as here, appears on the face of the complaint. Code Civ. Proc. § 50 (Mills' Ann. Code); *Ludington v. Hellman*, 9 Colo. App. 548, 49 Pac. 377; *Id.*, 26 Colo. 326, 57 Pac. 1075. The joinder of causes of action being unauthorized, it would seem necessarily to follow that there was an improper misjoinder of parties respondent—that is, a misjoinder in suing one individual in several different representative capacities. The following are in point: *Dubois v. Bowles*, 30 Colo. 44, 69 Pac. 1067; *Faust v. Smith*, 3 Colo. App. 505, 34 Pac. 261; *State ex rel. v. Commissioners*, 38 Kan. 317, 16 Pac. 337; *Co. Comm'rs. v. King*, 13 Fla. 451, 470; *Haskins v. Board of Supervisors*, 51 Miss. 406; *Rex v. Mayor*, 11 Mod. 382; 6 Bacon's

Abridgement, title "*Mandamus*," 421; *Merrill on Mandamus*, §§ 232, 234a; *Pomeroy's Rem. & Rem. Rights*, §§ 281, 307, 313, 442-451, 502; *A. T. & S. F. R. R. Co. v. Com'rs Sumner Co.*, 51 Kan. 617, 33 Pac. 312; *Kennedy v. Stallworth*, 18 Ala. 263; *Mesmer v. Jenkins*, 61 Cal. 151; *Mertens v. Loewenberg*, 69 Mo. 208; *Viall v. Mott*, 37 Barb. 208; *Nat. Bank v. Valenta*, 33 Tex. Civ. App. 108, 75 S. W. 1087.

The judgment must be reversed, and the cause remanded, and it is so ordered.

Reversed.

STEELE, C. J., and GABBERT, J., concur.

HELM v. BREWSTER et al.

(Supreme Court of Colorado. Feb. 3, 1908.)

1. FRAUDULENT CONVEYANCES — RELATION OF PARTIES—HUSBAND AND WIFE—BURDEN OF PROOF.

In an action by a creditor of a husband to set aside conveyances to the wife, the burden is on the husband and wife to clearly establish that the transaction is honest, and without intent to hinder or defraud such creditor.

2. SAME—FRAUD—CONSIDERATION.

A sale of property, though for a full consideration, made by the owner with intent to hinder, delay, and defraud his creditors, if the vendee participated in such intent, is void as against such creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, *Fraudulent Conveyances*, § 510.]

3. SAME—FRAUDULENT INTENT OF GRANTOR—EVIDENCE.

A grantor's intent to hinder, delay, and defraud his creditors may be inferred from facts and circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, *Fraudulent Conveyances*, §§ 892-895.]

4. SAME.

A husband, while indebted to plaintiff for borrowed money, transferred an apartment building and the furniture used in conducting a boarding house to his wife. The wife knew that the husband was greatly embarrassed, and that his remaining property was so heavily incumbered that his equities were of little or no value. The only business that the husband was engaged in was that of keeping the boarding house, and, by transferring the building and furniture, his creditors, other than those having liens thereon, were temporarily prevented from reaching the property. The boarding house was continued the same as before, except that the name of the manager was changed from the husband to the wife. Prior to the transfer, the husband supported the family from the income from the boarding house, and after the transfer the wife supported the family from the same source. Money, which the wife testified she borrowed to pay her husband for his equity in the building, was immediately applied by him in discharge of taxes against property which she had agreed to pay in part consideration for the transfer. *Held*, that the transfer was fraudulent as against the husband's creditors.

5. SAME—RIGHTS OF VENDEE—CONSIDERATION.

Where a wife participated in her husband's fraud in conveying property to her to hinder and delay his creditors, she was not entitled as against them to any rights in the property by virtue of the consideration actually paid to her husband; the loss of the amount paid by her

being the penalty for engaging in the fraudulent transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 578-582.]

6. SAME—SECURING INDEBTEDNESS.

A husband may secure an indebtedness to his wife which will be upheld as against the husband's creditors providing the transaction is bona fide.

7. SAME—ADDITIONS TO PROPERTY.

Where a husband conveyed a boarding house and the furniture therein to his wife, with intent to defraud his creditors, in which intention the wife participated, she acquired no rights as against the husband's creditors by virtue of having subsequently purchased furniture for the house from the proceeds of its operation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 578-582.]

8. APPEAL—SCOPE OF REVIEW—QUESTIONS NOT RAISED AT TRIAL—LACHES.

The defense of laches is not regarded with favor on appeal when raised there for the first time by the successful party below.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1079-1120.]

9. SAME—ACTION BY CREDITOR—CONDITION PRECEDENT—JUDGMENT.

A creditor is not entitled to maintain a bill to set aside an alleged fraudulent conveyance by his debtor until the creditor's claim has been reduced to judgment.

10. SAME—LACHES.

Where, after a fraudulent conveyance of a boarding house by a husband to wife, the business was run in the same manner as before, and the wife devoted no more time nor money in improving the property and business than she would have done had the title remained in her husband, the delay of a creditor of the husband in recovering judgment and instituting a creditor's suit to set the conveyance aside had not been prejudicial to the wife, and hence laches was no defense to the bill.

Appeal from District Court, City and County of Denver; Frank T. Johnson, Judge.

Action by Hannah E. Helm against Alice M. Brewster and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Appellant, as plaintiff, brought an action against appellees, as defendants, to subject certain real property, known as "the Aldine," standing in the name of the defendant Alice M. Brewster, together with the furniture therein, to the payment of a judgment which plaintiff had obtained against the defendant Albert W. Brewster. The latter defendant had borrowed a large sum of money from the plaintiff, which was the basis for this judgment. Their relation is that of brother and sister. The defendants are husband and wife. Subsequent to incurring the indebtedness to his sister, Mr. Brewster conveyed the property in question to his wife. This transfer the plaintiff claims was made for the purpose of hindering and delaying her in the collection of her claim against her brother. The main issue between the parties was the bona fides of this transaction. The trial resulted in a judgment dismissing the complaint, from which the plaintiff appealed to the Court of Appeals. On behalf of the plaintiff it is contended that the testimony bearing on the issues between

the parties does not conflict to any material extent, and clearly established that the property in controversy was held by the wife in trust for her husband, while on behalf of the defendants it is claimed that the testimony touching the issues tried was conflicting, and as the facts in issue were found in favor of the defendants they cannot be disturbed on review; and, further, that the evidence, without regard to its conflict, clearly established the good faith of the transfers from the husband to his wife. It therefore becomes necessary to review the testimony.

The defendants were married in 1888. About the time of their marriage, or shortly after, the husband purchased the lots upon which the Aldine stands for the sum of \$10,500, and erected thereon a substantial brick building of six tenements at a cost of about \$40,000. In order to make these improvements he borrowed money at various times, mortgaging the property therefor, which finally culminated in a mortgage for \$30,000, given in December, 1895, the principal of which was wholly unpaid when plaintiff commenced her action. Between October, 1893, and March, 1896, Mr. Brewster borrowed the money from plaintiff, the indebtedness for which was reduced to judgment in April, 1901. She commenced her action May following. The sum borrowed aggregated \$6,500, part of which has been repaid through the sale of collaterals pledged as security, leaving the balance due for which judgment was rendered the sum of \$4,706.11. From the time the property was purchased until August, 1894, the defendants, with their children, occupied a brick cottage on one of the lots. From the time the new buildings were completed until the early part of 1894, they were rented to different parties. On this last date they were all rented to one person for the purpose of keeping a boarding house, or family hotel. Part of the furniture used for this purpose belonged to Mr. Brewster, and had cost about \$3,000. In August, 1894, he bought out his tenant, paying her for the furniture which she had placed in the property, or allowing her therefor the equivalent of \$9,600. From that time until September, 1897, Mr. Brewster, with the assistance of his wife, who devoted all her energies in assisting him, conducted the place as a boarding house. On this date he surrendered the business to her, and transferred to her all the furniture in the six houses. The consideration named in the bill of sale evidencing this transaction was \$1,000. Thereafter the wife conducted the business. On the 30th of the same month Mr. Brewster conveyed the real estate to his wife. This included the six new buildings and the cottage above mentioned. The new buildings had been improved by the addition of a common dining room. The deed evidencing this transaction names the consideration at \$1,200. It warrants the title, except as against the mortgage above referred to. It is claimed by the defendants that the wife, as part of the consideration for the

transfer, assumed the payment of this mortgage and the interest then due thereon, which amounted to the sum of \$1,425. It is also claimed that the wife assumed the payment of other indebtedness against the husband in consideration of the conveyance to her, and has, in fact, discharged such indebtedness, but what the arrangement was between the husband and wife with respect to these matters, or what particular indebtedness she agreed to pay, is not at all clear. The wife knew that the husband was indebted to the plaintiff and numerous other creditors at the time of the transfers, and that he had no other means with which to pay his debts than the property transferred to her, because his other property was then incumbered for practically all it was worth. At this time his creditors were pressing him for the payment of their claims. By the transfers there was no apparent change in the possession or use and enjoyment of the property other than that the business was thereafter conducted in the name of the wife, whereas, before, it was conducted in the name of the husband. The consideration for the transfer of the furniture and business was a note for \$840, dated April 8, 1894, executed by the husband to the wife. Defendants testify that the note was given for money borrowed by the husband from the wife, which she earned by selling cakes to the Woman's Exchange between 1891 and August, 1894. It appears that during this period the family occupied the cottage above mentioned; that the cakes were baked in this cottage; that the family during this time was maintained by the husband, including the hiring and paying of a servant to do the general housework and care for the children; that the materials for the baking were bought by the husband in connection with the family supplies; that during this time the husband had no other business, and received orders for, and delivered, the cakes to the Exchange, and collected the accounts therefor. Occasionally the husband assisted the wife in preparing and baking the cakes. The books of account in connection with this business were kept by the husband, in which was entered the cost of materials. This was deducted from the gross receipts for the cakes, and the net proceeds turned over to the wife. The note above mentioned was given for a part of the money thus earned, which the husband claimed to have borrowed from the wife. Part of the money (about \$600) which the wife claims to have paid the husband, on account of the transfer of the real estate in question, she testifies she obtained from her father.

On the question of the value of the real estate there was a conflict in the testimony—some of the witnesses testifying that it was worth from \$38,000 to \$50,000, while others placed the value at from \$25,000 to \$35,000. The court ruled that the houses could not be valued separately, but should be estimated as an entire block as transferred. As to the value of the personal property, the

court ruled that it must be determined independently of the business in which it was being used, and that its value was only such as it would bring when so sold. On this basis there was testimony to the effect that its value was about \$1,000, while another witness stated that, in connection with the business, it was reasonably worth from \$6,000 to \$7,000. It appears from the testimony that the wife paid much more upon indebtedness against the husband than the consideration named in the instruments evidencing the transfers; in fact, paid something like \$3,000 more than she agreed to pay, but that she kept no account or memorandum of the amounts or dates of such payments. It also appears from the testimony of the defendant Brewster that the wife assumed the payment of the taxes on the Aldine; that shortly after the transfer of that property she obtained \$490 from her father, which she turned over to her husband on account of the consideration of such transfer, which sum he applied upon taxes against the Aldine, which, according to the testimony, she had agreed to discharge. It also appears from the testimony that, outside of the money which Mrs. Brewster received from her father, the many obligations against her husband which she discharged were paid out of the proceeds of the Aldine, operated by the wife as a boarding house. Persons whom he owed boarded at the house, and their accounts therefor were applied upon the husband's indebtedness. Some of this indebtedness he had incurred in operating the house prior to the transfer to his wife, and some of it was on account of incumbrances upon his other property. With respect to his wife furnishing, or paying, him money on account of the transfers, Mr. Brewster states: "She was to give me money to pay my bills as I needed it; that is, a certain class of indebtedness that was unsecured that I thought I ought to pay as soon as possible. There was no definite amount named. It was my understanding that she was to furnish money to pay taxes on other property, and help me save it, and anything I needed for unsecured accounts." Prior to these transfers, according to the testimony of Mr. Brewster, he had maintained his family, consisting of his wife and five children, out of the proceeds of the Aldine when operated by him. Since the transfers the family has been maintained by Mrs. Brewster from the same source. Mr. Brewster says that since such transfers he has had his living out of the house, and has assisted his wife in running it as much as he thought would pay his way. He does not appear to have engaged in any other business. The only apparent change after the transfers was, as stated in his own language, "She was manager, and I was not."

R. T. McNeal and Thos. Macon, for appellant. Luther M. Goddard, Tom Herrington, and S. C. Warner, for appellees.

GABBERT, J. (after stating the facts as above). The statutes of this state provide that: "Every conveyance * * * of any estate or interest in lands, or in goods, or things in action * * * made with intent to hinder, delay, or defraud creditors of their * * * demands, * * * as against the person so hindered, delayed or defrauded, shall be void." Mills' Ann. St. § 2030. Many decisions of courts of last resort in actions by creditors of a husband to set aside conveyances of property to his wife are reported, with the result that in this class of cases it has been firmly established that, when a conveyance by an insolvent debtor to his wife is attacked by a creditor of the former at the time of such conveyance, the husband and wife are required to clearly establish that the transaction was honest, and that there was no intent to thereby hinder and defraud such creditor. First Nat'l Bank v. Kavanagh, 7 Colo. App. 160, 43 Pac. 217; Horton v. Dewey, 53 Wis. 410, 10 N. W. 509; Livey v. Winton, 30 W. Va. 554, 4 S. E. 451; Glass v. Zutavern, 43 Neb. 334, 61 N. W. 579, 47 Am. St. Rep. 763; Burt v. Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; Seitz v. Mitchell, 94 U. S. 580, 24 L. Ed. 179. The reason for the rule is that the relationship of husband and wife affords exceptional opportunities for the former to defraud his creditors by conveying his property to his wife; and as they are generally the only persons who know all about transactions between themselves, the rule may be even stronger than we have indicated. In other cases where creditors have brought suits attacking conveyances by their debtors in fraud of their rights, it is also established that a sale of property, though for a full consideration, made by the owner with intent to hinder, delay, or defraud his creditors, is, if the vendee participated in such intent, void as against the creditors of the vendor. Reithmann v. Godsmann, 23 Colo. 202, 46 Pac. 684; Clements v. Moore, 6 Wall. 209, 18 L. Ed. 786; Bradley v. Ragsdale, 64 Ala. 558; Crow v. Beardsley, 68 Mo. 435. And that fraud may be inferred from facts and circumstances. Grimes v. Hill, 15 Colo. 359, 25 Pac. 698; Innis v. Carpenter, 4 Colo. App. 30, 34 Pac. 1011; Greenleve v. Blum, 59 Tex. 124.

There is no real conflict in the testimony bearing on the good faith of the transaction between the defendants; and, applying the principles above mentioned to the facts logically deducible from such testimony, the judgment should have been for the plaintiff. At the time the husband transferred the property to his wife he was insolvent, or, at least greatly embarrassed by indebtedness. The wife knew this fact, and was also aware that his remaining property was so heavily incumbered that his equities therein were of little or no value. The indebtedness to the plaintiff was in existence at the time of these trans-

fers. The only property which the husband had which was not incumbered was the furniture in the house. It was necessary to protect this from creditors, or the business of conducting a boarding house in the Aldine could not be continued. The only business in which the husband was engaged was keeping this boarding house. By transferring the Aldine and the furniture therein, his creditors, except those having liens thereon, would, temporarily, at least, be prevented from reaching that property, and in this way the business could be continued. The only change in the transfer was that, prior thereto, the business was conducted in the name of, and managed by, the husband, while thereafter it was conducted in the name of the wife and managed by her. Prior to such transfers the family was supported by the husband from the income derived from operating the boarding house, while thereafter it was supported by the wife from the same source. If, as contended, the wife, as a part of the consideration of the transfer of the title of the Aldine to her, assumed the payment of the mortgage thereon and taxes then due and unpaid, it is rather strange that in struggling with such a great indebtedness she did not limit her efforts to liquidating it, instead of discharging obligations against her husband to the amount of upwards of \$3,000 over and above what she had agreed to pay of such indebtedness as part of the consideration of the transfer of the title to her, as he from time to time requested. Or, to use his own language: "She was to give me money to pay my bills as I needed it. * * * There was no definite amount named. It was my understanding that she was to furnish money to pay taxes on other property and help me save it, and anything I needed for unsecured accounts."

Again, we find from the testimony that the wife kept no account or memorandum of the amounts or dates of the payments she made; that all these payments, except the note and money received from her father, were made with money derived from operating the boarding house, and that there was no definite arrangement between them regarding the amount she was to pay of indebtedness against her husband, which was not a lien upon the property which he had transferred to her. We further find that money which she says she borrowed from her father to pay her husband for his equity in the Aldine, and which she turned over to him, was immediately applied by him in the discharge of taxes against property which, according to their statements, she had agreed to pay. It is apparent, therefore, that the only change by the transfers was, as stated in his own language, "She was manager, and I was not;" and that the purpose of the defendants was to place the Aldine and its furnishings beyond the reach of the creditors of the husband, except those having liens thereon, and that, in fact, there was no sale of the property from the husband to the wife, but a mere transfer of title for the purpose

indicated. The evidence clearly establishes that this is another instance of an insolvent debtor deluding himself with the idea that if he could secure time, he would be able to pay his debts, and, possibly, save a surplus for himself; and, to obtain time, has resorted to the often-tried experiment of conveying his property to his wife, hoping thereby to still retain control thereof, and thus hinder and delay his creditors in the enforcement of their claims, or defeat them in the end.

We think the evidence in this case clearly establishes, without contradiction, that the defendants have not only failed to prove that the transactions between them were honest, and that there was no purpose to thereby hinder and defraud the creditors of the husband, but that it establishes a fraudulent intent upon their part, because it is apparent from the testimony as a whole that the property transferred to the wife was handled, and the proceeds thereof applied, just as they would have been had the husband retained the title and continued the business in his own name. It is immaterial, therefore, whether some of the money which the wife paid her husband was her own, because it appears from all the facts and circumstances, fairly deducible from the testimony, that it was the purpose of the defendants, by the transfers in question, to hinder and delay the creditors of the husband, and hence they are void, as against his creditors. It is, therefore, not necessary to determine whether the profits arising from the baking and sale of cakes belonged to the wife or the husband, or what amount she may have received from other sources which she paid to him on account of such transfers, or whether the consideration she claims to have paid was adequate, for the reason that, as she participated in the fraudulent intent which actuated the transfers, she can take nothing thereby. In such cases the validity of the conveyances, evidencing sales made in such circumstances, is determined not by their consideration, but by the intention with which they were made and accepted. *Bigby v. Warnock*, 115 Ga. 385, 41 S. E. 622, 57 L. R. A. 754. Being a fraudulent grantee, she cannot set up against the plaintiff's right of action the amount of money which she may have paid her husband, because the rule in such cases is that the loss of the amount paid by the fraudulent grantee is the penalty which the law imposes for the fraudulent transaction. To protect the grantee in such circumstances would be to remove all danger of loss, and destroy the salutary restraint which the law has built up against such transactions. *Id.* A husband may secure indebtedness to his wife the same as to any other creditor. Bona fide transactions between them will be upheld, but when they are not, they will be avoided at the instance of a creditor of the husband, and, in circumstances like the case at bar, the husband and wife must show that their transactions were bona fide.

The testimony does not establish, as con-

tended by counsel for defendants, that the husband was running behind in operating the boarding house, or that by the transfers in question his wife took over what was, under the management of her husband, a losing business, and by her efforts and superior business qualifications, made it pay. True, he was behind with his interest on the Aldine mortgage, and was owing his help, but, for aught that appears, it was because the proceeds from his business was used in discharging other indebtedness than that incurred in operating the boarding house. It is also claimed on behalf of Mrs. Brewster that the testimony established that she has expended something like \$2,500 for furniture placed in the property since the purchase. This, however, is immaterial, in view of the fact that it appears the money thus expended was realized from operating the boarding house, a property and business which, for reasons already given, so far as creditors are concerned, belonged to the husband.

On behalf of the defendants it is urged that the laches of the plaintiff should bar her action. This question does not appear to have been raised in the court below, and a party against whose action laches is suggested as a defense ought to be allowed to explain it away; and therefore it is not regarded with favor on appeal when raised for the first time by the successful party below after the case has been brought to this court for review. *Hagerman v. Bates*, 24 Colo. 71, 49 Pac. 139. In a recent case—*Mortgage Trust Co. v. Elliot*, 36 Colo. 233, 84 Pac. 980—it is decided, in effect, that where the defense of laches is not presented to, nor passed upon by, the trial court, it will not be considered on appeal, because the party against whom it is thus first suggested would be deprived of the opportunity to explain his delay. Plaintiff could not maintain her creditor's bill until her indebtedness against Mr. Brewster had been reduced to judgment. At the time of the transfers it was not in judgment, but the case at bar was commenced shortly after she reduced her claim to judgment. If there had been any delay on the part of the plaintiff of which defendants might complain, it arises from the fact that she did not reduce her claim to judgment at an earlier date, whereby she would have been enabled to sooner institute her action. Counsel for plaintiff insist that the time within which she should have commenced her action only began to run from the date she obtained judgment against the defendant Brewster. We do not deem it necessary to pass upon this question. Laches in bringing an action cannot be successfully interposed as a defense unless delay in this respect has injuriously affected the party against whom suit is brought, or his position has been altered to his prejudice thereby. *Morgan v. King*, 27 Colo. 539, 63 Pac. 416; *Farris v. Wirt*, 16 Colo. App. 1, 63 Pac. 946; *Du Bois v. Clark*, 12 Colo. App. 220, 55 Pac. 750.

As previously stated, in substance, in reviewing the evidence, Mrs. Brewster does not appear to have expended any money of her own in improving the property or discharging indebtedness against it. Whatever she may have expended in either of these ways she obtained from the income derived from operating the property as a boarding house. She has devoted no time to managing the business or in looking after it different from that which she would have done had the title remained in her husband. From the date of the transfers down to the time when plaintiff commenced her action it appears that the income from the property has been devoted to the support of the family, and the discharge of indebtedness against Mr. Brewster, precisely the same as though the property had remained in his name, and he had conducted the boarding house himself; consequently, it is apparent that the delay of the plaintiff in obtaining a judgment and commencing her creditor's suit at an earlier date has not been prejudicial to the rights of the defendants, or either of them.

The judgment of the district court is reversed, and the cause remanded, with directions to enter judgment for plaintiff in accordance with the views expressed in this opinion.

Reversed and remanded.

STEELE, C. J., and CAMPBELL, J., concur.

SQUIRES et al. v. CURTAIN.

(Supreme Court of Colorado. Feb. 3, 1908.)
JUSTICES OF THE PEACE—VENUE—AGREEMENT—EFFECT.

Though, if defendants believed the justice before whom they were sued was prejudiced against them, they could have had the venue changed to the next nearest justice, the right could be waived, and by consenting that the case be transferred to a third justice they conferred jurisdiction upon him.

Appeal from Summit County Court; J. W. Swisher, Judge.

Action by Martha Curtain against L. L. Squires and another. From a judgment of the county court for plaintiff, on defendants' appeal from a justice court judgment for plaintiff, defendants appeal. Affirmed.

H. R. Belford, for appellants. James T. Hogan, for appellee.

BAILEY, J. Appellee brought this action in the justice court before H. C. Rogers, a justice of the peace of Summit county. Appellants, who were defendants, asked for a change of venue because of the alleged prejudice of the justice. In the docket of the justice is the following memorandum: "Breckenridge, Colorado, October 12, 1903. Received of L. L. Squires \$1.75 for change of venue to Eli Fletcher's court. H. C. Rogers, Justice of the Peace." The attor-

ney for plaintiff filed an affidavit upon the 12th of October, wherein he states "that Eli Fletcher, the other justice residing in the town of Breckenridge, is disqualified to act in this case because said justice is prejudiced against the case and cause of action, and thinks and believes said case should not be tried, and the plaintiff asks that the case be sent to some other court." The transcript of the justice's docket then contains the following: "October 12, 1903, 10 o'clock a. m. Court called. By consent of both parties this case was transferred to D. B. Webster, justice of the peace, at Kokomo, Summit county, Colorado." When the matter was taken before Justice of the Peace Webster the defendants appeared specially and moved to dismiss the case, for the reason that the court was without jurisdiction because, upon the filing of the application for a change of venue, it was the duty of the justice of the peace before whom the action was brought to immediately transmit the papers to the next nearest justice, and Webster, not being the next nearest justice, failed to acquire jurisdiction. This motion was overruled, and judgment rendered for the plaintiff. The defendants appealed to the county court, where the same motion was made, and it was again overruled, and judgment rendered for the plaintiff. There was no appearance for the defendants either in the justice or county court, except for the purpose of making the motions. The overruling of this motion to dismiss by the county court is the only question before us.

If the defendants believed that the justice of the peace before whom the action was brought was prejudiced against them, they had the right to have the venue changed to the next nearest justice. This, however, is a right which may be waived. The record shows that the case was transferred to Justice of the Peace Webster by consent of the parties. When the venue is changed by an agreement of the parties, the court to which the transfer is made has jurisdiction. In the case of *Judah v. Trustees*, 23 Ind. 275, we find the following: "The venue was changed from Sullivan to Knox by agreement of parties, and then the appellant specially appeared in the Knox circuit court to object to its jurisdiction, and thereupon moved to dismiss the cause for want of jurisdiction. The motion was overruled, and this is assigned for error. The agreement entered of record in the Sullivan circuit court gave the Knox circuit court jurisdiction of the person of the appellant, and the law gives it jurisdiction of the subject-matter of the suit. The point has nothing like either principle or authority to support it." To the same effect, see *Center Twp. v. Commissioners*, 110 Ind. 579, 10 N. E. 291; *Salter v. Salter's Creditors*, 69 Ky. 624, and other cases cited in those authorities.

There is no contention that Justice Webster did not have jurisdiction of the subject-

matter, and when the defendants agreed that the case might be transferred to Webster they conferred upon him jurisdiction of the person. In relation to this matter appellants say: "This agreement to transfer only left the question of jurisdiction to try the cause by Fletcher open to the defendants' objection, which he promptly interposed." This is too narrow a construction to be placed upon the agreement that "the case is transferred to D. B. Webster." Parties may not in one breath agree to the transfer of a cause, and then in the next say that they only agreed to transfer in order to object to its being transferred, because the court had no power to make the transfer. By the agreement to transfer the case to Justice Webster, defendants conferred upon him jurisdiction of their persons, and there was no error in overruling the motion to dismiss because of the lack of such jurisdiction. The judgment of the county court will therefore be affirmed. Affirmed.

STEELE, C. J., and GODDARD, J., concur.

ELGIN JEWELRY CO. v. WILSON.

(Supreme Court of Colorado. Feb. 3, 1908.)

1. PLEADING—DEMURRER—DEMURRER TO PART OF ANSWER.

Separate demurrers to different paragraphs of the same defense may not be taken, and hence, in an action for the price of goods sold, where the defendant pleaded that plaintiff fraudulently procured her signature to a different order from the one she gave and for a larger amount, and that she received other articles than those she ordered, whereupon she returned them to plaintiff, and that plaintiff since then had been and still was in possession thereof, a demurrer to the part alleging the fraud as not constituting a defense to the action and being ambiguous, unintelligible, and uncertain, and another demurrer to the part alleging the return of the articles and that they were still in plaintiff's possession as being ambiguous, unintelligible, and uncertain, were properly overruled.

2. SALES—FRAUD BY SELLER—RESCISSION.

In an action for the price of goods sold an allegation that plaintiff by fraud procured defendant's signature to an order for a larger amount than she supposed, and that, on discovering the fraud, defendant immediately returned the goods to plaintiff, who retained possession of them, would constitute a valid defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 318.]

3. PARTNERSHIP—ACTION BY PARTNERS—AFFIDAVIT OF PARTNERSHIP—FAILURE TO FILE—EFFECT.

Sess. Laws 1897, pp. 248, 249, c. 65, provides that persons doing business in the state under the name of a company shall file with the clerk of the county of residence of the business and in which it is carried on an affidavit stating the full Christian names and addresses of the partners, in default of which they shall not sue to collect their debts. Held that, in an action for the price of goods sold, an allegation in the answer that plaintiff had failed to file such affidavit and should not have brought the action, was a good defense, and a motion to strike it out was properly denied.

Appeal from District Court, Fremont County; M. S. Bailey, Judge.

Action by the Elgin Jewelry Company, a copartnership, against Mrs. H. Wilson. From a judgment for defendant, plaintiff appeals. Affirmed.

A. L. Jeffrey, for appellant. Joseph H. Maupin, for appellee.

BAILEY, J. The complaint in this action alleges that appellee is indebted to appellant in the sum of \$110 upon a written contract for the purchase of goods. After denying the allegations of the complaint, the defendant alleged that she agreed with the agent of plaintiff to purchase goods amounting to \$11, but that the agent, then and there intending and contriving to cheat and defraud defendant, falsely represented to her that it was necessary that she sign a printed order for the goods, and that he showed her an order for the goods, amounting to \$11, and requested her to sign it, but that he fraudulently and without her knowledge obtained her signature to another order for goods aggregating \$110, representing to her, and she believing, that it was the \$11 order; that when the goods arrived and she opened the package she discovered that, instead of containing the goods which she had agreed to purchase, it contained other articles, whereupon she returned the goods to the Elgin Jewelry Company, plaintiff; and that said company since that time has been and still is in possession thereof. To this answer plaintiff filed two demurrers—the first to that part of the defense alleging the fraud, because the facts therein alleged constituted no defense to the action, and because it was ambiguous, unintelligible, and uncertain; the second to that part of the answer alleging the discovery of the fraud and the return of the goods, and that they were still in the possession of the company, for the reason that that portion of the defense was ambiguous, unintelligible, and uncertain, because it failed to show how it was a defense to the complaint. These demurrers were overruled by the court, and its action is assigned as error.

It will be borne in mind that these demurrers were not separate grounds of demurrer to the same defense, but were separate demurrers to different paragraphs of the same defense. This may not be done. The demurrer must go to the entire defense, and not to any segregated portion. The plaintiff may not pick out a sentence or a single allegation of an answer and demur to it because it is insufficient to constitute a defense, or because it is ambiguous or uncertain; but the answer must be taken as an entirety. This question was before this court in Herfort v. Cramer, 7 Colo. 483, 4 Pac. 896, and it was there said: "We observe, in the first place, that, whatever defects may exist in the portion of the answer under consideration, the

demurrer is still more defective. The attempt thus made to separate the averments descriptive of the fraud practiced upon the defendant into two distinct offenses seems to be wholly without pretext. This portion of the answer does not purport to state two grounds of defense, but the single ground that the defendant was induced to enter into the contract of purchase through fraud, and that he has been injured thereby in the sum stated." Again in the same case it is said: "The connected structure of a pleading cannot thus be destroyed or disjoined at the pleasure of a pleader, and its disconnected averments separately demurred to. Such a practice is not to be tolerated." See, also, *Cochrane v. Parker*, 5 Colo. App. 527, 39 Pac. 361. Taking the entire defense as alleged in this answer, it would seem to be sufficient, if true. If the agent showed the defendant a written order for \$11 worth of goods, which she consented to purchase, and signed the order for the purpose of procuring the goods, and then, by some subterfuge, chicanery, or fraud procured her signature to another order, which called for \$110 worth of goods, and upon receipt of the goods and the discovery of the fraud she immediately returned them to the principal and the principal retained possession of them, this would seem to constitute a valid defense to an action upon the contract for the purchase price of the goods.

The defendant also alleged by way of defense that the plaintiffs had failed to file in the office of the clerk and recorder an affidavit of copartnership as required by statute. Motion was made to strike this allegation from the answer, and it is said that the court erred in overruling the motion. The answer alleges that the plaintiff ought not to have prosecuted this action against defendant, because the said T. O. Loveland and J. L. Records on or about the 9th day of February, 1902 (which was the time alleged as the date of the order), were doing business in the county of Fremont, state of Colorado, under the name of the Elgin Jewelry Company, as partners and associates; that they did not file for record with the clerk and recorder of said Fremont county, in which they were carrying on their said business, an affidavit, as the law requires, setting forth their full Christian names and addresses. The statute provides that persons doing business in this state as partners under any other name than the personal name or names of the members shall file for record with the county clerk of the county in which the business or trade is carried on an affidavit setting forth the full Christian and sur names and addresses of parties who are represented; that in default of filing for record such affidavits such parties shall not be permitted to prosecute any suits for the collection of their debts until such affidavits shall be filed. Sess. Laws 1897, pp. 248, 249, c. 65.

The allegation in the answer appears to show the failure on the part of plaintiffs to comply with the requirements of this statute, and, if the facts were as stated in the answer, the plaintiffs could not prosecute the action until they had complied with the statute. Consequently there was no error in overruling the motion.

No exception was taken to the instructions given by the court to the jury, and it rendered a verdict for the defendant. It is contended that the verdict was not supported by the evidence. We have examined the testimony, and find that there is sufficient legal evidence in the record to support the verdict. That being true, it should not be disturbed.

Perceiving no prejudicial error in the record, the judgment of the district court will be affirmed.

Affirmed.

STEELE, C. J., and GODDARD, J., concur.

GOLDBERGER v. LEIBOWITZ.

(Supreme Court of Colorado. Feb. 3, 1908.)

1. SET-OFF AND COUNTERCLAIM — CLAIMS PLEADABLE—SAME TRANSACTION.

Under Code Civ. Proc. § 57, providing that a counterclaim may consist of a cause of action arising out of the transaction pleaded in the complaint as the foundation of plaintiff's claim or connected with the subject of the action, in an action for conversion of goods, the possession of which was acquired by defendant in an attachment suit against plaintiff, which suit defendant dismissed, defendant may not plead a counterclaim based on the debt on which the attachment suit was brought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 43-51.]

2. SAME—CONTRACT AND TORT.

A demand founded on contract cannot be a set-off to damages proved in an action for converting personality.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 26-37.]

3. SAME—EFFECT OF STATUTE.

Mills' Ann. St. § 2644, requiring all claims which either party has against the other of such a nature as to be consolidated into one action or defense to be brought forward, does not change the rule that a cause of action arising out of contract cannot be set off against an action of trespass or trover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 26-37.]

4. APPEAL — REVIEW—INSUFFICIENT SPECIFICATION OF ERROR.

Under Supreme Court rule 11 (66 Pac. viii), requiring errors to be particularly specified, etc., a specification that the trial court erred in rendering final judgment and in the findings contained in the judgment is too general to authorize a review of the findings and judgment for any purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3025-3027.]

Appeal from Pueblo County Court; L. B. Gibson, Judge.

Action by Isadore Leibowitz against M. Goldberger. From a judgment of the county court for plaintiff, on defendant's appeal

from a like judgment in justice court, defendant appeals. Affirmed.

Alfred Arrington, for appellant. C. S. Essex and D. M. Campbell, for appellee.

BAILEY, J. In September, 1902, appellant brought an action in a justice court of Pueblo county against the appellee and caused a writ of attachment to be issued and certain bundles of merchandise to be levied upon. No service was had upon the defendant in that action. The constable who levied upon the goods placed the same in the hands of the plaintiff for safe-keeping. The plaintiff then caused the suit to be dismissed and converted the goods to his own use. Defendant in that action, appellee here, then instituted this action in the justice court. Judgment was obtained in that court against the defendant therein, and an appeal was taken to the county court. It was stipulated in that court that the defendant was guilty of the conversion of the goods and that their value was \$153.38; that, if the defendant should be entitled to interpose his counterclaim as a set-off, the amount thereof should be \$90.38. The county court disallowed the counterclaim, and error is assigned because of its action.

The counterclaim was the basis of the suit which the appellant had brought against the appellee in which the writ of attachment was issued, and the amount was due plaintiff in that suit on account of the purchase price of a portion of the goods upon which the writ of attachment was levied. Code Civ. Proc. § 57, provides that: "A counterclaim may consist of a cause of action arising out of the transaction set forth in the complaint or answer as the foundation of the plaintiff's claim or defendant's defense or connected with the subject of the action." "If a transaction is set forth as the foundation of the plaintiff's demand, the counterclaim must arise out of that transaction." *Pomeroy's Remedies and Remedial Rights*, § 742. Here the transaction was the unlawful conversion of the goods, and the counterclaim, to be a valid set-off, must grow out of that. An antecedent debt cannot be set off against the damages arising from the tort. *Schaefer v. Empire L. Co.* (Sup.) 51 N. Y. Supp. 104; *Reaner v. Morrison Express Co.*, 93 Mo. App. 501, 67 S. W. 718; 6 Current Law, 1444; *Hanson v. Byrnes*, 96 Minn. 50, 104 N. W. 762. And herein is the case of *Warren v. Hall*, 20 Colo. 508, 38 Pac. 767, cited by appellant, distinguished. There the counterclaim grew out of the same transaction alleged in the complaint as the foundation of plaintiff's cause of action. It appears to be fundamental that a demand founded on contract cannot be a set-off to damages proved in an action for the conversion of personal property. *Waterman on Set-Off*, § 138;

Moore v. Davis, 11 Johns. (N. Y.) 144; *Lane et al. v. Bailey*, 47 Barb. (N. Y.) 395; *Donahue v. Henry*, 4 E. D. Smith (N. Y.) 162. This action having been brought in a justice court, section 2644, Mills' Ann. St., which provides that all claims which either party has against the other of such a nature as to be consolidated into one action or defense must be brought forward, should be considered. This statute does not change the rule that a cause of action arising upon contract cannot be set off against an action of trespass *de bonis or trover*. *Gunnerson v. Erickson*, 69 Ill. App. 159, and cases there cited. In that case the Illinois statute covering proceedings in a justice court, from which ours was taken, was considered, and it was therein determined that "a claim arising from contract cannot be set off against an action for conversion of goods." So it is apparent that the court committed no error in disallowing the counterclaim of appellant.

The only other error that appellant assigns is in the following words, namely: There "is manifest error in the following particular, to wit: * * * Second, the rendition of final judgment in said cause and in the findings contained in said judgment." In the stipulation hereinbefore alluded to it was agreed that if the court "shall find that in the commission of the conversion complained of defendant was guilty of either malice or willful deceit, or that the same was willful and attended by circumstances of fraud or malice, or wanton or reckless disregard of plaintiff's rights, then in either of said events the judgment to be entered herein shall be in substance and form the same as rendered by the justice who tried the cause below." The court so found, and rendered the same judgment as had theretofore been rendered by the justice, namely, for the value of the goods, \$153.38, and \$100 as exemplary damages. Under the assignment of error above quoted, appellant desires that we review the findings and judgment of the court as to the allowance of exemplary damages. This we are unable to do. The specification of error is too general for any purpose. Stating generally that the court erred in the rendition of the judgment or in its findings is not a compliance with rule 11 of this court (66 Pac. viii). *Percy C. M. Co. v. Hallam*, 22 Colo. 233, 44 Pac. 509; *Clear Creek v. Root*, 1 Colo. 375; *Colo. Central v. Smith*, 5 Colo. 160; 2 Enc. Pl. & Pr. 955, 956.

Perceiving no reversible error assigned in this record, the judgment of the county court will be affirmed.

Affirmed.

STEELE C. J., and GODDARD, J., concur.

42 Colo. 180)

RIMMER v. WILSON.

(Supreme Court of Colorado. Feb. 3, 1903.)

1. NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

The question of negligence is for the jury, where the circumstances are such that men of ordinary intelligence may honestly differ as to the question, and when the measure of duty is ordinary and reasonable care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 279-302.]

2. MASTER AND SERVANT—NEGLIGENCE OF SERVANT—LIABILITY OF MASTER.

Where the servant acts in obedience to an express order of the master, the master cannot escape liability for the consequences of the servant's acts, on the ground that they are outside the duty for which he was employed.

3. EVIDENCE—OPINIONS—QUALIFICATION OF WITNESS.

One shows himself qualified to testify to the value of a horse, which he knew; he testifying that he had lived in the place 10 years, that he had bought and sold horses, driving horses and single horses, and had seen them bought and sold in that place, and knew what they were bought and sold for, and that he almost constantly "dickered around horses" there, and knew the usual and fair market value of horses in that vicinity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2358.]

4. SAME—DETERMINATION OF QUESTION.

The sustaining or overruling of objections to testimony as to the value of property which is in almost universal use, when such objections are based on the qualification of the witnesses to answer the question, is largely in the discretion of the trial court.

5. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

There being competent testimony to show value, and no testimony placing it less than found, any error in receiving testimony of such value from persons not qualified was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

6. BAILMENT—DELIVERY—EVIDENCE.

That defendant, a farrier, was in the absolute control of plaintiff's horse, when it ran away after its harness had been unhitched from the buggy by defendant's servant, rather than that plaintiff's driver was in equal control with him, may be found from the testimony of such driver that she handed the reins to such servant when she got out of the buggy, and, aside from instructing him as to the character of shoes to be placed on the horse, gave no further instructions.

7. SAME—CONTRIBUTORY NEGLIGENCE.

Testimony of the servant of defendant, to whom plaintiff's driver turned over his horse to be shod, that after he had unhitched the harness from the buggy he spoke to the horse to "get up," and that it started on a jump and ran away, and that he did not have hold of the lines, halter, or strap, authorizes a finding that such driver did not have an opportunity to caution such servant in time to prevent the accident; she having no means of knowing he would attempt to drive it from the thills without having some means of controlling it.

8. APPEAL—OBJECTION AND EXCEPTION.

Complaint may not be made of a statement of the court to the jury; objection not having been made or exception saved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1251.]

9. TRIAL—INSTRUCTIONS—APPLICABILITY OF EVIDENCE.

An instruction, in an action for negligence, as to the things required to be found to author-

ize recovery, properly omits the element of contributory negligence; there being no evidence thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

10. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

There being practically no conflict in the testimony, judgment for plaintiff will not be reversed because of the use of the word "fair" in the court's instruction that plaintiff must prove defendant's negligence by the "fair preponderance" of the evidence, even if this requires a less degree of proof than would the word "preponderance" alone.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219-4223.]

Appeal from El Paso County Court; James A. Orr, Judge.

Action by R. L. Wilson against Thomas Rimmer. Judgment for plaintiff. Defendant appeals. Affirmed.

J. W. Shearfor, for appellant. R. L. Chambers, for appellee.

BAILEY, J. This action was brought by appellee against the appellant in the justice court to recover the value of a horse, which plaintiff claimed had lost its life through the negligence of the defendant. The case was tried in the justice court, resulting in a verdict for plaintiff, from which an appeal was taken to the county court, where the case was retried, a verdict rendered in favor of the plaintiff, and judgment entered upon this verdict for \$175.

The defendant was a blacksmith at Colorado Springs. The horse was taken by Catherine McGuire, the sister-in-law of plaintiff, to the shop of defendant for the purpose of having it shod; and defendant instructed his employé, Lalonde, to unhitch the horse and take it into the shop. Lalonde unfastened the harness from the buggy, and, without having possession of the lines or in any other manner placing himself in a position to control the horse, clucked at him to move forward. The horse passed out of the thills, ran away, met with an accident, and was injured to such an extent that he afterwards died. Some of the witnesses testified that he walked from the buggy for a short distance, then commenced to trot, and when some person attempted to stop him began to run. Others testified that, immediately upon being clucked to, the horse started with a jump and ran away. At the conclusion of plaintiff's testimony, defendant moved the court for a nonsuit, which motion was overruled. The action of the court in overruling the motion is assigned as error.

It is contended that the evidence failed to show any negligence on the part of Lalonde, and that whatever negligence there was was the contributory negligence of the plaintiff's agent, Miss McGuire. When Lalonde came from the shop, the custody of the horse was surrendered to him by Miss McGuire, and he was in a position to assume absolute control of it. In any event, where there is any proof of the negligence of a defendant, the question is one to be submitted to the jury. Where the

circumstances are such that men of ordinary intelligence may honestly differ as to the question of negligence, it must be left to the jury; and it is always a question to be determined by that body when the measure of duty is ordinary and reasonable care. *Miller v. U. P. Ry. Co.* (C. C.) 12 Fed. 600; *City of Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705; *Colo. Central R. R. Co. v. Martin*, 7 Colo. 592, 4 Pac. 1118; *Colo. Mld. Ry. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701. It is also contended that, inasmuch as the duty of the employé, Lalonde, was the shoeing of horses, in unhitching this horse he was performing services outside of that duty, and the master was not responsible; but in this case the master instructed Lalonde to unhitch the horse and take it into the shop. In such cases, where the servant acts in obedience to an express order given by the master, the master is liable for all the consequences of the servant's acts. *Sagers v. Nuckolls*, 3 Colo. App. 95, 32 Pac. 187.

The next error discussed by appellant is that the court erred in admitting testimony of certain witnesses as to the value of the horse, contending that the witnesses were not properly qualified. The witness Gallagher said that he had lived in Colorado Springs for 10 years; that he had bought and sold horses, driving horses and single horses, and had seen horses bought and sold in that place, and knew what they were bought and sold for; knew what he paid, and that he almost constantly "dickered around horses" in Colorado Springs, and knew the usual and fair market value of horses in that vicinity; that he knew the horse in question, and that it was worth \$200. Under any rule this witness was properly qualified to testify as to the value of the horse. Some of the other witnesses were not so well qualified; but those who were not placed the value of the horse at from \$175 to \$200, and the jury took the least value that was placed upon it. The defendant offered no proof whatsoever as to the value of this animal. The sustaining or overruling of objections to testimony of witnesses as to the value of property which is in almost universal use, when such objections are based upon the qualification of the witnesses to answer the question, is a matter largely within the discretion of the trial court. *Lundberg v. Mackenheuser*, 4 Ill. App. 603; *Ohio & Miss. R. R. Co. v. Irvin*, 27 Ill. 178; *Ohio & M. R. R. Co. v. Taylor*, 27 Ill. 207. There being competent testimony to show that the value of the horse was in excess of the amount found by the jury, and there being no testimony placing the value at a less sum, the defendant could not have been prejudiced by any possible error that the court might have committed in receiving testimony as to such value from those who may not have been thoroughly qualified to answer.

The defendant contends that in rendering the verdict the jury absolutely ignored the instructions of the court, and that the verdict

should have been set aside on account thereof. The third instruction was that if the jury found that the horse was not in the exclusive possession or under the control of the defendant, or that the agent of the plaintiff at the time of the accident was in equal control with the defendant in the charge and custody of the horse in question, they should find in favor of the defendant. The fourth instruction is to the effect that, if the plaintiff through his agent was present and witnessed any acts of negligence or misconduct on the part of defendant's agent in unhitching or handling the horse, it was the duty of the agent of plaintiff to speak to and make known to the defendant any omission on his part, and if the agent witnessed omissions or misconduct on the part of the defendant, and did not speak or make known to the defendant such omissions, if she had an opportunity to speak, the plaintiff was not entitled to recover. These are the two instructions which it is contended the jury failed to observe. The witness, Miss McGuire, testified that she handed the lines to the employé when she got out of the buggy, and, aside from instructing him as to the character of shoes to be placed on the horse, she gave no further instructions or directions. The jury had a right to believe that the employé was in the absolute control of this horse at the time. The employé testified that he spoke to the horse to "get up," and that it started on a jump; that he did not have hold of the lines, halter, or strap. If the jury believed this testimony, it would have had the right to have assumed that Miss McGuire did not have an opportunity to caution the employé in time to prevent the accident, because she had no means of knowing that he would attempt to drive the horse from the thills without having some means of controlling him. Upon the examination of the testimony it seems that, so far as these two matters are concerned, the verdict of the jury was justified.

Complaint is made of the following statement made by the court to the jury: "This is an action brought by R. L. Wilson, the plaintiff, against Thomas Rimmer, the defendant, to recover an amount alleged to be due the plaintiff by the defendant for injuries resulting to a horse, the property of plaintiff, and said injuries resulting from the negligence of the defendant. The defendant resists the claim and demand of the plaintiff, and denies that he is indebted to the plaintiff in any sum whatever, and denies that he was in any way negligent in handling the property of the plaintiff." We fail to see anything in this statement which could mislead the jury; but, if there was, the defendant is in no position to urge a reversal because of it. It does not appear that he made any objection to the statement made by the court, or saved any exception to it.

The first instruction to the jury was that, in order for the plaintiff to recover in the

action, he must prove by a preponderance of the evidence in the case, first, that the property of the plaintiff was intrusted to the defendant; second, that while in the care and custody of the defendant the property of the plaintiff was injured from the negligence of the defendant; third, if injury was sustained, the amount of the damage sustained by the plaintiff. It is contended that this instruction was erroneous, because it omits the element of contributory negligence. As we read the record, there was no evidence of contributory negligence upon the part of the plaintiff; and hence that matter could have no proper place in the instruction.

In the sixth instruction the court informed the jury that, in order to recover, the plaintiff must establish by a fair preponderance of all the evidence in the case that the defendant was guilty of negligence, etc. The word "fair" was objected to as being a modification of the word "preponderance," and as not warranted by the law. There was practically no conflict in the testimony in this case, and, in the absence of a substantial conflict in the testimony, the judgment should not be reversed solely because the court used the expression "fair preponderance," instead of "preponderance," even though the former expression would require a less degree of proof than the latter, which we do not determine.

Being unable to find any material error in this record, the judgment will be affirmed.

Affirmed.

STEELE, C. J., and GODDARD, J., concur.

ALAMOSA CREEK CANAL CO. et al. v. NELSON et al.

(Supreme Court of Colorado. Feb. 3, 1903.)

1. WATERS AND WATER COURSES—APPROPRIATION—ABANDONMENT—BURDEN OF PROOF.

The burden of proof is on plaintiff seeking to enjoin the diversion of water by an irrigation ditch to prove an alleged abandonment of priorities awarded thereto by a prior statutory decree.

2. ABANDONMENT.

Abandonment as applied to property rights consists of nonuser and intention.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 4-13; vol. 8, p. 7759.]

3. SAME.

Nonuser alone, at least short of the period of the statute of limitations, is not sufficient to prove an abandonment; but nonuser continues for a considerable time, coupled with other acts showing an intention on the part of the owner not to repossess himself of the thing whose use he has relinquished, may constitute an abandonment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abandonment, §§ 3-6.]

4. WATERS AND WATER COURSES—ABANDONMENT OF RIGHTS.

In a suit to enjoin the diversion of water by an irrigation ditch, evidence considered, and held sufficient to sustain a finding of an abandonment of a priority decreed to defendant.

5. SAME—APPROPRIATION—ADJUDICATION OF PRIORITIES—RES ADJUDICATA.

A statutory decree establishing priorities to the use of water for irrigation is res adjudicata as to the volume of water awarded to a particular ditch, and cannot be attacked collaterally.

6. SAME—ABANDONMENT OF RIGHTS.

A statutory decree establishing priorities to the use of water for irrigation confers no new rights, but is merely evidence of pre-existing rights, which may be lost by subsequent abandonment.

7. SAME—ACTIONS TO PROTECT RIGHTS—EVIDENCE.

Though evidence of nonuser and similar acts before a decree establishing priorities to the use of water by the owner of an irrigation ditch is improper for the purpose of proving his right to use a less volume of water than that decreed to him, as well as for the purpose of showing the element of nonuser in a subsequent abandonment relied on by another appropriator suing for diversion of the water, but where there is sufficient legal evidence as to the element of nonuser subsequent to the decree, evidence of nonuser and similar acts by such owner before the decree, for the purpose of showing his intent in not using what was awarded to him, is proper and not prejudicial.

8. SAME—INJUNCTION—DEFENSES—EVIDENCE.

Where a senior seeks to enjoin a junior appropriator of water from diverting the same by an irrigation ditch, and defendant seeks to avoid the same on the ground that if the diversion is restrained the plaintiff will derive no benefit, such defense must be established by clear and satisfactory evidence.

9. APPEAL AND ERROR—CONCLUSIVENESS OF FINDINGS.

Where the evidence is legally sufficient to uphold a finding by the trial court, the appellate court cannot disturb it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

Appeal from District Court, Conejos County; Charles C. Holbrook, Judge.

Action by Pladad Nelson and others against the Alamosa Creek Canal Company and others. From a judgment for plaintiffs, defendants appealed. Affirmed.

Jesse Stephenson, for appellants. Ira J. Bloomfield, for appellees.

CAMPBELL, J. This action was brought by plaintiffs, appropriators of water from the Alamosa river, a natural stream in water district No. 21 of this state, against defendants, appropriators from the same stream, to restrain the latter from diverting and using the waters thereof to the injury of plaintiffs, who are alleged to have the better right thereto. In 1888 a statutory decree was entered in the proper district court whereby the relative priorities of right to the use of water for irrigation between the various ditches and canals in this district were determined, including the rights of the parties here. The complaint alleged that defendants had wrongfully diverted the waters of the river, and threatened to continue the same, by means of the Molino ditch, to which ditch had been adjudicated priority No. 3 for 6.93 cubic feet of water per second of time to date from May 1, 1869, and that

each and all of the priorities of plaintiffs were, under the decree, inferior and junior to the adjudicated priority of the Molino ditch. Though there was awarded to the Molino ditch the priority mentioned, nevertheless its capacity was never such as to carry the quantity given, and that it has never been used to irrigate more than about 12½ acres of land. That in their statement the then owners of that ditch, preliminary to their obtaining a decree, claimed only 3 cubic feet of water per second of time to irrigate 50 acres of land. That only .93 cubic feet of water per second of time has ever been used in irrigating the lands lying under the ditch by the owners thereof until shortly before the beginning of this action. The complaint then charges that all of the water decreed to the Molino ditch, except .93 cubic feet per second of time, has been by the owners of the ditch abandoned since the decree was entered, and the same has been hitherto appropriated and ever since continuously used and enjoyed by plaintiffs and other appropriators of water from the same stream until a short time before the bringing of this action, when such use was interfered with by defendants. In the answer defendants denied the abandonment, and claimed a superior right to plaintiffs, and as a second and affirmative defense alleged that the headgate of the Molino ditch was several miles higher up the stream than the nearest headgate of any of the plaintiffs' ditches, and that between such nearest headgate and the headgate of the Molino ditch were a number of ditches through which had been made appropriations of water senior to plaintiffs and junior to the Molino ditch, which were entitled to divert such water before the ditches of plaintiffs were supplied, and that if a quantity of water equal to the entire volume which had been decreed to the Molino ditch was not turned into its headgate, but allowed to run down the stream, the bed of the stream between that point and such nearest headgate was of such a nature and character of soil that none of it would reach the headgates of any of plaintiffs' ditches. Upon these affirmative matters being traversed by the replication, the issues thus raised were tried to the court without a jury, and the court made specific findings of fact in favor of plaintiffs and granted the injunction prayed for. Defendants appeal.

1. The burden of proof was upon plaintiffs to prove the abandonment alleged. Abandonment is made up of two elements, act and intention. Nonuser alone, at least short of the period of the statute of limitations, is not sufficient to prove an abandonment, but nonuser continued for a considerable length of time, coupled with other acts of a character tending to show an intention on the part of the owner not to resume, or repossess himself of the thing whose use he relinquished,

may constitute an abandonment. The evidence in this case was conflicting, but we think it sustained the finding by the court of an abandonment.

The defendants say that it was error for the court to admit in evidence a copy of the statement of claim which the owners of the Molino ditch filed in the district court, as they were required to do under the statutes in order to obtain a decree of priority, and to hear evidence as to the carrying capacity of the ditch, and the quantity actually diverted and applied to a beneficial use before the decree was entered. This upon the ground that the decree is a verity, and that the volume of water thereby decreed is res adjudicata, and if such decree is not, within the statutory time, reviewed, set aside or appealed from, it is binding upon the parties to the proceedings, and cannot thereafter be questioned except on the ground of fraud. Defendants' propositions of law are correct, but they are in error as to their application to the facts of this case. We think the case as made comes squarely within the decision of this court in *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 357, 40 Pac. 989, and is not opposed to anything decided in *P. V. I. Co. v. Central Trust Co.*, 32 Colo. 102, 75 Pac. 391. In a late case decided at this term, *O'Brien v. King*, 92 Pac. 945, a similar objection, under a different state of facts, was considered. It was there held, in accordance with several of our previous rulings, that a statutory decree establishing priorities is res judicata as to volume, and cannot be collaterally attacked. In that case the complaint was framed upon two grounds: (1) That the appropriation had never been perfected to a greater extent than sufficient to irrigate two acres of land—a less quantity than the decree awarded; (2) an abandonment of the appropriation subsequent to the decree.

To sustain the first ground the plaintiff, who attacked the decreed appropriation, relied solely on the same kind of evidence as that objected to in the case at bar—that is, evidence of acts and conduct antecedent to the decree—and the court there said its admission was improper because such matters were not open to inquiry in that case, the question of volume being res judicata. Judge Goddard, who wrote that opinion, then proceeded to say that in some cases, evidently referring to the *New Mercer* and similar cases, which are like the one now before us, the admission of this class of evidence was held not to constitute prejudicial error, since evidence of acts subsequent to the decree was legally sufficient to prove abandonment; but in that (*O'Brien*) case, since the trial court made its findings of fact upon the issue of subsequent abandonment solely on evidence of what occurred before the decree was rendered, which the judge says was erroneously admitted in support of the first

ground of complaint, a decree adjudicating abandonment, based on such findings, was unwarranted. And the learned judge expressly said that the issue of subsequent abandonment was not there considered or properly determined, because the inquiry was not limited to acts subsequent to the decree. This was manifest, he said, because there was no evidence at all before the court of subsequent acts tending to prove that the owner had, subsequent to the decree, failed to use, in whole or in part, this decreed volume, and the only evidence, and that on which the findings concerning abandonment were made, was that of antecedent acts improperly admitted to prove the other cause or ground of complaint.

It, therefore, is clear that the O'Brien Case, a collateral proceeding, was one where the trial court wrongly admitted evidence of acts done before the statutory decree to prove that the owner of the ditch had not appropriated as much water as that decree gave him, and after admitting such evidence, directed to the first cause or ground of complaint, without any evidence at all of any amount of water the claimant had used, or ceased to use, subsequent to the decree, which was necessary to sustain the second cause or ground of complaint, proceeded to apply to this latter ground the evidence of prior acts and conduct, and based its findings on the alleged subsequent abandonment solely on the evidence of the antecedent acts. Very properly it was held that a decree that subsequent abandonment was thus established could not stand. Very different, however, is the case at bar. Here there was evidence that not only for 19 years before the decree, but thereafter and continuously from the time it was made, and down to a short time before this action was begun, the owners of the Molino ditch never used more than 2.85 cubic feet per second of time of the 6.93 cubic feet which the decree gave it; and that plaintiffs, junior appropriators under the decree, and other appropriators from the same stream junior to defendant but senior to plaintiffs, had made their appropriations, and when they could get it—the common source of supply not being sufficient in times of scarcity to satisfy all consumers—used the water remaining in the stream after defendant had used the 2.85 cubic feet. Such subsequent nonuse for 14 years after the decree was accompanied by some circumstances tending to show that defendant did not intend to repossess itself of the excess. Abandonment, as applicable to water rights, consisting of act and intention, was thus supported by direct evidence of acts and conduct limited in time to a period subsequent to the statutory decree.

There can be no question, under the proof, that sufficient was shown to satisfy one of the elements of abandonment—nonuse. The other element, intention, a distinct and necessary ingredient of abandonment, must also

be shown. To prove the intention with which the owner ceased to use a part of the volume after the decree was entered, it is competent to show a similar state of facts before its rendition. Certainly evidence thereof cannot be prejudicial. The statutory decree confers no new rights, but, as this court has repeatedly held, embodies in the form of a permanent, binding decree the evidence of pre-existing rights. It does not purport to be a perpetual insurance or guaranty to the owner of a ditch against a total or partial loss of his priority by abandonment. In that way he may lose the rights resulting from an appropriation and evidenced by the decree, just as he may where they have been acquired by purchase and conveyed by deed. If the statutory adjudication had not been made, it would be admitted, we think, that on the issue of abandonment nonuse could be shown, irrespective of time. In neither case would antecedent acts be admissible to prove that the right, alleged to have been abandoned, never existed in whole or in part, for one cannot abandon that which he never possessed or which never was in esse. *Ditch Co. v. Ditch Co.*, 22 Colo. 115, 43 Pac. 540.

But because antecedent nonuse and similar acts by the owner of a part of a decreed priority may not be shown, either for the purpose of proving that he never was entitled to the entire decreed volume, or that, subsequent to the decree, he also omitted to use the volume in whole or in part awarded, it does not necessarily follow that such prior acts do not have a tendency to show an intention not to reclaim the thing the use of which has been discontinued since the decree was entered. On the contrary, nonuse and similar acts, before and after the decree, directly bear on the element of intention of the owner in the failure to use what was awarded him.

Evidence, though incompetent to prove one essential issue or element of a cause of action or defense, should not be excluded if it is competent to establish some other issue. So, here, evidence of the antecedent acts of which defendant complains, though not proper to prove the right of the owner to a less amount of water than that decreed to him, and not proper to show the element of nonuse in a subsequent abandonment, certainly is proper, and not prejudicial, as throwing light on the intention which the appropriator entertained when, for so long a time, he ceased after the decree to make use of a part of his decreed property.

We do not think the doctrine of the New Mercer Case is rightly applied by either party to the present action. It is not authority for the claim inferentially, though not expressly, made by plaintiff, that in a collateral attack the volume awarded by a decree is an open question. Neither can we agree with defendant that in a case like this, on the issue of subsequent abandonment, of which there is direct sufficient legal evidence, the admission

of acts antecedent to the decree is necessarily erroneous or prejudicial. We are satisfied that the abandonment alleged in this case has been proved, and that no error prejudicial to defendant has intervened.

We have deemed it advisable, in view of the apparent misconception by counsel of the doctrine announced in the New Mercer Case, to give our views thereon, and to distinguish between this and the O'Brien Case, *supra*. The views herein expressed are in harmony with the New Mercer Case, *Ditch Co. v. Ditch Co.*, *supra*, and *Water Co. v. Irrigation Co.*, 24 Colo. 322, 51 Pac. 490, 46 L. R. A. 322.

(2) But defendants say, upon the assumption that the abandonment has been proved, plaintiffs are not entitled to this injunction because the granting of it would be a vain thing, for, as they allege in the affirmative defense of their answer, and as they attempted to prove at the trial, if the abandoned excess of water were not turned into the headgate of the Molino ditch, but was allowed to flow down the stream, none of it would reach the headgates of any of plaintiffs' ditches, and therefore they would not be benefited by an injunction restraining defendants from diverting it. Whether defendants are in a position to invoke such a defense in view of the fact that, as to this excess, they abandoned it and have no right whatever to it after intervening rights of other and junior appropriators have become vested before defendants manifested an intention to reclaim it, we need not decide. Such questions are discussed and passed upon in *Clark v. Ashley*, 34 Colo. 285, 82 Pac. 588, *Lower Latham D. Co. v. Loudon I. C. Co.*, 27 Colo. 267, 60 Pac. 629, 83 Am. St. Rep. 80, and *Platte Valley I. Co. v. Buckers Co.*, 25 Colo. 77, 53 Pac. 334. Where a senior seeks to enjoin a junior appropriator of water from diverting the same to the injury of the former, and the junior appropriator seeks to avoid the same upon the ground that if the use which he threatens to make of it is restrained the owner of the senior right will derive no benefit, such a defense ought to be established by clear and satisfactory evidence. The infringement of a prior by the owner of a junior right constitutes a legal injury, and, before the junior can justify his acts of interference with the prior right upon the ground stated, a strong showing should be made. Upon this controverted issue of fact which the defendants have set up in their affirmative defense the evidence was conflicting, and the defense was not established to the satisfaction of the trial court. On the contrary, the evidence was legally sufficient to uphold its finding in plaintiffs' favor, and we cannot interfere with it.

Perceiving no prejudicial error, and the findings and decree of the court being sustained by the evidence, the judgment is affirmed.

Affirmed.

STEELE, C. J., and GABBERT, J., concur.

GABBERT J. (concurring specially). I concur in the judgment of affirmance; but on the question of abandonment, I do so for the reason that, in my opinion, the testimony bearing on the subject of nonuse of water, and other acts of the claimants through the Molino ditch subsequent to the decree, clearly establishes abandonment on their part, as found by the trial court, without regard to their use of water or capacity of their ditch prior to such decree. For this reason the evidence on the subject of abandonment objected to by appellants could not have been prejudicial, and the question of its competency is therefore immaterial.

FORNWALD et al. v. NELSON et al.

(Supreme Court of Colorado. Feb. 3, 1908.)

Appeal from District Court, Conejos County; Charles C. Holbrook, Judge.

Action by Piadad Nelson and others against Peter Fornwald and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Jesse Stephenson, for appellants. Ira J. Bloomfield, for appellees.

CAMPBELL, J. This is an action by plaintiffs, appellees here, appropriators and users of water for irrigation from the Alamosa river in water district No. 21, in this state, against defendants, appellants, appropriators from the same stream, to restrain the latter from diverting and using water from such stream to the injury of plaintiffs, who, as against defendants, are said to be prior appropriators. The judgment was for plaintiffs, and defendants appeal.

Precisely the same questions of law, and largely the same questions of fact, are involved in this case as in *Alamosa Creek Canal Co. v. Nelson*, the opinion in which is published in 93 Pac. 1112. Indeed, some of the evidence is exactly the same in both cases. Al these questions, we think, were correctly decided by the trial court, and upon the authority of the foregoing decision the judgment is affirmed.

Affirmed.

STEELE, C. J., and GABBERT, J., concur.

HUGHES v. KERSHOW et al.

(Supreme Court of Colorado. Feb. 3, 1908.)

1. FIXTURES—WHAT CONSTITUTE.

A lease of city lots provided that all improvements by the lessee should belong to him and might be removed during the last 60 days of the lease, if he had paid all rents and taxes to be paid by him. *Held*, that a five-story brick building erected on the lots by the lessee remained personal property during the lease; and, on failure to remove it as provided therein, it became a part of the real estate as a fixture.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, §§ 5, 64, 65.]

2. LIENS—LOSS OF LIEN.

The lien, if any, for money advanced for improvements made on premises by the lessee, is lost by the lessee's loss of the improvements by failure to remove them before the expiration of the lease as provided therein; the lien attaching only to the interest of the lessee.

3. SAME—PRIORITIES.

One who claims a lien on improvements on leased land for money advanced for such improvements cannot claim that the giving of a renewal of the lease without her knowledge invested the lienor with an absolute lien on the improvements free from the limitation to the lessee's interest, since she is presumed to know the date of the expiration of the lease, and is put on inquiry if the lessee fails to remove the improvements before its expiration; and, having failed to enforce her lien during the life of the lease, must be held to have acquiesced in the renewal lease and continue the lien subject thereto.

4. GUARDIAN AND WARD—AUTHORITY OF GUARDIAN.

A guardian of infants as lessor of premises has no power in the absence of express authority from the court, on the expiration of the lease, to agree to a lien on the improvements made by the lessee for advances to the lessee for such improvements.

5. LIENS—ENFORCEMENT—LACHES.

Delay of five years in suing to enforce a lien for money used in erecting improvements on leased premises, and almost five years more in bringing the action to trial without excuse, will defeat the claim.

6. SAME—PLEADING LACHES.

The defense of laches may be interposed in an action in equity to enforce a lien on property without being specially pleaded.

Appeal from District Court, Denver County; Peter L. Palmer, Judge.

Action by Margaret Hughes against Carlton M. Kershow and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Jeremiah Kershow died seised of three lots at the corner of Sixteenth and Market streets, Denver. These lots became the property of his minor sons. J. Henry Kershow, as guardian for such minors, in 1882 leased the same to Paul T. Hughes, for a period ending April 23, 1893. By the terms of the lease, "all erections and improvements and repairs made by party of the second part at any time during said term erected upon said premises" were to remain the property of the tenant Hughes. Within the sixty days last preceding the expiration of the time fixed in the lease Hughes was given the privilege of removing such erections, improvements, etc., provided he had then "discharged all rents,

taxes, and assessments" payable by him under the contract. The building first erected upon the premises was destroyed by fire in 1886. The insurance money not being sufficient to re-erect the kind of a structure desired, Hughes borrowed from appellant, who was plaintiff below and who was his wife, some \$10,000 or \$15,000 with which to finish the same. Mrs. Hughes took no notes or other evidences of this indebtedness, nor did she take any written security therefor. She asserts, however, that Hughes gave her a verbal lien upon the building as such security; and she further claims that after she had advanced some \$3,000 or \$4,000, and when the brickwork was only partly completed, J. Henry Kershow, the guardian, assured her that, if she would continue furnishing the money necessary to complete the building, he would see that she was repaid the same, and that she should have a lien on the improvement for all of the money so furnished. The building, being a brick structure covering the entire three lots and with a foundation capable of supporting five stories, was then completed; plaintiff furnishing the money. The lower part was used for stores. The upper part was finished off for and used as a theater. In December, 1892, four months before the expiration of the lease, owing to the hard times and other causes, Kershow, the guardian, and Hughes, the tenant, arranged for and completed the execution of a new lease extending the term of the tenancy to June 30, 1896, at a higher rental for the ground. Subsequently certain litigation arose between the parties, which was compromised and disposed of early in 1896. Through such compromise and settlement Hughes received a rebate of several thousand dollars upon rents due and \$2,000 in cash, and turned the possession of the premises over to his lessors. On the 16th of June, 1898, plaintiff begun the present action for the enforcement of the lien so claimed by her upon the building. The answer of J. H. Kershow, guardian, was filed on March 11, 1899. The cause came on for trial on May 19, 1903, decision being rendered August 17th of the same year. From the decree, which was in favor of defendants, plaintiff prosecuted the present appeal.

Whitford & May, for appellant. Wells & Chiles, for appellees.

HELM, J. (after stating the facts as above). The building erected by Paul T. Hughes upon the three lots at the corner of Sixteenth and Market streets, Denver, leased from the heirs of Jeremiah Kershow, through J. H. Kershow, guardian, is clearly within the class of improvements known in law as "fixtures." This structure, as re-erected after the fire, was of brick, covering the entire three lots, and with a foundation sufficiently strong to support a five story building. The ground floor was divided into storerooms and so used, while the upper portion was finished

off for theatrical purposes, and subsequently became known as the "Haymarket Theater." But the parties invested this structure with the character of personalty. In the lease it was expressly stipulated that all improvements erected upon the property by the lessee should belong to him, and that he might remove the same during the 60 days last preceding the expiration of the lease, provided he had paid all rents, taxes, and assessments agreed to be discharged by him. Thus by express contract the building mentioned became personal property during the life of the lease. This provision was for the benefit of the lessee; but, to avail himself of such benefit, it was incumbent upon him to remove the building before expiration of the contract. If he failed to do so in accordance with the terms specified, then upon expiration of the contract, by operation of law, the building ceased to be personalty. Its character as a fixture attached, and it at once became a part of the real estate. During the existence of the lease mentioned, plaintiff advanced to Hughes the tenant, who was her husband, an aggregate of about \$15,000 with which to rebuild or reconstruct the building first placed upon the leased ground and previously destroyed by fire. The loans thus made were not evidenced by writing, but, according to plaintiff's testimony, Hughes, as security therefor, gave her a verbal lien upon his interest so retained in the building. It is not necessary for the purposes of this case to consider the sufficiency of a lien thus created; for, assuming that this lien was valid and binding as between the parties, it could only extend to the interest held by Hughes in the property. And, when for any reason this interest legally terminated, plaintiff's lien thereon also terminated. Hence, as above observed, if Hughes allowed the period fixed in the lease to expire without payment of rents, taxes, and assessments and removal of the structure from the lots, as therein provided, the building became a part of the realty; that is to say, the inchoate right or claim of his lessors thereto ripened into complete ownership, and title vested in them. "It is hardly necessary to add that the plaintiffs can claim no better title to the property in controversy than that which was vested in the tenant under whom they claim as mortgagee. When the mortgage was made, the building and machine were fixtures annexed to the realty of the defendant by his tenant, and which the defendant had then the inchoate right to claim as part of the freehold if not seasonably disannexed before the term was ended." *Talbot v. Whipple*, 14 Allen (Mass.) 177. "Although the tenant possessed the right of removal, he was bound to exercise it if at all before his term expired or within the period limited by his lease, or, at all events, before quitting possession of the real estate upon which the trade fixtures were situated." *Mass. Nat. Bk. v. Shinn*, 18 App. Div. 282, 46 N. Y. Supp. 329;

Fitzgerald v. Anderson, 81 Wis. 342, 51 N. W. 534; *Smith v. Park*, 31 Minn. 70, 16 N. W. 490; *Free v. Stuart*, 39 Neb. 225, 57 N. W. 991. The giving of the new lease a few months before the original lease expired, extending the tenancy period on practically the same terms, did not operate to invest plaintiff with an absolute lien upon the structure, freed from limitation to the interest of Hughes. She says that this action was taken without her knowledge or consent, but she knew or must be presumed to have known the date fixed for expiration of the original lease. When her husband failed to take steps for removal of the building during the last 60 days of such period, she was put upon inquiry which would have disclosed the existence of the new contract; and, if she intended to assert her lien under the expiring lease, she should have taken appropriate steps so to do. Failing to assert her lien within the time fixed by that contract, she must at least be held to have acquiesced in the new lease and consented to the extension, intending to hold her lien subject thereto. She certainly can occupy no stronger position than that her lien continued to cover Hughes' interest under the new lease with the same force and effect it possessed under the former lease.

The conditions here are not analogous to the illustration used by counsel for appellant of two chattel mortgages given at different dates upon the same property. Undoubtedly in such case a release of the senior mortgage would invest the junior mortgagee with a paramount lien, even though a new mortgage were taken for the earlier debt. The lien of plaintiff under consideration being limited to the conditional interest reserved by Hughes in the building in the first lease, the only question arising is whether this lien perished altogether upon expiration of that lease, or whether under all the circumstances we can treat it as attaching to the interest of Hughes under the new lease. But when in 1896, shortly before expiration of the second lease, Hughes surrendered the tenancy and turned the property over to his lessors under an arrangement for distribution of accumulated rents, his title as tenant finally terminated, and all right or interest held by him in the building ceased. The character of the building as personalty disappeared. It became a part of the real estate and ownership vested in the landlord. It might, perhaps, be held that, when the interest of Hughes thus ceased, the lien of plaintiff upon that interest also ceased; but, giving plaintiff the benefit of the most favorable view we could possibly adopt, her lien could not have continued beyond June 30th following, the date at which the second lease expired by its own terms. And, when she allowed this period to pass and the possession to be retained by the landlord, without attempting to assert any right or interest claim-

ed under the lien, most assuredly the lien itself became ineffective and nonenforceable. In law she could not sit quietly by for two years, as she did, before taking steps to enforce her lien even had she possessed a right to such enforcement at the expiration of the period fixed by the second lease.

But counsel for appellant invite our attention to the alleged agreement of J. H. Ker-show, guardian for the minor heirs—owners of the lots, to recognize her claim or lien against the building; and they argue that by virtue of this agreement her status and rights as above indicated were in some way modified, so that her lien upon the building was preserved, and she was entitled to enforce the same in the present action. This agreement of the guardian is not clearly established by the evidence. It is denied by him. It is in certain respects, which we will not now enumerate, unreasonable and improbable. The trial court declined to determine the matter, saying that it was not material in view of his conclusion otherwise touching the case. But let us assume that the guardian did give plaintiff the assurances to which she testifies. His agreement that her advancements to Hughes should be returned was a mere verbal promise to answer for the debt of her husband, and was not binding even upon himself. And as guardian he had no power, certainly without express authority from the court, which nowhere appears, to place a lien or incumbrance upon the estate of his wards through such an agreement. His assurance, if he gave such an assurance, can only be regarded as an acquiescence by him in plaintiff's claim of a verbal lien upon the interest of Hughes in the building for moneys advanced by her. The foregoing conclusions require an affirmance of the decree under review, and it is not necessary to consider the additional questions discussed in the briefs and arguments on file.

If the view urged by counsel for appellant were correct, that plaintiff's lien was entirely independent of and unsupported by the second lease, her claim to relief would also be defeated by her laches. The first lease expired according to its own terms in April, 1893. Suit was not instituted by plaintiff until June, 1898, over five years after her cause of action, according to counsel's view, accrued; but this is not all. After instituting the action she did not bring it to trial until May, 1903, nearly five years later. No sufficient excuse, if indeed there could be one, appears in the record for either of these delays. This is an action in equity for the enforcement of a lien against property, and the wise and beneficent doctrine of laches is applicable, even though no such special plea is formally interposed by answer. In support of the foregoing suggestions in relation to plaintiff's laches, viz., that no formal plea thereof was necessary, that the delay in commencing this action should, under counsel's assumption above stated, operate as a bar

thereto, and that such unreasonable delay in prosecuting a suit, even though it be commenced in time, might in and of itself bar a recovery in equity, we cite the following authorities: *Hagerman v. Bates*, 5 Colo. App. 402, 38 Pac. 1100; *Hagerman v. Bates*, 24 Colo. 80, 49 Pac. 139; *Sullivan v. Portland R. R. Co.*, 94 U. S. 811, 24 L. Ed. 324; *Johnston v. Standard Min. Co.*, 148 U. S. 370, 13 Sup. Ct. 585, 37 L. Ed. 480; *McKnight v. Taylor*, 1 How. (U. S.) 168, 11 L. Ed. 86; *Terry v. Fontaine's Adm'r et al.*, 83 Va. 455, 2 S. E. 743; *Great West Min. Co. v. Woodmas of A. Min. Co.*, 14 Colo. 90, 23 Pac. 908; *Graff v. Town Co.*, 12 Colo. App. 112, 54 Pac. 854.

The judgment of the court below must be affirmed.

Affirmed.

STEELE, C. J., and MAXWELL, J., concur.

WITHERBEE et al. v. WALKER.

(Supreme Court of Colorado. Feb. 3, 1908.)

1. BROKERS—RIGHT TO COMMISSIONS—EFFICIENT CAUSE OF SALE.

A real estate broker, who merely calls the attention of a church officer to a lot he has for sale, telling him the price, is not the efficient and procuring cause of the sale to the church, and so cannot recover commissions therefor; the church refusing to make the purchase through him, never making him an offer, and buying the lot through another agent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 65-74.]

2. SAME.

Where an owner of land openly places it for sale with rival real estate agents, and one of them, the first to make the attempt, makes a sale to a customer to whom the other had unsuccessfully tried to sell it, the latter is not entitled to commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 65-74.]

Appeal from District Court, City and County of Denver; John I. Mullins, Judge.

Action by Guernsey Walker against Lewis C. Witherbee and others. Judgment for plaintiff. Defendants appeal. Reversed and remanded, with instructions.

George K. Andrews, for appellants.

CAMPBELL, J. This action is by a broker to recover commissions for the sale of defendants' real estate. Trial before the jury resulted in favor of plaintiff, and defendants appeal.

The court should have granted defendants' motion for nonsuit, made at the close of plaintiff's case, and renewed after defendants produced their evidence. There is some doubt whether, under the evidence, the contract of employment was established. Plaintiff asked and obtained from the owners the price at which they were willing to sell, and it is uncertain whether anything more was done in that direction. In *Castner v. Richardson*, 18 Colo. 496, 33 Pac. 163, it was said this does not give rise to the relation of prin-

cial and agent between the parties. But for the purpose of the opinion it may be assumed that the contract of employment was proved. Let us, then, examine the evidence to see if plaintiff, under the law applicable to this case, earned a fee.

We first state the testimony of plaintiff himself. A church society wanted to buy this kind of property. Plaintiff interviewed an officer of the church, and called his attention to defendants' city lots, and told him the price at which they could be bought. Plaintiff does not say that his offer was accepted, or that a counter offer was made by the proposed purchaser. Plaintiff did not report to the owners this effort, or that he had procured, or was in negotiation with, a purchaser. About 10 days after he listed the property for sale one of the defendants came into his office and asked if the lots were sold, or would be taken by his party, apparently referring to the church. Plaintiff said that the sale was not complete, and the defendant owner replied, in substance, that "they," i. e., the church, had been corresponding with defendants through another agent, and were not dealing fairly by plaintiff, whereupon plaintiff told the owner not to sell to the church, as it was his customer, and he would hold defendants for the commission. Defendant asked plaintiff to buy the lots himself, but plaintiff said he could not. Plaintiff says that he told the owner of the efforts that he had made to make the sale. Two or three days after this conversation plaintiff learned that another broker of defendants had sold the property, through a third person, as trustee, to the church, and, upon defendants' refusal to pay his claim for brokerage fee, this action was brought.

Some of the officers or members of the church were called by plaintiff as his witnesses, and they testified that for some reason the church officers, who had the power to buy, refused to make the purchase of the lots through plaintiff, and never made him any offer for them, and refused to deal with him, but bought through another agent. Plaintiff was not the efficient and procuring cause of the sale, and, on his own showing, was not entitled to a commission. The nonsuit should have been granted when his evidence was in.

When defendants renewed such motion at the close of their case, for another reason, also, should the court have granted it. From the uncontroverted evidence produced by defendants it appears that the sale was actually made by another broker, Mr. Merritt, and that he began negotiations with defendants to secure this property for the church before it was listed for sale by defendants with plaintiff, and, therefore, first called the attention of the church to it. Before, and during, the time of plaintiff's efforts to sell, there were posted upon the lots at least two "For Sale" signs by two different agents, and the

property had openly, and without any attempt at concealment, been placed by defendants with a number of different agents before plaintiff's authority to sell was given. Plaintiff was not given a monopoly of the sale of these lots. The sale, as made, was for \$100 less than the price quoted to plaintiff.

Throughout the negotiations between the church and the various agents there is not a word of evidence that defendants interfered therewith, or favored one agent as against another. They remained neutral throughout. Merritt was paid his commission by defendants for making the sale before this action was brought. There is nothing tending to impeach the entire good faith of defendants. Under the uncontradicted evidence of both parties, plaintiff did not procure a purchaser, able, willing, and ready to buy at the price for which he might sell. Indeed his party absolutely refused to buy through, or deal with, him, and for such refusal defendants are not to blame. We do not say that the officers of the church were guilty of the improper conduct which plaintiff charges against them; but, if they were, defendants are not, in any way, connected therewith. In two respects there was a failure of proof: First, plaintiff was not the efficient and procuring cause of the sale; second, the case is also one where the owners of property openly placed it for sale with rival real estate agents, and one of them, the first to make the attempt, made a sale to a customer to whom the other had unsuccessfully tried to sell the same property. The owner, therefore, was liable for commissions only to the agent who made the sale, and plaintiff, the unsuccessful agent, was not entitled to recover. *Carper v. Sweet*, 26 Colo. 547, 59 Pac. 45; *Scott v. Lloyd*, 19 Colo. 401, 35 Pac. 733; *Babcock v. Merritt*, 1 Colo. App. 84, 27 Pac. 882; *Lawrence v. Weir*, 3 Colo. App. 401, 33 Pac. 646; *Vreeland v. Vetterlein*, 33 N. J. Law, 247.

The judgment is reversed, and the cause remanded, with instructions to dismiss the action.

Reversed.

STEELE, C. J., and GABBERT, J., concur.

WILLIAMS v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Supreme Court of Colorado. Feb. 3, 1908.)

WILLS — CONTEST — APPEAL — BONDS — LIABILITY—ATTORNEY'S FEES.

A bond given by a contestant in a will contest on an appeal from an adverse judgment of the county court, conditioned on his performing whatever judgment may be rendered against him, and on his paying all "damages" which the executor has sustained by reason of the appeal, does not authorize a recovery of attorney's fees paid by the executor in successfully resisting the appeal.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 2, pp. 1818, 1819.]

Error to District Court, City and County of Denver; John I. Mullins, Judge.

Action by Frederick A. Williams, executor of Caroline M. Rice, deceased, against the Fidelity & Deposit Company of Maryland. There was a judgment for defendant, and plaintiff brings error. Affirmed.

F. A. Williams, pro se. Guy Lee R. Stevick, for defendant in error.

CAMPBELL, J. Action on an appeal bond. The plaintiff in error, Williams, is executor of the last will and testament of Caroline M. Rice, deceased. The will was contested in the county court of Arapahoe county by Edward E. Rice and Caroline E. Rice, and there sustained and admitted to probate. The contestants perfected an appeal to the district court, and gave an appeal bond signed by defendant in error as surety, which bond was conditioned that contestants "shall abide, fulfill, and perform whatever judgment may be rendered against them in said district court, and shall pay all damages which the said Frederick A. Williams, * * * executor as aforesaid, may sustain, by reason of such appeal and the delay incident thereto, and shall pay all costs." On trial de novo in the district court the will was again sustained and admitted to probate, whereupon the executor Williams brought this action against defendant in error, surety on the appeal bond, to recover the sum of \$500 which he had paid as attorney's fees in the district court on the appeal. The judgment was for defendant, and plaintiff sued out this writ of error.

Counsel are agreed that at common law attorney's fees paid in resisting an unsuccessful appeal could not be recovered as damages on the appeal bond. Plaintiff in error admits that, in the absence of a statute or contract so providing, they are not now recoverable in this state, but his contention is that the condition in this bond provides for them. He says that in the highest courts of most of the states of the Union, though not in the federal courts, attorney's fees disbursed in securing the dissolution of a writ of attachment or injunction may be recovered in an action on the bond as a part of the legal damages sustained by the wrongful issuing of the writ when the condition of the bond, on which it was based, provides for the recovery of "damages." This court and our Court of Appeals have so held in actions on injunction bonds (*Belmont M. Co. v. Costigan*, 21 Colo. 465, 42 Pac. 650; *Church v. Baker*, 18 Colo. App. 369, 71 Pac. 888), and possibly the same rule would be followed in actions upon attachment bonds. The tendency of the courts is not to extend the meaning of "damages" to include such elements as attorney's fees. The reason usually given for awarding as damages counsel fees incurred for services rendered in dissolving injunctions and writs of attachment is that they are provisional or extraordinary

remedies, ancillary to the main purpose of the suit, and, as the granting of the writ secures to the applicant some privilege or right not incident to ordinary remedies, it is but reasonable to hold that "damages," as used in the bond upon which the granting of the writ is conditioned, embraces attorney's fees.

But this reason does not apply to appeal or supersedeas bonds in ordinary civil actions or will contests, and we are not inclined to extend to actions thereon the doctrine pertinent to injunction and attachment bonds, and allow as part of the legal damages attorney's fees which the obligee in the former kind of security has paid in resisting an unsuccessful appeal or writ of error. While this point has not hitherto been expressly ruled in this state, it is in line with the reasoning and intimation of several of the decisions of this court and our Court of Appeals. *Tabor v. Clark*, 15 Colo. 435, 25 Pac. 181; *Joslin v. Teats*, 5 Colo. App. 531, 534, 39 Pac. 349; *Spencer v. Murphy*, 6 Colo. App. 453, 41 Pac. 841. So far as we are advised, only the Supreme Court of Alabama adheres to a different doctrine. While the decisions of that eminent court are entitled to great respect, we think the weight of authority, as well as reason, is in favor of the conclusion which we have reached. The authorities are collated in 2 Cyc. 958, and 1 Enc. Pl. & Pr. 1015.

The determination of the other points raised by plaintiff in error not being necessary to a determination of this writ, they have not been considered. The judgment is affirmed.

Affirmed.

STEELE, C. J., and GABBERT, J., concur.

KERR v. BURNS et al.

(Supreme Court of Colorado. Feb. 3, 1908.)

1. COURTS—JURISDICTION—COLORADO DISTRICT COURTS—WATER RIGHTS.

Const. art. 6, § 11, giving the district court jurisdiction of all causes both at law and equity, gives jurisdiction to determine claims to priorities in the appropriation of water from public streams, and that jurisdiction is not affected by the statutes dividing the state into water districts, and providing for the adjudication of priorities in those districts.

2. SAME—WAIVER OF OBJECTIONS.

The district court having had jurisdiction of the subject-matter of a suit to award priorities in the appropriation of waters from a stream, a defendant therein is estopped to assert for the first time in a suit brought nine years later that the court in the first suit was without jurisdiction on the ground that the adjudication should, under the statutes, have covered all the priorities in the district, and not merely priorities for water from such stream, where defendant voluntarily submitted himself to the jurisdiction of the court in the first suit, and fully participated in the proceedings, excepted to the findings and decree proposed by the referee, appealed from a judgment approving such decree, which judgment was affirmed, and received water according to the award.

3. JUDGES—DISQUALIFICATION—CONSENT.

Under Mills' Ann. Code, § 429, providing that a judge shall not sit in a case in which he has been an attorney unless by consent of all the parties, a judge who had acted as an attorney for one of the parties was not disqualified where all the parties participated in the suit without objecting to his sitting; such acquiescence being equivalent to affirmative consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, § 233.]

4. VENUE — CHANGE — RIGHT — DISQUALIFICATION OF JUDGE.

Mills' Ann. Code, § 29, providing for a change of venue when the judge is disqualified to try the action, did not require a change of venue in an action to enjoin parties holding decreed water priorities from taking more than they are entitled to, because the judge was an attorney in the suit in which the priorities were adjudicated.

5. APPEAL—DISCRETION OF TRIAL COURT.

The granting or refusing of changes of venue is discretionary, and a refusal is not reviewable, unless there has been obvious abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3836.]

6. JUDGMENT—CONCLUSIVENESS.

All questions determined by a decree, adjudicating water priorities, affirmed on appeal, are res judicata, for the purpose of a subsequent suit against appellant and another to enjoin them from taking more water than they are entitled to do under one of the priorities.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1251.]

Error to District Court, La Plata County; James L. Russell, Judge.

Suit by Thomas D. Burns and others against Thomas A. Kerr and another. From the decree, defendant Kerr brings error. Affirmed.

In April, 1897, a final decree was entered by the district court of La Plata county in a proceeding for the adjudication of the water rights connected with the waters of Hermosa creek, begun in October, 1893. By this decree priority No. 3 was awarded for 1 cubic foot of water per second to irrigate 35 acres of land, a part of which land belongs to plaintiff in error, who was defendant below, and the remainder to one Mead. By the same decree priority No. 4 for 9 cubic feet of water per second to irrigate 435 acres of land, and priority No. 8 for 2 cubic feet of water per second to irrigate 70 acres of land, were awarded to defendants in error, who were plaintiffs below. To the referee's findings in that proceeding plaintiff in error filed and argued exceptions, and, after final decree was entered thereon, appealed the case to this court, where the decree was affirmed. Hermosa creek is a tributary of the Rio Las Animas river; and the lands in the state of Colorado irrigated by ditches or canals taking water from this river and its tributaries constitute water district No. 30. On the 11th of February, 1902, a complaint was filed in the present action by defendants in error, who were the owners of the water covered by said priori-

ties 4 and 8, with the exception of a small interest belonging to one McNally, against plaintiff in error Kerr and the said Mead. This complaint set forth a portion of the said water decree showing the distribution therein of water to said priorities, the action of the water commissioner in distributing the water according to the decree, the alleged violation of the decree and of the rights of defendants in error by said Kerr and Mead through the diversion and use of more than the one foot of water awarded to priority No. 3; and a permanent injunction against the continuation of such alleged illegal and injurious diversion and use was prayed for. At the date of the institution of the original water adjudication proceeding above mentioned James L. Russell appeared therein as attorney for one William G. Allen, in 1895, and while said water adjudication was pending, said James L. Russell was elected judge of the district court of said district, and as such judge he proceeded with the adjudication, appointing a referee, receiving and approving the referee's report, and entering the said final decree thereon. He also presided at the trial of this cause below.

O. S. Galbreath, for plaintiff in error.
Reese McCloskey, for defendants in error.

HELM, J. (after stating the facts as above). The most important objection presented by the record before us is based upon the assertion of counsel for plaintiff in error that the complaint filed herein fails to state a cause of action. This contention would, if true, of course, nullify the proceedings below, and require a reversal of the judgment entered upon such complaint. The present action is in equity. It is based upon the refusal of plaintiff in error and another to comply with a decree entered in 1897, adjudicating water priorities to appropriators from Hermosa creek in La Plata county; such refusal resulting in injury to defendants in error, whose priorities were adjudicated at the same time, but were junior to that of plaintiff in error. The object of the action is to enjoin the latter and one Mead from using a greater quantity of water than they are entitled to use under said decree. So much of that water decree as covers the rights of the parties hereto is necessarily set forth in the complaint, and, of course, constitutes the basis of the action.

In support of the contention that the complaint fails to state a cause of action, plaintiff in error insists that said water decree of 1897 is absolutely void, and without any force or effect. This alleged invalidity is made to rest upon the fact that that adjudication only related to priorities for water from Hermosa creek; whereas, so it is contended, the cause should have covered priorities for the entire water district No. 30,

of which the lands irrigated from Hermosa creek were only a portion. Counsel urges the view that since the adoption of statutes dividing the state into water districts, and providing for the adjudication of water priorities in those districts, no such proceeding as the one under consideration could take place; that water priorities must be determined for the entire district or not at all, there being no authority for adjudicating the same "piecemeal"; and, therefore, that the court in said Hermosa creek proceeding had no jurisdiction over the subject-matter. We are not now called upon to consider the status or rights of an appropriator from the Las Animas river below the mouth of Hermosa creek, which is a tributary of said stream. No such appropriator is here complaining; and the petition originally filed in that proceeding averred, among other things, that the Animas river below the mouth of Hermosa creek carried a volume of water greatly in excess of the quantity diverted by all appropriators from said river. The interest of plaintiff in error is confined to water taken from Hermosa creek. By article 6, § 11, Const., the district court is given jurisdiction of all causes both at law and in equity. This jurisdiction is amply broad enough to cover the determination of questions relating to priorities in the appropriation of water from the public streams of the state. The statutes referred to by counsel were adopted for the purpose of enabling parties to adjudicate in one proceeding all such priorities throughout a prescribed district covering, so far as possible, a single natural stream with its tributaries. They do not enlarge or limit the constitutional jurisdiction of the district court in this respect. They simply designate that court as the exclusive tribunal for the trial of such proceedings. *Broadmoor D. Co. v. Brookside W. & I. Co.*, 24 Colo. 541, 52 Pac. 792. The district court of La Plata county, therefore, had jurisdiction over the subject-matter involved in the adjudication and decree of 1897. Plaintiff in error was a party to that proceeding. He voluntarily appeared, and, without objection, submitted himself to the jurisdiction of the court. He offered evidence touching his claims to water, and fully participated in the hearings before the referee. He excepted to the findings and decree proposed by the referee, and argued his exceptions before the court. From the judgment of the trial court approving that decree, he appealed to this court, and again presented and argued all matters complained of in the proceeding; and this court, after full and careful consideration, affirmed the decree. *Kerr v. Dudley*, 26 Colo. 457, 58 Pac. 610. At no time from the beginning to the end of the water proceeding did plaintiff in error suggest the jurisdictional objection now urged. It was only upon the institution of the present action over nine years subsequent to the commencement of said cause that he first

attempted to raise this question. Moreover, during the period between the entries of the said decree and the beginning of the present action plaintiff in error accepted the fruits of that adjudication. He received water according to the terms of the award therein made. He received and used water awarded by priority numbered 1, as well as that given under priority numbered 3, which latter priority is specifically involved in the case at bar. And, even if the water decree of 1897 were void, plaintiff in error would be now estopped from repudiating or assailing the same. *D. C. I. & W. Co. v. Middaugh*, 12 Colo. 436, 21 Pac. 565, 13 Am. St. Rep. 234; *Arthur v. Israel*, 15 Colo. 152, 25 Pac. 81, 10 L. R. A. 693, 22 Am. St. Rep. 381; *Handy Ditch Co. v. South Side Ditch Co.*, 26 Colo. 330, 58 Pac. 30.

In view of the foregoing conclusion in relation to the decree entered in the water priority adjudication, it is needless to discuss the further claim that said decree was void because the presiding judge was counsel for one of the parties at the inception of that proceeding in 1893. Besides, this objection does not go to jurisdiction over the subject-matter. The statute upon which plaintiff in error relies—Civ. Code (Mills' Ann. Code) § 429—does not disqualify the judge under such circumstances when all parties consent to his acting. All the other parties to that proceeding, as well as plaintiff in error, voluntarily appeared therein, taking active part without objection or protest in this respect. From first to last the action of Judge Russell in presiding over those proceedings was acquiesced in by every one in any manner connected therewith. And such acquiescence must be held equivalent to an affirmative consent. The present objection, therefore, even had it been presented to this court on the appeal from the priority adjudication itself, would have been overruled. Much less is it available in the present controversy. Other reasons there are why this objection cannot now be favorably considered; but the foregoing is decisive.

The only remaining challenge worthy of notice attacks the court's action in overruling the motion of plaintiff in error for a change of venue. This motion also rests upon the fact last above considered, viz., that Judge Russell, who presided in the present cause, likewise presided at the final trial of the Hermosa creek water adjudication, notwithstanding he had appeared as counsel for one of the parties at the institution of that proceeding. Our Civil Code (Mills' Ann. Code, § 29) provides for a change of venue "when from any cause the judge is disqualified to try the action." The "action" there referred to is the action in which the motion for a change of venue is made. There is no claim that Judge Russell was ever attorney in the case at bar for any of the parties thereto. The specific objection urged in this connection is that he was counsel for

a party at the inception of another and different proceeding which was terminated by final decree five years before the present cause was instituted. Clearly the judge was not disqualified to try this cause by virtue of the inhibition contained in section 429 of the Code above referred to. He might have granted the motion for a change of venue without error; but the granting or refusing of such motions is discretionary, and, unless there is obvious abuse of discretion, the refusal thereof is not reviewable. *Doll v. Stewart*, 30 Colo. 327, 70 Pac. 326.

The subject-matter of this action is wholly different from that involved in the earlier proceeding. That was an adjudication of priorities between parties claiming different appropriations from the same natural stream. This is an action in equity to enjoin parties holding a certain decreed priority from taking more water than they are entitled to take under such priority, to the injury of plaintiffs, who claim by virtue of a junior priority given in the same decree. True, it happens that the present action is to maintain rights covered by the decree in the former proceeding. But obviously the issues, the evidence, and the modes of procedure are widely different. And, since that decree is upheld as against the challenge of plaintiff in error in this case, all questions therein determined are for the present purpose *res judicata*. Had a motion for a change of venue been submitted in the Hermosa creek water adjudication upon the ground now urged, the objection would have been within the statute and the cases cited by counsel might have been pertinent. But in *People ex rel. v. District Court*, 26 Colo. 226, 56 Pac. 1115, the county judge was entertaining and proceeding to hear an application to set aside the judgment entered by his predecessor two years before, in a case where he had acted as counsel for the losing party at the trial. And in *O'Connell v. Gavett*, 7 Colo. 41, 1 Pac. 902, the county judge was about to try a case in which he had been counsel for the losing party at a former trial, wherein, on motion, a new trial had previously been allowed. No special intelligence or ability is required to discover the radical difference between the action of those judges in denying motions for a change of venue and the action of the trial judge in denying a similar motion in the case at bar; and, upon careful consideration of all the facts and circumstances, we cannot hold that there was here such an abuse of discretion as requires a reversal of the judgment or decree now under review.

Several other matters are earnestly urged as constituting fatal errors at the trial below; but all of these objections relate either to irregularities which could not have been prejudicial to plaintiff in error, or deal with matters touching the trial of the Hermosa creek water priority adjudication.

These objections are not well taken, and a discussion thereof would not be profitable.

The decree of the court below is accordingly affirmed.

Affirmed.

STEELE, C. J., and MAXWELL, J., concur.

SCOTT SUPPLY & TOOL CO. v. ROBERTS.

(Supreme Court of Colorado. Feb. 3, 1908.)

1. APPEAL—ESTOPPEL TO COMPLAIN OF RULING ON EVIDENCE.

Even if a word as used in a contract was unambiguous, plaintiff cannot avail itself of the objection to evidence of its meaning, having also introduced testimony of the same tenor and effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3591-3610.]

2. SALES — CONTRACT — CONSTRUCTION — "PLANT."

Where plaintiff's agent, when taking an order from defendant for an engine with connections, was present at defendant's well, wherein was installed a pump, invented by defendant, and knew that defendant desired to obtain power to utilize the pump in raising water to irrigate his crop, the word "plant," in the provision of the order that payment shall be as soon as "plant" is running in good order, will be held to cover and include the pump as well as the engine; its operation being essential to accomplish the purpose desired.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5400, 5401; vol. 8, p. 7753.]

3. APPEAL—HARMLESS ERROR.

Any error in submitting to the jury a question clearly determined by a contract on its face is harmless; their finding being in conformity to such construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4225-4228.]

Error to Weld County Court; Charles E. Southard, Judge.

Action by the Scott Supply & Tool Company against John P. Roberts. Judgment for defendant. Plaintiff brings error. Affirmed.

H. E. Churchill (Joseph C. Ewing, of counsel), for plaintiff in error. Elbert C. Smith, for defendant in error.

GODDARD, J. The facts upon which this controversy arises are, in brief, as follows: On August 11, 1902, the plaintiff in error sold to defendant in error a certain gasoline engine and appurtenances at and for the agreed price of \$575, to be operated in pumping water from a well on defendant's land to irrigate about 60 acres planted in potatoes. Defendant admits the purchase of the engine and appliances upon the terms and conditions set forth in the following written order:

"The Scott Supply & Tool Co., Denver, Colo.:

"Ship to John P. Roberts.

"How ship: F. by U. P. R. R.

"When: At once.

"Terms: Cash, as soon as plant is running in good order.

"One 14-H. P. Charter engine with all the connections including battery and 50 feet of 6-ply O-8 inch rubber belt. Will furnish a man to set it up. Party to pay expenses from Denver. No charge for time of man.

"Price, f. o. b. Denver, \$575.

"[Signed] John P. Roberts."

And he claims that the plant referred to in the order was to be put in good running order by the 13th day of August, 1902; that the plant was not put in good running order on the 13th, or at any time; and that on the 20th day of August, 1902, he rescinded said order, and gave plaintiff notice that he would not accept the engine. Plaintiff, on the other hand, insists that it delivered the engine and accessories at the time and fully complied with the terms of the contract. There is a marked conflict in the testimony introduced by the respective parties as to the actual operation of the engine and pump; that of the plaintiff being to the effect that the plant, including the pump, was put in good running order, and successfully operated, that of defendant to the effect that not only the plant, including the pump, was not put in good running order, but that the engine itself was never put in good running order. There was testimony given by disinterested witnesses to support both of defendant's contentions, and upon which the jury, in the exercise of its province to determine the weight of evidence and credibility of witnesses, might have based its verdict for defendant; but, since their finding might have been, and probably was, based upon the theory that the word "plant," as used in the written order, included the pump, as well as the engine by which it was to be operated, it becomes necessary to determine what the word "plant" referred to and was intended to cover in the circumstances surrounding the transaction.

Counsel for plaintiff in error insists that the word "plant," as here used, was unambiguous when considered with the actual state of the subject-matter at the time of the execution of the contract of sale, and plainly referred only to the engine itself and attachments, and assigns as error the ruling of the court in admitting testimony offered by the defendant as to the construction that should be placed upon the written contract above mentioned. Whether the court erred in this particular we do not feel called upon to determine, since the plaintiff is not in a position to avail itself of this objection, having on its own behalf introduced testimony of the same tenor and effect. Experts called by defendant were allowed to testify, without objection, to the meaning of the word "plant" when used in connection with an engine and pump, as in this case, and in rebuttal plaintiff in error offered to prove by William Nash, the agent of plaintiff who made the sale, what the term "plant," as used in the order, would imply. The Century Dictionary defines the word "plant" as "the fixtures,

machinery, tools, apparatus, appliances, etc., necessary to carry on any trade or mechanical business, or any mechanical operation or process." In *Yarmouth v. France*, 19 Q. B. D. 647, at page 658, Lindley, L. J., says, that "plant" in its ordinary sense "includes whatever apparatus is used by a business man in carrying on his business, * * * all goods and chattels fixed or movable, live or dead, which he keeps for permanent employment in his business." Reading this contract in the light of these definitions, and the circumstances surrounding the parties at the time of its execution, and the object and purpose for which the engine was purchased by defendant, the word "plant," as therein used, was clearly intended to cover the pump, as well as the engine, and that both parties so regarded and understood it. Mr. Nash, the agent of the plaintiff, at the time he procured the order was present at the well of the defendant wherein was installed a pump of which he was the inventor, and knew that the defendant desired to obtain power to utilize this pump in raising water from a well that afforded an abundant supply for the purpose of irrigating his crop of potatoes. It was therefore manifest to him that the defendant desired to purchase, and contracted for, the engine to operate the pump. In such circumstances it was manifestly intended and understood that the word "plant," as used in the contract of purchase, should cover and include the pump, as well as the engine, since its operation was essential to accomplish the purpose desired. And it follows therefore that if the court did err in submitting to the jury a question that was clearly determined by the contract on its face, and their finding was in conformity with such construction, such action, if erroneous, in no way prejudiced the rights of the plaintiff.

Error is also assigned upon the giving and refusing of other instructions which, after careful consideration, we think are untenable. The instructions given by the court fully and fairly announced the law, and embodied, in substance, the instructions asked by the plaintiff which were refused so far as they express the law. In lieu of giving plaintiff's instruction No. 5, the court instructed the jury as follows: "You are further instructed that if the engine furnished * * * was sufficient to operate an ordinary pump of the character and description and purposes of the pump on defendant's premises, but on account of some fault or defect in the pump, unknown to the plaintiff, plaintiff was prevented from putting the pump in good order and operating the said pump, then you will find for the plaintiff." And, further: "That if from the evidence you find that it was the intention of the parties to this suit that the defendant was to pay for the engine when it was put in good running order by the plaintiff, and that it was put in good running order by the plaintiff, then you should find for the plaintiff."

The further error assigned and argued is that the judgment is contrary to the law and the evidence. After carefully examining the record, we are satisfied that the judgment is supported by the evidence and conforms to the law as we have announced it.

The judgment is affirmed.
Affirmed.

STEELE, C. J., and BAILEY, J., concur.

AGRICULTURAL DITCH CO. et al. v. ROLLINS.

(Supreme Court of Colorado. Feb. 3, 1908.)

MANDAMUS—GROUNDS—PERFORMANCE OF IMPOSSIBLE ACTS.

In mandamus to compel a ditch company to transfer shares of stock to petitioner, and to deliver to him during the irrigation season of a designated year the quantity of water to which such shares entitle the owner, a judgment awarding the writ rendered after the expiration of the irrigation season for the designated year is erroneous, under the rule that courts do not order performance of impossible acts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 48.]

Appeal from District Court, City and County of Denver; Peter L. Palmer, Judge.

Mandamus by Robert P. Rollins against the Agricultural Ditch Company and others to compel respondents to transfer capital stock to relator, and to deliver to him during an irrigation season a quantity of water. From a judgment awarding the peremptory writ, respondents appeal. Reversed and remanded.

J. W. Barnes, for appellants. William Young and C. L. Dickerson, for appellee.

CAMPBELL, J. The appellee, Robert P. Rollins, as petitioner, sought by writ of mandamus to compel the respondent ditch company and its officers to transfer upon its books four shares of its capital stock, which he had acquired by purchase, and to deliver to him during the irrigation season of 1903 the quantity of water to which these shares of stock in the company entitled their owner. From a judgment awarding the peremptory writ, the respondents appealed.

The alternative writ states that the respondent ditch company is a mutual benefit company organized under the laws of this state solely for the purpose of carrying and delivering to its stockholders water for irrigating their lands, and is in no sense a carrier of water for sale, rent, hire, or profit, otherwise than to its stockholders and at such charges as are necessary, the amount to be ascertained by its officers, to defray the actual expenses necessary or incidental to the keeping up of the ditch. It is alleged that the petitioner tendered to the proper officers of the company such charges for the year 1903 to be paid by him, and demanded of them an immediate delivery of water to irri-

gate his lands, which then were in need thereof for growing crops; but they refused either to transfer the stock or deliver the water, and the alternative writ commanded them to do so on or before June 2, 1903, or show cause why they should not. To the alternative writ the respondent company and its officers filed an answer, in which they said that this stock which plaintiff purchased was delinquent for various amounts due thereon to the respondent company by the former owner, and that petitioner refused to pay the same, although he knew of such delinquency at the time of his purchase; and respondents say that, until such arrearages are paid, defendant is not entitled to receive water to irrigate his lands during any irrigating season.

The respondents further claim that a writ of mandamus will not be granted to compel a private corporation to transfer stock upon its books, because the petitioner has an adequate remedy for damages against its officers if they wrongfully refuse to make the transfer. As to the question of the remedy, the authorities are in conflict. *Butterfly-Terrible Gold Mining Co. v. Brind* (Colo.) 91 Pac. 1101. We do not find it necessary to determine that question, or whether the facts set up in the answer to the alternative writ were proved, and, if so, whether they constituted a defense. The trial court found the issues both of law and fact in favor of petitioner, and awarded the peremptory writ. The hearing was had at the close of the year 1903, but final judgment awarding the peremptory writ was not rendered until May, 1904, long after the expiration of the season of irrigation for the year 1903. This judgment was manifestly improper. The object of petitioner was not to secure a decree establishing in him a perpetual water right, but the most that he can claim is that his object was temporary relief to secure a delivery to him of water during the irrigating season of 1903. Courts do not order performance of impossible acts, and the award of a peremptory writ in 1904 to compel the delivery of water during the year 1903 is impossible of fulfillment. That a judgment, such as was entered here, is wrong, has been expressly ruled by this court in *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 596, 17 Pac. 487, 3 Am. St. Rep. 603; *Townsend v. Fulton, &c.*, 17 Colo. 142, 29 Pac. 453; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 28 Pac. 966, 31 Am. St. Rep. 275.

Since the proceeding by petitioner was to obtain relief for a particular year, nothing could be gained by him by a new trial. The judgment, therefore, should be reversed and the cause remanded, with instructions to the district court to permit petitioner to dismiss his action without prejudice.

Reversed.

STEELE, C. J., and GABBERT, J., concur.

CHICAGO, B. & Q. R. CO. v. PROVOLT et al.
(Supreme Court of Colorado. Feb. 3, 1908.)

1. ASSIGNMENTS—VALIDITY—FUTURE WAGES.
An assignment of wages to be earned in the future is not void as against public policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 19-23.]

2. SAME.

An assignment of wages to be earned in the future is not violative of any provision of the Constitution of the United States, of the state, or of any statute of the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 19-23.]

3. SAME — ACTIONS — EVIDENCE — PRESUMPTIONS AND BURDEN OF PROOF.

In an action for assigned wages, assignee is not required to prove that at the time of notice of assignment wages remained due from defendant to assignor, but, on proof of the amount earned, the presumption of law is that it remained unpaid and payment or other extinguishment is a matter of defense.

4. SAME.

An assignment recited that assignor sold to assignee for the sum of \$27.50 any and all his salary, amounting to \$75 a month for one year, "or until such time as the sum as written above has been paid," authorized assignor to collect his salary on condition that he turn over to assignee \$27.50 on each pay day "until the amount as written above has been paid," and provided that, on failure to do so, his authority to collect should become void, and assignee should collect "until the total amount collected and retained shall amount to \$27.50"; that, on assignor's leaving his then employment "at any time before the full amount of \$27.50 has been received," then assignee should have authority for 10 years to collect the salary of assignor from any one by whom employed "until the amount collected and retained shall amount to \$27.50"; and that it was agreed "that, when the amount due has been paid in full, this contract shall become null and void." Held, that the assignment was simply security for money loaned, and not an absolute assignment of all the wages of assignor for the time stated, notwithstanding it purported to be of "any and all salary"; and hence, in an action for the assigned wages, proof of the amount due from assignor to assignee was essential to recovery against the employer.

5. CONTRACTS—CONSTRUCTION.

Where a contract is susceptible of two constructions, the one working an injustice and the other consistent with the rights of both parties, the one which upholds the rights of the parties should be adopted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 723-735.]

6. ASSIGNMENTS—PARTIAL ASSIGNMENTS—VALIDITY.

A partial assignment of wages not accepted by the employer cannot be enforced against it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 59, 121-123.]

Appeal from District Court, City and County of Denver; F. T. Johnson, Judge.

Action by T. S. Provolt and another, co-partners as the Employés' Credit Company, against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Valle & Waterman, E. N. Clark, W. W. Field, and Henry McAllister, Jr., for appellant. C. K. Phillippis, for appellees.

MAXWELL, J. Appellees were plaintiffs below. They brought suit against appellant to recover wages alleged to be due Corse, Patty, and Palmer, employés of appellant, upon separate assignments made by the parties named to appellees.

The Corse assignment is as follows: "Articles of agreement, made and entered into this 23d day of October, A. D. 1900, by and between Employés' Credit Company, E. J. Cavanaugh, Mang., of Denver, Arapahoe county, Colorado, party of the first part, and F. A. Corse, of Denver, Arapahoe county, Colorado, party of the second part, witnesseth: That said party of the second part hereby sells, assigns, and transfers to said party of the first part for the sum of \$27.50, and other good and valuable consideration, the receipt of which is hereby acknowledged, any and all of his salary, which amounts to \$75 per month and becomes due and payable on the 15th day of each and every month, for the period of one year from the date hereof, or until such time as the sum first written above has been paid by or for said party of the second part to said party of the first part. Said party of the first part has made and delivered to said party of the second part written authority to collect the said salary when it shall become due from Chicago, Burlington & Quincy Railroad Company, the conditions of said written authority being that said party of the second part shall turn over to said party of the first part the amount of \$27.50 on each and every pay day until the amount first written above has been paid to said party of the first part. On the failure of said party of the second part to turn over to said party of the first part said money as provided, the said authority to collect said salary shall become null and void, and all of the money to be paid to said party of the first part shall become due and payable at once, and the said party of the first part shall collect all of the said salary of the party of the second part from the said employers, and shall apply the same to the liquidation of the obligation due said party of the second part to the said party of the first part, until the total amount collected and retained by said party of the first part shall amount to \$27.50, together with an attorney fee of \$10 as liquidated damages and to cover the expense to said party of the first part in collecting the said salary or wages. It is further mutually agreed to by and between the parties to this contract that in case the said party of the second part shall at any time before the full amount of \$27.50 has been received by said party of the first part, for any reason leave or discontinue in the employ of said present employers, the assignment of the salary or wages of the said party of the second part shall extend and apply to any and all positions hereafter held or occupied by said party of the second part for a period of ten years from and after this date, and the

said party of the first part is hereby authorized to collect the salary of said party of the second part from any and all persons by whom said party of the second part may be employed during said ten years, until the amount collected and retained by the party of the first part shall amount to \$27.50 and attorney's fees and interest. The said party of the second part hereby instructs his present employers, or any other person, firm, or copartnership, company, corporation, organization, or official by whom he may hereafter be employed, or from whom he may have any money due, to, on presentation of a copy of this contract, duly verified, any time before the expiration of ten years from the date hereof, pay to the order of the said party of the first part, for value received, the amount designated as due in the affidavit, filed with the verified copy of this contract, with interest at 10 per cent. per annum from the date hereof, out of any money his, due as salary, wages, commissions or from any other source, or to become due after notice to said debtor of the existence of this contract. The said party of the second part hereby irrevocably waives all exemptions or other rights he may have by reason of any law of any state in which he is now, or may hereafter be, employed or live, and orders such payment out of the first money to become his due. Said party of the second part further agrees not to collect or attempt to collect, any part of any salary, wages, commissions or other money due him from any employer or other person after a written notice of this contract to said employer or other person until amount due said party of the first part, or his assignees or representative, has been paid in full. It is further mutually agreed by and between the parties to this contract that when the amount due said party of the first part from said party of the second part, as shown by this contract, has been paid in full, this contract shall become null and void, and of no further effect. In witness whereof the said parties to this contract have hereunto set their hands and seals on the day and year first above written. Employés' Credit Co. E. J. Cavanaugh, Mangr. [Seal.] F. A. Corse [Seal.]" The Patty and Palmer assignments are in force and effect, the same as the Corse assignment, except that in the Patty assignment the consideration is stated at \$39 and in the Palmer assignment at \$26, and the monthly salary at \$75 and \$50, respectively. The complaint was in three counts alleging three separate assignments. The answer as it finally stood was a general denial. Appellees proved the execution of the assignments by the assignors, that assignors were employés of appellant at the dates of the several assignments, the several amounts due from the appellant to each assignor at the respective dates when assignors quit the service of appellant, as follows: Corse, \$42.11; Patty, \$27.80; and Palmer, \$12—and intro-

duced in evidence, over the objection of appellant, the several assignments. Defendant offered no evidence. The court instructed the jury to return a verdict in favor of appellees for \$79.62, upon which judgment was rendered, from which is this appeal.

Many errors are assigned and urged by appellant based on rulings on demurrers and motions interposed to the pleadings, the reception and rejection of testimony, the instruction to the jury to find for appellees, and the refusal to instruct as requested by appellant, most of which may be comprehended in this statement found in appellant's brief. "We contend that these contracts and each of them were on their faces illegal, invalid, unenforceable, and void, because in violation of law, the Constitutions of Colorado and of the United States, the statutes of Colorado, and because against public policy; and, further, because the court below erred in refusing to permit examination of witnesses and the introduction of evidence tending and intending to disclose and establish the illegality and invalidity of said alleged contracts." The argument of counsel for appellant in support of this contention is erudite and forceful, and, if time and space permitted, it would be a pleasure to state and review it here. Since the filing of appellant's brief, the Supreme Court of Illinois has ruled the questions discussed by counsel under this head adversely to its contention, and the conclusion arrived at by that court meets with our approval. In *Mallin v. Wenham et al.*, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233, from the statement of facts it appears that Mallin had borrowed from Wenham at usurious rates of interest \$342 more than he had paid back, and to secure such indebtedness executed and delivered to Wenham the following assignment: "For a valuable consideration to me in hand paid by C. F. Wenham, the receipt whereof is hereby acknowledged, I do hereby transfer, assign, and set over to said C. F. Wenham, his heirs, executors, administrators or assigns, all salary or wages, and claims for salary or wages, due or to become due me from Armour & Co., or from any other person or persons, firm, copartnership, company, corporation, organization, or official by whom I am now or may hereafter become employed, at any time before the expiration of ten years from the date hereof. I do hereby constitute, irrevocably, the said C. F. Wenham, his heirs, executors, administrators, or assigns, my attorney, in my name to take all legal measures which may be proper or necessary for the complete recovery and employment (sic) of the claim hereby assigned and I hereby authorize, empower and direct the said Armour & Co. or any one by whom I may be employed as above, to pay the said demand and claim for wages or salary to the said C. F. Wenham, his executors, administrators or assigns, and hereby authorize and empower him or them to receipt for the same in my name. Chicago, Ill., third day of June, 1898. J. H. Mallin."

Wenham brought suit in the name of Mallin for the use of Wenham against Armour & Co., claiming the wages of Mallin by virtue of the above assignment. Mallin filed his bill in equity, without offering to repay the \$342 or any part thereof, and prayed that the assignment be declared null and void, and that Wenham be restrained from enforcing the same. The following questions were presented: (1) Whether an assignment transferring wages to be earned in the future under an existing employment is valid. (2) Is such an assignment against public policy? The court said: "In respect to the first proposition mentioned, the authorities are ample and conclusive to the effect that an assignment of wages to be earned in the future, under an existing employment, is valid. This precise question has frequently been passed upon by the courts of the different states and of England, and, so far as we are advised, the courts of dernier ressort have, without exception, upheld such contracts where they have been for a valuable consideration and untainted with fraud." Our Court of Appeals announced the same conclusion in *C. F. & I. Co. v. Kidwell*, 20 Colo. App. 8, 12, 76 Pac. 923, where Judge Thomson, writing the opinion of the court, said: "It is well settled that a person in the employ of another may make a valid assignment of wages to be earned during the existence of the employment." We again quote from *Mallin v. Wenham*, supra: "The second proposition urged by appellant is that the assignment in question is against public policy, and for that reason ought not to be upheld. This question was raised in the case of *Edwards v. Peterson*, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207, and the court there held such an assignment did not contravene public policy, and quoted with approval from the case of *Smith v. Atkins*, 18 Vt. 461, in which case it was said: 'It is argued that such contracts are so much against public policy that they ought not to be supported, but we think they are rather beneficial, and enable the poor man to obtain credit when he could not otherwise do it, and that without detriment to the creditors.' * * * Appellant, in this connection, calls attention to the statutes and exemption laws of this state, and insists that the liberal provisions made by the Legislature for the indigent and poorer classes indicate the adoption of a broad and liberal public policy toward the classes named, and that it is the duty of this court to so construe the law that the class and individuals so favored by the statute shall be compelled to accept of its beneficent provisions. Such is not the province of this court. The citizens of the state have a right to contract, and there is no law forbidding one from selling or assigning any property he may have. A person has the same right to assign his wages that he has to mortgage his homestead or to mortgage personal property that is exempt from execution. The statute provides

liberal exemptions, of which a person has the right to avail himself if he so desires, but, if he does not, the courts are powerless to help him. The duty of the courts in instances of this kind is well laid down in the case of *Carroll v. City of East St. Louis*, 67 Ill. 568, 18 Am. Rep. 632: 'It is the legislative, and not the judicial power in the state, that must control and give shape to its public policy. That power does not pertain to the courts. They can only observe that policy and apply it to cases as they arise, without changing or obstructing it.' * * * We also indorse the doctrine laid down in *Greenhood on Public Policy*, pages 116, 117, as follows: "The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. Before a court should determine a transaction which has been entered into in good faith, stipulating for nothing that is *malum in se*, to be void as contravening the policy of the state, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical. He is the safest magistrate who is more watchful over the rights of the individual than over the convenience of the public, as that is the best government which guards more vigilantly the freedom of the subject than the rights of the state.' * * * We cannot see that there is anything intrinsically vicious in an assignment of wages. The assignor, in such case, simply draws upon his future prospects to supply present needs, which may be of the most urgent and pressing character. There is no law in this state to prevent a poor person from mortgaging or pledging any or every article of property he possesses as security for his debts, and such a privilege may be of great value. On the whole, we see no reason or right for holding the assignment in question here void as against public policy." The reasoning of the above case and the authorities therein cited convince us that there is no warrant in law for holding the assignments here under consideration void as against public policy, nor are they in any respect violative of any provision of the Constitution of the United States or of this state, or any of the statutes of this state. In *Brewer v. Griesheimer*, 104 Ill. App. 323, the court had under consideration an assignment almost identical in terms with the assignments in the case at bar, and at page 333 it was said: "We have sought in vain for legal ground on which the unearned wages or salary of a workman or employé may be protected against his own assignment, fairly and voluntarily made, for a valuable consideration. The law, when properly invoked, is ample to protect one in his rights, but, if a person has sufficient mental capacity to attend to ordinary business and act rationally

in the ordinary affairs of life, the law is impotent to protect him against the consequences of his own deliberate folly."

Appellant further contends that appellees should not have had judgment, for the reason that they failed to prove that at the time of the service upon appellant of notice of the assignments any sums remained due from appellant to the several assignors. Appellees meet this contention by saying that, the answer being a general denial, the issue of payment was not raised thereby, and that payment, being a special defense, should have been pleaded and proved. *D. & R. G. R. R. Co. v. Wilson*, 4 Colo. App. 355, 36 Pac. 67, was a suit against the railroad company to recover assigned wages. The appellant contended that plaintiff was required to prove that the wages had not been paid or otherwise extinguished. Judge Thomson, writing the opinion, said upon this point: "We cannot assent to this proposition. We think the effect of the assignment was to transfer to the plaintiff wages of the assignors for the time mentioned. Upon proof of the amount earned by each, the presumption of law is that it remained due and unpaid; and payment, set-off, or anything else which might go in reduction or extinguishment of the claims was matter of defense." The foregoing case is decisive of this question, contrary to the contention of appellant. *Wabash R. R. Co. v. Papin*, 119 Ill. App. 99, is cited in support of appellant's contention. There is nothing in the statement of facts or the opinion of the court in the case cited to indicate the issue presented by the pleadings, and we are not disposed to follow the rule there announced, especially as the same is contrary to the rulings of our Court of Appeals.

It is further contended by appellant that the assignments were made merely as security for money loaned, they were by their terms limited in their operation to the reimbursement of plaintiffs the amount of such loan, and that the assignments were partial. The language of the assignments supports the contention that the assignments were made merely as security for the money loaned. In effect it is that the assignor sold, assigned, and transferred to appellees "for the sum of \$27.50" any and all his salary, amounting to \$75 per month for the term of one year, "or until such time as the sum as written above, has been paid," authority is given the assignor to collect his monthly salary upon condition that he shall turn over to appellees "the amount of \$27.50 on each and every pay day until the amount as written above has been paid," and, upon failure of assignor to turn over to appellee "said money as provided," his authority to collect shall become null and void, and assignee shall collect "until the total amount collected and retained by said party of the first part shall amount to \$27.50 together with an attorney fee of \$10.00." In the event assignor leaves his present employment "at any time before the

full amount of \$27.50 has been received by said party of the first part," then the party of the first part has authority for a period of 10 years to collect the salary of assignor from any and all persons by whom he may be employed "until the amount collected and retained by the party of the first part shall amount to \$27.50 and attorney's fees and interest." The last clause of the assignment is: "It is further mutually agreed by and between the parties to this contract that when the amount due said party of the first part from said party of the second part, as shown by this contract, has been paid in full this contract shall become null and void, and of no further effect." The language above quoted and italicized clearly indicates that the assignments were executed as security for money loaned, and testimony introduced by appellees was to the same effect. By the express terms of the assignments they became null and void when the amount of the secured debt was paid by the assignors; and it is clear that the indebtedness secured is the consideration expressed in each assignment. The latter proposition is established by the use of the words, "sum as written above" and equivalent expressions, found in the assignments, which expressions could only refer to the consideration stated. This being true, it follows that appellees should have proved the amount due from each assignor, otherwise the judgment rendered afforded appellant no protection against subsequent claims of assignors for any excess there might have been over and above the amounts due appellees from the assignors. The record in this case shows that the Corse assignment was dated October 23, 1900. Notice thereof was served upon appellant May 18, 1901, between which dates seven pay days intervened. If any presumption may be indulged, based upon the terms of the assignment, it is to the effect that payment of the indebtedness secured thereby had been made long prior to the service of the notice, and that the assignment was thereby rendered null and void. There is no evidence in the record as to the amount due from Corse to appellees. The evidence shows that \$42.11 was due Corse as wages. The indebtedness secured by the Corse assignment was \$27.50. The jury were instructed to return a verdict in an amount which must have included the whole amount due from appellant to Corse.

In *Mallin v. Wenham*, supra, the court held the assignment a lien upon the wages of the assignor dischargeable by payment. We quote from page 257 of 209 Ill., page 566 of 70 N. E. (65 L. R. A. 602, 101 Am. St. Rep. 233): "The assignment of appellant's wages was simply a lien on the same so long as he remained in the employ of Armour & Co., and until the indebtedness secured thereby was satisfied." *Cramer v. Marsh*, 5 Colo. App. 302, 38 Pac. 612, was an action by the pledgee of personal property against the sheriff for seizure of the pledged property under a writ

of attachment. There was evidence in the case showing that the amount of the indebtedness due appellee upon the assignment relied upon had been fully paid, and the court below was requested to instruct the jury that, if they found from the evidence that at the time of the seizure under the writ the claim secured by the assignment had been paid, then their verdict must be for defendant, otherwise such verdict must be for such amount as would be sufficient to satisfy the unpaid and outstanding portion of the claim. The trial court refused this instruction. The Court of Appeals reversed this action, holding: "When the property is seized by the owner, or by any one who claims in his right, the pledgee may then only recover the value of his interest in the goods." In *Stevenson v. Lord*, 15 Colo. 131, 133, 25 Pac. 313, it is said: "That the mortgagee is entitled to maintain replevin for the property mortgaged, where it is seized under a prior invalid mortgage, provided any portion of the debt secured by plaintiff's incumbrance remains unpaid." We think the principle announced in the last two cases cited is peculiarly applicable to the facts of the case here under consideration. Our conclusion is that the assignments relied upon in this case were simply liens and security for money loaned, that proof of the amount due from the assignors to appellees was essential to a recovery against appellant, and that the court erred in instructing the jury to find a verdict in favor of appellees, in the absence of such evidence. In arriving at this conclusion, the fact that the assignments purport to be of "any and all salary" of assignors is not lost sight of. Familiar rules applicable to the construction of contracts are that a contract must be construed as a whole, effect being given to all its parts and provisions, where that can be done without working an injustice to either party, and when doubt exists and the instrument is susceptible of two constructions, the one working an injustice and the other consistent with the rights of both parties, the one which upholds the rights of both parties should be adopted. To hold that the contracts or assignments under consideration are absolute, unconditional, and unqualified sales and assignments of all the wages of assignors for the periods of time therein stated seems to be so unjust and inequitable as to preclude its adoption. The assignments being merely security for loans as we have determined, the amounts of such loans secured by each assignment as expressed therein, being less than the monthly salary or wages of each assignor, likewise expressed in the assignments, it follows that the assignments were partial, and, not having been accepted by the appellant, cannot be enforced against it. *Welch v. Mayer*, 4 Colo. App. 440, 36 Pac. 613; *McMurray v. Marsh*, 12 Colo. App. 95, 54 Pac. 852; *Colo. School Co. v. Ponick*, 16 Colo. App. 478, 66

Pac. 458; *Home Ins. Co. v. Railroad*, 19 Colo. 46, 34 Pac. 281.

For the reasons stated, the judgment must be reversed.

Reversed.

The CHIEF JUSTICE and HELM, J., con-

SILBERBERG v. CHIPMAN.

(Supreme Court of Colorado. Feb. 3, 1908.)

1. BROKERS—COMMISSIONS—WHEN EARNED.

Where a broker, employed to procure a purchaser or a lender, obtains a purchaser ready, willing, and able to purchase at the price fixed, or a lender ready, willing, and able to lend the amount desired, and on the terms agreed on, he has earned his commission, though the transaction is not completed because of the wrongful conduct of the principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 94-96.]

2. SAME.

Defendant employed a broker to procure a loan on real estate. The broker procured a blank application for a loan, which defendant filled out. The application stated that defendant held the undisputed title to real estate in fee; that he did not owe any money to mechanics for work done thereon; and that the proposed mortgage was to be a first lien thereon. An agent of the proposed lender notified the broker that the loan was accepted. The proposed lender, on ascertaining that buildings had recently been erected on the property, and that the time for filing liens had not expired, demanded that a bond should be given to protect the lender against liens. Defendant refused to give such bond. He, after the application, had conveyed to a third person an interest in the property. The loan was not made. Held, that the broker was entitled to his commissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 94-96.]

Appeal from Pueblo County Court; L. B. Gibson, Judge.

Action by C. O. Chipman against Aaron Silberberg. From a judgment for plaintiff, defendant appeals. Affirmed.

A. Moore Berry, for appellant. J. T. McCorkle, for appellee.

CAMPBELL, J. Defendant, Silberberg, employed plaintiff, Chipman, to obtain for him a loan of \$11,000, and for procuring it agreed to pay as commission \$220. The proposed lender of the money was the Penn Mutual Life Insurance Company, and the printed form of application for the loan was one which that company used. The blanks were filled by Chipman at Silberberg's dictation, and the statements therein made were for the purpose of procuring the loan. Among other promises was one that "searches for liens of all kinds * * * if necessary, and such other papers as are desired by said company are to be furnished by me" (Silberberg). The security which the borrower offered was real estate in the city of Pueblo. The application stated that Silberberg held the undisputed title thereto in fee, and that the

proposed mortgage for the loan was to be the first lien thereon, and that Silberberg did not owe any money to mechanics, builders, or others for work done, or materials furnished, upon the property. When the application was received at its eastern office, the company, through its western agent, notified the broker that the loan was accepted, and the broker at once notified Silberberg thereof, and the borrower handed the title papers to the property to the broker, who, in turn, delivered them to the local attorney of the lender for examination. A short time thereafter the western agent of the lender, as the result of a personal examination of the property, ascertained that some buildings had recently been erected on the same, and the statutory time for filing mechanics' liens thereon for labor and materials had not expired, and would not expire for about 60 days, and advised the broker that the company, in such cases, required a bond of indemnity to protect it against liens. When the broker told Silberberg of this fact, the latter said he would not give a bond. The lender insisted that a bond should be given, but Silberberg and his sister, to whom he had deeded an interest in the property after the application for the loan, though they still said they wanted the money, absolutely refused to give a bond. They asserted that the houses and improvements for which liens might be filed had been fully paid for, and that no liens would be filed, and Silberberg offered to furnish written proof thereof, and, if it was not satisfactory to the lender, to leave \$1,000 cash in its hands with which to pay any just lien claim that might be presented. But the lender refused the borrower's offers, and declined to make the loan without an indemnity bond. The county court upon this evidence gave judgment for plaintiff, and defendant appeals.

On these facts, which are undisputed, the sole question is whether the broker earned his commission. Defendant's contention is that the commission was not earned because the loan was not made, owing to the wrongful insistence by the lender upon a bond of indemnity. His counsel argues that, under the written application, defendant was not obliged to furnish, and the lender could not require, a bond of indemnity against liens of mechanics or materialmen, and that, when he offered to leave on deposit with the lender \$1,000 as a security against possible anticipated liens, or to furnish proof that none would be filed, and the lender refused such offer, this absolved him from the payment of commissions to the broker. The law applicable to this case is the same as that which governs the rights of a broker who is employed to sell real estate. When the broker obtains a purchaser ready, willing, and able to buy at the price and upon the terms agreed upon, or a lender who is ready, willing, and able to lend the amount desired and

upon the terms agreed upon, the broker has earned his commission if he has been the efficient and procuring cause of the sale or loan, even though the same is not completed because of the wrongful conduct of the principal. *Squires v. King*, 15 Colo. 416, 25 Pac. 26; *Millett v. Barth*, 18 Colo. 112, 31 Pac. 769; *Lawrence v. Weir*, 3 Colo. App. 401, 33 Pac. 646; *Ross v. Smiley*, 18 Colo. App. 204, 70 Pac. 766; *Rundle v. Staats*, 19 Colo. App. 164, 73 Pac. 1091. Defendant says he rightfully refused to furnish a bond, because his duties are such only as are imposed by the language above quoted from the application, "such other papers as are desired by said company." "Such other papers" he says must be documents of the same kind as the ones specifically mentioned in the same clause—that is, similar to abstracts of title, mortgages, and certificates of absence of tax liens, etc.; and indemnity bonds are not of this description.

The question here involved does not require that the meaning of "such other papers" be determined, for the rights of the parties may be ascertained from other parts of this application. In the application defendant stated that he held the undisputed title in fee simple to the property which he was offering as security for the loan, and that the mortgage which he proposed to give thereon was to be a first lien. By implication, if not by express agreement, defendant thereby represented that he had, for mortgage purposes, a perfect or marketable title to the property to be given as such security. Under the law of this state, mechanics and materialmen are given a certain time after the completion of a building or structure on land within which to file their statements claiming a lien for labor done upon, or materials furnished that went into, their construction. It appears in this case without contradiction that buildings had recently been constructed on the premises, and that at the time of the negotiations between these parties the time for filing liens thereon by laborers and materialmen had not expired. Nothing was said by defendant in his application about these improvements, and the broker did not know of them until the lender's agent notified him after the loan was accepted. If it be material here, we say it was not unreasonable, therefore, indeed it was wholly within his rights, and we think quite in accordance with the custom in similar cases, for the lender to exact as a condition for making the loan a bond of indemnity to secure him against future liens, the time for filing which had not then expired. If liens had been filed and established, they would have been paramount to the lien of the proposed mortgage given and recorded after the labor and materials were furnished. The offer of proof that liens did not exist, and would not be filed, and to leave with the lender \$1,000 of the contemplated loan as security, if such

proof was not satisfactory, were not, in the circumstances, the equivalent of a bond of indemnity. At least, it was entirely competent for the lender to reject the offer and insist upon the bond for the reasons stated.

For another reason the lender might have rightfully declined to lend the money. Defendant, after his application, conveyed to his sister an interest in the property, and thereafter he could not give a marketable title as security, as she refused to join in the bond.

It clearly appears that plaintiff fully complied with his contract, and he was entitled to the amount of compensation agreed upon. He obtained a lender who was willing, ready, and able to lend the amount of money which the defendant wanted to borrow upon the terms and conditions mutually satisfactory to lender and borrower. In other words, plaintiff brought them together, and their minds met with reference to the loan. The fact that the lender refused to complete it because of a defect in defendant's title, and that defendant refused to furnish the bond, do not deprive plaintiff of his brokerage fee. Indeed, the failure of defendant to obtain the money as a loan was due to his own act, his refusal to give as a security, what he promised to furnish, a marketable title for such purpose. The following authorities are in point, and sustain the conclusions reached: *Crasto v. White* (Sup.) 3 N. Y. Supp. 682; *Follinsbee v. Sawyer* (Super. Buff.) 36 N. Y. Supp. 405; *Van Orden v. Morris* (City Ct. N. Y.) 42 N. Y. Supp. 473; *Bruce v. Wolfe*, 102 Mo. App. 384, 76 S. W. 723; *Ross v. Smiley*, 18 Colo. App. 204, 70 Pac. 766; *Middleton v. Thompson et al.*, 163 Pa. 112, 26 Atl. 796; *Gauthier v. West*, 45 Minn. 192, 4 N. W. 656; *Fitzpatrick v. Gilson*, 176 Mass. 477, 57 N. E. 1000.

The judgment should be affirmed; and it is so ordered.
Affirmed.

STEELE, C. J., and GABBERT, J., concur.

MEMORANDUM DECISIONS.

PEOPLE v. MORRIS. (Cr. 65.) (Court of Appeal, Second District, California. Dec. 3, 1907.) Appeal from Superior Court, Riverside County; F. E. Densmore, Judge. Gertrude Morris was convicted of a crime, and she appeals. Affirmed. Lafayette Gill and K. H. Stahl, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was charged, under section 523 of the Penal Code, with sending a threatening letter with intent to extort money from another. Upon the trial she was convicted as charged, and appeals from the judgment and order denying her motion for a new trial. No points or authorities are filed by appellant; but

counsel in oral argument contends that the verdict should be reversed and a new trial ordered on the sole ground that the verdict is not supported by the evidence. The evidence is largely circumstantial, but consists of circumstances all of which tend to prove that defendant wrote the letter upon which the charge is founded. In addition to the circumstantial evidence pointing to her guilt, there is direct evidence to the effect that the letter was in her handwriting. There is nothing in the record which would justify this court in disturbing the verdict. Judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

BOEKEN et al. v. SCHOOL DIST. NO. 49, ALLEN COUNTY. (Supreme Court of Kansas. Jan. 11, 1908.) Appeal from District Court, Allen County; Oscar Foust, Judge. Action by School District No. 49, Allen County, against Harry Boeken and others. Judgment for plaintiff, and defendants appeal. Dismissed. Ewing, Gard & Gard, for appellants. Campbell & Goshorn, for appellee.

PER CURIAM. The school district sued Boeken, ex-treasurer of the district, and his bondsmen, for \$331.82, alleged to be money remaining in his hands as such treasurer belonging to the school district, and which he refused to turn over on demand to his successor in office. Boeken answered, setting up a counterclaim for a small amount, and admitted a balance of indebtedness of \$105.29, for which he offered to confess judgment. The case was tried to a jury in the district court of Allen county, and a verdict was returned in favor of the plaintiff for \$194.54, and judgment was rendered against the defendants for that sum and costs. The difference between the amount of the judgment and the offer is \$89.25, and this is the sum attempted to be put in controversy in this court by the appeal. The error proceeding is not within the jurisdiction of this court. Civ. Code, § 542. The appeal is dismissed.

COURTNEY v. HARKINS. (Supreme Court of Kansas. Dec. 7, 1907.) Error from District Court, Leavenworth County; J. H. Gilpatrick, Judge. Action by W. H. Courtney against L. J. Harkins. Judgment for defendant, and plaintiff brings error. Affirmed. Arthur M. Jackson, for plaintiff in error. A. E. Dempsey, for defendant in error.

PER CURIAM. Plaintiff sued to recover rent of a farm. The bill of particulars claimed that the rent amounted to \$800, and gave defendant credit for payments amounting to \$652.19, and asked for judgment for the balance. Defendant answered, and claimed cash payments amounting to \$770, and set up a counterclaim of \$57.19 for repairs and labor. He asked judgment on his counterclaim for \$27.19. The jury returned a verdict for defendant. Plaintiff then moved for judgment notwithstanding the verdict. This, as well as a motion for a new trial, being denied, judgment was rendered in accordance with the verdict, and plaintiff brings error. The contention is that because the jury refused to find any balance due the defendant they discredited the entire counterclaim, and plaintiff insists that this entitled him to judgment in full for his claim. The only authorities cited are cases where there were separate findings. In this case there were no findings, and there was evidence to support the verdict; and, as the judgment has been approved by the trial court, it must be affirmed.

DIXIE DEVELOPMENT CO. v. SMITH et al. (Supreme Court of Kansas. Dec. 7, 1907.) Error from District Court, Wilson County; L. Stillwell, Judge. Action by John Smith and

others against the Dixie Development Company. Judgment for plaintiffs, and defendant brings error. Affirmed. P. C. Young, for plaintiff in error. A. H. Ward, for defendants in error.

PER CURIAM. Action to cancel an oil and gas lease, which stipulated that it should continue as long as oil or gas should be produced in paying quantities by the lessee. The company, which was an assignee of the lease, sank several wells, from four of which considerable oil was at first obtained. After several months the flow of oil greatly diminished, and at the end of 1½ years only one well was in operation, and pumping from that was finally suspended. Then followed this action, in which it was claimed that the lease ought to be canceled because there had been abandonment and forfeiture, and upon conflicting evidence a cancellation was adjudged. From the testimony it then appeared that oil was not being produced in paying quantities and that nothing better could be expected from a continuance of operation under the lease. The wells were in bad condition, and their product had been turned over by the company to an operator under an agreement that he should clean out and put the wells in good condition; but after several months it appeared that the output lacked \$800 or more of paying the expense of repair and operation. The fact that the company had incurred a large indebtedness, however, is no ground for cancellation; but there was abundant testimony going to show that the operation of the wells was unprofitable. In fact, the company had stated in an allegation of its answer, which was afterwards stricken out, that oil could not be produced in paying quantities from the wells and that they could not be profitably operated. A good deal of testimony was also introduced, such as the neglect of the wells, the pulling out of tubing, and permitting the appliances to deteriorate and go to destruction, which indicated an intention to desert the wells and abandon the enterprise. We have no hesitation in holding that there is sufficient testimony to sustain the judgment, and it must therefore be affirmed.

HOBBS v. HOBBS. (Supreme Court of Kansas. Dec. 7, 1907.) Error from District Court, Lyon County; F. A. Meckel, Judge. Action by W. T. Hobbs against Sarah A. Hobbs for divorce. Judgment for defendant for divorce, and from an allowance of alimony, plaintiff brings error. Affirmed. W. A. Randolph, for plaintiff in error. O. S. Samuel and Lambert & Huggins, for defendant in error.

PER CURIAM. Action by W. T. Hobbs to obtain a divorce from Sarah A. Hobbs and an equitable division of the property. She filed a cross-petition asking for a divorce on account of the default of the husband, and this the court granted. W. T. Hobbs was awarded \$700 as his share of the accumulated property, the title of which stood in the name of Mrs. Hobbs, and the award was made a lien upon the property. He makes no complaint that a divorce was granted to the wife; but it is insisted that he was not given a fair share of the property. It appears that the property was acquired and preserved largely through her labor and management. While the area of the property is considerable, its location is not desirable, and the rentals derived from it are uncertain and not large. To pay the judgment of \$700 awarded to him considerable of the property must be sold, and when the difficulty in finding tenants and the unprofitable character of the property are considered the disparity in the shares allotted may not be great. He has an insurance policy of \$2,000, which was assigned to a relative to pay for his maintenance during his life, and he also has a pension from the government. In view of the fact that the divorce was granted because of his wrong, and also of the way in which the property was acquired, and consider-

ing, further, the superior opportunities of the trial court to measure the rights of the parties and fairly divide the property, we do not feel justified in disturbing the distribution that was made. Judgment affirmed.

NEPTUNE v. COLLINS. (Supreme Court of Kansas. Jan. 11, 1908.) Error from District Court, Sedgwick County; Thos. J. Flannelly, Judge. Action by R. L. Collins against John F. Neptune. Judgment for plaintiff, and defendant brings error. Affirmed. Stanley & Stanley and Geo. W. Freerks, for plaintiff in error. Wm. E. Keith, for defendant in error.

PER CURIAM. Action to cancel a deed conveying real estate in Wichita, the execution and delivery of which by J. F. Neptune is alleged to have been procured by misrepresentation and fraud. Mathis, assisted by his partner, Tunnel, who were real estate agents, negotiated an exchange of Neptune's property in Wichita for Collins' farm in Oklahoma, and it was agreed that each party should assume the mortgage on the property he received in exchange. In pursuance of the agreement, deeds for the respective properties were executed by both parties and deposited in escrow with Mathis, to be delivered, according to some of the testimony at least, when the abstract of Collins' land was returned from Oklahoma showing no other incumbrance than the one agreed to be assumed by Neptune. The abstract was returned, showing the title as had been represented, and, the required conditions having been performed, the deed was turned over to Collins, and the Collins deed mailed to Neptune. Neptune insists that there was collusion and fraud between Collins and Mathis, which destroyed the validity of the transfer. Although he pleaded the deposit of his deed in escrow, he gave a different version of the conditions upon which it was to be delivered than was related by other witnesses, and he also testified that prior to the delivery of the deed he gave notice to Mathis not to deliver the same. There was some testimony, too, that there was misrepresentation as to the character and value of the Oklahoma property. On the other side, there was contrary testimony as to representations made regarding the property in Oklahoma, and testimony, too, that there was a fair escrow agreement providing that the deeds should be placed with Mathis, who was acting for both parties, and that he should deliver the deeds upon certain conditions, that these conditions had been performed, and that the deeds had been accordingly delivered. The claims of misrepresentation and fraud, the nature of the escrow agreement, the irrevocable character of the deposit of the deeds as an escrow, and whether there had been a compliance with the conditions, were all questions of fact, which were settled by the trial court adversely to the contention of the plaintiff in error; and the decision, being based on sufficient testimony, must be regarded as final. Judgment affirmed.

ALEXANDER, Respondent, v. WILSON, Appellant. (No. 2,372.) (Supreme Court of Montana. Jan. 14, 1907.) Appeal from District Court, Rosebud County; C. H. Loud, Judge. J. C. Lyndes and Geo. W. Farr, for appellant.

PER CURIAM. On motion of respondent, supported by affidavit, the appeal in the above entitled cause is hereby dismissed, for failure of appellant to file brief within the time allowed by the rules of this court.

COOK, Appellant, v. ROBISON, Respondent. (No. 2,432.) (Supreme Court of Montana. April 29, 1907.) Appeal from District Court, Fergus County; E. K. Cheadle, Judge. De

Kalb & Mettler, for appellant. John C. Huntor and O. W. Belden, for respondent.

PER CURIAM. Respondent's motion to dismiss the appeal herein is sustained, and the appeal dismissed without prejudice, in accordance with stipulation of counsel on file herein.

CUDAHY PACKING CO., Respondent, v. DORAIS, Appellant. (No. 2,333.) (Supreme Court of Montana. Feb. 28, 1907.) Appeal from District Court, Silver Bow County; John B. McClernan, Judge. John A. Kirk and Charles A. Wallace, for appellant. Binnard & Rodger, for respondent.

PER CURIAM. Respondent's motion to dismiss the appeal herein, supported by affidavit, is hereby sustained, and the appeal dismissed.

In re DAVIS' ESTATE. DAVIS et al., Appellants, v. DREMEN et al., Respondents. (No. 2,179.) (Supreme Court of Montana. April 20, 1907.) Appeal from District Court, Silver Bow County; E. W. Harney, Judge. Jesse B. Roote, for appellants. C. P. Drennen, for respondents.

PER CURIAM. Appellants' motion to dismiss the appeal herein is sustained, and the appeal hereby dismissed.

HARRINGTON, Respondent, v. LEGGAT et al., Appellants. (No. 2,399.) (Supreme Court of Montana. Feb. 11, 1907.) Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge. C. M. Parr, for appellants. Maury & Hogevoil, for respondent.

PER CURIAM. Respondent's motion to dismiss the appeal herein, on the ground that the undertaking is void for ambiguity, is hereby sustained, and the appeal dismissed without prejudice.

LEYSON, Respondent, v. DAVENPORT et al., Appellants. (No. 2,336.) (Supreme Court of Montana. Jan. 8, 1907.) Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge. C. M. Parr, for appellants.

PER CURIAM. It is ordered that the appeal herein be, and the same is, hereby dismissed, in accordance with praecipe of counsel for appellant on file herein.

PERRY, Respondent, v. AETNA LIFE INS. Co., Appellant. (No. 2,337.) (Supreme Court of Montana. Jan. 8, 1907.) Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge. C. M. Parr, for appellant.

PER CURIAM. It is ordered that the appeal in the above-entitled cause be, and the same is, hereby dismissed, on request of counsel for appellant.

STATE ex rel. DOERR et al. v. DISTRICT COURT OF FIRST JUDICIAL DIST. (No. 2,412.) (Supreme Court of Montana. Feb. 20, 1907.) Original application for writ of supervisory control to annul and set aside a peremptory writ of mandamus ordered issued by Hon. J. M. Clements, a judge of the district court of Lewis and Clark county. McConnell & McConnell, for relators. E. A. Carleton, for respondents.

PER CURIAM. The motion to dismiss the order to show cause why a writ of supervisory control should not issue herein, heretofore ar-

gued by counsel and taken under advisement, is hereby sustained, and the proceeding dismissed.

SMITH, J., deeming himself disqualified, takes no part in the foregoing decision.

WALTER, Appellant, v. COX, Respondent. (No. 2,423.) (Supreme Court of Montana. April 30, 1907.) Appeal from District Court, Flathead County; J. E. Erickson, Judge. McIntire & Kendall, for appellant. C. H. Foot, for respondent.

PER CURIAM. Respondent's motion to dismiss the appeal from the judgment herein is sustained, and the appeal dismissed.

WILEY et al., Appellants, v. STITH et al., Respondents. (No. 2,397.) (Supreme Court of Montana. April 8, 1907.) Appeal from District Court, Custer County; Chas. H. Loud, Judge. Geo. W. Farr, for appellants.

PER CURIAM. Appellants' motion to dismiss the appeal herein is hereby sustained, and the appeal dismissed.

WRIGHT, Respondent, v. POSER et al., Appellants. (No. 2,401.) (Supreme Court of Montana. Feb. 13, 1907.) Appeal from District Court, Silver Bow County. John A. Shelton, for appellants. Lewis A. Smith, for respondent.

PER CURIAM. Respondent's motion to dismiss the appeal herein is hereby sustained, and the appeal dismissed.

ELLIS v. ELLIS. (Supreme Court of Oregon. Feb. 11, 1908.) Appeal from Circuit Court, Multnomah County, Arthur L. Frazer, Judge. Suit by Goldie R. Ellis against Joseph T. Ellis. From a decree for plaintiff, defendant appeals. Reversed, and suit dismissed. H. H. Northrup, for appellant. L. E. Crouch, for respondent.

PER CURIAM. This is a suit by the wife for a divorce on the ground of cruel and inhuman treatment and personal indignities, rendering life burdensome. From a decree in her favor, dissolving the marriage contract, the defendant appeals. The plaintiff, on cross-examination, contradicted several of her statements made on direct examination, and, when her attention was called to the discrepancy, she admitted that mistakes had been made in the sworn declarations. Her testimony is corroborated in many respects by her foster mother, whose exclamations, by way of emphasis, "So help me God," and "May God be my judge and strike me dead," in the affirmance of her statements, as well as her admission as a witness that she had used vile epithets when talking to the defendant over the telephone, very much discredit her testimony. There is, in the declarations of these witnesses, such a degree of improbability, when considered in connection with the circumstances mentioned, as to lead to the belief that the story which they told at the trial was made up for the occasion and false in most particulars. Without further alluding to the testimony, which is unfit for publication, the decree is reversed, and the suit dismissed.

NATSURHARA et ux. v. CLAPSADDLE et ux. (WITT et ux., Intervenor). (Supreme Court of Washington. Jan. 6, 1908.) Appeal from Superior Court, King County; R. B. Albertson, Judge. Action by Cecil Natsurhara and wife against George W. Clapsaddle and wife, in which action L. E. Witt and wife intervened. Judgment for plaintiffs, and Clapsaddle and wife appeal. Affirmed. Charles R.

Crouch, for appellants. James Hart and Jay C. Allen, for respondents.

PER CURIAM. The appeal in this case presents only a question of fact. We have examined the evidence, and are satisfied with the findings of the trial court. The judgment must therefore be affirmed.

DUNBAR and ROOT, JJ., took no part.

STATE v. VON SHULTZ. (Supreme Court of Washington. Dec. 20, 1907.) Appeal from Superior Court, Whatcom County; Jeremiah Neiter, Judge. Prosecution of F. Von Shultz for sodomy. From a judgment of dismissal, the state appeals. Affirmed. Virgil Peringer and George Livesey, for the State. Hardin & Hurlbut, for respondent.

PER CURIAM. This is an appeal by the state from a judgment of dismissal, after sustaining a demurrer to an information filed under section 7226, Ballinger's Ann. Codes & St. The demurrer was properly sustained. Wharton, Criminal Law (10th Ed.) 576; Bishop's Criminal Law, § 794; Prindle v. State, 31 Tex. Cr. R. 551, 21 S. W. 360, 37 Am. St. Rep. 833 and authorities cited. Honselman v. People, 168 Ill. 172, 48 N. E. 304, and Kelly v. People, 192 Ill. 119, 61 N. E. 425, 85 Am. St. Rep. 323, cited by the appellant, arose under a different statute and are not in point. Had the defendant been convicted, it might become our duty to further discuss the questions involved; but, inasmuch as the state alone is interested, we feel that its interests will be best subserved by silence. The judgment is affirmed.

STILES v. SIMPSON et al. (Supreme Court of Washington. Jan. 17, 1908.) Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge. Action by G. H. Stiles against J. M. Simpson and others. Judgment for defendants, and plaintiff appeals. Affirmed. J. P. Perkins and Hamblen, Lund & Gilbert, for appellant. Horace Kimball and Belt & Powell, for respondents.

PER CURIAM. The appellant and respondent J. M. Simpson entered into a contract, in the month of November, 1904, by which appellant, for a stipulated consideration, was admitted to the office of the respondent as a student, with certain duties to perform, and under the terms of which he was to receive certain compensation. It is not necessary to reproduce the long contract here. After remaining in the office for nearly a year under the terms of the contract, the appellant brought this action to obtain relief from an alleged fraud, alleged to have been practiced upon him by respondent by means of false representations by which he (appellant) was induced to enter into the contract. The case was placed in issue by answer and reply, and was tried before a judge without a jury. Upon the conclusion of the testimony, the court announced that he was of the opinion that plaintiff had failed to prove the allegations of his complaint, and had failed to prove or show that defendant was guilty of any fraud, misrepresentation, or overreaching in the matter of the contract and transactions between plaintiff and defendant, or that plaintiff was entitled to any relief whatever. The action was dismissed. From the judgment dismissing the case, this appeal is taken. A careful perusal of all the testimony convinces us that the conclusion by the trial judge was entirely justified.

The appellant was in the prime of life, a man of education and varied experience, and was in reality what might be termed a trading man, and there were no fiduciary relations existing between him and the respondent, and it does not appear that any undue influence whatever was brought to bear upon him to induce him to execute the contract, or, for that matter, that it was an unconscionable contract. About all that can be said was that the venture did not prove as profitable as he had hoped, while, on the other hand, the property which he had sold to respondent had increased in value beyond his calculations. Without any extensive analysis of the testimony, we are satisfied that the appellant signally failed to establish the material allegations of his complaint; and the judgment of the trial court is affirmed.

CITY OF LOS ANGELES v. LOS ANGELES FARMING & MILLING CO. (L. A. 1,952.) (Supreme Court of California. Feb. 21, 1908.) In Bank. On petition for rehearing. Denied.

For former opinion, see 93 Pac. 869.

PER CURIAM. Rehearing denied.

BEATTY, C. J. In recording the order denying a rehearing of this cause I desire to protest against the citation of my opinion in City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585 as authority for the affirmance of this judgment. It is true that the opinion of Justice Temple in that case, which was concurred in by a majority of the justices, furnished a precedent for the present decision; but that opinion, it will be seen by reference to page 647 of 124 Cal. and page 604 of 57 Pac., was written for the express purpose of overriding that portion of my opinion commencing on page 639 of 124 Cal. and page 600 of 57 Pac., in which I expressly deny the rights here asserted and upheld. In my opinion the paramount right of Los Angeles to the waters of the Los Angeles river is limited to that part of the present city comprised in the four leagues (about 17,500 acres) constituting the original pueblo, and cannot be asserted for the satisfaction of the wants of the additional 10,400 acres added by the amended act of incorporation, or the territory since added and that may be hereafter added by the joint action of the municipal authorities and the inhabitants of the extensive unincorporated area adjoining the city. But this is what is now decided to be the law: The city of Los Angeles, as it has been enlarged far beyond the limits of the old pueblo and as it may be indefinitely enlarged in the future, has a paramount right over all riparian proprietors above the city to the use of all the water necessary to the supply of its inhabitants. It may annex all the lands between it and the ocean, including a vast area not riparian to the Los Angeles river, and the inhabitants of this annexed territory immediately become invested with the paramount right to the water flowing in the tributaries of the river, whether above or below ground, notwithstanding they have been used for a hundred years by the grantees of Spain and Mexico, and their successors, of lands riparian to the stream. This is, I concede, the logical outcome of the decision of the court in Los Angeles v. Pomeroy; but it is a doctrine which I disclaimed in that case, and for which neither Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674, nor Vernon District v. Los Angeles, 106 Cal. 237, 39 Pac. 762, is authority.

